

Winter 1999

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### Recommended Citation

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# STATE LAWS CRIMINALIZING FEMALE CIRCUMCISION: A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?

SHEA LITA BOND\*

## INTRODUCTION

Everyday in the United States strangers tie thousands of infants to plastic boards and surgically alter their genitals without anesthetic or medical justification.<sup>1</sup> The procedure is male neonatal circumcision, and it “is the most commonly performed surgical procedure in the United States.”<sup>2</sup>

Doctors circumcised Donna Fishbeck’s infant son.<sup>3</sup> The boy’s father consented to the procedure; she did not.<sup>4</sup> The circumcision took place in North Dakota where a Female Genital Mutilation (FGM) criminal statute specifically prohibits female circumcision but not male circumcision.<sup>5</sup> Ms. Fishbeck believes that the North

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1. Sami A. Aldeeb Abu-Sahlieh, *To Mutilate In the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision*, 13 MED. & L. 575, 606 (1994); Karen Garloch, *Still Debatable*, CHI. TRIB., July 10, 1997, at 2. Abu-Sahlieh estimates that 3,300 male babies are circumcised each day. Abu-Sahlieh, *supra*, at 606. Approximately one circumcision occurs “every 26 seconds.” Electronic Memorandum from Tim Hammond, National Organization to Halt the Abuse and Routine Mutilation of Males (NOHARM), to Shea Lita Bond (Sept. 9, 1997) (on file with author).

2. Thomas E. Wiswell & Dietrich W. Geschke, *Risks From Circumcision During the First Month of Life Compared With Those For Uncircumcised Boys*, 83 PEDIATRICS 1011, 1011 (1989); see also David L. Gollaher, *From Ritual to Science: The Medical Transformation of Circumcision In America*, 28 J. SOC. HIST. 5, 5 (1994) (stating that “[s]ince the early years of the twentieth century, neonatal circumcision has been the most frequently performed surgery in the United States”).

3. *Fishbeck v. North Dakota*, 115 F.3d 580, 581 (8th Cir. 1997).

4. *Id.*

5. *Id.* at 580. See N.D. CENT. CODE § 12.1-36-01 (1997) (stating that “any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor is guilty of a class C felony.”). The statute exempts medical correction of “an anatomical abnormality or [the] remov[al of] diseased tissue . . .” *Id.* Persons who perform female circumcision on a minor commit a felony and face a serious penalty. *Id.* § 12.1-32-01 (1997). Violators face “a maximum penalty of five years’ imprisonment,

Dakota law should have prevented the child's father from consenting to the surgery over her objection.<sup>6</sup> She feels North Dakota should ban male circumcision because the procedure is just as immoral and harmful as female circumcision.<sup>7</sup> Believing the state failed to protect her son from needless harm, Ms. Fishbeck filed a suit against the state of North Dakota alleging that the FGM statute violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution for failing to treat males and females equally under the law.<sup>8</sup>

Jody McLaughlin and Duane Voskuil, the FGM statute's authors, originally drafted a gender-neutral law which would have prohibited both male and female circumcision.<sup>9</sup> The North Dakota legislature, however, refused to pass the law.<sup>10</sup> The authors decided that the state government needed to protect at least some of the children who were at risk of being circumcised.<sup>11</sup> Therefore, they redrafted the legislation to prohibit only female circumcision.<sup>12</sup> The law in this form passed both houses of the North Dakota legislature and was signed into law by the governor.<sup>13</sup>

Although Ms. McLaughlin and Mr. Voskuil got the current law passed, they were unsatisfied with a law that only protected half of the newborn population from having their genitals surgically altered.<sup>14</sup> Thus, Ms. McLaughlin and Mr. Voskuil joined Donna Fishbeck in her suit challenging the FGM statute in the District Court of North Dakota on the grounds that the statute violated the Equal Protection Clause.<sup>15</sup> The plaintiffs argued that the FGM statute was unconstitutional because males were treated differently than females solely because of their gender.<sup>16</sup> The District Court of North Dakota dismissed the case for lack of standing, which the Eighth Circuit Court of Appeals affirmed.<sup>17</sup>

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a fine of five thousand dollars, or both." *Id.*

6. *Fishbeck*, 115 F.3d at 581.

7. *Id.*

8. *Id.* at 580. The Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

9. Telephone Interview with Jody McLaughlin, Local Coordinator, Bismark Chapter, National Organization of Circumcision Information Resource Centers of North Dakota (NOCIRC) (Aug. 30, 1997).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Telephone Interview with Jody McLaughlin, *supra* note 9.

15. *Fishbeck v. North Dakota*, 115 F.3d 580, 580 (8th Cir. 1997).

16. *Id.*

17. *Id.* at 581. The Eighth Circuit held that appellants Ms. McLaughlin and Mr. Voskuil did not suffer any injury and therefore had "no personal stake in the outcome of [the] case." *Id.* at 580. A "public policy" interest "is not

Since none of the plaintiffs in *Fishbeck* had standing under Article III of the Constitution, the issue of whether a female circumcision statute violates the Equal Protection Clause remains unanswered.<sup>18</sup> This Comment discusses why state female circumcision laws violate the Equal Protection Clause of the Fourteenth Amendment of United States Constitution. Part I describes male and female circumcision and why male circumcision became so prevalent in the United States. This Part further discusses why state legislatures have enacted only female circumcision laws. Part II addresses why male circumcision rates are too high considering the lack of medical support and potential health concerns related to the procedure. This Part also outlines the equal protection argument that the plaintiffs in *Fishbeck* would have proposed and further demonstrates that male circumcision should be banned under the Fourteenth Amendment notwithstanding the First Amendment's right to exercise the religion of one's choice. Part III proposes that the courts strike down FGM statutes as unconstitutional, and that state legislatures enact gender neutral, generally applicable circumcision laws which protect all children from unnecessary modification of their genitalia. To accomplish this goal, this Part proposes a model circumcision statute which passes constitutional scrutiny.

### I. CIRCUMCISION IN THE UNITED STATES

Currently in the United States, physicians circumcise somewhere between sixty and seventy-seven percent of male babies.<sup>19</sup> This rate is one of the highest in the world.<sup>20</sup> By

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sufficient to create a case or controversy for purposes of Article III of the Constitution." *Id.* Ms. Fishbeck lacked standing because the injury to her son was moot and not redressible. *Id.* at 581. Additionally, there was no certainty that Ms. Fishbeck would give birth to another son who would be forcibly circumcised. *Id.* The court further stated that even if Ms. Fishbeck could have successfully demonstrated standing and damages, the Eleventh Amendment would have required the court to dismiss the cause of action. *Id.* The Eleventh Amendment prevents federal courts from hearing "any suit in law or equity . . . prosecuted against one of the United States by Citizens of another State . . ." U.S. CONST. amend. XI. Generally, a citizen cannot file suit directly against her own state in federal court unless the state consents. *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997). Absent the state's consent, the court must dismiss the action. *Autio v. Minnesota*, 968 F. Supp. 1366, 1367 (D. Minn. 1997) (stating that "the Eleventh Amendment proscribes federal actions against states unless consent to suit is unequivocally expressed").

18. *Fishbeck*, 115 F.3d at 581.

19. See Abu-Sahlieh, *supra* note 1, at 606 (reporting a circumcision rate of 60%); John R. Holman & Robert L. Ringler, *Neonatal Circumcision Techniques*, 52 AM. FAM. PHYSICIAN 511, 511 (1995) (citing National Center for Health Statistics report that 60.7% of male babies were circumcised in

comparison, female circumcision in the United States is virtually non-existent.<sup>21</sup> Yet, several state legislatures besides North Dakota have enacted statutes banning only female circumcision.<sup>22</sup> Other states prohibit ritual mutilations but make exceptions for circumcisions performed in hospitals or by medical physicians.<sup>23</sup> This Part discusses the introduction of male circumcision into the United States and its prevalence today. It also reviews female circumcision and its current status in the United States. This Part concludes with a discussion of state FGM laws.

### A. History of American Male Circumcision

Circumcision removes the foreskin, or prepuce, from the penis

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1992); Edward O. Laumann et al., *Circumcision In the United States: Prevalence, Prophylactic Effects, and Sexual Practice*, 277 JAMA 1052, 1053 (1997) (stating a male circumcision rate of 77% between the years of 1933-74); Thomas E. Wiswell et al., *Declining Frequency of Circumcision: Implications For Changes In the Absolute Incidence and Male to Female Sex Ratio of Urinary Tract Infections In Early Infancy*, 79 PEDIATRICS 338, 339 (1987) (reporting a male circumcision rate of 70.5%).

20. See Abu-Sahlieh, *supra* note 1, at 606 (reporting Canadian and Australian circumcision rates at 20%); N. Williams & L. Kapila, *Complications of Circumcision*, 80 BRIT. J. SURGERY 1231, 1231 (1993) (reporting the United Kingdom's circumcision rate at 5-6%); Electronic Memorandum from Chris Lewis, Information Analyst, Analytical Unit, New Zealand Health Information Service, to Shea Lita Bond (Sept. 10, 1997) (on file with author) (reporting that only 1,777 male circumcisions were performed in New Zealand in 1993).

21. Barbara Crossette, *Female Genital Mutilation by Immigrants Is Becoming Cause for Concern in the U.S.*, N.Y. TIMES, Dec. 10, 1995, at A18. The Council on Scientific Affairs for the American Medical Association reports that approximately 80 to 110 million women around the world are circumcised. Council on Scientific Affairs, American Medical Association, *Female Genital Mutilation*, 274 JAMA 1714, 1714 (1995) [hereinafter Council Report]. However, clitoridectomies (removal of the clitoris) in the United States are "infrequent." *Id.* Although no exact figures exist as to how many female circumcisions are being performed in the United States, indications are that the number is low, occurring "in scores" or possibly "hundreds of families." Crossette, *supra*, at A18. These figures are small compared to the millions of male circumcisions performed every year in the United States. Abu-Sahlieh, *supra* note 1, at 606. Although the Council Report on female genital mutilation recognized that more American doctors are encountering females (mostly immigrants and refugees) who are already circumcised, there is no indication whether the women were circumcised in the United States or abroad. Council Report, *supra*, at 1715-16.

