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A Physican's Dilemma: Legal Ramifications of an Unorthodox Surgery

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A PHYSICIAN'S DILEMMA: LEGAL RAMIFICATIONS OF AN UNORTHODOX SURGERY

I. INTRODUCTION

> When I was a girl of ten, I was told to be brave and not to cry, that I'd be a big girl after the ordeal. But when I saw the half-blind old woman with her razor, I bolted. My mother and aunts held me down and spread open my legs. Suddenly, I felt excruciating pain. She sliced off my clitoris and now it lay in her gnarled hands. She then sliced my inner lips until there was nothing left. There was blood everywhere, but by now I felt no more pain, not even when she stuck a thorn from the acacia tree into me to keep the wound closed.[1]

This account by a Somalian woman describes a rite of passage undergone by more than eighty million African women.[2] Female genital mutilation (FGM), often referred to as female circumcision,[3] is performed on many young women, indeed children in most cases, to ensure that they will be chaste, and consequently, desirable wives.[4] This practice is carried out in the countries of Asia, Europe, Latin America, and most commonly in Africa.[5] Where large numbers of immigrants from Africa and Asia have settled, the practice of FGM has followed. Although the practice is far from routine in the United States, the demand for the various surgeries comprising FGM will likely increase as the immigrant population from those cultures which value the practice grows. As the demand for these procedures increases, surgeons in the United States may be faced for the first time with the decision of whether or not to perform them.

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1. *World Trouble Spots; Africa: A Ritual of Danger*, TIME, Oct. 1, 1990, Fall, Special Issue, at 39.

2. *See Female Circumcision: Excision and Infibulation*, MINORITY RIGHTS GROUP, REPORT NO. 47 (1992).

3. I will refer to the operations generally as FGM to avoid confusion or comparison with male circumcision.

4. *See infra* notes 35-36, 43-45 and accompanying text.

5. OLAYINKA KOSO-THOMAS, THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION 17 (1987).

This comment examines the legal ramifications of the performance of these surgeries under California statutory law and state and federal constitutional law. This comment begins by describing the various procedures involved and the health problems associated with each.[6] It then explores the origins of FGM and the justifications asserted in defense of the practice.[7] By way of analysis of the criminal culpability or civil liability of surgeons who perform these procedures, this comment analyzes the constitutional issues affected, including the right of privacy embraced by the Due Process Clause of the Fourteenth Amendment,[8] the statutory law of child abuse,[9] mayhem[10] and unprofessional conduct, including the revocation of a medical license.[11] Finally, this comment cautions surgeons to refuse to perform these procedures due to the negative legal implications and ethical considerations involved.[12]

II. BACKGROUND

A. *Types of Procedures*

There are three types of female genital mutilation: clitoridectomy, excision and infibulation. A clitoridectomy, sometimes referred to as a sunna, is "the removal of the prepuce of the clitoris; the prepuce is the foreskin protecting the clitoris itself."[13] An excision or intermediate circumcision involves the removal of the prepuce, the clitoris and the labia minora (small folds of the vagina).[14] An infibulation, or pharaonic circumcision is the most extensive of the three procedures and involves the removal of the prepuce, the clitoris, the labia minora, the labia majora (large folds of the vagina) and the suturing of the vulva leaving a small hole for urination and menstruation.[15] Following the procedure, the female's legs are bound together for several weeks to allow scar tissue to

6. *See* discussion *infra* part II.A.
7. *See* discussion *infra* part II.B.
8. *See* discussion *infra* part IV.
9. *See infra* notes 64-72, 95-96 and accompanying text.
10. *See infra* notes 72-78, 85 and accompanying text.
11. *See infra* notes 80-84 and accompanying text.
12. *See infra* part V.
13. KOSO-THOMAS, *supra* note 5, at 24. *See also* O.M.T. Odujinrin et al., *A Study of Female Circumcision in Nigeria*, 8 W. AFR. J. MED. 183 (1989).
14. KOSO-THOMAS, *supra* note 5, at 24.
15. *Id.*

form.[16] This subsequent immobilization of the female may result in infection, poor drainage, or urinary retention.[17]

In Africa, the vast majority of the procedures are performed by "traditional healers" or midwives without any anesthesia or antiseptic.[18] The instruments used to perform the surgery include razor blades, knives, pieces of cut glass, sharp stones, hot rocks or other sharp objects.[19] Many of these may not be sterile and the same surgical instrument may be used to treat several female children in succession.[20]

The effects of these procedures will vary according to the circumstances under which they are performed. In a sanitary hospital setting, the harmful effects will likely be minimized. However, as procedures in this setting are not routine, it is necessary to examine common responses to these procedures in the average setting, which usually involves no anesthesia.[21] The immediate health problems associated with these procedures include pain, hemorrhage, shock due to blood loss, acute urinary retention, septicaemia (blood poisoning) due to unsterilized equipment and conditions, tetanus and death.[22] After the surgery or excision is performed, pelvic infection, dysmennorhea, cysts, recurrent urinary tract infection, difficulty in urinating and painful intercourse may result.[23] Intercourse may not only be painful but may be nearly impossible if the vaginal orifice is very small. If the vaginal opening is too small for penetration, another incision must be made to enlarge the opening or the woman may be subjected to forceful penetration by her husband.[24] Some harmful effects may

16. *See* EFUA DORKEENO & SCILLA ELWORTHY, FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE 7 (3d ed., 1992).

17. Lawrence P. Cutner, *Female Genital Mutilation*, 40 J. OBSTETRICAL AND GYNECOLOGICAL SURVEY 438, 440 (1945).

18. *A Traditional Practice That Threatens Health: Female Circumcision*, ATLANTA J. AND CONST., Nov. 15, 1992, at 29. *See also* Robert A. Myers, *Circumcision: Its Nature and Practice Among Some Ethnic Groups in Southern Nigeria*, 21 SOC. SCI. & MED. 581, 585 (1985).

19. Cutner, *supra* note 17, at 440. *See also* Myers, *supra* note 18, at 586.

20. Cutner, *supra* note 17, at 440.

21. *Id.* Statistical verification of health problems associated with FGM is not readily available because a great deal of secrecy surrounds the practice. However, in Sierra Leone, a study indicates that 83% of circumcised women are likely to require medical treatment for a condition resulting from the procedures. KOSO-THOMAS, *supra* note 5, at 29.

22. KOSO-THOMAS, *supra* note 5, at 25.

23. *Id.* at 26.

