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# THE CRIMINALIZATION OF FEMALE GENITAL MUTILATION IN THE UNITED STATES

*Karen Hughes\**

## INTRODUCTION

Female genital mutilation (“FGM”)<sup>1</sup> is a cultural and ritual tradition most often practiced in African and Middle Eastern countries.<sup>2</sup> Female genital mutilation refers to several types of genital operations performed on young girls—from newborn babies to adolescents—where part or all of the external female genitalia are removed.<sup>3</sup>

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\* Brooklyn Law School Class of 1996. The author wishes to thank Brooklyn Law School Professor Elizabeth M. Schneider for her valuable assistance in the preparation of this Note.

<sup>1</sup> The term “female genital mutilation” (“FGM”) adequately describes the practice discussed in this Note. “Female circumcision” is a misnomer which suggests that the procedure is closely related in nature and effect to male circumcision. Male circumcision involves the removal of a portion of penile foreskin, whereas female genital mutilation involves the removal of healthy and highly sensitive genital organs. Eugenie Anne Gifford, *“The Courage to Blaspheme”*: *Confronting Barriers to Resisting Female Genital Mutilation*, 4 UCLA WOMEN’S L.J. 329, 332 (1994). “Female genital surgery” is also an inadequate term to describe the procedure, as this terminology lends an air of legitimacy or medical necessity to the practice which cannot be supported. For a brief discussion on arriving at an acceptable term to describe FGM, see *id.* at 332-33.

<sup>2</sup> HANNY LIGHTFOOT-KLEIN, *PRISONERS OF RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA* 27-31 (1989).

<sup>3</sup> FRAN P. HOSKEN, *THE HOSKEN REPORT* 25 (3d ed. 1982). Most communities perform female genital mutilation on young girls between the ages of 4 and 10. However, some communities perform the procedure on infants, while other communities postpone FGM until just before marriage or after the birth of a

The child, completely naked, is made to sit on a low stool. Several women take hold of her and open her legs wide. . . . With her kitchen knife the operator first pierces and slices open the hood of the clitoris. Then she begins to cut it out. While another woman wipes off the blood with a rag, the operator digs with her sharp fingernail a hole the length of the clitoris to detach and pull out the organ. The little girl, held down by the women helpers, screams in extreme pain . . . .

The operator finishes this job by entirely pulling out the clitoris, cutting into the bone with her knife. . . . The operator then removes the remaining flesh, digging with her finger to remove any remnant of the clitoris among the flowing blood.

. . . .  
. . . After a short moment, the woman takes the knife again and cuts off the inner lips (labia minora) of the victim. . . . Then, the operator, with a swift motion of her knife, begins to scrape the skin from the inside of the large lips.

. . . .  
. . . With the abrasion of the skin completed, according to the rules, the operator closes the bleeding large lips and fixes them one against the other with long acacia thorns.

. . . .  
The operator's chief concern is to leave an opening no larger than a kernel of corn or just big enough to allow urine, and later the menstrual flow, to pass. The family honor depends on making the opening as small as possible because with the Somalis, the smaller the artificial passage is, the greater the value of the girl and the higher the brideprice.

. . . The woman then immobilizes her thighs by tying them together with goat skin. This bandage is applied from the knees to the waist of the girl, and is left in place for

about two weeks. The girl must remain lying on a mat for the entire time, while all the excrement evidently remains with her in the bandage.

After that time, the girl is released and the bandage is cleaned. Her vagina is now closed, and remains so until her marriage. . . . There are, of course, various complications which frequently leave the girl crippled and disabled for the rest of her life.<sup>4</sup>

This excerpt is a brief case history describing FGM as it is practiced in Somalia, where all girls must undergo the procedure as a requirement for marriage.<sup>5</sup> Countries throughout the world have practiced female genital mutilation for approximately 2,500 years, and forty countries continue to practice it.<sup>6</sup> Close to 100 million females of all ages in Africa alone have suffered mutilation.<sup>7</sup>

As immigrants from FGM practicing countries settle in the United States and other non-practicing countries, they bring with them their culture, traditions and religious beliefs.<sup>8</sup> Many Americans find the subject of FGM taboo or consider the decision whether to perform FGM on young girls a private, religious and cultural decision authorized by the family. However, Americans cannot ignore the practice of FGM within immigrant communities in the United States.<sup>9</sup> Although no statistical studies reveal the

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<sup>4</sup> HOSKEN, *supra* note 3, at 120-21 (quoting JACQUES LANTIER, *LA CITE MAGIQUE ET MAGIE EN AFRIQUE NOIRE* 277-79 (1972)). Female genital mutilation is practiced in numerous forms and occurs in various ritual settings depending upon the particular custom of the country. *See generally* HOSKEN, *supra* note 3, at 95-265 (presenting case histories in various countries such as Somalia, Egypt and Indonesia).

<sup>5</sup> HOSKEN, *supra* note 3, at 120.

<sup>6</sup> Ethiopia, Egypt, Ghana, Kenya, Nigeria, Indonesia and Malaysia are a few of the countries that continue to practice FGM. HOSKEN, *supra* note 3 app. (listing *WIN News List of Female Genital Mutilation Around the World: Population Groups*); Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 *HUM. RTS. Q.* 437, 439 (1988).

<sup>7</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 31; Toubia, *supra* note 3, at 712.

<sup>8</sup> With increasing mobility, African and Middle Eastern immigrants are settling all over the world and are bringing the practice of FGM with them. HOSKEN, *supra* note 3, at 48.

<sup>9</sup> *Nightline* (ABC television broadcast, Feb. 10, 1994), available in LEXIS,

prevalence of FGM in the United States, evidence exists that physicians and families practice FGM in secrecy within immigrant communities in the United States.<sup>10</sup> Detroit, Atlanta, New York and Los Angeles have reported the practice of FGM among immigrant communities in their states.<sup>11</sup> The World Health Organization<sup>12</sup> and other health groups report that wealthy immigrants have paid Western physicians in the United States and Europe to perform FGM on their daughters.<sup>13</sup> In addition, researchers believe that immigrants often bring “excisers”—the women who perform the mutilations—to these countries to continue the practice outside of Africa.<sup>14</sup>

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News Library, ABCNEW File [hereinafter *Nightline*].

<sup>10</sup> *Id.* Catherine Hogan, the founder of the Washington Metropolitan Alliance Against Ritualistic FGM, likens FGM to the early reports of incest and suggests that the anecdotal and empirical data regarding the prevalence of FGM in the United States is only “the tip of the iceberg.” Linda Burstyn, *Female Circumcision Comes to America*, THE ATLANTIC MONTHLY, Oct. 1995, at 28, 30.

Efforts to study the practice of FGM in the United States are thwarted by the limited contact that many African women have with the U.S. health care system. Maggie Garb, *U.S. Doctors Seeing ‘Circumcised’ Female Immigrants*, AM. MED. NEWS, Apr. 27, 1990, at 3. A study published in 1985 by the *Journal of American College Health* found that African immigrants who had undergone FGM feared U.S. physicians, believing that these physicians were unaware of the practice. *Id.*

<sup>11</sup> Garb, *supra* note 10, at 3. Researchers say that at least one young girl has died due to FGM complications in the United States. Garb, *supra* note 10, at 3.

<sup>12</sup> The World Health Organization (“WHO”) is made up of medical professionals from throughout the world who come together to discuss and develop policies regarding various medical issues. WHO unequivocally advises that FGM should not be practiced by any health care professional in any setting. Garb, *supra* note 10, at 3.

<sup>13</sup> Garb, *supra* note 10, at 3.

<sup>14</sup> Garb, *supra* note 10, at 3.

It’s going on all over Europe. It would be very unusual if it was not going on here . . . . Any woman that comes over from one of these countries where circumcision is common has been circumcised . . . .