22. *E.g.*, CAL. PENAL CODE § 273.4 (West 1997); DEL. CODE ANN. tit. 11, § 780 (1996); 720 ILCS 5/12-34 (1998); MD. CODE ANN., Health General § 20-601 (1998); MINN. STAT. § 609.2245 (1996); N.Y. PENAL LAW § 130.85 (McKinney 1998); R.I. GEN. LAWS § 11-5-2 (1996); TENN. CODE ANN. § 39-13-110 (1996); WIS. STAT. ANN. § 146.35 (1997).

23. *E.g.*, CAL. PENAL CODE § 667.83(c)(2) (West 1997) (stating that "[t]his section shall not apply to . . . [t]he lawful medical practice of circumcision or any ceremony related thereto . . ."); 720 ILCS 5/12-32 (West 1997) (stating that "[t]he offense ritual mutilation does not include the practice of circumcision . . .").

exposing the glans underneath.<sup>24</sup> Customarily, the procedure is performed before the infant is a week old.<sup>25</sup> Jews and Muslims who practice circumcision maintain that holy scriptures mandate male circumcision.<sup>26</sup> In the Jewish religion, circumcision must occur on the eighth day of life.<sup>27</sup> Boys belonging to the Muslim faith are usually circumcised before seven years of age.<sup>28</sup>

Prior to the late Nineteenth Century, and outside religious circles, circumcision was performed in the United States solely as a medical procedure to remove cancer and cysts and to correct phimosis.<sup>29</sup> Around the year 1870, some members of the medical community prescribed circumcision to cure other disorders such as irritability in children, sleep dysfunction, poor digestion, epilepsy, hernia and lunacy, after finding that boys who suffered from phimosis and underwent circumcision were relieved of these conditions.<sup>30</sup> Doctors evidently ignored the obvious conclusion that inflammation and illness, rather than the presence of foreskin, may have caused the patient to experience crankiness, irritability, and loss of sleep and appetite.<sup>31</sup> Once the inflammation was cured

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24. Holman & Ringler, *supra* note 19, at 513.

25. Abu-Sahlieh, *supra* note 1, at 606 (stating that infants are circumcised within a few days of birth); American Academy of Family Physicians, *Deciding About Circumcision*, 52 AM. FAM. PHYSICIAN 519, 519 (1995).

26. The book of Genesis reports that God told Abraham: "[e]very male among you shall be circumcised. You shall be circumcised in the flesh of your foreskins, and it shall be a sign of the covenant between me and you." *Genesis* 17:9-11. Although the Koran does not discuss circumcision, Muslim scholars justify the tradition by citing to a verse in the Koran stating that Abraham should serve as a "model for the Muslim faith." Abu-Sahlieh, *supra* note 1, at 580 (citing verse 16:123 which states, "Then we inspired you [Mohammed] to follow the religion . . . of Abraham, a true believer.").

27. *Genesis* 17:12 (reporting that "[h]e that is eight days old among you shall be circumcised."). The Jewish circumcision ceremony is referred to as "Bris Milah." Claire I. L'Archevesque & Helene Goldstein-Lohman, *Ritual Circumcision: Educating Parents*, 22 PEDIATRIC NURSING 228 (1996). A "Mohel," a rabbi learned in the art of ritual circumcision, performs the circumcision. *Id.*

28. Abu-Sahlieh, *supra* note 1, at 589. Although Muslim law has no set circumcision age, ideally the procedure should occur no later than seven years after the child is born. *Id.*

29. Gollaher, *supra* note 2, at 9. Phimosis is a "constricting or tightening of the foreskin" which prevents it from retracting and exposing the glans. *Id.* In younger boys, phimosis can obstruct urination and cause pain. *Id.* at 6, 9. Later in life, phimosis may interfere with erection. *Id.* at 9.

30. *Id.* at 5-8. Dr. Lewis Sayre first used circumcision to treat a five-year-old boy who was unable to walk due to an inflamed, contracted foreskin. *Id.* at 6. Convinced that circumcision cured orthopedic problems, the doctor treated a second boy for paralysis by circumcising him. *Id.* Dr. Sayre published his "findings" in a medical journal stating that he was "certain that he had unlocked the secret of a host of ills." *Id.* at 7.

31. *See id.* at 7 (suggesting that doctors ignored medical precedent and immediately accepted Dr. Sayre's findings).

the patient recovered and felt healthy.<sup>32</sup>

Doctors in the late Nineteenth Century additionally began to prescribe male circumcision as a means to curb sexual desire and to prevent masturbation.<sup>33</sup> Physicians believed that when boys would clean under the foreskin, the process would encourage masturbation.<sup>34</sup> Society praised any method that would decrease human handling of genitalia.<sup>35</sup> While some doctors recommended clitoridectomies for women to cure the same "ailments," the procedure was not as widespread and doctors eventually abandoned the procedure by the 1930's.<sup>36</sup>

At the end of the Nineteenth Century and the beginning of the Twentieth Century, individuals embraced and practiced better standards of personal hygiene.<sup>37</sup> The American middle class viewed good hygiene as a way to separate themselves from the dirty, amoral lower class.<sup>38</sup> Physicians' distorted views on public health and new disease theories contributed to class stratification.<sup>39</sup> Unable to comprehend how to treat microscopic germs, doctors fell back on surgery as a means to cure ailing patients and promote good health.<sup>40</sup> Doctors recommended circumcision to eliminate a substance known as "smegma" which collects underneath the foreskin and can attract bacteria.<sup>41</sup> Genital organs became associated with filth and waste from the body.<sup>42</sup> Doctors also thought circumcision would prevent cancer

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32. *Id.* at 6.

33. *Id.* at 20-21; William E. Brigman, *Circumcision As Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 339 (1984).

34. Brigman, *supra* note 33, at 339.

35. Gollaher, *supra* note 2, at 21. Main stream religious groups considered masturbation a "mortal sin" while the medical community theorized that it "caused disease." *Id.*

36. *Id.* at 9; Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J.L. & POL'Y 321, 332 (1995). A clitoridectomy is a procedure which removes the clitoris. Council Report, *supra* note 21, at 1714.

37. Gollaher, *supra* note 2, at 11. Americans' increased attention toward personal hygiene mirrored their attempts at sanitizing urban decay. *Id.* General public health measures intended to clean the unwashed masses led individuals to take more pride in their appearance. *Id.* Americans equated a clean appearance with "good morals, sound health and upright character." *Id.*

38. *Id.* at 11-12. During the Victorian period, middle and upper class Americans were preoccupied with "social hierarchies" and sought out ways to elevate themselves above the common man. *Id.* at 12.

39. *Id.*

40. *Id.* Doctors were learning about "germ theory" and disease-causing microbes; however, this new knowledge confused many in the medical profession. *Id.* Doctors continued to recommend surgery because it was familiar and easy. *Id.* at 12-13.

41. *Id.* at 13; Brigman, *supra* note 33, at 339.

42. Gollaher, *supra* note 2, at 13.

and sexually transmitted diseases.<sup>43</sup> During the Victorian Era, the surgical removal of healthy body parts was thought to be the simplest way to avoid poor health and as a result “surgery replaced soap and water.”<sup>44</sup> Male circumcision was one procedure that replaced washing.<sup>45</sup> During this period at least one doctor compared circumcision to childhood vaccinations because, in his opinion, both were easy and simple procedures that prevent disease.<sup>46</sup>

Although during the early Twentieth Century doctors stopped performing female circumcision as a hygienic measure and sexual suppressant, male circumcision rates increased to around eighty to ninety percent between World War I and World War II.<sup>47</sup> Most parents never questioned the procedure because they either accepted medical opinion or were not informed that doctors were circumcising their sons.<sup>48</sup> Parental notification and consent did not become a routine practice until the 1960's and 1970's.<sup>49</sup> Today, circumcision remains an optional procedure that requires at least one parent's consent.<sup>50</sup>

Although circumcision is not required, it has become a part of American culture.<sup>51</sup> Men wanting to look like their peers, parents not wanting their sons ostracized for being different, and the convenience of not having to clean under the foreskin keep the practice of circumcision alive.<sup>52</sup> In recent years, the medical

43. *Id.* at 14-15. Syphilis was common during this time and doctors were desperate for a means to stop it from spreading. *Id.* at 15. Doctors also attempted to cure genital herpes with circumcision. *Id.*

44. *Id.* at 12.

45. *Id.*

46. *Id.* at 19.

47. Tom Steadman, *Circumcision: A Divisive Medical Practice*, GREENSBORO NEWS & REC., June 10, 1997, at D1. During World War I, American soldiers living in trenches were unable to wash regularly. *Id.* The military began circumcising new recruits to reduce the number of infections. *Id.* See Frederick Hodges & Jerry W. Warner, *The Right to Our Own Bodies: The History of Male Circumcision In the U.S.*, 6 M.E.N. MAG. 11, 17 (1995) (indicating that numerous soldiers were involuntarily circumcised). Doctors in military hospitals soon began circumcising infants. Steadman, *supra*, at D1. Doctors believed that males circumcised as infants experienced less pain and trauma than as adults. *Id.* The circumcision trend spread to other hospitals and before long the male newborn circumcision rate reached approximately 60%-90%. *Id.* See also Laumann et al., *supra* note 19, at 1053 (reporting a male circumcision rate of 80% after World War II).

48. Hodges & Warner, *supra* note 47, at 17; Gollaher, *supra* note 2, at 24.

49. Hodges & Warner, *supra* note 47, at 17.

50. *Id.* at 17.

51. Gollaher, *supra* note 2, at 25 (stating that circumcision evolved into “social custom”); Garloch, *supra* note 1, at 2 (reporting a male circumcision rate of 90% in the late nineteen sixties and early nineteen seventies); Hodges & Warner, *supra* note 47, at 17 (reporting a male circumcision rate of 90% just before 1970).