24. *Id.*

not appear until years later. These include reproductive tract infections that may be sufficiently severe enough to cause infertility.[25]

There may also be difficulty in administering general obstetrical care to females subjected to FGM, as basic pelvic examinations may not be performed and obtaining a Pap smear, culture, or inserting catheters is often impossible.[26] Additionally, a physician may not be able to determine the progress of labor for those females with an infibulation or excision.[27]

Further complications arise in the birthing context. At delivery, a mother who has undergone these procedures may experience prolonged labor, hemorrhage due to tearing of the scar tissue, and perineal laceration. The mother may need to undergo a caesarian section delivery where surgeons are not familiar with the practice.[28] In addition, the child may be still-born or suffer varying degrees of brain damage due to a lack of oxygen in the birth canal and/or loss of perineal elasticity.[29]

In addition to the physical effects, females who undergo these procedures also suffer psychological effects. These young women experience feelings of anxiety, depression and inadequacy.[30] Experts have suggested that adolescent girls often suffer severe pre-operative anxiety, experience traumatizing terror during the procedure during which they are forcibly restrained, and feel betrayed by the mother or other female relative who has forced them to undergo the operation.[31]

While some health risks and consequences may be avoided by performing these procedures in a sanitary clinical setting—for example, abating pain by using local anesthesia or preventing septicaemia by using sterilized instruments—the long-term health risks including protracted labor and danger to future children remain.

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25. *See* REPRODUCTIVE TRACT INFECTIONS: GLOBAL IMPACT AND PRIORITIES FOR WOMEN'S REPRODUCTIVE HEALTH 307 (Adrienne German et al. eds., 1992).

26. Cutner, *supra* note 17, at 441.

27. *Id.*

28. KOSO-THOMAS, *supra* note 5, at 27.

29. *Id.*

30. *Id.* For a fictional account of the psychological effects of FGM, see ALICE WALKER, POSSESSING THE SECRET OF JOY (1992).

31. DORKEENO & ELWORTHY, *supra* note 16, at 10.

The age of the child on which the practice has been performed varies. Girls ages five to nine represent the most common subjects, but there are cases where the procedure is performed on babies, adolescents and women.[32]

B. *Justifications for FGM*

The practice of FGM started at approximately the same time in different areas of the world in primitive communities.[33] The earliest literary references to the procedures date back to 2,000 B.C.[34] The justifications for the procedures vary from maintenance of tradition, religion, chastity, purity, and fidelity to cleanliness and feminine hygiene.[35] However, the practice was essentially enacted to control the sexual behavior of women and thereby guarantee marriage and future security for the female.[36] In the Western world, the practice was used to cure nymphomania, hysteria, insanity, depression and epilepsy.[37] It is important to examine these justifications in order to determine: (1) the scope of parental rights should parents request a procedure for their daughter, (2) the extent of the minor's rights, and (3) what, if any, constitutional rights or liberty interests are affected.

1. *Tradition*

One study on FGM in Nigeria found that this practice was perpetuated by older women who had been subjected to FGM.[38] The long history of this practice has resulted in its being deeply rooted in the culture of those groups who perform it. Genital surgery is often associated with initiation rites at puberty and confers full social integration and acceptance of the female by the community.[39] In the Sudan, the procedure is accompanied by an elaborate ceremony, includ-

32. Robin Abcarian, *Essential Rite of Passage or "Ultimate Child Abuse?"*, L.A. TIMES, June 6, 1993, at E1. *See* KOSO-THOMAS, *supra* note 5, at 49 (showing number of circumcisions by age and ethnic group); Myers, *supra* note 18, at 585-86.

33. KOSO-THOMAS, *supra* note 5, at 15.

34. *A Traditional Practice That Threatens Health*, *supra* note 18, at 29.

35. Abcarian, *supra* note 32, at E1.

36. KOSO-THOMAS, *supra* note 5, at 8.

37. *Id.* at 9.

38. Note, *What's Culture Got To Do With It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944 (1993).

39. KOSO-THOMAS, *supra* note 5, at 8; *Female Circumcision—Because It's Always Been Done*, THE ECONOMIST, Sept. 18, 1982, at 42.

ing the giving of gifts, that highlights the social recognition of the female at this time.[40] As with other rites of passage and initiation rites, the recipient enjoys full recognition as a member of the group and participates in a shared heritage. One author has stated, "Tradition—the reluctance to break with age-old practices that symbolize the shared heritage of a particular ethnic group—is the most frequent reason that diverse ethnic groups cling fiercely to a practice that inflicts significant pain and suffering on women and children."[41]

2. *Religion*

Compliance with religious doctrine is also advanced as a justification for FGM.[42] There is little expansion on the basis for this justification. As opposed to the biblical requirement of male circumcision, no formal requirement of female circumcision can be found in the Koran or the Bible.[43] This is, however, a commonly asserted justification and it must, therefore be addressed.

3. *Chastity*

Proponents of FGM also contend that the practice prevents promiscuity and, therefore, keeps females chaste and ensures fidelity.[44] A clitoridectomy or removal of the clitoris is allegedly beneficial because the clitoris is believed to emote sexual desires, and may result in a woman making uncontrollable sexual demands on her husband or seeking sexual satisfaction elsewhere.[45] The argument follows that the control of women's sexual behavior remains integral to a cohesive, harmonious society.[46]

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40. Cutner, *supra* note 17, at 440.

41. Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1949 (1993).

42. KOSO-THOMAS, *supra* note 5, at 46. In a survey of 300 women in the Western Area of Sierra Leone, religious considerations were cited by 17% of the respondents as the motivating factor for undergoing female circumcision, the third most important factor, following tradition and social identity. *Id.* This survey also revealed that out of 150 Muslims interviewed, 149 were circumcised (99.3%), and of the forty Roman Catholics interviewed, thirty-five were circumcised. *Id.*

43. KOSO-THOMAS, *supra* note 5, at 46.

44. *Id.* at 8.

45. *Id.*

46. *Id.*

4. *Hygiene and Cleanliness*

Feminine hygiene or cleanliness serves as another justification for the practice of FGM.[47] This justification is also underdeveloped. No published medical reports, or the like, exist which might provide background or confirmation that FGM contributes to greater cleanliness. Again, however, as this justification is commonly asserted, it will be addressed.

The previously mentioned justifications for the continuation of the practice of FGM must be acknowledged and understood if a legal theory is to lead to specific prohibition of the practice in the United States or prosecution under existing law. Furthermore, an understanding of the justifications for this practice aids in the educational process that should accompany legal action to prohibit FGM in this country.

C. *Legal Responses in Other Countries*

Some countries have prohibited FGM, notably, Sudan, Burkina Faso, Britain, Sweden and Switzerland.[48] Recently in France, a mother was sentenced to prison for arranging the circumcision of her two eldest daughters when they were one and two years old.[49] Prosecution of excision cases in France began ten years ago.[50] French law classifies genital mutilation as a severe form of child abuse whereby any violence to a child resulting in mutilation is a crime.[51] In 1991, a French jury sentenced a woman accused of performing excisions on seventeen children to five years in prison.[52] These sentences were more severe than those previously handed down in France, which tended to give mothers suspended sentences.[53] French authorities have been accused of ignoring and degrading immigrants' cultural heritage by pursuing

47. *Id.* at 7.