The question is what do they do about their children, do they send them home or do they do them here.

Garb, *supra* note 10, at 3 (quoting an interview with Hanny Lightfoot-Klein). One researcher suggests that families frequently “chip in” to bring an exciser from the homeland to the United States to perform FGM, because it is cheaper

Congress has failed to enact legislation to prohibit FGM in the United States;<sup>15</sup> however, other countries have responded to the continuing practice by criminalizing FGM.<sup>16</sup> For example, the United Kingdom and Sweden passed federal laws which specifically prohibit the practice of FGM, while Australia, Canada, France and the Netherlands apply existing child abuse laws to prohibit FGM.<sup>17</sup> Several African countries, such as Cameroon, Djibouti, Egypt, Ghana and the Sudan, also have enacted legislation prohibiting the practice of FGM.<sup>18</sup>

This Note proposes that Congress enact legislation to prohibit the practice of FGM in the United States.<sup>19</sup> Part I describes the

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to import an exciser than it is to send several girls abroad. Burstyn, *supra* note 10, at 30.

<sup>15</sup> The U.S. House of Representatives failed to pass the Federal Prohibition of Female Genital Mutilation Act of 1993. H.R. 3247, 103d Cong., 1st Sess. (1993), *available in* LEXIS, Legis Library, BLTRCK File. Representative Patricia Schroeder authored and introduced a similar bill in the House on February 14, 1995. H.R. 941, 104th Cong., 1st Sess. (1995), *available in* LEXIS, Legis Library, BLTRCK File. The Federal Prohibition of Female Genital Mutilation Act of 1995 was referred to the House Commerce Committee and the House Judiciary Committee in February, 1995. *Id.*

Senator Harry Reid introduced the Federal Prohibition of Female Genital Mutilation Act of 1995 in the Senate on July 13, 1995. S. 1030, 104th Cong., 1st Sess. (1995), *available in* LEXIS, Legis Library, BLTRCK File. The Act was referred to the Senate Judiciary Committee in July, 1995. *Id.*

<sup>16</sup> In addition to the response of various countries to the practice of female genital mutilation, in 1992, the International Federation of Gynecology and Obstetrics published a joint statement with the World Health Organization condemning the practice of FGM as harmful and calling for coalitions to abolish it. The World Health Assembly issued a similar statement in 1993. Toubia, *supra* note 3, at 715.

<sup>17</sup> *Female Genital Mutilation Fact Sheet*, Office of Congresswoman Patricia Schroeder 1 (1993) (on file with the *Journal of Law and Policy*) [hereinafter FGM Fact Sheet]; Mary Ann James, *Federal Prohibition of Female Genital Mutilation: The Female Genital Mutilation Act of 1993*, H.R. 3247, 9 BERKELEY WOMEN'S L.J. 206 n.3 (1994).

<sup>18</sup> FGM Fact Sheet, *supra* note 17, at 1; James, *supra* note 17, at 206.

<sup>19</sup> This Note advocates that Congress pass specific legislation criminalizing the practice of FGM on young girls under the age of 18. "While most experts agree U.S. courts would likely consider female circumcision child abuse, no one has tested that law. Opponents say explicit legislation banning the practice is long

origins of and continuing justifications advanced for the practice of FGM, as well as the history of FGM in the United States. Part II summarizes the criminalization and treatment of FGM in other Western and African countries. Part III analyzes constitutional and legal issues involved in passing federal legislation criminalizing FGM. Section A argues that Congress has the power to enact federal legislation to prohibit FGM via the Commerce Clause.<sup>20</sup> Sections B and C argue that a federal law prohibiting FGM would not violate the Free Exercise of Religion Clause of the First Amendment<sup>21</sup> or the fundamental right to privacy recognized by the Supreme Court.<sup>22</sup> Moreover, Section D reasons that if FGM is criminalized in the United States, immigrants who practice FGM should not be exempt from prosecution under a cultural defense<sup>23</sup>

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overdue." Garb, *supra* note 10, at 3. For an alternative perspective which advocates punishing FGM under existing state child abuse laws, see generally Nancy I. Kellner, *Under the Knife: Female Genital Mutilation as Child Abuse*, 14 J. JUV. L. 118 (1993).

Various states have taken legislative action to prohibit FGM. For example, on March 20, 1995, North Dakota enacted legislation which provides that anyone who performs FGM on a minor is guilty of a Class C felony. N.D. CENT. CODE § 12.1-36-01 (1995). New York is currently debating the passage of the New York State Prohibition of Female Genital Mutilation Act which provides that anyone who performs FGM on a person under the age of 18 is guilty of a Class E felony. S.B. 510, 218th Leg., 1st Sess., 1995 N.Y. Laws, *available in* WESTLAW, BILLS Database. Texas is currently debating a similar statute which provides that anyone who performs FGM on a female is guilty of a felony of the third degree. H.B. 2442, 74th Leg., 1995 Tex. Gen. Laws, *available in* WESTLAW, BILLS Database. In addition, New Jersey is considering enacting a resolution "memorializing the Congress of the United States to expeditiously enact legislation to prohibit female genital mutilation." A.C.R. 102, 206th Leg., 2d Sess., 1995 N.J. Laws, *available in* WESTLAW, BILLS Database.

<sup>20</sup> U.S. CONST. art. I, § 8.

<sup>21</sup> U.S. CONST. amend. I.

<sup>22</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that several of the Bill of Rights' guarantees protect privacy interests and create a "penumbra" or zone of privacy); *see Parham v. J.R.*, 442 U.S. 584 (1979) (establishing the right of parents to make the decision whether to commit their children to mental institutions); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (establishing the right of parents to control the upbringing and education of their children).

<sup>23</sup> *See generally* Alice J. Gallin, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723, 725 (1994) ("[A]

or religious exemption.<sup>24</sup> Lastly, Section E analyzes the Federal Prohibition of Female Genital Mutilation Act of 1995,<sup>25</sup> authored by Congresswoman Patricia Schroeder, which would make the practice of FGM a federal crime and suggests modification to the proposed bill.

## I. BACKGROUND AND HISTORY OF FEMALE GENITAL MUTILATION

### A. Description of Female Genital Mutilation

Countries in Africa, Asia and the Middle East practice various types of FGM. FGM is most often performed by women, largely midwives, who "are part of the creation of a special and exclusive 'women's space.'"<sup>26</sup> A young girl traditionally undergoes FGM in a ceremonial atmosphere along with other young girls, usually sisters and female relatives.<sup>27</sup> The least severe procedure is mild

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'cultural defense' negates or mitigates criminal responsibility for acts that are committed under a reasonable, good faith belief in their propriety based upon the defendant's cultural background.").

<sup>24</sup> Many criminal child abuse and neglect statutes allow religious exemptions from prosecution for parents who provide care and treatment to their children in accordance with the religious tenets of their church, even though this care does not meet current medical standards. *E.g.*, CAL. PENAL CODE § 270 (West 1995).

<sup>25</sup> H.R. 941, 104th Cong., 1st Sess. (1995); *see text of H.R. 941, infra pp.* 361-63.

<sup>26</sup> Gifford, *supra* note 1, at 335 (quoting Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 219 (1992)).

Many women who have undergone FGM experience positive reinforcements in the forms of economic and social benefits that support continuation of FGM. Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155, 167 (1985). Mothers who have undergone FGM realize moral and social acceptability and want their daughters to realize these same benefits and to experience the camaraderie and celebration of womanhood present during the ceremony. *Id.* at 167.

<sup>27</sup> Gifford, *supra* note 1, at 335 (quoting Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 219 (1992)).