52. Steadman, *supra* note 47, at D1; Kathleen Parker, *Retire Primitive*



profession has taken a neutral position toward the benefits of circumcision and is not vigorously endorsing circumcision.<sup>53</sup>

Few dissenters voiced opinions against circumcision during the late Nineteenth and early Twentieth Centuries because most people either supported the procedure or were indifferent.<sup>54</sup> Organized opposition to male circumcision began in the 1970's and continues to be a noticeable voice in condemning the procedure.<sup>55</sup> These groups also criticize female circumcision.<sup>56</sup> Anti-circumcision groups argue that the medical evidence supporting circumcision is inconclusive and that the physical pain is long lasting and psychologically scarring.<sup>57</sup> Opponents feel that any kind of circumcision is an unacceptable and illegal invasion of a minor's body, regardless of religious mandate, custom or parental consent.<sup>58</sup>

*Practice of Circumcision*, GREENSBORO NEWS & REC., Mar. 31, 1997, at D1. See also Gollaher, *supra* note 2, at 25 (noting that medical textbooks utilized in American schools depict the "normal" penis as circumcised).

53. Edgar J. Schoen et al., *Task Force on Circumcision: Report of the Task Force on Circumcision*, 84 PEDIATRICS 388, 388 (1989).

54. Gollaher, *supra* note 2, at 17 (noting that dissent in the medical community was rare and that only a few doctors in the late Nineteenth Century believed circumcision was wrong).

55. American Academy of Pediatrics Committee on Fetus and Newborn, *Report of the Ad Hoc Task Force on Circumcision*, 56 PEDIATRICS 610, 611 (1975) [hereinafter American Academy of Pediatrics Committee]. In 1975, the American Academy of Pediatrics declared that "[t]here is no absolute medical indication for routine circumcision of the newborn." *Id.* Since that report was published, various grass-roots organizations that oppose circumcision have formed, including NOCIRC (founded in 1985) and NOHARMM (founded in 1992). Hodges & Warner, *supra* note 47, at 17; Marilyn Fayre Milos & Donna Macris, *Circumcision: A Medical or a Human Rights Issue?*, 37 J. OF NURSE-MIDWIFERY 87S, 89S (1992). NOCIRC's goal is to end circumcision by the year 2000. Telephone Interview with Jody McLaughlin, *supra* note 9. These groups have participated in several International Symposiums on Circumcision (ISC) around the country and have protested before the Physicians' Committee for Responsible Medicine in Washington, D.C. Abu-Sahlieh, *supra* note 1, at 611.

56. Milos & Macris, *supra* note 55, at 89S. ISC functions as a forum where international groups that oppose male and female circumcision debate strategies intended to end these procedures around the world. *Id.*

57. See Jim Bigelow, *Uncircumcising: Undoing the Effects of an Ancient Practice in a Modern World*, 71 MOTHERING 56, 60 (1994) (reporting that men suffer emotional pain from having a body part removed); Hodges & Warner, *supra* note 47, at 17 (suggesting that the restoration of the foreskin improves self-esteem of men); Milos & Macris, *supra* note 55, at 92S (indicating that circumcision pain affects men throughout their lives).

58. *Declaration of the First International Symposium on Circumcision*, 1 TRUTH SEEKER 52, 52 (1989) (stating that "all human beings [have the right] to an intact body; [p]arents . . . do not have the right to consent to the surgical removal . . . of their children's normal genitalia; physicians who [circumcise are] violating . . . Article V of the United Nations Universal Declaration of Human Rights . . .").

Male circumcision is a popular procedure in the United States.<sup>59</sup> In other countries, female circumcision is performed just as frequently.<sup>60</sup> Female circumcision and male circumcision both pose similar health risks. However, female circumcision invokes stronger ridicule and reproach in the United States.<sup>61</sup>

### B. *Female Circumcision*

Female circumcision varies in degree, but the procedure removes some or all of the external genitalia.<sup>62</sup> Female circumcision is practiced in African nations to suppress sexual desire and to insure virginity.<sup>63</sup> Girls generally undergo the procedure before they are seven years old without the aid of anesthetic or antiseptic conditions.<sup>64</sup> The severity of the procedure is usually more extreme than male circumcision.<sup>65</sup> For instance, infibulation removes the entire external female genitalia.<sup>66</sup> The wound is stitched leaving an opening the size of a match stick, then the girl's legs are tied together for over a month or until the wound closes.<sup>67</sup> "Sunna" is the form most similar to male circumcision because it removes the least amount of skin.<sup>68</sup>

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59. Abu-Sahlieh, *supra* note 1, at 606 (reporting an American male circumcision rate for non-religious reasons at 60%).

60. *Id.* at 578 (reporting an Egyptian female circumcision rate of 66.2% for educated females and 97.5% for uneducated females).

61. Hughes, *supra* note 36, at 362-63 (insisting that the federal government criminalize female circumcision because the procedure harms minor females); Melissa A. Morgan, Commentary, *Female Genital Mutilation: An Issue On the Doorstep of the American Medical Community*, 18 J. LEGAL MED. 93, 114 (1997) (stressing the need to enact laws criminalizing female circumcision in the United States because the procedure endangers "the health and welfare of . . . citizens").

62. Council Report, *supra* note 21, at 1714. Female circumcision takes three forms. *Id.* The first, sunna, is comparable to a clitoridectomy which removes the clitoris. *Id.* The second, excision, removes the clitoris and sections of the labia minora. *Id.* The third, infibulation, removes the entire external genitalia. *Id.* See Lori Ann Larson, Note, *Female Genital Mutilation In the United States: Child Abuse or Constitutional Freedom?*, 17 WOMEN'S RTS. L. REP. 237, 238 (1996) (discussing the various types of female circumcision).

63. Abu-Sahlieh, *supra* note 1, at 578; Council Report, *supra* note 21, at 1715.

64. Council Report, *supra* note 21, at 1714. A midwife usually performs the procedure in the girl's village using a non-sterilized razor blade, scissors or sometimes the midwife's teeth. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The wound is usually sewn using catgut or held in place with thorns. *Id.* The smallness of the opening prevents normal urination and menstruation. *Id.* at 1715. Frequently women must reopen the scar tissue prior to intercourse or giving birth. *Id.*

68. See *id.* at 1714 (reporting that sunna is the one "procedure that could properly be called circumcision").

Although the procedure's supporters claim that the Koran requires female circumcision, the text never mentions circumcision.<sup>69</sup> Supporters claim that female circumcision enhances aesthetic appeal, promotes hygiene and prevents disease.<sup>70</sup> However, it is widely accepted that female circumcision serves no medical purpose and causes many health risks including infection, difficulty giving birth, and death.<sup>71</sup> Female circumcision also causes painful sex and eliminates a woman's ability to achieve orgasm.<sup>72</sup>

Male circumcision is similar to female circumcision because both procedures remove healthy, genital tissue from a minor without medical purpose.<sup>73</sup> Minors of both sexes experience pain during and long after the procedure.<sup>74</sup> Health complications, death and disfigurement result from both procedures.<sup>75</sup> Children of either gender are forced to endure a procedure that cuts away a part of their body and subjects them to pain and permanent scarring.<sup>76</sup>

Female circumcision opponents maintain that male circumcision does not resemble female circumcision.<sup>77</sup> Those who

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69. See Abu-Sahlieh, *supra* note 1, at 580-82 (explaining that the Koran does not discuss male or female circumcision); see generally Morgan, *supra* note 61, at 94-95 (discussing the religious background of female circumcision).

70. See Abu-Sahlieh, *supra* note 1, at 593 (stating that some believe female circumcision prevents cancer and protects husbands from infections); Morgan, *supra* note 61, at 95 (stating that circumcision supporters believe female circumcision promotes "good hygiene"); Note, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1953 (1993) (suggesting that the procedure's supporters believe that circumcision "makes the vulva aesthetically more appealing").

71. See Abu-Sahlieh, *supra* note 1, at 594 (illustrating numerous medical complications including pain, hemorrhaging, urinary tract obstruction, cysts and difficult pregnancy); Council Report, *supra* note 21, at 1715 (naming tetanus, hepatitis and sterility as possible complications).

72. See Abu-Sahlieh, *supra* note 1, at 594 (indicating that female circumcision destroys a woman's ability to achieve orgasm); Council Report, *supra* note 21, at 1715 (noting that scar tissue blocks the vaginal opening making penetration nearly impossible).

73. Council Report, *supra* note 21, at 1714; Milos & Macris, *supra* note 55, at 94S.

74. Council Report, *supra* note 21, at 1715; Anna Taddio et al., *Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination*, 349 LANCET 599, 602 (1997) (indicating that pain tolerance decreases in circumcised boys).

75. Milos & Macris, *supra* note 55, at 94S.

76. *Id.*

77. See 141 CONG. REC. H1695 (daily ed. Feb. 14, 1995) (statement of Rep. Schroeder) (arguing that "[f]emale genital mutilation is not comparable to male circumcision, unless one considers circumcision amputation."); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 6 n.18 (1995) (citing those who believe female circumcision is different from male

assert this position attempt to bring attention to the seriousness of female circumcision by avoiding comparisons to a procedure that interests no one.<sup>78</sup> Worldwide, female circumcision affects more women than male circumcision affects men.<sup>79</sup> Female circumcision causes many deaths and health problems because of the unsanitary conditions it is performed under.<sup>80</sup> Opponents feel women are in a different position than males because the purpose behind and severity of the procedures are different.<sup>81</sup> Vivid stories of young girls dying or facing difficult labor because they were circumcised make headlines in newspapers and journals.<sup>82</sup> Stories discussing the amputation of an infant's penis during circumcision are not discussed with the same frequency.<sup>83</sup> American legislators rely on newspaper articles to claim that atrocities related to female circumcision occur in immigrant communities in the United States.<sup>84</sup> Therefore, they claim that laws protecting women from circumcision are necessary and valid.<sup>85</sup>

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circumcision); Layli Miller Bashir, Comment, *Female Genital Mutilation In the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 420 (1996) (stating that female circumcision "would only be similar to male circumcision if the penis were amputated").