48. Rone Tempest, *Ancient Traditions vs. the Law*, L.A. TIMES, Feb. 18, 1993, at A10.

49. *Circumcision Results in Prison*, ARIZ. REPUBLIC, Jan. 12, 1993, at C3.

50. Tempest, *supra* note 48, at A10.

51. *Id.*

52. *Id.*

53. *Id.* In another recent case in France, the jury was more lenient and gave five-year suspended sentences to two women who had their daughters excised. *Id.* Emotional debate regarding cultural and ethnic relativism gives rise to a "cultural defense" argument which highlights the importance of immigrant's cultural heritage and traditions and portrays the defendant as a victim of ignorance of the law. *Id.*

criminal prosecution.[54] France's minister of state for social and racial integration, Kofi Yamgnane, a native of Togo, has defended the stand against excision by stating, "When we say 'liberty' in France, that means you don't mutilate people. You don't have that right."[55] The Netherlands also treat FGM as a form of child abuse and hold those who perform the surgeries accountable under the criminal statute.[56]

While no statutes currently exist which specifically prohibit the practice of FGM in the United States, those who perform these procedures are likely to incur culpability under present child abuse statutes. Examples of such action, however, remain scarce. In the United States, the first case was brought in 1986. Authorities charged a nurse with child abuse for slicing her two-year-old niece's clitoris.[57] Eventually, the nurse was acquitted because it could not be proven exactly who had performed the procedure.[58] In another instance, it was reported that a woman asked the head of obstetrics in a Georgia hospital to amputate her daughter's genitals.[59] To date, there are no published cases governing this issue in the United States. There has been, however, some attention paid to this issue by the legislature.

On October 7, 1993, House Resolution 3247 was introduced in the House of Representatives.[60] This bill would amend title 18 of the United States Code and seek to carry out the obligations of the United States under the Interna-

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54. *Id.*

55. *Id.* American novelist Alice Walker, who has written a fictional account of FGM and its effects, has stated that she believes the prosecutions and stiff sentences will have a "ripple effect" and send a strong message to African communities that FGM is torture. *Id.* French authorities, meanwhile, have defended their stand against FGM on grounds that ethnic heritage provides no defense for those who maim and mutilate children on French soil. *Id.*

56. *Id.*

57. *Genital Cutting Now U.S. Issue: Practice of Altering Girls Poses Legal, Medical, and Ethical Problems*, DET. NEWS & FREE PRESS, Jan. 9, 1993, at 4A.

58. *Id.*

59. *A Traditional Practice That Threatens Health*, *supra* note 18, at 29.

60. A.M. Rosenthal, *Female Genital Torture*, S.F. CHRON., Nov. 17, 1993, at A17. The bill was introduced by Patricia Schroeder of Colorado and Barbara Rose Collins of Michigan. Mrs. Schroeder in her remarks to the House declared, "As communities of African immigrants from nations where FGM is practiced grow in the United States, we must make it clear—they and their rich and proud cultures are welcome in the United States, but the practice of FGM is not . . . . This practice runs contrary to this country's attitudes towards women's equality and women's place in society. There is no place for FGM here." 139 CONG. REC. H. 7564 (1993).

tional Covenant on Civil and Political Rights by prohibiting all operations that mutilate female genitalia.[61] More recently, the Senate has addressed the issue of FGM through the introduction of a Senate Resolution and a Senate Bill.[62] The Senate Bill would outlaw the practice of FGM in the United States on young women and girls under the age of eighteen.[63] As legislative representatives discuss adoption of a consistent policy in response to requests for the performance of these procedures, it is essential to analyze the present statutory law in order to assess a physician's liability.

III. STATE STATUTORY LAW

A. *Background*

As requests for genital mutilation procedures increase in this country, it is necessary to determine whether criminal culpability exists under current state law. This determination's importance lies not only in enabling physicians to avoid engaging in criminal activity, but also in propelling legislators toward specifically prohibiting the practice of FGM if there is no culpability under existing law. Confusion among

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61. *See* H.R. 3247, 104th Cong., 2d Sess. (1993). The American Medical Association has recently stated its position against unnecessary FGM and the Council on Legislation has recommended support for House Resolution 3247. Memorandum from Merle W. Delmer to The Board of Trustees 2 (June 1994)(on file with author); *see also* AMA Policy Statement I-1993 Number (Apr. 12, 1994) 535.987 (stating, "The AMA (1) encourages the appropriate obstetric/gynecologic and urologic societies in the United States to develop educational programs addressing medically unneccessary surgical modification of female genitalia, the many complications and possible corrective surgical procedures, and (2) opposes all forms of medically unnecessary surgical modifications of female genitalia.") (on file with author).

62. S. Res. 263 (condemning the "cruel and tortuous" practice of FGM); S. 2501, 103rd Cong., 2d Sess. (1994) (entitled "Federal Prohibition of FGM Act of 1994").

63. S. 2501, 103rd Cong., 2d Sess. (1994). This bill was introduced by Senators Reid, Wellstone and Mosley-Braun. By way of introduction, Senator Reid stressed:

> As immigrants from countries in which FGM is performed as a rite of passage have traveled to other nations, this practice, sadly, has traveled with them. Following my statement a few weeks ago on the floor on this subject, I received a letter in my office from a woman in Woodland Hills, CA. She wrote to me to express her support for my efforts—now our efforts—to draw attention to this practice. One paragraph of her letter tells it all. It stunned me. It reads: When my gynecologist told me that a colleague of his in Los Angeles regularly performed this ritual legally, you could have taken my breath away.

140 CONG. REC. H. 14242 (1994).

surgeons and the public at large appears likely if a proactive, consistent stance is not adopted before the legal and ethical ramifications of FGM pose unanswerable questions. Therefore, an analysis of whether the use of existing law from different jurisdictions will suffice to bring about an eradication of this practice is not only timely, but of the utmost importance in formulating national policy.

The procedures comprising FGM are medically unwarranted and result in permanent disfigurement. As these procedures are performed on female children in the vast majority of cases,[64] it would appear that this practice falls within the sphere of prohibited action in the California child abuse statute.

In California, the pertinent penal codes are California Penal Code section 273a and section 273d. Section 273a provides,

> (a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in such situation that its person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for 2, 4, or 6 years.[65]

This section is intended to protect children from situations in which there exists a great probability of serious injury.[66] The Code goes on to define the act as a misdemeanor when performed under circumstances or conditions other than those likely to produce great bodily harm or death.[67] Section 273d provides in pertinent part: "Any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is guilty of a felony,

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64. Abcarian, *supra* note 32, at E1. In Mali it was found that more than 50% of girls were operated on before they were one year old. *Female Circumcision—Because It's Always Been Done*, THE ECONOMIST, Sept. 18, 1982, at 42; KOSO-THOMAS, *supra* note 5, at 49.