*sunna*, taken from the Arabic word meaning "tradition."<sup>28</sup> Mild *sunna* involves the removal of the clitoral prepuce which is the outer layer of skin over the clitoris (the hood of the clitoris); the body of the clitoris remains intact.<sup>29</sup> The most severe procedure is infibulation or pharaonic circumcision which involves removal of part or all of the clitoris and the excision of the labia minora (inner lips) as well as the inner layers of the labia majora (outer lips).<sup>30</sup> Other types of FGM include modified *sunna*,<sup>31</sup> clitoridectomy,<sup>32</sup> introcision<sup>33</sup> and reinfibulation.<sup>34</sup>

Female genital mutilation imposes terrible physical suffering on young girls and often results in lifelong medical problems.<sup>35</sup> The clitoris contains specialized sensory tissue concentrated in a rich neurovascular area of a few centimeters.<sup>36</sup> The removal of even a small amount of this tissue is dangerous and can have irreversible

<sup>28</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 33.

<sup>29</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 33.

<sup>30</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 33. For a brief description of infibulation, see text *infra* pp. 322-23.

After infibulation, the raw edges of skin are sewn together with catgut or made to adhere to each other by means of thorns. LIGHTFOOT-KLEIN, *supra* note 2, at 33. "A small sliver of wood or straw is inserted into the vagina to prevent complete occlusion and to leave a passage for urine and the menstrual flow." LIGHTFOOT-KLEIN, *supra* note 2, at 33. The women then tie the girl's legs together, and she is immobilized for an extended period, varying from 15 to 40 days while the wound heals. HOSKEN, *supra* note 3, at 120.

<sup>31</sup> "Modified *sunna*" is the partial or total excision of the body of the clitoris. LIGHTFOOT-KLEIN, *supra* note 2, at 33.

<sup>32</sup> "Clitoridectomy," also known as "excision," is the removal of part or all of the clitoris, the labia minora and the labia majora. LIGHTFOOT-KLEIN, *supra* note 2, at 33.

<sup>33</sup> "Introcision" is the enlargement of the vaginal orifice by means of tearing it downward. LIGHTFOOT-KLEIN, *supra* note 2, at 33.

<sup>34</sup> "Reinfibulation," also known as "recircumcision," is performed on women who have given birth, are widowed or are divorced to simulate a virginal vagina. It is also called *adla* (tightening) and is mostly performed on those women who have had a previous pharaonic circumcision. During the procedure, the edges of the scar are pared and sewn together. Reinfibulation is also referred to as *adlat el rujal* (men's circumcision) because it is designed to create greater sexual pleasure for men. LIGHTFOOT-KLEIN, *supra* note 2, at 35.

<sup>35</sup> HOSKEN, *supra* note 3, at 25.

<sup>36</sup> Toubia, *supra* note 3, at 712.

physical effects.<sup>37</sup> If the young girl does not die from the genital mutilation, she is likely to develop devastating medical complications, such as tetanus infection, severe hemorrhaging, dysuria (painful urination) or dysmenorrhea (painful menstruation) due to pelvic congestion.<sup>38</sup> Young girls also commonly experience shock due to blood loss, pain and infections shortly after the operation.<sup>39</sup> Similarly, many adult women who have undergone FGM as children develop complications during childbirth, as scar tissue may block the birth canal and result in intrauterine fetal death.<sup>40</sup> Chronic infections, infertility, painful menstruation, cysts,<sup>41</sup> lack of orgasm and coital difficulties are also reported by adult women who have undergone FGM.<sup>42</sup>

Moreover, these young girls incur psychological trauma as a result of being subjected to genital mutilation by their own families whom they love and trust.<sup>43</sup> Few studies have been conducted on the psychological effects of FGM, but it is "logical that such

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<sup>37</sup> Toubia, *supra* note 3, at 712.

<sup>38</sup> Shelley Simms, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1944-49 (1993).

<sup>39</sup> HOSKEN, *supra* note 3, at 29.

<sup>40</sup> HOSKEN, *supra* note 3, at 29. "Deinfibulation" is the cutting open of the vaginal tissue that was previously sewn together during FGM. This cutting allows for delivery of the child through the vaginal opening. Where deinfibulation is not performed, contractions are weak and the delivery of the fetal head is delayed, fetal death can occur. Toubia, *supra* note 3, at 713. In addition, if deinfibulation is not performed during childbirth, exit of the fetal head may be obstructed and strong contractions can lead to perineal tears in the mother. HOSKEN, *supra* note 3, at 29.

Also, in European and North American countries, where physicians are not trained to deal with infibulated women, unnecessary Cesarean sections are performed. These operations could be avoided with the less severe deinfibulation surgery. Toubia, *supra* note 3, at 714.

<sup>41</sup> The formation of dermoid cysts in the line of the scar tissue is the most common long-term complication associated with FGM. These cysts can be as small as a pea or as large as a grapefruit and can cause anxiety, shame and fear in women who think that their genitals are regrowing in monstrous shapes or who fear that they have cancer. Toubia, *supra* note 3, at 713.

<sup>42</sup> HOSKEN, *supra* note 3, at 29.

<sup>43</sup> For a fictional account of the psychological and emotional effects of FGM, see ALICE WALKER, *POSSESSING THE SECRET OF JOY* (1992).

intense pain in an extremely delicate, complex and vital physical area, when experienced by young girls in their formative years, could result in substantial psychological problems."<sup>44</sup> Young girls also experience anxiety and fear in anticipation of the operation.<sup>45</sup> Additionally, the physical pain suffered in the initial operation often recurs throughout these women's lives as other medical problems develop as a result of this procedure. Emotional reactions to physical problems, such as repeated infection and painful urination, often present themselves as chronic irritability, anxiety, depressive episodes, conversion reactions or psychosis.<sup>46</sup> It also appears that a large number of circumcised women are afraid of sex and experience extreme pain during intercourse.<sup>47</sup>

### B. *History of Female Genital Mutilation*

The history of FGM dates back to ancient Egypt in the fifth century B.C., prior to either Islam or Christianity.<sup>48</sup> The cultural origins of the practice are unknown.<sup>49</sup> No consensus exists as to

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<sup>44</sup> Slack, *supra* note 6, at 454.

<sup>45</sup> Slack, *supra* note 6, at 454.

<sup>46</sup> Slack, *supra* note 6, at 455 (quoting *Draft Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, at 13, U.N. Doc. E/CN.4/HC.42/1985/L.5 (1985)).

Nahid Toubia reports that based on her clinical experience in Sudan, many infibulated women have a "syndrome of chronic anxiety and depression arising from worry over the state of their genitals, intractable dysmenorrhea, and the fear of infertility." Toubia, *supra* note 3, at 714. Also, Sudan has reported a few cases of psychopathological disorders directly attributable to FGM; however, among the majority of girls and women, the psychological effects are "often subtle and buried in layers of denial and acceptance of social norms." Toubia, *supra* note 3, at 714.

Toubia also suggests that the psychological sequelae of FGM among immigrants living in countries that do not practice FGM may be more severe than the effects on women living in countries where FGM is prevalent. Women living in societies where FGM is not traditionally performed may have serious problems in developing their sexual identity. Toubia, *supra* note 3, at 714.

<sup>47</sup> Slack, *supra* note 6, at 455.

<sup>48</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 27.

<sup>49</sup> The cause of the practice of excision and infibulation is lost in the distant past; typically, no one in Africa today can give a plausible

whether the procedure originated in one area and spread, or if it was "invented" by different ethnic groups in different areas and times.<sup>50</sup>

Various practicing cultures advance theories suggesting why FGM began. First, many FGM proponents adhere to the mistaken belief that FGM originated as a requirement of Islam.<sup>51</sup> Second, many advocates believe that FGM originated to control the sexual desires of women, i.e. to preserve virginity until marriage, to assure marital fidelity and to prevent a woman's outward enjoyment or sexual response.<sup>52</sup> Third, others believe that FGM originated to change women from common to private property.<sup>53</sup>

FGM practicing societies advance the following cultural and religious justifications for the continuation of FGM:<sup>54</sup> to abide by the religious requirements of Islam, the need to maintain tradition, to increase fertility in women,<sup>55</sup> to provide a biologically cleansing process that improves the hygienic condition of the female

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explanation for genital mutilation of girls that is not tied to myths and ignorance of the biological facts. One can only guess how long it has taken to bring about the acceptance "as custom" of these terrifyingly sadistic and permanently damaging mutilations, which are even now considered an essential requirement for marriage in many African countries.