78. See Abu-Sahlieh, *supra* note 1, at 576 (stating that "male circumcision does not really interest anyone").

79. *Id.* at 606 (reporting that 1.25 million men are circumcised in the United States each year); Council Report, *supra* note 21, at 1714 (reporting that globally 80 to 110 million women have been circumcised).

80. Council Report, *supra* note 21, at 1715.

81. See CAL. PENAL CODE § 273.4(e) (West 1997) (stating in the historical and statutory notes that female circumcision "ensure[s] that wives are virgins at marriage and that children are verifiably the men's descendants"); 141 CONG. REC. H1695 (daily ed. Feb. 14, 1995) (statement of Rep. Schroeder) (arguing that female circumcision is used to control sexuality and reproduction); 142 CONG. REC. S8972 (daily ed. July 26, 1996) (statement of Sen. Reid) (arguing that the purpose of female circumcision is to guarantee virginity and prevent extramarital sex).

82. *11 Year Old Girl in Egypt Bleeds to Death*, DALLAS MORNING NEWS, July 15, 1996; *Girl, 14, Bleeds to Death From Female Circumcision*, GREENSBORO NEWS & REC., Aug. 25, 1996, at 1. See also *20/20: Update on Female Genital Mutilation Story* (ABC television broadcast, Aug 22, 1997) (transcript available in LEXIS, News Library, CURNWS File) (reporting a woman's statement that those who perform female circumcision sometimes "cut the wrong vein" and the girl "bleed[s] to death").

83. See Kathleen Parker, *Retire Primitive Practice of Circumcision*, GREENSBORO NEWS & REC., Mar. 31, 1997, at 1 (discussing the amputation of an infant's penis during circumcision).

84. 142 CONG. REC. S8972 (daily ed. July 26, 1996) (statement of Sen. Reid) (stating that he has read more than one story about girls dying from circumcision complications).

85. See CAL. PENAL CODE § 273.4 (West 1997) (stating in the historical and statutory notes that California is joining other jurisdictions in criminalizing and condemning female circumcision); 141 CONG. REC. H1695 (daily ed. Feb. 14, 1995) (statement of Rep. Schroeder) (emphasizing the need to pass a federal law prohibiting female circumcision); 142 CONG. REC. S8972 (daily ed.

### C. State Laws Prohibiting Female Circumcision

Several state legislatures have enacted FGM statutes.<sup>86</sup> These statutes were enacted following Congressional passage of the federal Female Genital Mutilation statute.<sup>87</sup> Congress passed the FGM statute in response to reports that female circumcision is currently practiced in immigrant communities around the United States.<sup>88</sup> Several other state legislatures are debating whether to pass similar laws.<sup>89</sup>

The principle underlying FGM statutes is to protect child welfare.<sup>90</sup> States that prohibit female circumcision, or are considering making it illegal, treat the procedure either as a separate offense or penalize it under child abuse statutes.<sup>91</sup> States that equate female circumcision with child abuse recognize that the procedure harms the child physically and emotionally and serves no medical purpose.<sup>92</sup> Those states that criminalize female circumcision as a separate offense still recognize that the procedure endangers the child's life, health and safety.<sup>93</sup> Various

July 26, 1996) (statement of Sen. Reid) (stressing the need to pass a federal law prohibiting female circumcision).

86. *E.g.*, CAL. PENAL CODE § 273.4 (West 1997); DEL. CODE ANN. tit. 11, § 780 (1996); 720 ILCS 5/12-34 (1998); MD. CODE ANN., Health General § 20-601 (1998); MINN. STAT. § 609.2245 (1996); N.Y. PENAL LAW § 130.85 (McKinney 1998); R.I. GEN. LAWS § 11-5-2 (1996); TENN. CODE ANN. § 39-13-110 (1996); WIS. STAT. ANN. § 146.35 (1997).

87. Female Genital Mutilation, 18 U.S.C. § 116 (1996). The statute imposes a fine or imprisonment up to five years on anyone who "knowingly circumcises, excises or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years . . ." *Id.* Congress found that female genital mutilation violates individual rights guaranteed under "Federal and State law, both statutory and constitutional." *Id.* § 116(3).

88. 141 CONG. REC. H1695 (daily ed. Feb. 14, 1995) (statement of Rep. Schroeder) (arguing that female circumcision is occurring in the United States); 142 CONG. REC. S8972 (daily ed. July 26, 1996) (statement of Sen. Reid) (arguing that immigrants are circumcising female minors in the United States).

89. S.B. 85, 61st Leg., 1st Reg. Sess. (Colo. 1997); S.B. 1865, 207th Leg. (N.J. 1996); H.B. 3334, 69th Leg. (Or. 1997); S.B. 73, 73d Leg. (W. Va. 1997).

90. *E.g.*, CAL. PENAL CODE § 273.4 (West 1997) (explaining in the historical and statutory notes that the FGM statute was enacted to halt child and human rights abuse); S.B. 85, 61st Leg., 1st Reg. Sess. (Colo. 1997) (indicating that the bill is intended to stop child abuse and protect child welfare).

91. *E.g.*, DEL. CODE ANN. tit. 11, § 780 (1996) (listing female circumcision as a separate offense); S.B. 85, 61st Leg., 1st Reg. Sess. (Colo. 1997) (criminalizing female circumcision under child abuse statute).

92. *See* CAL. PENAL CODE § 273.4 (West 1997) (indicating in the historical and statutory notes that female circumcision causes physical and emotional harm); S.B. 85, 61st Leg., 1st Reg. Sess. (Colo. 1997) (stating that female circumcision is child abuse because it injures the minor's health).

93. *E.g.*, S.B. 1865, 207th Leg. (N.J. 1996) (stating that female circumcision causes "physical and psychological" harm). California acknowledges that

states have created FGM funds enabling the department of public health or other institutions to initiate education programs and studies to convince communities most likely to circumcise their daughters to discontinue the procedure.<sup>94</sup>

Although FGM statutes are intended as child welfare laws, they do not protect all children because they exclude males.<sup>95</sup> At least three states have conflicting statutes or proposed statutes that outlaw female circumcision and ritual mutilations, yet expressly exempt male circumcision from criminal prosecution.<sup>96</sup> These statutes clearly allow a double standard which protects females but not males from harm.<sup>97</sup>

## II. FGM LAWS VIOLATE EQUAL PROTECTION UNDER THE LAW

State laws that ban female circumcision treat males differently from females solely on the basis of gender.<sup>98</sup> FGM statutes are underinclusive in their protection of children because

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female circumcision violates "basic human rights." CAL. PENAL CODE § 273.4 (West 1997).

94. *See, e.g.*, CAL. PENAL CODE § 273.4 (West 1997) (stating in the historical and statutory notes that California "must take a proactive role to prevent these mutilations through education and outreach activities to make recent immigrants aware of California laws, standards, and expectations for child protection"); MINN. STAT. ANN. § 144.3872 (West 1997) (directing the health department to educate "communities about the health risks and emotional trauma" associated with female circumcision); S.B. 85, 61st Leg., 1st Reg. Sess. (Colo. 1997) (setting up a fund to inform the public about the physical and mental harm caused by female genital mutilation); H.B. 3334, 69th Leg. (Or. 1997) (assigning to the Department of Human resources the duty to "establish and implement appropriate education, prevention and outreach activities"); A.B. 3379, 220th Leg. (N.Y. 1997) (directing the department of social services to coordinate suitable "education, preventive and outreach activities").

95. *E.g.*, DEL. CODE ANN. tit. 11, § 780 (1996); MINN. STAT. § 609.2245 (1996); N.D. CENT. CODE § 12.1-36-01 (1997); TENN. CODE ANN. § 39-13-110 (1996); WIS. STAT. ANN. § 146.35 (1997).

96. *Compare* CAL. PENAL CODE § 273.4 (criminalizing female circumcision) *with* CAL. PENAL CODE § 667.83(c)(2) (exempting "lawful medical" circumcision from criminal prosecution). *Compare* N.Y. PENAL LAW § 130.85 (McKinney 1998) (criminalizing female genital mutilation) *with* S.B. 1113, 220th Leg. (N.Y. 1997) (requiring hospitals to permit ritual male circumcision to be performed upon consent of parents). *See also* H.B. 106, 90th Leg., Reg. Sess. (Ill. 1997) (prohibiting female circumcision but amending the ritual mutilation statute to exempt male circumcision from criminal prosecution).

97. *See* CAL. PENAL CODE § 273.4 (making female circumcision a criminal offense); CAL. PENAL CODE § 667.83(c)(2) (allowing doctors to perform "lawful medical" circumcision).

98. *E.g.*, DEL. CODE ANN. tit. 11, § 780 (1996); MINN. STAT. § 609.2245 (1996); N.Y. PENAL LAW § 130.85 (McKinney 1998); N.D. CENT. CODE § 12.1-36-01 (1997); R.I. GEN. LAWS § 11-5-2 (1996); TENN. CODE ANN. § 39-13-110 (1996); WIS. STAT. ANN. § 146.35 (1997).

they deny males the same legal protections that females have.<sup>99</sup> Female circumcision is medically unnecessary, inflicts serious pain and poses medical complications.<sup>100</sup> Although these characteristics are also associated with male circumcision, state laws do not protect males who undergo this similar procedure.<sup>101</sup> This Part discusses the reasons why male circumcision is medically unnecessary and qualifies as child abuse. This Part also analyzes the Fourteenth Amendment equal protection argument that state FGM statutes are unconstitutional.<sup>102</sup> Finally, this Part explains why statutes proscribing male circumcision would not violate the First Amendment right to free exercise of religion.