65. CAL. PENAL CODE § 273a (Deering Supp. 1995).

66. People v. Odom, 277 Cal. Rptr. 265, 267 (Ct. App. 1991). *See also* Cline v. Superior Court, 185 Cal. Rptr. 787 (Ct. App. 1982).

67. CAL. PENAL CODE § 273a(b)(2) (Deering Supp. 1995).

punishable by imprisonment . . . [or] by a fine of up to six thousand dollars ($6,000) or by both . . . ."[68]

The California law is a typical example of state law proscribing child abuse. Child abuse is universally proscribed by state law and is "commonly defined as the intentional, nonaccidental use of physical force that results in injury to a child."[69] Texas Penal Code section 22.04 provides another example. The Code states: "A person commits an offense if he intentionally, knowingly, recklessly or with criminal negligence, by act . . . causes to a child . . . (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; (3) bodily injury."[70] A violation of this section constitutes a felony of the first degree if the conduct is intentional or done with knowledge; it is a felony of the second degree if the conduct is engaged in recklessly.[71] In addition, the Texas Penal Code includes in the definition of abuse, "physical injury by any person that results in substantial harm to the child."[72]

In addition to criminal culpability under child abuse statutes, a physician may also be guilty of the criminal act of mayhem. California Penal Code section 203 states: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless . . . is guilty of mayhem."[73] Furthermore, it is mayhem if the injury inflicted deprives the person injured of a member of his body or the normal uses of the severed organ.[74]

In *People v. Keenan,*[75] a defendant was prosecuted and convicted of mayhem because he burned a woman's breast

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68. *Id.* § 273d(a).

69. William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 340 (1984)

70. TEX. PENAL CODE ANN. § 22.04(a) (West 1994).

71. *Id.* § 22.05(e).

72. TEX. FAML. CODE ANN. § 34.012(c) (West 1995). *See also* Juvenile Court Act of 1987, 705 ILCS 405/2.3 (Supp. 1994) (defining an abused minor to include "any minor under 18 years of age whose parent . . . or any person responsible for the minor's welfare . . . (i) inflicts . . . physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function . . . ."

73. CAL. PENAL. CODE § 203 (Deering Supp. 1995). Mayhem is punishable by imprisonment in the state prison for two, four or eight years. CAL. PENAL CODE § 204 (Deering Supp. 1995).

74. People v. Cartier, 353 P.2d 53, 60 (Cal. 1960).

75. 277 Cal. Rptr. 687 (Ct. App. 1991).

with a lit cigarette.[76] The court found that although the injuries occurred on a part of the body that is not normally exposed, the injuries were no less significant.[77] The court also found that the disfigurement represented an intentional violation of the integrity of the victim, and emphasized the emotional disability that frequently attends a mutilation of this sort.[78] The court articulated the modern rationale as the preservation of the natural completeness and normal appearance of the human face and body.[79]

If the practice of FGM constitutes criminal conduct, a physician who engages in this practice may be subjected to an ethical hearing and disciplinary action. A determination of criminal culpability may lead to a finding of unprofessional conduct on the part of the physician, resulting in consequent suspension, revocation of the physician's medical license or other disciplinary action deemed proper by the Board of Medical Examiners.[80] According to California Business and Professions Code section 2234, unprofessional conduct includes, but is not limited to, gross negligence, incompetence, and the commission of any act involving dishonesty or corruption which is substantially related to the qualifications, function, or duties of a physician and surgeon.[81] Section 2361 of the Business and Professions Code makes unprofessional conduct grounds for disciplinary proceedings.[82] The Code does not specifically define what constitutes unprofessional conduct but it has been interpreted so that it "must relate to conduct which indicates an unfitness to practice medicine . . . [and] is that conduct which breaches the rules or ethical code of the profession, or conduct which is unbecoming a member in good standing."[83] Section 2236 of the Business and Professions Code states that "the conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct . . . ."[84]

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76. *Id.*
77. *Id.* at 693.
78. *Id.*
79. *Id.*
80. *See* Shea v. Board of Medical Examiners, 146 Cal. Rptr. 653, 659-64 (Ct. App. 1978).
81. CAL. BUS. & PROF. CODE § 2234 (Deering 1993).
82. *Id.* § 2361.
83. *Shea*, 146 Cal. Rptr. at 660 (citations omitted).
84. CAL. BUS. & PROF. CODE § 2236 (Deering 1993).

B. *Analysis Under State Statutory Law*

A reading of criminal statutes indicates that the practice of FGM may constitute the crime of child abuse, mayhem, assault and battery or child endangerment, which crimes are punishable in every state, even when committed by parents or physicians.[85]

FGM deprives the young female of a member of her body as this practice typically involves the removal of the clitoris and the labia minora, labia majora or both.[86] In addition, the health consequences of FGM may deprive the female of the usual uses of the external genitalia.[87] Further, the disfigurement is permanent and irreversible. Once a healthy organ is removed from the body it cannot be replaced, resulting in the destruction of the natural completeness of the human body. In light of California's mayhem statute and the court's decision in *People v. Keenan*, it seems highly probable that the surgeries of excision and infibulation would be considered mayhem.[88] Both of these surgeries involve the removal of a member of the body, thereby destroying the "natural completeness" and natural appearance of the body.[89] Although the "normal appearance of the human face and body" may be culturally subjective, the overriding concern of the court in *Keenan* seems to be preservation of the integrity of the victim by prohibiting maiming injury, deprivation or disfigurement.[90] As in *Keenan*, the fact that the disfigurement in question occurs in a part of the body not normally exposed does not impair its significance.[91]

A conviction of mayhem or child abuse would likely be secured under section 2236 of the Business and Professions Code because it is a conviction related to the qualifications and functions of the surgeon. The surgeon has used his medical qualification to perform an operation that is medically unwarranted and which poses substantial health risks for the recipient. The surgeries comprising FGM may be considered a form of cosmetic surgery, albeit extreme. However, cos-

85. Brigman, *supra* note 69, at 339.
86. *See supra* notes 13-15 and accompanying text.
87. *See* KOSO-THOMAS, *supra* note 5, at 26-27.
88. *See supra* notes 73-79 and accompanying text.
89. *See* supra notes 73-79 and accompanying text.
90. *See supra* notes 77-79 and accompanying text.
91. People v. Keenan, 277 Cal. Rptr. 687, 693 (Ct. App. 1991).

metic surgery may not be reasonable, ethical or justifiable where the health risks and consequences to the patient include sterility, tetanus and death.[92] A criminal conviction should be considered unprofessional conduct. In addition to providing a deterrent to physicians, disciplinary action by the Board of Medical Examiners and a finding of unprofessional conduct can serve as an educational tool, expressing to the community at large that medically unwarranted, excessive surgical procedures are not to be encouraged, especially where they result in the types of health consequences associated with FGM.