HOSKEN, *supra* note 3, at 52.

<sup>50</sup> HOSKEN, *supra* note 3, at 51.

<sup>51</sup> Gifford, *supra* note 1, at 343. This belief is fallacious as the Koran does not mention FGM; moreover, the Prophet Mohammed advised that any female genital mutilation be slight. Slack, *supra* note 6, at 446; Gifford, *supra* note 1, at 343. In addition, the practice of FGM is unknown in 80% of Islamic countries. LIGHTFOOT-KLEIN, *supra* note 2, at 41.

<sup>52</sup> Gifford, *supra* note 1, at 345-48.

<sup>53</sup> FGM curbs the sexual freedom of women, and women become the sole property of their husbands. LIGHTFOOT-KLEIN, *supra* note 2, at 28. This rationale focuses on the male roots of FGM. In addition, this rationale propagates "patriarchal religious codes and a male view of ideal womanhood in which women are silent, powerless and submissive." Gifford, *supra* note 1, at 341.

<sup>54</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 41-42.

<sup>55</sup> Some ethnic groups perform genital surgery on women during the advanced stages of their first pregnancy under the belief that if the first-born baby's head touches the clitoris during childbirth, the child will die. Simms, *supra* note 38, at 1950.

genitalia, to prevent promiscuity, to preserve virginity and to pursue aesthetics.<sup>56</sup> However, “[t]radition—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.”<sup>57</sup>

### C. *History of Female Genital Mutilation in the United States*

FGM was practiced in the United States from the late nineteenth century until approximately 1937.<sup>58</sup> Post-Civil War attitudes amongst men and doctors toward women reflected anxiety about female emancipation and changing sex roles.<sup>59</sup> At the time, prominent American physicians believed that women were especially vulnerable to insanity because of their body’s peculiar dominance.<sup>60</sup> Doctors began to place great emphasis on the physiological origins of women’s mental disorders and found sexual transgressions to be symptoms of mental disorder.<sup>61</sup>

Excision of the clitoris (clitoridectomy) and extirpation of the ovaries (female castration) were among the many gynecological operations practiced to treat the psychological disorders of

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<sup>56</sup> Slack, *supra* note 6, at 446-47; Simms, *supra* note 38, at 1949, 1953.

FGM functions as a means of sexual and social control of women in various ways. For example, FGM seeks to assure that a woman will be a virgin when she marries. Females in practicing cultures are repeatedly told that they will not be suitable for marriage if their reputation for chastity does not remain intact. FGM practicing countries also believe that FGM will protect women from rape—a rationale that simplifies rape as purely an act of sex and not as an act of violence and domination. Finally, FGM is believed to assure marital fidelity. When sexual intercourse is painful, women can hardly be expected to seek out sex with various partners. See generally Gifford, *supra* note 1, at 345-48.

<sup>57</sup> Simms, *supra* note 38, at 1949.

<sup>58</sup> Ben Barker-Benfield, *Sexual Surgery in Late-Nineteenth-Century America*, 5 INT’L J. HEALTH SERV. 279, 285 (1975).

<sup>59</sup> *Id.* at 280.

<sup>60</sup> *Id.* Doctors believed “[i]t was woman’s sexuality that made woman mad.” *Id.*

<sup>61</sup> *Id.* at 283.

women.<sup>62</sup> Female genital mutilation was designed to insure that women stayed in their conventional roles as dependent, submissive and imparting morality.<sup>63</sup> Doctors eventually abandoned the practice of female surgeries as cures for psychological disorders because in the vast majority of cases the surgery failed in its purpose.<sup>64</sup>

Common practice of female genital mutilation is a part of American history. Although doctors no longer perform female genital surgeries for the treatment of psychological disorders in the United States, the attitudes and assumptions concerning gender roles which provided the justification for these surgeries remain largely prevalent in our culture.<sup>65</sup> With a history of tolerance for female genital mutilation in the United States and the knowledge that immigrant communities are secretly practicing FGM within our borders, the federal government must pass legislation to prohibit FGM to prevent further physical and emotional harm to young girls who have no voice in the decision.<sup>66</sup>

## II. CRIMINALIZATION AND TREATMENT OF FEMALE GENITAL MUTILATION IN OTHER COUNTRIES

As immigrants from countries that traditionally practice FGM move into non-practicing countries, many non-practicing countries have responded by enacting legislation to prohibit FGM within their borders. Experts note that female genital mutilation is a common occurrence among immigrant communities in the Western nations of Canada, France, Italy, the United Kingdom and the

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<sup>62</sup> *Id.* at 284. Women's psychological disorders included hypersexuality, hysteria, nervousness, melancholy and lesbianism. Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 208 (1992).

<sup>63</sup> Barker-Benfield, *supra* note 58, at 287.

<sup>64</sup> Barker-Benfield, *supra* note 58, at 287.

<sup>65</sup> Gunning, *supra* note 62, at 211.

<sup>66</sup> "Yet, there remains a sense that the United States is immune to the brutal effects of FGM." Kellner, *supra* note 19, at 123. American lawmakers can no longer ignore the fact that immigrant children living in the United States are currently being subjected to this harmful tradition.

United States; nevertheless, only the United States has yet to criminalize FGM in some way.<sup>67</sup> One scholar notes that:

An investigation of the present-day situation concerning genital mutilation in Western countries shows that wherever immigrants from Africa and the Middle East settle, they bring the operations along. Many continue to impose them on their children, even if the children are not going to return to their country of origin.<sup>68</sup>

In response, the United Kingdom and Sweden passed laws which specifically prohibit the practice of FGM.<sup>69</sup> In 1985, the United Kingdom passed the Prohibition of Female Circumcision Act which imposes criminal fines or imprisonment on anyone who performs, aids, abets, counsels or procures the performance of FGM on another person.<sup>70</sup> Similarly, in 1981, the Swedish Minister of Health proposed a new law to specifically prohibit FGM to demonstrate the government's solidarity with the women affected by FGM.<sup>71</sup> In 1982, Sweden passed the proposed law which makes all forms of female genital mutilation illegal.<sup>72</sup>

France responded by applying an existing law, Article 312<sup>73</sup> of their penal code, to the practice of FGM in their borders. Article 312 classifies any violence to a child that results in the child's

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<sup>67</sup> Kellner, *supra* note 19, at 123.

<sup>68</sup> HOSKEN, *supra* note 3, at 257.

<sup>69</sup> FGM Fact Sheet, *supra* note 17, at 1.

<sup>70</sup> Prohibition of Female Circumcision Act, 1985, ch. 38, § 1 (Eng.). The English law specifically provides that "no account shall be taken of the effect on that person of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual." *Id.* at § 2.

In the United Kingdom, FGM is most common in the Somali community and among immigrants from other African and Middle Eastern countries. Donu Kogbara et al., *Harley Street Surgeon Agreed to Perform Female Circumcision*, SUNDAY TIMES (London), Oct. 18, 1992, available in LEXIS, World Library, ALLNWS File. Since 1989, British authorities have intervened to protect young girls in seven cases of suspected female genital mutilations. Kellner, *supra* note 19, at 122.

<sup>71</sup> HOSKEN, *supra* note 3, at 258-59.

<sup>72</sup> Toubia, *supra* note 3, at 715.