#### A. Male Circumcision: No Medical Justification

In 1971, the American Academy of Pediatrics reported that male circumcision was not medically necessary.<sup>103</sup> In recent years, however, some members of the medical community have taken a neutral stand on circumcision.<sup>104</sup> The evidence supporting circumcision is unpersuasive, considering the pain and risk of medical complications associated with the procedure.<sup>105</sup>

Some members of the modern medical community still maintain that circumcision prevents cancer and disease.<sup>106</sup> One study reports a higher rate of human immunodeficiency virus (HIV) in uncircumcised men.<sup>107</sup> Later, however, in the same

99. *E.g.*, N.D. CENT. CODE § 12.1-36-01 (1997) (criminalizing only circumcision of female minors).

100. *See* Council Report, *supra* note 21, at 1715 (discussing health risks associated with female circumcision).

101. *E.g.*, N.D. CENT. CODE § 12.1-36-01 (1997) (protecting only female minors from circumcision).

102. Issues related to and a discussion of the Fifth Amendment right to privacy is beyond the scope of this comment. For a discussion of the fundamental right to privacy related to FGM statutes, see Hughes, *supra* note 36, at 348-54.

103. American Academy of Pediatrics Committee, *supra* note 55, at 610.

104. Schoen et al., *supra* note 53, at 388; Laumann et al., *supra* note 19, at 1056 (stating that "medical research on the topic has generated an ambiguous set of results regarding the impact of circumcision status on the lives of men").

105. *See, e.g.*, Robert W. Enzenauer & Anthony G. Smith, *Circumcision: Needless Risks, No Medical Benefits*, 46 RN 99, 99-100 (1983) (discussing some of the medical risks associated with circumcision); Taddio et al., *supra* note 74, at 602 (indicating that circumcised boys have a lower pain tolerance).

106. Rachel A. Royce et al., *Sexual Transmission of HIV*, 336 NEW ENG. J. MED. 1072, 1075 (1997) (indicating that circumcision protects males from contracting sexually transmitted diseases). Some reports indicate penile cancer develops "almost exclusively" in uncircumcised men. *Fact Sheet for Physicians Regarding Neonatal Circumcision*, 52 AM. FAM. PHYSICIAN 523, 523 (1995). A virus thought to contribute to cervical cancer is found more frequently in uncircumcised men. *Id.* at 523-24. The virus would be transmitted to the woman during sexual intercourse. *Id.*

107. Royce et al., *supra* note 106, at 1075. The authors report that "[t]he

report, the authors state that condoms protect against infection and conclude that safe sex is one of the best means for protection.<sup>108</sup> The report never mentions that circumcision should be promoted as a preventative measure.<sup>109</sup> A recent study in the *Journal of the American Medical Association* shows that circumcision does not afford protection from sexually transmitted diseases (STD).<sup>110</sup> In fact, circumcised men have a higher rate of infection than uncircumcised men.<sup>111</sup> Therefore, circumcision status has less to do with contracting HIV or a STD than having unprotected sex.

Some reports indicate that circumcision prevents penile and cervical cancers.<sup>112</sup> However, penile cancer is linked to hygiene rather than an intact penis.<sup>113</sup> Rates in the United States are almost equal to those in nations that do not circumcise males, presumably because uncircumcised men in those countries practice better hygiene standards than uncircumcised men in the United States.<sup>114</sup> The link between uncircumcised males and cervical cancer is also inconclusive.<sup>115</sup> Evidence indicates that multiple sexual partners have more to do with developing cervical cancer than circumcision status.<sup>116</sup>

The one infection that is associated with an intact penis is a higher rate of urinary tract infection (UTI).<sup>117</sup> Yet, proper hygiene eliminates the bacteria that causes UTI.<sup>118</sup> Uncircumcised men are not taught how to clean under the foreskin because circumcision has replaced hygiene.<sup>119</sup> Doctors do not instruct parents on how to

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prevalence of HIV infection is 1.7 to 8.2 times as high in men with foreskins as in circumcised men, and the incidence of infection is 8 times as high." *Id.*

108. *Id.*

109. *Id.* at 1072-76.

110. Laumann et al., *supra* note 19, at 1054 (reporting that circumcised males are "more likely" to contract bacterial or viral STDs during their lives).

111. *Id.* The researchers found that the number of sexual partners a man had was significant to whether he had contracted a STD. *Id.* They concluded that "circumcision provides no discernible prophylactic benefit and may in fact increase the likelihood of STD contraction." *Id.* at 1057.

112. *Fact Sheet for Physicians Regarding Neonatal Circumcision*, *supra* note 106, at 523.

113. Schoen et al., *supra* note 53, at 389 (stating that "[t]he incidence of penile cancer is related to hygiene").

114. *Id.* at 388-89. The rate of American penile cancer is 0.7 to 0.9 per 100,000 men per year. *Id.* at 388. In developed countries that do not customarily perform circumcision the rate is 0.3 to 1.1 per 100,000 men. *Id.* at 388-89.

115. *Id.* at 389.

116. *Id.*

117. Wiswell et al., *supra* note 19, at 339. The study showed that 72% of all male infant urinary tract infections occurred in uncircumcised males. *Id.*

118. Milos & Macris, *supra* note 55, at 91S.

119. See, NOCIRC, *Answers to Your Questions About Your Young Son's Intact Penis* (visited on Aug. 8, 1997) <<http://www.fathermag.com/htmlmodule>



care for their uncircumcised sons because most assume the child will be circumcised.<sup>120</sup> The Victorian custom of “cut” rather than clean has survived.<sup>121</sup> Circumcision opponents note that other body parts are not treated in the same way.<sup>122</sup> No one suggests “pull[ing] our fingernails off because dirt collects underneath.”<sup>123</sup> Some doctors believe that the foreskin actually protects against bacteria generated by urine and feces during infancy and throughout childhood.<sup>124</sup> Even if UTI does occur, antibiotics are an easy and safe cure.<sup>125</sup>

Doctors use circumcision to prevent phimosis.<sup>126</sup> However, ninety percent of uncircumcised boys have a retractable foreskin by age three.<sup>127</sup> Of those boys who do not, topical creams or steroids are safe treatments for the condition.<sup>128</sup> Stretching the foreskin manually can also correct phimosis without medical treatment.<sup>129</sup>

Traditionally, babies who are circumcised are operated on without anesthetic because the medical community assumes that infants either do not feel pain or that the pain is temporary.<sup>130</sup> A recent study dispels this myth.<sup>131</sup> One study found that

s/circ/xboy-care.html> (stating that “doctors don’t know how to care for an intact penis and recommend circumcision for any and every problem”).

120. *Id.*

121. See Gollaher, *supra* note 2, at 12-13 (describing trend toward surgery for a variety of ailments).

122. Dean Edell, *The Circumcision Decision*, 12 EDELL HEALTH LETTER 1, 1 (Dec. 1992). Mr. Edell notes that doctors do not remove healthy teeth to prevent cavities, nor does the medical community recommend tonsillectomies in children as frequently as it used to because “we’re learning that everything in the body serves a purpose.” *Id.* See also Milos & Macris, *supra* note 55, at 92S (stating that “[f]ear of infection is no reason to routinely amputate a tonsil, an appendix or a foreskin.”).

123. Catherine Creno, *Opposition to Circumcision Gains Supporters*, ARIZ. REPUBLIC, Aug. 31, 1993 (quoting Richard Morris, Phoenix attorney).

124. Milos & Macris, *supra* note 55, at 88S.

125. *Id.* at 91S.

126. Schoen et al., *supra* note 53, at 388.

127. *Fact Sheet for Physicians Regarding Neonatal Circumcision*, *supra* note 106, at 523. The report indicates that there is difficulty in diagnosing phimosis in newborns because the penis is not fully developed at birth. *Id.* Doctors should not circumcise a newborn if they cannot make a definite diagnosis. *Id.*

128. NOCIRC, *More Landmarks in Medical and Ethical Literature - 1996*, 11 NOCIRC ANNUAL REPORT 1, 4 (Spring 1997) (citing P. A. Dewan et al., *Phimosis: Is Circumcision Necessary?*, 32 J. PEDIATRICS & CHILD HEALTH 285, 289 (1996) and Z. Golubovic et al., *The Conservative Treatment of Phimosis in Boys*, 78 BRIT. J. OF UROLOGY 786-88 (1996)).

129. Milos & Macris, *supra* note 55, at 91S.

130. Taddio et al., *supra* note 74, at 599; David B. Chamberlain, *Babies Remember Pain* (visited Sept. 11, 1997) <<http://www.net-connect.net/~jspeyrer/babies.htm>>.

131. Schoen et al., *supra* note 53, at 389. The task force investigating male

circumcised babies have a lower pain tolerance later in life than uncircumcised babies.<sup>132</sup> This reaction to pain is understandable considering sensitive skin is torn off the body without anesthetic.<sup>133</sup> Using anesthesia in newborns during and after circumcision, however, can be dangerous.<sup>134</sup> Thus, infants are forced to suffer the pain of surgery and healing without medical comfort.

There are medical complications such as bacterial infections and bleeding associated with neonatal circumcision.<sup>135</sup> Amputation and death do occur.<sup>136</sup> Disfigurement or mangled circumcisions require further surgery to correct.<sup>137</sup> Even if a doctor performs the circumcision correctly, improper bandaging can block urination which, without immediate care, can cause infection and require a catheter to release the pressure.<sup>138</sup>

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circumcision reported that infants encounter behavioral changes including crying during circumcision and disrupted sleep afterward. *Id.*

132. Taddio et al., *supra* note 74, at 602. The researchers believe that the lower threshold for pain is the result of "alterations in the infant's central neural processing of painful stimuli" during circumcision. *Id.*

133. Chamberlain, *supra* note 130. Chamberlain describes a typical circumcision:

Surgery with a clamping device begins by inserting a probe between the foreskin and glans. The probe is moved all around the glans to cut and loosen adhesions . . . This is the maximum point of pain and crying. The foreskin does not naturally retract at birth and must be torn and cut back, leaving raw areas subject to urine burns and infection. After . . . the skin is slit and the clamp applied, the skin is pulled through and the excess cut away.