Under the child abuse statutes presented above, the practice of FGM appears to constitute a clear case of child abuse. The surgeries comprising FGM involve an intentional use of physical force which, in the majority of cases, results in bodily injury.[93] This bodily injury includes permanent disfigurement and endangers the present and future, physical and mental health of the child.[94] Therefore, according to state law, this may suffice for a finding of child abuse.

One element of California Penal Code section 273a(a), however, requires that the infliction of physical pain or suffering be unjustifiable.[95] The legislative intent behind this suggests criminalizing the the infliction of physical pain or mental suffering upon a child which could not be defended, or vindicated, or which was not exculpable, excusable or authorizable under the circumstances.[96] Therefore, before it can be concluded that existing child abuse or mayhem statutes prohibit the practice of FGM, constitutional and legal issues regarding rights of parents, the nature of the family, the free exercise of religion and the right to privacy must be analyzed to determine whether this intentional infliction of injury to children is justifiable under the circumstances.

IV. CONSTITUTIONAL ISSUES

A. *Constitutional Rights of Parents and Family Autonomy*

Parental rights to the custody and control of their minor children have been given significant protection by the courts.

92. *See supra* notes 22-25 and accompanying text.
93. *See supra* notes 22-25.
94. *See supra* notes 22-31 and accompanying text.
95. CAL. PENAL CODE § 273a(a) (Deering Supp. 1995).
96. People v. Curtiss, 116 Cal. App. Supp. 771, 779 (1931).

The vast majority of matters concerning the upbringing of children are left to the determination of parents. The Supreme Court has stated: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder."[97]

In the area of education, the Supreme Court first found in *Meyer v. Nebraska*[98] that children's rights to receive teaching in languages other than the nation's common tongue were guarded against the State's encroachment.[99] This case specifically addressed the rights of parents to control their children's education. This right was found to be within the ambit of the Due Process Clause of the Fourteenth Amendment.[100] Similarly in *Pierce v. Society of Sisters,* [101] the Supreme Court sustained the parent's authority to combine religious and secular schooling, and the child's right to receive it, in contravention of the state's requirement of attendance at public schools.[102] The Court stated that "the child is not the mere creature for the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[103]

Outside the area of education, the Supreme Court stated in *May v. Anderson* [104] that one of the most fundamental rights concerns the "immediate right to the care, custody, management and companionship of . . . minor children."[105] In *Stanley v. Illinois,*[106] the Supreme Court struck down a state law that deprived fathers of the custody of their illegitimate children after the death of the child's mother.[107] The Court found that the mere assertion of a *parens patrie* interest by the State in the protection of the child was insufficient

97. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
98. 262 U.S. 390 (1923).
99. *Id.* at 399-403.
100. *Id.* at 399.
101. 268 U.S. 510 (1925).
102. *Id.*
103. *Id.* at 535.
104. 345 U.S. 528 (1953).
105. *Id.* at 533.
106. 405 U.S. 645 (1972).
107. *Id.*

to allow abridgement of parental rights unless the potential harm to the child was significant.[108]

In sum, parental autonomy receives constitutional protection and the Supreme Court has articulated the concept of personal liberty found in the Fourteenth Amendment as a right of privacy which extends to certain aspects of a family relationship.[109] The Court construes this right of privacy broadly to include the right of marriage, procreation, motherhood, child rearing, education,[110] parental right to determine child's religious upbringing,[111] right to marital privacy and to obtain contraceptives,[112] right to marriage and procreation,[113] freedom of parents to direct the education of their children,[114] and the liberty of parents to raise their children without undue interference from the State.[115] A preference for parental autonomy exists which includes an acceptance of diverse lifestyles and restraint from judgment regarding the value of various child rearing methods.[116]

Rights of parenthood, however, are not beyond limitation or regulation. The State has a wide range of power to limit parental freedom and authority in things affecting the child's welfare.[117] The State may act to guard the general interest in the child's well-being and restrict the parental control.[118] According to the doctrine of *parens patriae*, the State has a right and a duty to protect children.[119] The State may uphold society's basic values and state officials may interfere within the family sphere "to safeguard the child's health, educational development and emotional well-being."[120]

One of the most important Supreme Court cases that exemplifies State intervention into the family relationship to protect children is *Prince v. Massachusetts*.[121] In *Prince*, the

108. *Id.*
109. United States v. Orito, 413 U.S. 139, 142 (1973).
110. *Id.* at 142.
111. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
112. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).
113. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
114. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
115. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
116. *In re* Phillip B., 156 Cal. Rptr. 48, 50 (Ct. App. 1979).
117. *Prince*, 321 U.S. at 165.
118. *Id.*
119. *Phillip B.*, 156 Cal. Rptr. at 50.
120. *Id.*
121. *Prince*, 321 U.S. at 158.

Supreme Court upheld the conviction of a Jehovah's Witness for violation of a state law which prohibited street solicitation by children.[122] The Court rejected the mother's due process claim and held that the State had the power to limit parental control in the interest of children.[123] Moreover, the Court refused to limit the State's power in these circumstances despite the mother's claim that control of her child's conduct was grounded on religious belief and practice.[124] The Court found that the state action was necessary to protect the child from danger and that while "parents may be free to become martyrs themselves . . . it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[125]

In 1972, the Supreme Court decided *Wisconsin v. Yoder*,[126] which limited the holding of *Prince*. In *Yoder*, the Court upheld Amish parents' right to refuse to educate their children beyond the eighth grade.[127] The Court relied on cases such as *Meyer* and *Pierce* to reiterate the principle that parents are autonomous in the nurturing and upbringing of their children.[128] However, the parental values in question in *Yoder* were based on religious beliefs and practice, and therefore may in some cases be distinguished from the motivations behind FGM. As indicated earlier, the motivating factor behind FGM may be religious belief but there are a number of other factors which may distinguish FGM from the circumstances of *Yoder*. Further, *Yoder* allows for interference with parental decisions where the health or safety of the child will be jeopardized.[129] As previously discussed, FGM poses significant health risks, thereby jeopardizing the child's health and safety when she is subjected to FGM.[130] The State has a duty to protect children and is justified in inter-

122. Prince v. Massachusetts, 321 U.S. 158, 158-59 (1944).
123. *Id.* at 165.
124. *Id.*
125. *Id.* at 167-68.
126. 406 U.S. 205 (1972).
127. *Id.*
128. *Id.*
129. *Id.* at 234.
130. *See supra* notes 18-32 and accompanying text.

vening where parents are not adequately protecting their children's health.[131]

In California, the Court of Appeal for the First District stated that where parents fail to provide their children with adequate medical care, state intervention is justified.[132] However, the State has a significant burden of justification before substituting its judgment for that of the parents, and thereby abridging parental autonomy.[133] *In re Phillip B.*[134] concerned the State's insistence upon medical treatment for a child which the parents had previously rejected.[135] The State petitioned for authorization to perform corrective heart surgery on a Down's Syndrome child, whose lungs were fatally deteriorating.[136] The court refused to grant authorization due to the higher than average morbidity in Down's Syndrome children who undergo this surgery. Consequently, the court determined that the possible benefits to be gained from the operation did not outweigh the risks involved.[137] Although this case is factually distinct from the situation involved in FGM, where the State would substitute its judgment for that of the parents, both situations involve state protection of the sanctity of a child's life when parents fail to adequately protect that life.