<sup>73</sup> C. PÉN., art. 312 (1993-1994).

mutilation as a crime.<sup>74</sup> When prosecution of FGM first began in France, most of those convicted were given suspended sentences; however, the recent trend is to sentence those convicted to jail time in order to send a stronger message to the African communities in France and abroad.<sup>75</sup>

There has also been a movement in Canada<sup>76</sup> to pass specific legislation criminalizing FGM, even though the practice is already considered a crime in Canada under child abuse legislation in the Criminal Code.<sup>77</sup> The Canadian Advisory Council proposes that such a law would act as a deterrent and send a strong message that the federal government is serious about preventing FGM.<sup>78</sup> In addition, Australia<sup>79</sup> and the Netherlands<sup>80</sup> currently prosecute

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<sup>74</sup> *Id.*

<sup>75</sup> Rone Tempest, *Ancient Traditions vs. The Law; Prosecutions of Two Immigrants for 'Female Circumcision' in France Highlight an Increasingly Common Cultural Clash*, L.A. TIMES, Feb. 18, 1993, at A1.

In 1982 in France, a baby girl, whose parents were from Mali, died as a result of an excision operation. The child, brought to the hospital three days after the operation, bled to death. The father was arrested and charged with criminal negligence. HOSKEN, *supra* note 3, at 260. However, in 1989, two immigrant parents from Mali were prosecuted under Article 312 for paying another woman \$30.00 each to perform FGM on their two daughters. Tempest, *supra* note 75, at A1. More recently in 1991, a French jury sentenced a Malian woman, accused of performing excisions on 17 children, to five years in prison. Tempest, *supra* note 75, at A1.

<sup>76</sup> Numerous requests by African immigrants and refugees for the procedure prompted the movement to criminalize FGM in Canada. Kellner, *supra* note 19, at 122.

<sup>77</sup> *Ban Urged for Genital Mutilation*, CALGARY HERALD (Canada), Mar. 8, 1994, at A7 [hereinafter *Ban Urged*].

Moreover, in 1992, the Council of the College of Physicians and Surgeons of Ontario announced that they would treat any performance of female circumcision, excision or infibulation by a licensed Ontario physician as professional misconduct. The Council hopes to combat the practice of FGM by educating African parents as to the health problems associated with FGM. By bringing the practice to the attention of social service policy makers, health service providers and educators, the health needs of those already mutilated, as well as potential candidates for FGM, may also be met. Kellner, *supra* note 19, at 122.

<sup>78</sup> *Ban Urged*, *supra* note 77, at A7.

<sup>79</sup> See Paul Daley, *Australia: Wade Resists Move for Law on Mutilation*,

the offense under child abuse laws, but are considering legislation to specifically prohibit FGM.

In African countries where FGM has been traditionally practiced, legislative efforts to criminalize FGM have not met with the same success as in European countries. In 1946, Sudan passed a law prohibiting infibulation, but still permitted *sunna*, the removal of the free and projecting part of the clitoris.<sup>81</sup> The Sudanese attempt to criminalize FGM has largely failed<sup>82</sup>—the Sudanese ignore the law, as infibulation is still an integral part of the entire socio-cultural system.<sup>83</sup> Similarly in 1959, Egypt passed a resolution which allowed for only partial clitoridectomies with the consent of a physician.<sup>84</sup> The resolution, however, did not provide for penal sanctions.<sup>85</sup> Consequently, excision and infibulation are still prevalent in Egypt.<sup>86</sup>

Evidence suggests that immigrant populations in Westernized countries throughout the world practice FGM,<sup>87</sup> and many of these countries have taken actions to criminalize FGM. It is incumbent upon the United States to join these countries and prohibit the practice of FGM within its borders.

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REUTER TEXTLINE SUNDAY AGE (Melbourne), Aug. 7, 1994, at 10.

<sup>80</sup> See Guido de Bruin, *Women: Dutch Government Ends Debate on Circumcision Proposal*, INTER PRESS SERVICE (Amsterdam), Nov. 11, 1992, available in LEXIS, World Library, ALLNWS File.

<sup>81</sup> The Sudanian law imposed criminal liability of up to seven years imprisonment for performing infibulation. Gunning, *supra* note 62, at 228.

<sup>82</sup> The Sudanian law failed primarily because the law was in response to pressure from British colonial authorities to pass legislation to prohibit FGM. Gunning, *supra* note 62, at 228.

<sup>83</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 43.

<sup>84</sup> Gunning, *supra* note 62, at 228.

<sup>85</sup> Gunning, *supra* note 62, at 228.

<sup>86</sup> Slack, *supra* note 6, at 478.

<sup>87</sup> Kellner, *supra* note 19, at 123.

### III. CRIMINALIZATION OF FEMALE GENITAL MUTILATION IN THE UNITED STATES

#### A. Federal Jurisdiction via the Commerce Clause

Congress has the power to enact legislation prohibiting the practice of FGM through the Commerce Clause.<sup>88</sup> Without uniform federal legislation prohibiting FGM, children and families can travel from state to state to procure the surgery in those states which allow FGM or from those individual physicians who perform FGM. Congress should enact a federal law to prohibit such movement of families and children in interstate commerce, particularly considering the frequent need of post-FGM medical attention that these young girls require.

In *McCulloch v. Maryland*,<sup>89</sup> the Supreme Court held that Congress has the power to enact laws which are ancillary to a power which is enumerated in the Constitution. In *McCulloch*, Chief Justice John Marshall emphasized that Congress must be "entrusted with ample means" for executing the enumerated powers.<sup>90</sup> Moreover, he stated that Congress is empowered to make all laws which may be "necessary and proper for carrying

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<sup>88</sup> U.S. CONST. art. I, § 8. The Commerce Clause states that "Congress shall have Power [t]o . . . regulate Commerce . . . among the several States . . ." *Id.* Most federal legislation is based upon the Commerce Clause, such as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended in 42 U.S.C. §§ 2000a-2000a-6 (1994)). Under present doctrines, courts will uphold commerce-based laws if there is *any rational basis* upon which Congress could have found *some relation* between its regulation and interstate commerce. *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 276, 283 (1981).

<sup>89</sup> 17 U.S. 316 (1819). *McCulloch* was the first Supreme Court case to interpret the Necessary and Proper Clause of the Constitution. U.S. CONST. art. I, § 8. In the opinion, Justice Marshall concluded that Congress had the power to charter the second Bank of the United States to regulate currency and to help solve national economic problems. In particular, Marshall reasoned that congressional power to charter the Bank could be implied from the explicit grant of other constitutionally enumerated powers, such as the power to collect taxes, to borrow money and to regulate commerce. *McCulloch*, 17 U.S. at 407-08.

<sup>90</sup> *McCulloch*, 17 U.S. at 408.

into execution” any of the enumerated powers.<sup>91</sup> Justice Marshall interpreted the Necessary and Proper Clause to mean that Congress has the power to employ any means calculated to produce an end; these means may be “convenient, useful or essential” in attaining a desired end which is defined in an enumerated power.<sup>92</sup>

The power to regulate interstate commerce is specifically granted to Congress by the Constitution.<sup>93</sup> In light of *McCulloch*, Congress possesses broad discretion<sup>94</sup> in enacting laws to regulate interstate commerce. If individual states are allowed to choose whether to enact FGM legislation, families and children will move in interstate commerce to procure the surgery in those states which legalize FGM. Congress must pass federal legislation to regulate this type of interstate commerce given the devastating effects of FGM on its victims.<sup>95</sup>

After *McCulloch*, the Supreme Court developed three theories upon which a commerce-based regulation can be premised. Congress possesses the power to enact federal legislation criminalizing FGM under each of these three theories.

First, in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>96</sup> the Court held that Congress has the power to regulate even purely intrastate

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<sup>91</sup> U.S. CONST. art. I, § 8.

<sup>92</sup> *McCulloch*, 17 U.S. at 413.