*Id.*

134. See Schoen et al., *supra* note 53, at 390 (stating that local anesthesia can cause bruising and skin problems).

135. Holman & Ringler, *supra* note 19, at 516-17. Besides localized infections, the researchers reported that gangrene and meningitis have been known to occur after circumcision. *Id.* at 517.

136. See Muhammad v. Strassburger, 543 A.2d 1138, 1138 (Pa. Super. Ct. 1988) (describing the death of a male infant after a botched circumcision); Felice v. Valleylab, Inc., 520 So. 2d 920, 922 (La. Ct. App. 1987) (describing how a boy's "penis was burned off by an electrosurgical device"); Wiswell & Geschke, *supra* note 2, at 1013 (estimating the death rate at two to three per year); L'Archevesque & Goldstein-Lohman, *supra* note 27, at 228 (describing a case where a child was disfigured during a bris); *Atlanta Hospital to Pay \$22.8 Million Settlement in Circumcision Accident*, MODERN HEALTHCARE, Apr. 1, 1991 (illustrating a case where boy had his penis amputated after circumcision); NOCIRC, *Legal Action*, 9 NOCIRC NEWSLETTER 1 (Fall/Winter 1995) (reporting three cases of partial amputation and disfigurement in children who were circumcised); NOCIRC, *World News*, 10 NOCIRC NEWSLETTER 1, 3 (Spring/Summer 1996) (reporting a case where a boy lost part of his glans during circumcision).

137. See, e.g., Carpenter vs. United States., No. CV937182, 1994 WL 845880, at \*1 (C.D. Cal. Dec. 3, 1994) (describing a situation where a child underwent plastic surgery to repair his deformed penis resulting from a poorly performed circumcision).

138. Julian D. Eason, et. al., *Male Ritual Circumcision Resulting in Acute Renal Failure*, 309 BRIT. MED. J. 660, 660 (1994).

In addition to these immediate problems, several complications can arise later in life.<sup>139</sup> Circumcised men may have decreased sexual sensitivity due to years of exposure of the glans to clothing and urine causing them to become tough and less sensitive.<sup>140</sup> Some men also experience emotional pain from knowing that they do not have a fully intact penis.<sup>141</sup> For these reasons and more, it is estimated that thousands of men have sought foreskin reconstructive surgery to feel "whole" again.<sup>142</sup>

Although neither male nor female circumcision is justifiable, critics of female circumcision assert the procedures are not comparable.<sup>143</sup> The main differences involve the purposes and severity of the procedures.<sup>144</sup> However, these differences do not indicate that male circumcision is a safe or moral procedure. Circumcision amputates the child's normal genitalia and causes excruciating pain and potential medical risks.<sup>145</sup> State governments have enacted FGM statutes to protect females from this risk; however, they have failed to extend the same protection to males.<sup>146</sup>

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139. See Tim Hammond, *Not "Just A Little Piece of Skin"*, 71 *MOTHERING* 56, 59 (1994) (describing sexual dysfunction resulting from circumcision).

140. *Id.*

141. Bigelow, *supra* note 57, at 60 (stating that circumcised men do not "feel whole"); Hodges & Warner, *supra* note 47, at 17 (indicating that some circumcised men feel victimized and have low self esteem); Chamberlain, *supra* note 130 (stating that "some men carry conscious memories of circumcision").

142. Garloch, *supra* note 1, at 2 (quoting Wayne Griffiths of the National Organization of Restoring Men that approximately seven thousand men have gone through foreskin reconstruction); Electronic Memorandum from Marilyn F. Milos, R. N., Executive Director, NOCIRC, to Shea Lita Bond, (Sept. 5, 1997) (on file with author) (estimating that ten thousand men have restored their foreskins); Electronic Memorandum from Tim Hammond, NOHARMM, to Shea Lita Bond, (Sept. 9, 1997) (on file with author) (reporting that "over 10,000 copies of *THE JOY OF UNCIRCUMCISING!* [a book instructing men on how to reconstruct their foreskin] . . . have been sold."). Foreskin reconstruction involves pulling the skin down over the glans until a new foreskin is created. Bigelow, *supra* note 57, at 58. This process can take several years if done without surgery. *Non-Surgical Foreskin Restoration: The Stretching Procedure* (visited Aug. 8, 1997) <<http://www.eskimo.com/~gburlin/restore/uncirc.txt>>.

143. Bashir, *supra* note 77, at 420 (stating that the less severe forms of female circumcision are not similar to male circumcision).

144. 142 CONG. REC. S8972 (daily ed. July 26, 1996) (statement of Sen. Reid) (arguing that the purpose of female circumcision is to guarantee virginity and prevent extramarital sex); Council Report, *supra* note 21, at 1714-15 (stating that female circumcision usually removes the entire external genitalia for the purpose of ensuring virginity).

145. Milos & Macris, *supra*, note 55, at 92S, 94S.

146. *E.g.*, CAL. PENAL CODE § 273.4 (West 1997); DEL. CODE ANN. tit. 11, § 780 (1996); 720 ILCS 5/12-34 (1998); MD. CODE ANN., Health General § 20-601 (1998); MINN. STAT. § 609.2245 (1996); N.Y. PENAL LAW § 130.85 (McKinney 1998); R.I. GEN. LAWS § 11-5-2 (1996); TENN. CODE ANN. § 39-13-

### B. *The Fourteenth Amendment and Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution states that “[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>147</sup> The United States Supreme Court interprets the Equal Protection Clause as one that protects all citizens from state laws which discriminate on the basis of race, gender, legitimacy or economic class.<sup>148</sup> North Dakota committed the intentional act of discrimination when it refused to treat female and male circumcision the same solely because it wanted to treat males differently than females.<sup>149</sup>

State laws that discriminate on the basis of gender must pass intermediate scrutiny.<sup>150</sup> Intermediate scrutiny requires “that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives” in order to survive constitutional challenge.<sup>151</sup>

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110 (1996); WIS. STAT. ANN. § 146.35 (1997).

147. U.S. CONST. amend. XIV, §1.

148. There are three levels of scrutiny that a court may use in analyzing an equal protection issue. First, laws that classify individuals according to their race are subject to “strict scrutiny.” *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying strict scrutiny to a state statute that prohibited interracial marriage). In comparison, state laws which discriminate on the basis of age or economic position are accorded minimal scrutiny by the court. *Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) (applying minimal scrutiny to a state law requiring judges to retire at age 70); *Lyng v. International Union*, 485 U.S. 360, 370 (1988) (applying minimal scrutiny to a state law that denied striking laborers access to food stamps because of decreased income); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (applying minimal scrutiny to a Massachusetts’ law that required uniformed police officers to retire at age 50); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (applying minimal scrutiny to a Texas law which was alleged to discriminate against the poor for providing that local schools be funded by local property taxes). The third level of scrutiny is “intermediate scrutiny,” a standard which lies between strict scrutiny and minimal scrutiny and tests laws that discriminate on the basis of gender. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (applying intermediate scrutiny to state alcohol law that required a higher drinking age for males).

149. Telephone Interview with Jody McLaughlin, *supra* note 9 (stating that the North Dakota legislature refused to pass a circumcision law that protected male minors as well as female minors).

150. *Craig*, 429 U.S. at 197.

151. *Id.* See also *United States v. Virginia*, 518 U.S. 515, 531 (1996) (stating that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that intermediate scrutiny requires that “a statutory classification must be substantially related to an important governmental objective”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (asserting that state laws “that classif[y] individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification” and that “[t]he burden is met only by showing at least that the classification serves ‘important governmental

The standard requires that laws treat individuals "similarly situated" the same.<sup>152</sup> The Supreme Court recently indicated that a more stringent test may be appropriate in gender discrimination cases.<sup>153</sup> In *United States v. Virginia*, the majority stated that when a law discriminates on the basis of gender, the government must show an "exceedingly persuasive justification for that action."<sup>154</sup> This standard suggests that gender classifications may have to pass a more difficult constitutional analysis.<sup>155</sup>

Traditionally, courts applied intermediate scrutiny to cases where state laws discriminate against women on the basis of gender.<sup>156</sup> However, men have successfully sued under the Equal Protection Clause alleging sex discrimination by state laws denying males access to graduate schools and alimony.<sup>157</sup>

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objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (remarking that state laws will pass intermediate scrutiny "to the extent they are substantially related to a legitimate state interest"); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (stating that "[t]he Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.").

152. *Reed*, 404 U.S. at 76 (stating that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). However, laws that classify an individual on the basis of gender are constitutional if they attempt to redress past economic injustices because historically women have been discriminated against economically. *Califano v. Webster* 430 U.S. 313, 318 (1977) (upholding a federal law that allowed females applying for social security benefits "to eliminate additional low income earning years from the calculation of their retirement benefits" because it redressed past economic discrimination); *Schlesinger v. Ballard* 419 U.S. 498, 508 (1975) (upholding a federal law that allowed female naval officers longer tenure before discharge because it took into consideration that females do not have the same opportunity for career advancements as do male officers); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (holding valid a state law that gave widows but not widowers a \$500 property tax exemption because it redressed past economic discrimination).

153. *Virginia*, 518 U.S. at 531 (stating that the government "must demonstrate an 'exceedingly persuasive justification'" for any law that treats men differently from women solely on the basis of gender).

154. *Id.* (reaffirming the "exceeding persuasive justification" standard established in *Hogan*, 458 U.S. at 724).

155. *Id.* The majority used the term "skeptical scrutiny" instead of intermediate scrutiny. *Id.*; Karen Lazarus Kupetz, Note, *Equal Benefits, Equal Burdens: "Skeptical Scrutiny" For Gender Classifications After United States v. Virginia*, 30 LOY. L.A. L. REV. 1333, 1370 (1997) (stating that the decision "represents an invitation for courts to apply a stricter standard of review to gender classifications").

156. *Reed*, 404 U.S. at 76-77 (holding that state law could not prefer males over equally qualified females as estate administrators).