The court of appeal found that several relevant factors should be considered before the State could insist upon medical treatment rejected by the parents: the seriousness of the harm the child is suffering or the substantial likelihood that he will suffer serious harm; the evaluation of the treatment by the medical profession; the risks involved in medically treating the child; and the expressed preferences of the child.[138] These factors can also be used to determine when the State may interfere in family matters and insist that a child not be exposed to harmful medical treatment which the parents have approved.

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131. *See* Prince v. Massachusetts, 321 U.S. 158 166 (1944); In re Phillip B., 156 Cal. Rptr. 48, 50 (Ct. App. 1979).

132. *Phillip B.*, 156 Cal. Rptr. at 50.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *In re* Phillip B., 156 Cal. Rptr. 48, 52 (Ct. App. 1979).

138. *Id.* at 51.

With respect to the practice of FGM, these factors help to ascertain whether State interference is permissible. The female child does not face serious injury or harm in the absence of these procedures. In fact, the medical community agrees that FGM has no medical value.[139] As noted, a substantial likelihood exists that the child will suffer serious physical and psychological harm if forced to undergo FGM.[140] The medical profession's evaluation of FGM remains difficult to gauge as few formal medical opinions comment on the subject and the practice is currently uncommon in the United States. However, initial response in other western countries appears negative. Some commentators contend that FGM constitutes a form of assault and appears ethically unsound.[141] Taking the grave risks of these procedures into account in conjunction with the absence of medical necessity, the possible consequences are indeed severe. Finally, in a majority of cases, the forcible restraint of the child during the operation indicates the child's strong desire to avoid these procedures.[142] It seems implausible that the child would prefer to undergo a procedure that entails pain and permanent disfigurement. Application of these factors to FGM indicates that State interference may be justifiable to protect children. In this case, the State's duty to protect children and the value of human life necessitates that the State be allowed to substitute its judgment for that of the parents when parents fail to protect their children and, indeed, when parents themselves place their children in harmful situations.

Unfortunately, the cases discussed above do not directly address whether the child's interests were contrary to their parents' interests, and therefore, the rights of the children involved were not clearly determined.[143] In more recent cases, the Supreme Court has been confronted with conflicts be-

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139. Draft Report on FGM, AMA Office of Women's and Minority Health (on file with author).

140. *See supra* notes 17-31 and accompanying text.

141. An article by English medical professionals indicates that as a medical procedure, FGM may be beyond the scope of what is considered "reasonable surgical interference." Furthermore, despite obtaining a patient's consent, this procedure may still be considered an assault. Roger Cranfield & Elizabeth Cranfield, *Female Circumcision: An Assault?*, 227 THE PRACTITIONER 816, 817 (1983); *See also* Eike-Henner Kluge, *Female Circumcision: When Medical Ethics Confronts Cultural Values*, 148 CAN. MED. ASS'N. J. 288 (1993).

142. *See Female Circumcision: Excision, and Infibulation*, *supra* note 2, at 3.

143. *See supra* notes 121-138 and accompanying text.

tween the parents and the child as centers of authority. In cases involving the right of teenage females to obtain abortions, courts have intervened to determine whether parental consent and notification is required before an abortion will be performed.[144] The Supreme Court has struck down state statutes which require prior written parental consent for a minor as a prerequisite for an abortion in lieu of a state judge authorization "for good cause shown."[145] The Court has refused to grant the parents an absolute veto over the child's decision.[146] A mature minor must be allowed to obtain, without undue burden, an order permitting the abortion without parental consultation.[147] Although the Court recognizes a State interest in encouraging family resolution of a minor's abortion decision, the Court has allowed the minor to by-pass parental consent and receive an abortion with judicial authorization.[148]

The Court's analysis in those cases indicates that the State may help determine the best interests of the minor where the minor and the parents are in direct conflict. Furthermore, the absence of a parental consent requirement helps to define the rights of the minor, exclusive of the constitutionally-protected rights of parents to direct the upbringing of their children.

Parental autonomy is a fundamental right protected by the Due Process clause of the Fourteenth Amendment.[149] Parents are free to instill cherished values in their children and direct their upbringing in a variety of ways. However, as *Prince* and its progeny make clear, parents may not make "martyrs" of their children.[150] The State, under the doctrine of *parens patriae*, may interfere in family matters to protect the general welfare of the child,[151] including the most basic value protected by the state—the "sanctity of human life."[152]

144. *See infra* notes 145-148 and accompanying text.

145. Bellotti v. Baird (Bellotti I), 428 U.S. 132, 145 (1976).

146. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

147. Bellotti v. Baird (Bellotti II), 443 U.S. 622, 650 (1979).

148. *Id.* at 648-51.

149. *In re* Phillip B., 156 Cal. Rptr. 48, 50 (Ct. App. 1979) (citing cases that recognize parental rights in areas such as the child's religious upbringing and education).

150. *See supra* note 126 and accompanying text.

151. *Phillip B.*, 156 Cal. Rptr. at 51.

152. *Id.* (referring to U.S. CONST amend. XIV, § 1).

As FGM endangers health, and indeed human life, the State justifiably interferes where a parental decision will result in a child's genital mutilation, permanent disfigurement and possible death.

B. *Child's Right of Privacy*

The female child who is forced to endure genital mutilation may have a claim that her constitutional rights have been infringed upon. The Supreme Court has established the right of minors to constitutional rights and protection.[153] The Court stated that, "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[154] However, the protected interests of the minor may not be as extensive as those secured for adults. The Supreme Court has explained, "The state's authority over children's activities is broader than over like actions of adults."[155] In addition, parents have the authority to impair a child's exercise of his/her constitutional rights within the parents' constitutionally-protected right to raise that child.[156]

The State's authority to control the conduct of children, in excess of the State's authority to control the conduct of adults, was discussed in *Prince v. Massachusetts*.[157] The Court found that children have rights similar to those of adults.[158] The Court qualified this broad principle by explaining that there are dangers which threaten children which may not endanger adults to the same degree. In *Prince*, children and adults held a common right in the primary use of highways.[159] The Court, however, held that the likelihood of danger affecting children was greater than that affecting adults and, therefore the State may prohibit street

153. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

154. *Id.* at 74.