<sup>93</sup> U.S. CONST. art. I, § 8.

<sup>94</sup> Since *McCulloch*, the Court generally will not inquire into the motives of Congress as long as the legislation is rationally related to *one* constitutionally enumerated end which Congress was pursuing. *McCulloch*, 17 U.S. at 423. The fact that other ends not within the enumerated powers of Congress might also be achieved does not invalidate the congressional action. In sum, the Court will show great deference to Congress.

<sup>95</sup> Federal legislation prohibiting FGM is rationally related to commerce. The fact that Congress is motivated by a compelling interest in the physical and mental health of these young girls does not invalidate the use of the commerce power in this manner. See *supra* note 94 and accompanying text.

<sup>96</sup> 301 U.S. 1 (1937) (holding that the National Labor Relations Act, which regulated intrastate labor practices, was within the purview of the commerce power). Even though Jones & Laughlin Steel Corporation only produced steel in Pennsylvania, the production of their steel had an effect on interstate commerce due to their multi-state network of operations, such as shipping products to other states. *Id.* at 25-27. A labor stoppage of the Pennsylvania intrastate manufacturing of steel would have a substantial effect on interstate commerce. *Id.* at 41.

activity if the regulation of those activities has a “close and substantial relation” to interstate commerce.<sup>97</sup> Female genital mutilation will most often be a purely intrastate activity which takes place within one state’s borders. However, if the various states are allowed to enact or not enact laws regulating FGM, families and children who desire the surgery will likely travel from states that prohibit FGM to those which do not prohibit it. Thus, differing intrastate practices of FGM will have a close and substantial relationship to interstate commerce and warrant national regulation as set forth in the *NLRB* test.

Second, in *Wickard v. Filburn*,<sup>98</sup> the Court held that Congress has the power to regulate intrastate activity if the cumulative effect of the activity interferes with interstate commerce. Following the *Wickard* test, to allow various individual physicians to decide if they will perform FGM will likely result in transporting children by roadways, airways or railways to procure the surgery.<sup>99</sup> Leaving the issue of FGM up to state legislatures or individual doctors will have the cumulative effect of movement of these young girls in interstate commerce.

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<sup>97</sup> *Id.* at 37.

<sup>98</sup> 317 U.S. 111 (1942) In *Wickard*, the Court held that the Agricultural Adjustment Act of 1938, which regulated the amount of wheat a farmer could produce for self-consumption, was within the purview of the commerce power. *Id.* at 127-128. *Wickard* exemplifies how far the Court will go to sustain commerce-based legislation. The Court concluded that even though *Wickard*’s own consumption of wheat may be trivial, *Wickard*’s individual wheat consumption taken together with that of many others similarly situated is significant. *Id.* The Court reasoned that regulation of home production and consumption of wheat is reasonably related to protecting the interstate commercial trade of wheat. *Id.*

<sup>99</sup> Hypothetically, suppose that New York passes legislation allowing physicians to perform FGM, and Dr. X decides to begin performing FGM in her practice. However, New Jersey passes legislation prohibiting physicians from performing FGM. Dr. X’s decision to perform FGM will likely result in New Jersey families bringing their young girls to New York to legally procure the surgery and avoid possible prosecution. Dr. X’s practice may have a trivial impact on interstate commerce, but when her practice is taken together with other doctors who decide to perform FGM, the impact on interstate commerce may be significant.

Third, in *United States v. Darby*,<sup>100</sup> the Court unanimously held that Congress “may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.”<sup>101</sup> *Darby* extended the broad purview of the commerce power to include intrastate activities which had an effect on interstate commerce or the exercise of congressional power over interstate commerce, making regulation of the intrastate activities an appropriate means to the attainment of a legitimate end.<sup>102</sup> In accordance with the *Darby* test, Congress

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<sup>100</sup> 312 U.S. 100 (1941) (holding that the Fair Labor Standards Act of 1938 which (1) prohibited *shipment* in interstate commerce of goods made by employees under substandard conditions, and (2) prohibited the *employment* of workers under substandard conditions for the production of these goods was within the commerce power).

In the latter portion of the opinion, the Court reasoned that the criminalization of employer conduct was a reasonable means of implementing the prohibition on interstate shipments of goods made under substandard conditions. *Id.* at 121-26. This rationale is often referred to as the “superbootstrap theory,” which suggests that Congress may attack even an overwhelmingly local problem by prohibiting all interstate activity associated in any way with the local activity. GERALD GUNTHER, *CONSTITUTIONAL LAW* 134-35 (12th ed. 1991). Then, the local activity itself can be prohibited as a means of implementing the ban on interstate transactions.

Theoretically under the “superbootstrap theory,” Congress could prohibit all interstate movement of girls under age 18 *for the purpose of procuring FGM*. Then, Congress could prohibit FGM itself as a means of implementing the ban on interstate movement of these young girls.

<sup>101</sup> *Darby*, 312 U.S. at 121.

<sup>102</sup> *Id.* at 118. Moreover, *Darby* affirmed *McCulloch* in disavowing any interest in Congress’ motive. The Court declared that “[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.” *Id.* at 115.

Several Supreme Court decisions affirm Congress’ power to regulate purely intrastate activities which have an effect on interstate commerce. *See, e.g.,* *Perez v. United States*, 402 U.S. 146 (1971) (holding that a federal criminal statute regulating intrastate loan-sharking was within the commerce power because loan-sharking as a whole had an effect on intrastate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that a restaurant’s discriminatory conduct had an aggregate negative effect on interstate commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that a hotel’s discriminatory conduct dissuaded blacks from travelling in interstate commerce).

has the power to regulate the intrastate practice of FGM, as frequent traveling due to complications which develop post-surgery and movement of children from state to state after the traumatic surgery will have an obvious effect on interstate commerce. Such practical concerns for the welfare of these young girls warrant a national prohibition against FGM.

Finally, in *Hoke v. United States*,<sup>103</sup> the Supreme Court held that Congress had the power, via the Commerce Clause, to prohibit the transportation of women in interstate commerce for immoral purposes, namely prostitution. The Court defined commerce among the states as "intercourse and traffic between their citizens, and includ[ing] the transportation of persons and property . . . a person may move or be moved in interstate commerce."<sup>104</sup> Thus, the movement of persons amongst the states is considered commerce. Moreover, *Hoke* held that when Congress is concerned with issues of morality and interstate commerce, Congress may exert control over areas that the states cannot, even though the means have the quality of police regulations.<sup>105</sup>

Following the definition of commerce given in *Hoke*, the movement of young girls amongst the states to procure FGM surgery is interstate commerce. Moreover, federal regulation of FGM may be deemed a regulation of personal morality.<sup>106</sup> *Hoke*

<sup>103</sup> 227 U.S. 308 (1913) (affirming a conviction under the Mann Act for inducing a woman to go from Louisiana to Texas in interstate commerce for the purpose of prostitution).

<sup>104</sup> *Id.* at 320.

<sup>105</sup> *Id.* at 321-23. In *Hoke*, the Court argued that:

There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states. We have examples; others may be adduced. The pure food and drugs act is a conspicuous instance.

*Id.* at 321-22.

<sup>106</sup> Moral justifications advanced for the continuation of FGM are grounded in the ideals of modesty, virginity and control of the sexual desires of women

makes clear that Congress has the power to regulate interstate commerce even where Congress is largely concerned with personal or family morality and the means have the quality of police regulations. Consequently, even though Congressional regulation of FGM may be deemed a regulation of personal or family morality, *Hoke* affirms Congress' power to regulate interstate commerce even where Congress is largely motivated by moral concerns.<sup>107</sup>

If Congress allows state legislatures or individual physicians to decide if FGM will be practiced in their states, children and families will move in interstate commerce to procure the surgery in the states that choose not to criminalize FGM. Considering this resulting effect on interstate commerce, Congress has the power to enact a federal, criminal law to prohibit FGM and should exercise its power to prevent the harmful physical and emotional consequences which FGM imposes on its victims.