157. See *Hogan*, 458 U.S. at 730-31 (1982) (holding that the state could not bar a man from attending nursing school solely because of his gender); *Orr v.*

Therefore, men also have constitutional rights under the Fourteenth Amendment to be free from state laws that discriminate on the basis of gender.<sup>158</sup>

State FGM statutes violate the Equal Protection Clause because they treat males differently than females solely on the basis of gender.<sup>159</sup> Assuming, *arguendo*, that the FGM statutes which prohibit human rights or child abuse serve an important governmental purpose, the means are not substantially related to that purpose because they do not protect similarly situated individuals.<sup>160</sup> States have an important governmental interest in protecting and regulating child welfare.<sup>161</sup> Therefore, a law enacted to further this important governmental interest is valid as long as the law is substantially related to this end.<sup>162</sup> FGM statutes attempt to protect children from harmful circumcision, but fail to protect all children from the procedure's harmful effects.<sup>163</sup> Males are similarly situated to females because their bodies are subjected to similar harm.<sup>164</sup> FGM statutes prevent female circumcision regardless of parental consent or religious beliefs.<sup>165</sup> However, as long as one parent consents to male circumcision, the child is forced to undergo the procedure.<sup>166</sup> The

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Orr, 440 U.S. 268, 282-83 (1979) (holding unconstitutional an Alabama state law that required men to pay alimony but not women); *see also* Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding unconstitutional a New York law that permitted an unwed mother but not an unwed father to block the adoption of their children); *Craig*, 429 U.S. at 210 (1976) (holding unconstitutional an Oklahoma state law prohibiting alcohol sales to males under 21 and females under 18).

158. *Hogan*, 458 U.S. at 730-31; *Orr*, 440 U.S. at 282-83; *Caban*, 441 U.S. at 394; *Craig*, 429 U.S. at 210.

159. *See Craig*, 429 U.S. at 197 (stating that laws which treat males differently from females are unconstitutional).

160. *Reed*, 404 U.S. at 76-77.

161. *See Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (stating that society has an interest in "safeguard[ing children] from abuses").

162. *Craig*, 429 U.S. at 197.

163. *E.g.*, N.D. CENT. CODE § 12.1-36-01 (1997).

164. Compare Council Report, *supra* note 21, at 1714 (describing female circumcision) with Holman & Ringler, *supra* note 19, at 513 (describing male circumcision). Bleeding, infection and pain are common to both procedures. Compare Council Report, *supra* note 21, at 1714 (illustrating various medical complications associated with female circumcision) with Holman & Ringler, *supra* note 19, at 511-17 (describing some of the medical complications associated with male circumcision).

165. *E.g.*, DEL. CODE ANN. tit. 11, § 780(c) (1996) (eliminating consent as a defense); MINN. STAT. § 609.2245(1) (1996) (stating that consent is no defense); N.Y. PENAL LAW § 130.85 (McKinney 1998) (eliminating consent based on custom or ritual as a defense); TENN. CODE ANN. § 39-13-110(a) (1996) (indicating that consent is no defense); WIS. STAT. ANN. § 146.35(4)(a) (1997) (prohibiting consent as a defense).

166. *Fishbeck v. North Dakota*, 115 F.3d 580, 581 (8th Cir. 1997).

other parent cannot control whether the child is circumcised.<sup>167</sup> The male baby faces a real danger because more likely than not one or both of the parents will authorize circumcision.<sup>168</sup>

FGM statutes intended to prevent child abuse or protect child welfare are not substantially related to achieving that purpose.<sup>169</sup> Male circumcision has threatened and continues to threaten millions of American newborns, yet no child welfare statutes exist to protect them.<sup>170</sup> Statutes criminalizing female circumcision are designed to discriminate solely on the basis of gender.<sup>171</sup> When state legislatures enacted FGM statutes, they chose to protect only half the newborn population from harm without any justification for this gender bias.<sup>172</sup> Since state legislatures' chosen means are not substantially related to the important governmental interest of protecting child welfare, state FGM statutes are unconstitutional.<sup>173</sup>

Male babies are subject to the same abuse, yet state legislatures refuse to acknowledge or choose to ignore the condition, possibly for fear of infringing upon religious freedoms.<sup>174</sup> However, female circumcision is practiced as a religious custom and yet legislatures feel free to regulate the procedure.<sup>175</sup>

### C. Religious Freedom and Free Exercise Under the First Amendment

If state legislatures were to adopt gender neutral statutes that protected both sexes from circumcision, the laws might be challenged as unconstitutional for violating the First

167. *Id.*

168. See Abu-Sahlieh, *supra* note 1, at 606 (indicating that males are circumcised approximately 60% of the time).

169. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

170. See Holman & Ringler, *supra* note 19, at 511 (indicating that over 60% of male babies are circumcised each year). There are no indications that this rate is decreasing or will decrease in the future. *Id.*

171. *E.g.*, DEL. CODE ANN. tit. 11, § 780 (1996) (protecting exclusively females on the sole reason of gender).

172. CAL. PENAL CODE § 273.4 (West 1997). This section states that female circumcision is "child abuse," "medically unnecessary," and a "health risk." *Id.* All of these descriptions apply equally to male circumcision, but the state legislature denies or chooses to ignore these facts. Telephone Interview with Jody McLaughlin, *supra* note 9.

173. *Craig*, 429 U.S. at 197.

174. Compare *e.g.*, A.B. 3379, 220th Leg. Sess. (N.Y. 1997) (criminalizing female genital mutilation) with S.B. 1113, 220th Leg. Sess. (N.Y. 1997) (requiring hospitals to permit ritual male circumcision to be performed upon consent of parents).

175. *E.g.*, DEL. CODE ANN. tit. 11, § 780(c) (1996) (stating custom is no defense); N.Y. PENAL LAW § 130.85 (McKinney 1998) (eliminating consent based on custom or ritual as a defense); N.D. CENT. CODE § 12.1-36-01(2) (1997) (indicating that neither custom nor ritual is a valid defense); WIS. STAT. ANN. § 146.35(4)(b) (1997) (stating neither custom nor ritual is a defense).

Amendment's guarantee to freedom of religion.<sup>176</sup> Laws that restrict an individual's right to practice most religious beliefs are unconstitutional.<sup>177</sup> However, not all religious practices are constitutionally protected.<sup>178</sup> The First Amendment will not bar state legislatures from criminalizing circumcision.

Early Supreme Court cases upheld the individual's right to practice religion and to raise children according to those religious views.<sup>179</sup> Parental rights are recognized as superior to that of the state in regards to the nurturing and education of children.<sup>180</sup> When parental rights join the right to freely exercise religion, the state has very little power to regulate an activity that infringes upon those rights.<sup>181</sup>

However, even though this combination of rights is extremely strong, it is not enough to defeat every state regulation that restrains religious rights.<sup>182</sup> Child welfare is of the utmost importance to the state.<sup>183</sup> Adults have discretion over their own religious convictions, but when those convictions have an effect on the lives of children, the state may regulate their actions.<sup>184</sup> In this

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176. See U.S. CONST. amend. I. (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."). The Supreme Court defines free exercise as "the right to believe and profess whatever religious doctrine one desires" combined with "the performance of (or abstention from) physical acts . . ." related to that belief. *Department of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990).

177. See *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding Wisconsin state law requiring students to attend high school violated Amish parents' right to remove their children from high school on religious grounds).

178. See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997) (holding a city historical landmark ordinance did not violate right to free exercise when the city prevented a Catholic church from expanding its building); *Smith*, 494 U.S. at 890 (upholding Oregon drug statute even though it restricted sacramental use); *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 505 (D.Wash. 1967), *reh'g denied*, 390 U.S. 598 (1968) (upholding a Washington statute enabling courts to order blood transfusions for children even if it runs contrary to the parents' religious beliefs); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that a Massachusetts child labor law which prevented children from selling magazines in public places did not violate the First Amendment).

179. *Yoder*, 406 U.S. at 234; *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35 (1925).

180. *Yoder*, 406 U.S. at 233; *Prince*, 321 U.S. at 165-66; *Pierce*, 268 U.S. at 534-35.

181. *Yoder*, 406 U.S. at 233.

182. See *id.* at 233-34 (indicating that the state can regulate behavior if parents' actions "jeopardize the health or safety of the child"); see also *Prince*, 321 U.S. at 166 (stating that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty," and "neither rights of religion nor rights of parenthood are beyond limitation").

183. See *Prince*, 321 U.S. at 165 (stating that "[i]t is the interest . . . of the whole community, that children be . . . safeguarded from abuses").

184. See *Yoder*, 406 U.S. at 233-34 (stating that parental rights, even when



regard, "the state as *parens patriae* may" limit parental discretion in the areas of education, labor and health.<sup>185</sup> Parents cannot deny their children blood transfusions, nor can they allow their children to peddle merchandise in public areas if these religious practices run contrary to state child welfare laws.<sup>186</sup>

Although an adult's right to free exercise of religion is relatively safe from government interference, some state laws that impair this right have withstood constitutional challenge.<sup>187</sup> The Supreme Court recognizes that neutral laws which unintentionally affect religious freedom are constitutional.<sup>188</sup> In *Department of Human Resources of Oregon v. Smith*, an Oregon law denied workers unemployment benefits if they were fired for misconduct.<sup>189</sup> In *Smith*, Mr. Smith and Mr. Black were members of the Native American Church which enlisted its members to use peyote in religious ceremonies.<sup>190</sup> Both men were fired from their jobs for ingesting peyote which is a criminal offense under Oregon law.<sup>191</sup> Both were denied unemployment benefits because they were fired for misconduct.<sup>192</sup> Mr. Smith and Mr. Black filed suit alleging that the Oregon criminal law prohibiting the use of a controlled substance violated their right to free exercise of religion.<sup>193</sup> The Supreme Court upheld the Oregon law stating that laws "of general applicability," which are not intended to regulate acts solely because of their religious quality, do not interfere with free exercise.<sup>194</sup> Individuals must comply with the criminal law even if it interferes with their religious practices, assuming the

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in conjunction with free exercise, "may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child"); see also *Prince*, 321 U.S. at 168, 170 (stating that "[t]he state's authority over children's activities is broader than over like actions of adults," and "[p]arents may be free to become martyrs themselves, [b]ut it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of [majority]").