155. *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968). "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *Id.* (*quoting* Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

156. *In re* Roger S., 569 P.2d 1286, 1290 (Cal. 1977). *See also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

157. 321 U.S. 158 (1944).

158. *Id.* at 169.

159. *Id.*

preaching by children, while permitting adults to engage in the same activity.[160] The Court reasoned that the State may secure against danger the "healthy, well-rounded growth of young people into full maturity as citizens."[161] The State may prohibit some action by children and, thereby, curtail some of their constitutional rights when pursuing a legitimate objective, such as protecting children from evil or danger.[162] This also justifies legislation that would eliminate such danger even where such legislation is contrary to a parental decision regarding upbringing of a child.

Although *Prince* concerned child employment in public places, the Court's reasoning can be extended to limit a child's constitutional right to consent[163] (if indeed such a constitutional right existed for children) to a procedure of genital mutilation in conformity with a parental decision where the dangers and consequences of genital mutilation prevent the healthy growth of children into citizens. The Court found that the State may secure against danger using "a broad range of selection."[164] The *Prince* Court clearly stated that parents may not make "martyrs" of their children before the children can make such a choice for themselves.[165]

Another possible obstacle to the justifiable practice of FGM, aside from state protection of the health and welfare of children, is embodied by the right of privacy guaranteed under the Fourteenth Amendment.[166] An argument can be made that the Constitution guarantees autonomy and privacy in consensual sexual behavior through substantive due process protection.

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160. *Id.*

161. *Id.* at 168.

162. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

163. A question remains as to whether the constitutional rights of minors include a right to consent to medical procedures. Usually parental consent is required for effective consent to medical procedures on a minor. Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941). Indeed, there are situations, such as statutory rape, where a minor is incapable of giving consent and laws exist to protect the unsophisticated minor from violation of her virtue. *See* People v. Lourintz, 46 P. 613 (Cal. 1896).

164. *Prince*, 321 U.S. at 170.

165. *See supra* note 126 and accompanying text.

166. U.S. CONST. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

Bowers v. Hardwick represents the major Supreme Court decision in this area.[167] In *Bowers*, a homosexual challenged a Georgia statute which criminalized any sexual act involving the sexual organs of one person and the anus or mouth of another.[168] Although the statute did not distinguish between heterosexual and homosexual behavior, the Court defined the issue as whether the Constitution "confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many states that still make such conduct illegal . . . ."[169] The majority, in a 5-4 decision, concluded that the cases recognizing a right of privacy for matters of marriage, family, and procreation were not consistent with a finding of a right to engage in homosexual sodomy.[170] The Court placed significant reliance on the fact that all fifty states outlawed sodomy until 1961, and at the time of the *Bowers* decision, twenty-four states still prohibited such acts, indicating that a right to practice sodomy was not supported by the Nation's tradition or "implicit in the concept of ordered liberty."[171]

In a dissent by Justice Blackmun, in which Justices Brennan, Marshall and Stevens joined, the right to privacy was found to include a right to be free of governmental interference in making certain private decisions and a right of privacy in certain places.[172] The dissent recognized that sexual intimacy involved a sensitive, primary relationship of human existence and the richness of a relationship related to an individual's ability to choose the nature of personal bonds.[173] The dissent found a fundamental interest in individual control over "the nature of their intimate associations with others."[174] Furthermore, the dissent recognized the fundamental right of an individual to conduct intimate relationships in the parameters of one's home.[175] It is interesting to speculate whether, as the Court's composition changes, the

167. 478 U.S. 186 (1986).
168. *Id.* at 188 n.1.
169. *Id.* at 190.
170. *Id.* at 192.
171. *Id.* at 193.
172. Bowers v. Hardwick, 478 U.S. 186, 199-214 (1986) (Blackmun, J., dissenting).
173. *Id.* at 205.
174. *Id.* at 206.
175. *Id.*

dissent's position might become the prevailing norm and a fundamental right to engage in adult consensual sexual behavior might be established as within the right to privacy. Nonetheless, a right to marital privacy is established and sexual relations within that relationship are protected from undue interference by the State.[176]

As applied to FGM, although there may be no direct state action, a constitutional right to make decisions regarding sexual relationships is likely impaired where an operation irreversibly interferes with the normal biological and sexual functions of the genitalia. The child's right to engage in sexual relations of her choosing as an adult in the usual sense is irreversibly denied. The child may be deinfibulated which requires an incision to open the vaginal orifice.[177] Yet, it seems the control over sexual intimacy and the nature of intimate associations with others has been removed from the individual child and placed with the parents, leaving the child only a limited ability to reclaim control. Regardless, the nature of sexual relations for the individual will be permanently changed as a clitoridectomy and removal of the labia minora and majora are irreversible. More importantly, the right to "be let alone" has been interfered with and the ability to make decisions about the most intimate aspects of life has been given to a third party. The child has a right to privacy and although the child may not be able to exercise that right in terms of sexual intimacy until she has reached adulthood, the right exists.[178] This right should not be denied by the parents of the child because the parental decision not only curtails a child's exercise of the constitutional right she may

176. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

177. Draft Report, FGM, AMA Office of Women's and Minority Health, 3 (on file with author).

> Infibulated women often call upon the midwife on their wedding night to cut open their scar if their husband is unable to penetrate them. Gradual penetration may take place over the course of months. In regions where the husband is unable to penetrate his wife by his own means, 'the consummation of a marriage may take several weeks, the opening of the scar of an infibulated woman being done by the husband either with his fingers, a razor, or a knife.

Id. (*citing* DORKEENO AND ELWORTHY, *supra* note 16).

178. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

otherwise enjoy, but also jeopardizes the health of the child.[179]

Finally, the right of privacy under the Due Process Clause encompasses protection of individual decisions against intrusion by the State in matters of childbearing.[180] In *Eisenstadt v. Baird*,[181] the Supreme Court invalidated a statute which permitted contraceptives to be distributed only to married persons.[182] The Court found that the right of privacy included the right of the individual to be free from unwarranted government intrusion into matters so fundamentally affecting a person, including the decision whether to bear or beget a child.[183] As FGM can lead to infertility, the child's constitutional right to free decision-making regarding procreation may be infringed. Again, as the action is taken by private individuals, the parents and physician, the child may not have constitutional protection of this right as she would have against similar state action. However, the parental right to direct the upbringing of children is subject to limitation by the State where the parental decision harms the health of the child[184] and the protection from interference by the State of a right guaranteed by the Constitution underscores the significance of parental decisions in this area.