### *B. Freedom of Religious Exercise*

Many FGM practicing cultures advance religious beliefs as a justification for the continuation of the practice; however, neither Islam nor Christianity scripturally mandate the practice of FGM.<sup>108</sup> Given the lack of scriptural mandate for the practice of FGM, it is more appropriately characterized as a cultural tradition which the First and Fourteenth Amendments do not protect from governmental regulation. Moreover, criminalizing FGM—even if characterized as a religious belief—will pass strict scrutiny analysis because of the compelling governmental interest to protect young girls from the serious physical and emotional trauma of FGM.

A federal criminal statute prohibiting FGM will not violate the Freedom of Religious Exercise Clause found in the First

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which are highly valued in Islam. Slack, *supra* note 6, at 446-47. Congress would certainly have a moral interest in preventing the sexual and social control over women which FGM promotes.

<sup>107</sup> In enacting legislation to prohibit FGM in the United States, Congress may be motivated in part by moral concerns; however, the compelling interest of the federal government is to protect these young girls from the emotional and physical harm that results from FGM.

<sup>108</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 41-42.

Amendment.<sup>109</sup> FGM is not rooted in religious doctrines—FGM existed in the fifth century B.C., prior to either Islam or Christianity.<sup>110</sup> Islam seems to have incorporated FGM most heavily into its culture, however, FGM is never mentioned in the Koran.<sup>111</sup> Nevertheless, the religion of Islam appears to accept and support the harmful tradition “in view of its effect on attenuating the sexual desire of women and directing it to desirable moderation.”<sup>112</sup>

FGM is more appropriately characterized as tradition or custom,<sup>113</sup> both of which are not protected from state and federal regulation by the First and Fourteenth Amendments, as opposed to a religious practice which the First and Fourteenth Amendments protect from government regulation. FGM practicing societies advance custom as the most common justification for the continuation of FGM.<sup>114</sup> In many societies that practice FGM, the

<sup>109</sup> U.S. CONST. amend. I.

<sup>110</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 27.

<sup>111</sup> Slack, *supra* note 6, at 446.

<sup>112</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 41-42. The strict demands of female modesty, chastity and sexual repression imposed by the Islamic tradition contribute to the perpetuation of FGM. Many women accept Islam's dictates without question. Gifford, *supra* note 1, at 343.

<sup>113</sup> Religious justifications for FGM rest on an “insufficient doctrinal foundation, the argument ultimately misuses religion as an instrument of fear, oppression, and exploitation.” Simms, *supra* note 38, at 1952.

A religion that is authentic in the principles it represents “aims at truth, equality, justice, love and a healthy wholesome life for all people, whether men or women.” In contrast, the argument that circumcision is a religious requirement casts religion in the role of mandating mutilation, amputation, and infirmity of otherwise healthy female reproductive organs. The latter characterization is the complete antithesis of the ideals that religion should promote.

Simms, *supra* note 38, at 1952.

<sup>114</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 38; Simms, *supra* note 38, at 1949. A 1985 study conducted by the Working Group on Traditional Practices Affecting the Health of Women and Children, a body associated with the United Nations Commission on Human Rights, revealed that 54% of a sample of women who had undergone FGM stated “tradition” as the reason for the continuation of the procedure. Slack, *supra* note 6, at 448. Similarly, a 1982 study conducted by Asama El Dareer in Sudan found tradition to be the most frequently given justification for the continuation of FGM. Slack, *supra* note 6, at 448.

traditional ritual of these mutilations confers full social acceptability and integration into the community upon the females.<sup>115</sup> FGM often serves as a rite of passage into womanhood.<sup>116</sup> For many women in cultures who practice FGM, FGM enables them to identify with their heritage and to enjoy recognition as full members of their ethnic group, with just claim to its social privileges and benefits.<sup>117</sup> Thus, the practice continues throughout the world as a result of cultural tradition.<sup>118</sup> The strong cultural emphasis on FGM coupled with a lack of religious doctrinal foundation warrants characterizing FGM as a tradition or custom which the First and Fourteenth Amendments do not protect from state and federal regulation.

Nevertheless, it is difficult to draw a clear distinction as to whether FGM is a religious belief or a secular belief purely based on tradition. Many cultures genuinely believe that religion mandates FGM, although most cultures justify the continuation of the practice through tradition.<sup>119</sup> Many Muslims incorrectly believe that the Koran scripturally mandates FGM.<sup>120</sup> Similarly, in Kenya, where many tribes have converted to Christianity, many believe that young girls will be condemned to hell if they do not submit to FGM.<sup>121</sup> Only beliefs that are rooted in religion are protected by

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<sup>115</sup> Simms, *supra* note 38, at 1949.

<sup>116</sup> Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1509 (1992).

<sup>117</sup> Simms, *supra* note 38, at 1949.

<sup>118</sup> The following is an excerpt taken from an interview with an Egyptian woman regarding FGM:

It's true that God created us this way, but when we woke up to ourselves we found this custom handed down to us from our grandfathers and theirs and from those of whom we are not even aware and those we no longer know. We emerged into this world and found this habit already existed. It's just so. My people do this, and so I must do like they do.

Slack, *supra* note 6, at 449 (quoting NAYRA ATIYA, KHUL-KHAAL: FIVE EGYPTIAN WOMEN TELL THEIR STORIES 11 (1982)).

<sup>119</sup> Simms, *supra* note 38, at 1949.

<sup>120</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 42.

<sup>121</sup> LIGHTFOOT-KLEIN, *supra* note 2, at 42.

the Free Exercise Clause; purely secular views will not suffice.<sup>122</sup> Nevertheless, if FGM is characterized as a religious belief, criminalization will still pass constitutional scrutiny because of the serious physical and emotional harm that FGM inflicts upon young girls.<sup>123</sup>

The U.S. Constitution guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof."<sup>124</sup> In applying this doctrine, the Court looks at the genuineness of a belief and the religiousness of a belief in deciding whether to prohibit federal regulation under the Free Exercise Clause. The Supreme Court holds that a religious belief can be held by a single person rather than being a part of a particular religious sect,<sup>125</sup> and the Court strives to avoid considering the truth or reasonableness of a religious belief as long as that belief is genuinely held by the person.<sup>126</sup> A particular religious

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<sup>122</sup> *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989). Frazee refused a temporary retail position offered to him because the job required him to work on Sunday. *Id.* at 830. Frazee then applied for unemployment benefits with the State of Illinois claiming that there was good cause for his refusal to work on Sundays. Frazee's application was denied. *Id.* The Court held that this denial violated the Free Exercise Clause of the First Amendment. *Id.* at 835. The Court's decision rested on the fact that Frazee had a sincere belief that his religion required him to refrain from work on Sunday. *Id.* at 833. The Court noted that there may be difficulty in distinguishing between religious and secular convictions, but the religiousness of Frazee's convictions were not an issue in the case. *Id.*

<sup>123</sup> This Note prefers to characterize FGM as a secular belief purely based on tradition; however, given the Court's observation in *Frazee*, that it is often difficult to distinguish between religious and secular beliefs, this Note will proceed with an analysis of FGM as a religious practice. *See id.* at 833.

<sup>124</sup> U.S. CONST. amend. I. The Free Exercise Clause also applies to the States via the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV.

<sup>125</sup> In *Frazee*, the Court noted that membership in an organized religion that forbids members to work on Sundays would undoubtedly simplify the problem of identifying sincerely held religious beliefs, but rejected the notion that membership in a particular religious sect was required to claim protection under the Free Exercise Clause. *Frazee*, 489 U.S. at 834.