185. *Prince*, 321 U.S. at 166.

186. *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 505 (D. Wash. 1967), *reh'g denied*, 390 U.S. 598 (1968); *Prince*, 321 U.S. at 170.

187. *City of Boerne v. P. F. Flores*, 117 S. Ct. 2157 (1997); *Department of Hum. Resources of Or. v. Smith*, 494 U.S. 872 (1990).

188. *Smith*, 494 U.S. at 878-79.

189. *Id.* at 874.

190. *Id.*

191. *Id.* at 874, 876. The Oregon Supreme Court held that ingesting peyote was prohibited under Oregon's "controlled substance" statute even if used for "sacramental use." See *id.* at 876 (citing *Department of Hum. Resources of Or. v. Smith*, 763 P.2d 146, 148 (Or. 1988)).

192. *Id.* at 874.

193. *Smith*, 494 U.S. at 878.

194. *Id.* at 878-79. The Court rejected the *Sherbert* balancing test as the appropriate standard to apply. *Id.* at 885. The *Sherbert* test requires the state to prove that a law which burdens free exercise serves a compelling governmental interest. *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963).

law does not regulate religious activity solely because it is a religious activity.<sup>195</sup>

Congress attempted to “overrule” *Smith* with the Religious Freedom Restoration Act (RFRA).<sup>196</sup> The RFRA made neutral laws that burden the free exercise of religion illegal.<sup>197</sup> The Supreme Court struck down the RFRA as an unconstitutional assertion of congressional power.<sup>198</sup> In striking down the RFRA the Court implicitly reaffirmed *Smith*, which held that neutral laws that unintentionally burden free exercise of religion are constitutional.<sup>199</sup>

Although religious groups practice circumcision, state governments can prohibit the procedure without violating the right to free exercise of religion.<sup>200</sup> The government has a legitimate, important interest in ensuring that children’s health, welfare and safety are protected.<sup>201</sup> Female circumcision is

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195. See *Smith*, 494 U.S. at 877-78 (observing that laws banning “acts or abstentions only when they are engaged in for religious reasons” would be unconstitutional).

196. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1997). Congress noted in its “findings” that the *Smith* decision allowed governments to burden free exercise without having to justify the burden. *Id.* § 2000bb(a)(4). The proper standard should require governments to show a compelling interest in order to burden free exercise. *Id.* § 2000bb(a)(3).

197. *Id.* § 2000bb-1. The RFRA prohibited government from “substantially burden[ing] a person’s free exercise of religion even if the burden results from a rule of general applicability.” *Id.* § 2000bb-1(a). The government could burden free exercise if it showed that the law was “in furtherance of a compelling governmental interest; and [was] the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1(b).

198. *City of Boerne v. P. F. Flores*, 117 S. Ct. 2157, 2172 (1997). The Court held that Congress overstepped its constitutional power under section five of the Fourteenth Amendment. *Id.* Section five gives Congress the “power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].” U.S. CONST. amend. XIV, § 5. The Court interprets the Enforcement Clause as giving Congress the right to enact “remedial,” “corrective legislation.” See *Boerne*, 117 S. Ct. at 2166 (citing *Civil Rights Cases*, 109 U.S. 3 (1883)). The *Boerne* Court held that the RFRA was not remedial legislation intended to prevent unconstitutional acts. *Id.* at 2170. Rather Congress sought to make “substantive” changes to free exercise. *Id.* Also, Congress “has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Id.* at 2164. Constitutional interpretation is reserved to the judicial branch, not the legislative. *Id.* at 2172.

199. See *Boerne*, 117 S. Ct. at 2172 (stating that “[w]hen the political branches . . . act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases . . . the Court will treat its precedents with the respect due them under settled principles, including *stare decisis* . . .”).

200. *Smith*, 494 U.S. at 877-78. As long as the statute does not intentionally burden the free exercise of religion, it is constitutional. *Id.*

201. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

recognized as child abuse.<sup>202</sup> Male circumcision is similarly harmful.<sup>203</sup> Circumcision laws of a generally applicable nature, designed solely to protect children's rights, would not intentionally interfere with religious freedom and therefore, would survive constitutional scrutiny.<sup>204</sup>

Cases that have upheld state regulatory laws against First Amendment challenges have centered around religious beliefs belonging to smaller, less prominent religions.<sup>205</sup> Judaism and Islam are two of the world's major religions.<sup>206</sup> However, laws burdening members of the Catholic church have withstood constitutional challenge.<sup>207</sup> Assuming a state law is neutral and generally applicable, it will sustain constitutional challenge.<sup>208</sup> Circumcision laws protecting both sexes would guard child welfare and intend nothing more.

### III. PROPOSED: A GENDER NEUTRAL CIRCUMCISION STATUTE

This Part proposes that the courts strike down current FGM statutes as unconstitutional and that state governments enact gender neutral circumcision laws that protect both male and female minors. First, Section A sets forth a model circumcision statute. The discussion following the model statute explains the textual differences between existing FGM statutes and the proposed revisions. Finally, Section B discusses the reasons for the revisions, the intended result of the revisions, and how the revisions cure existing statutory defects.

#### A. Model Circumcision Statute

A. Circumcision on a minor. Except as provided in subsection B, any person who knowingly circumcises, excises or infibulates, in whole or in part, the labia majora, labia minora or clitoris of a minor is guilty of a felony.<sup>209</sup> Any

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202. *E.g.*, CAL. PENAL CODE § 273.4 (West 1997); S.B. 85, 61st Leg., 1st Reg. Sess. (Colo. 1997).

203. *See* Milos & Macris, *supra* note 55, at 90S (indicating that male circumcision has "inherent risks" including bleeding, infection, disfigurement and death).

204. *Smith*, 494 U.S. at 878-79.

205. *Jehovah's Witness v. King County Hosp.* 278 F. Supp. 488 (1967), *reh'g denied*, 390 U.S. 598 (1968) (concerning a Jehovah's Witness's religious beliefs); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (involving a Jehovah's Witness religious belief).

206. MICROSOFT ENCARTA ENCYCLOPEDIA (1998 ed.).

207. *City of Boerne v. P. F. Flores*, 117 S. Ct. 2157, 2160 (1997).

208. *Smith*, 494 U.S. at 878-79.

209. *See* TENN. CODE ANN. § 39-13-110(a) (1996) (stating "[e]xcept as otherwise permitted . . . whoever knowingly circumcises, excises or infibulates in whole or in part, the labia majora, labia minora or clitoris of another commits a . . . felony").

person who knowingly circumcises or removes the foreskin or prepuce from the penis of a minor is guilty of a felony. Consent to the procedure by a minor on whom circumcision is performed or by the minor's parent or legal guardian is not a defense to a violation of this section.<sup>210</sup>

B. Exceptions. A surgical circumcision is not a violation of this section if it:

1. is necessary to the health of the minor on whom it is performed,<sup>211</sup> or to correct an anatomical abnormality or to remove diseased tissue,<sup>212</sup> and is performed by a licensed physician or physician in training,<sup>213</sup> or

2. is performed on a person in child labor or who has just given birth and is performed for medical reasons connected with that labor by a licensed physician or physician in training.<sup>214</sup>

The proposed statute combines segments from several existing FGM statutes. Yet, the model statute goes further to include specific language that makes male circumcision a felony. Some FGM statutes expressly state that neither custom nor religious belief are valid defenses.<sup>215</sup> The model statute abandons that language.

### B. A Constitutional Solution

The model statute protects all children from unnecessary surgery and pain regardless of gender or religious belief because it explicitly bans both female and male circumcision. State governments that enact this statute would validly and legally protect children from abuse. The model statute passes constitutional scrutiny because it does not differentiate on the basis of gender. Therefore, Fourteenth Amendment equal protection claims are not at issue. The proposed statute does not

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210. *See id.* § 39-13-110(a) (stating that “[c]onsent to the procedure by a minor on whom it is performed or by the minor's parent is not a defense to a violation of this section”).

211. *See id.* § 39-13-110(b)(1) (allowing surgical alteration when “[n]ecessary to the health of the person on whom it is performed”).

212. *See* N.D. CENT. CODE § 12.1-36-01(2) (1997) (permitting a surgical operation “to correct an anatomical abnormality or to remove diseased tissue”).

213. *See* MINN. STAT. § 609.2245(2)(1) (1996) (requiring “a physician licensed” or a “physician in training under the supervision of a licensed physician” perform a surgical circumcision).

214. *See* TENN. CODE ANN. § 39-13-110(b)(2) (1996) (allowing a surgical operation when “[p]erformed on a person who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a licensed physician or a physician-in-training under the supervision of a licensed physician”).

215. *E.g.*, N.D. CENT. CODE § 12.1-36-01(2) (1997).

expressly state that its purpose is to regulate religious activity. The statutory language is generally applicable and therefore avoids any possible First Amendment challenge that the statute violates the free exercise of religion clause.

#### CONCLUSION

Both male and female circumcision are medically unnecessary procedures that can cause children to experience physical and psychological harm. State legislatures enacted FGM statutes to protect female minors from circumcision complications, but never extended the same legal protection to male children. This Comment does not suggest that female circumcision is less important than male circumcision or that it is not a serious, human rights problem. However, here in the United States male minors face circumcision on a wider scale, yet they are not legally protected from this painful, medically unnecessary procedure. Laws criminalizing female circumcision are a step in the right direction toward protecting child welfare. However, all children are at risk of being circumcised and yet currently only half are protected under these laws.

State FGM laws violate the constitutional guarantee that similarly situated males and females be treated equally before the law. Notwithstanding a state government's good intentions, and its legal prerogative to protect young girls from an injurious procedure, the state must extend the same legal protections to boys at risk for a similar procedure. Striking down unconstitutional FGM statutes and replacing them with gender neutral, generally applicable laws will protect all children from harm and further the state's legitimate interest in protecting child welfare without discriminating on the basis of gender.