C. *Freedom of Religion*

Assuming that FGM may be prohibited under general criminal laws and child abuse statutes, the question arises whether this prohibition will be an unconstitutional limitation on the religious freedom of those who claim that FGM is required by their religion. Further, a question arises as to whether these people or groups deserve exemptions from statutes prohibiting genital mutilation. The answer to both questions is no. As noted, one of the justifications for FGM is adherence with religious teaching.[185] It was also noted that there is no doctrinal basis for this justification in the Muslim or Christian religions.[186] This raises the initial question of

179. *See* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).
180. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
181. 405 U.S. 438 (1972).
182. *Id.*
183. *Id.*
184. Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).
185. *See supra* note 42 and accompanying text.
186. *See supra* note 43 and accompanying text.

whether one can legitimately claim that FGM is necessary to the free exercise of a particular religion. The Supreme Court has stated that under the Constitution, the courts may not determine the legitimacy or intensity of religious beliefs.[187] The sincerity of the religious belief, however, may be assessed and helpful in determining the burden which a governmental regulation places on the free exercise of that religion.[188] Aside from a showing of basic sincerity, it is impermissible and would indeed be difficult to determine the intensity of such belief. As a result, those who claim that FGM is a religious practice may need to show that this practice indeed conforms with the beliefs and teachings of the particular religion, and the sincerity of that belief will not likely be further tested.

An evaluation of some of the cases decided under the Free Exercise clause of the First Amendment is necessary to determine the basis for which religious groups have been granted exemptions from laws and regulations. The first major "free exercise" case is *Reynolds v. United States*,[189] which sustained the application of a federal law making bigamy a crime to a Mormon who claimed that polygamy was his religious duty.[190] The Court distinguished between religious beliefs, which could not be reached by legislative power, and religious practices, which could be limited by legislative power if they were in "violation of social duties or subversive of good order."[191] This belief-action distinction serves to limit conduct that presents harm to interests which the State may lawfully protect.[192]

Most of the opinions from *Reynolds* until the mid-1960s were skeptical about claims that religious practices should be exempt from general regulatory laws.[193] Later, however, the Court in *Sherbert v. Verner*,[194] faced the situation where a Seventh Day Adventist was fired for refusing to work on

187. United States v. Lee, 455 U.S. 252 (1981).

188. *Yoder*, 406 U.S. at 214-15.

189. 98 U.S. 145 (1878).

190. *Id.*

191. *Id.* at 164.

192. Subsequent cases found that the First Amendment protected some religious conduct but, the freedom to act in accordance with religious belief is not absolute. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

193. GERALD GUNTHER, CONSTITUTIONAL LAW 1558 (12th ed. 1991).

194. 374 U.S. 398 (1963).

Saturdays, her religion's day of rest, and the State refused to give her unemployment compensation benefits.[195] In that case, the Court found that the State must show a compelling interest justifying its policy which could not be satisfied by less burdensome means.[196] Thus, a State action that has an indirect effect on religious freedom must be the least burdensome alternative to accomplish the legitimate objective.[197]

The California Supreme Court has limited state action by finding that an ordinance making it illegal to possess peyote was an unconstitutional limitation on the religious freedom of the Navajo Indians.[198] The court believed that peyote was an integral part of the Navajo ceremony and the religion could not be practiced without it.[199] This case further established that only compelling state interests that did not unduly burden religious freedom could outweigh claims to the free exercise of religion.[200]

A brief analysis under the balancing test established in *Sherbert* indicates that a religious exemption to child abuse statutes is improbable. The State most definitely has a compelling interest in protecting the health and safety of minors. Thus, the State may enter the domain of parental autonomy over decisions of child rearing, a constitutionally protected right, where the health and safety of the child is at risk. In addition, the burden on the free exercise of religion would not be great, as the practice of FGM is not prescribed by any religious doctrine. This absence indicates that FGM is not such an integral part of the Muslim or Christian religions that they could not be practiced fully without it. Furthermore, enforcing child abuse statutes would not likely interfere with the basic tenets of these religions. Thus, the slight burden, in light of the compelling state interest in preserving the health and integrity of children, is insufficient to justify a religious exemption to otherwise valid child abuse statutes.

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195. *Id.*

196. *Id.* at 406.

197. *Id.* at 407.

198. People v. Woody, 61 Cal. 2d 716 (1964).

199. *Id.* at 717.

200. *See* United States v. Lee, 455 U.S. 252 (1981); McDaniel v. Paty, 435 U.S. 618 (1978); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

V. SUMMARIZATION AND PROPOSAL

The AMA policy statement[201] issued in June of 1994 regarding FGM is a proactive step which will help guide behavior and lend a degree of certainty and, hopefully, consistency to the nature of acceptable behavior of medical personnel. Similar policies issued from other medical associations will further educate physicians, hospitals and the public at large to the problem of FGM.

The importance of education is evident because, notwithstanding the constitutional objections to prosecution of those who practice FGM under existing child abuse statutes or mayhem statutes, it appears that this practice falls within the proscribed criminal conduct. Further, a determination of criminal culpability may lead to a finding of unprofessional conduct on the part of the physician and consequent suspension or revocation of a physician's medical license for the practice of medicine or other disciplinary action by the Board of Medical Examiners.[202]

In addition to response from the medical community at large, a continuation of the action begun in the House of Representatives by House Resolution 3247 must be effectuated by the Nation's legislators. A specific statute prohibiting the practice of FGM in the United States will effectively demonstrate that this behavior is unacceptable. While child abuse and mayhem statutes may result in prosecution and conviction of those who continue the practice of FGM, these criminal statutes do not have the educational value that a specific statute prohibiting genital mutilation would have. A specific statute clearly defines what action is prohibited and the expectations for the desired treatment of women and children in the United States. At the forefront of any legal action should be a policy of educating women and circumcisers from the cultures in which this practice is embedded with valued tradition.

V. CONCLUSION

The practice of FGM may not be familiar to a majority of Americans, but as resettlement programs for people from

201. *See supra* note 61.

202. *See* Shea v. Board of Medical Examiners, 146 Cal. Rptr. 653 (Ct. App. 1978).

other cultures are established, and travel from Third World countries becomes less difficult, the tradition of FGM will affect more Americans. A lack of preparation and action in the United States is irresponsible. Existing laws should be explored to determine the culpability or liability of physicians, and new laws should be discussed and pursued. Finally, this issue involves basic, universal principles of respect and human dignity for all people. Cultural heritage should be valued and respected. This, however, does not require unreflective acceptance of practices that are known to be medically inappropriate, harmful and demeaning.[203] Respect for human dignity is belied where a practice is allowed that results in the torture and mutilation of half of the population. Amercian ideals encourage the equality of women and the preservation of human dignity. The law can be a powerful force for education and transformation. The domestic and international laws of the U.S. have the ability to proscribe harmful traditions and thereby instill values of dignity, respect and humanity for all peoples.

Joleen C. Lenihan

203. *See* Kluge, *supra* note 141, at 288.