<sup>126</sup> *United States v. Ballard*, 322 U.S. 78, 86 (1944), *rev'd on other grounds*, 329 U.S. 187 (1946) (holding that the trial court should not have submitted the truth or veracity of Ballard's religious doctrines or beliefs to the trier of fact).

belief must also be central to the *individual's* religion (as opposed to being central to the individual's particular religious sect) in order to be exempt from federal or state regulation.<sup>127</sup> Although FGM is not scripturally mandated by any particular religious sect, many cultures and individuals advocate the continuation of FGM based on genuinely held religious beliefs which are central to their individual religions.<sup>128</sup> Applying the aforementioned standards, FGM may be characterized as a religious belief; therefore, a federal law prohibiting FGM must pass constitutional scrutiny under the Freedom of Religious Exercise Clause.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court held that a criminal law that merely burdens a religious practice, but is neutral and of general applicability, does not violate the Free Exercise Clause.<sup>129</sup> The Court suggests that as long as the criminal law is not motivated by a governmental desire to affect religion and is generally applicable, it is enforceable, regardless of the degree of burden it places on an individual's religious belief.<sup>130</sup> A law criminalizing FGM would not meet the first criteria of general applicability set forth in the *Smith* decision, as the law will only affect those immigrants who choose to practice FGM within the United States, rather than applying to all citizens. Furthermore, a law criminalizing FGM

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In *Ballard*, the Court stated that:

[t]he religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

*Id.* at 87.

<sup>127</sup> *Thomas v. Review Bd. Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981) (striking down a state's denial of unemployment benefits to a Jehovah's Witness who left his job because of his religious beliefs, even though evidence suggested that other Jehovah's Witnesses were willing to work the same job).

<sup>128</sup> Slack, *supra* note 6, at 457-56.

<sup>129</sup> 494 U.S. 872, 878 (1990) (holding that the Free Exercise Clause did not prohibit application of Oregon drug laws to ceremonial ingestion of peyote, and the state could deny claimants unemployment compensation for work-related misconduct based on the use of peyote).

<sup>130</sup> *Smith*, 494 U.S. at 879, 885.

would not meet the second criteria in *Smith*, because the law is specifically motivated to infringe upon and restrict what may be characterized as a religious practice. Consequently, a law specifically intending to prohibit FGM will undergo strict scrutiny.<sup>131</sup>

In the subsequent decision of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Supreme Court held that city ordinances that intentionally disfavor and punish a religious practice must undergo the most rigorous of scrutiny: they must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.<sup>132</sup> Although this decision concerned

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<sup>131</sup> Irrespective of the fact that a federal law criminalizing FGM would not meet the two-prong test of *Smith* and would consequently have to undergo strict scrutiny, the Religious Freedom Restoration Act of 1993 supersedes the *Smith* holding. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in 42 U.S.C. § 2000bb (1993)). The Act specifically finds that in *Smith*, "the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb (a)(4). Moreover, the Act's purposes are:

- (1) to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb (b)(1), (b)(2). The constitutionality of the Religious Freedom Restoration Act has not yet been challenged.

<sup>132</sup> 113 S. Ct. 2217, 2226 (1993) (holding that city ordinances which targeted animal sacrifices practiced by the Santeria religion violated the Free Exercise Clause). The Court held that since the ordinances did not meet the neutrality and general applicability requirements of *Smith*, the ordinances must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Id.* The Court found that the ordinances were not generally applicable or neutral, were enacted for the specific purpose of disfavoring the Santerian religious practice of animal sacrifices and were not narrowly tailored to satisfy a compelling governmental interest. *Id.* at 2233.

Although *Lukumi* held that the city ordinances did not pass strict scrutiny analysis, not every governmental regulation which burdens a religious belief will be struck down. For example, in *United States v. Lee*, the Court applied strict scrutiny and upheld the federal government's refusal to exempt Amish employers from paying social security taxes on wages paid. 455 U.S. 252 (1982). The Amish believe that it is sinful not to provide for their own elderly and needy, and the Amish religion prohibits acceptance of social security benefits and

city ordinances, the Court's rationale can be similarly applied to a federal criminal statute. A two-prong test is applied in this analysis. First, a federal law criminalizing FGM is justified by a compelling governmental interest in preventing physical and emotional harm to young girls. The physical and mental anguish experienced by victims of FGM is not a transitory harm, but one that reoccurs throughout their lives.<sup>133</sup> Second, such a law can be narrowly tailored<sup>134</sup> to prohibit FGM and to punish those who perform or aid in securing the performance of FGM. Thus, a federal criminal law prohibiting FGM would not violate the Free Exercise Clause, as Congress can narrowly tailor the law to advance the compelling interest of protecting female children from the harmful results of FGM.

### C. *Fundamental Right to Privacy*

A federal law criminalizing FGM performed on children<sup>135</sup> will not violate the fundamental right to privacy and will survive the strict scrutiny traditionally given to right to privacy cases.<sup>136</sup> The extreme physical and emotional harm caused by FGM warrants federal interference with the parental, familial right to privacy.

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contributions by the Amish to the social security system. *Id.* at 255.

Note that *Lee* was decided prior to *Smith* or *Lukumi*, when the compelling interest, narrowly tailored test was routinely applied to statutes which substantially burdened the free exercise of religion.

<sup>133</sup> Simms, *supra* note 39, at 1946-49.

<sup>134</sup> The statute proposed in this Note is neither overbroad nor underinclusive as it imposes criminal sanctions only on those who perform or aid in the performance of FGM. *See infra* pp. 361-69. Moreover, the proffered objective of preventing FGM on girls under the age of 18 cannot be pursued by an analogous nonreligious statute since the targeted conduct of FGM is advanced as a religious practice.

<sup>135</sup> This Note advocates criminalization of FGM performed on children in the United States. It does not argue that adult women who freely choose to follow the tradition of FGM should not have the right to do so, even if doing so compromises their own health and well-being.

<sup>136</sup> *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right to privacy is a fundamental right which warrants strict constitutional scrutiny by the judiciary).

The Fifth Amendment guarantees that no person "shall be deprived of life, liberty, or property, without due process of law."<sup>137</sup> In the substantive due process area, the Supreme Court treats most fundamental interests as falling within the broad category of the right to privacy. These rights most often relate to the areas of sex,<sup>138</sup> marriage,<sup>139</sup> child-bearing<sup>140</sup> and child rearing.<sup>141</sup> The practice of FGM concerns a family decision regarding child rearing, and as such invokes the strict scrutiny standard which courts traditionally assign to right to privacy cases.

In many of the right to privacy cases, the Supreme Court upheld parental rights to control family life and the upbringing of children.<sup>142</sup> In the first major case, *Meyer v. Nebraska*,<sup>143</sup> the Court struck down a Nebraska law which prohibited the teaching of German in public schools, and upheld the rights of parents to control their children's education. The Court, appearing to apply a mere rationality test rather than strict scrutiny, ultimately concluded that the statute was "arbitrary and without reasonable relation to any end within the competency of the State."<sup>144</sup> The Court also noted that a state has broad discretion to enact legislation which aims at improving the quality of its citizens: physically, mentally

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<sup>137</sup> U.S. CONST. amend. V. The Due Process Clause also applies to the states via the Fourteenth Amendment. U.S. CONST. amend. XIV.

<sup>138</sup> *Griswold*, 381 U.S. at 484 (holding that the Bill of Rights establishes a "penumbra" or zone of privacy which prohibits the state from interfering with the decision of married couples to use contraception).

<sup>139</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the right to marry is a fundamental right).

<sup>140</sup> *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (holding that a state cannot place an undue burden in the path of a woman seeking an abortion prior to fetal viability).

<sup>141</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the state could not prohibit the teaching of foreign languages in elementary schools).

<sup>142</sup> *See Parham v. J.R.*, 442 U.S. 584 (1979) (holding that parents have the right to make the decision whether to commit their children to mental institutions); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that the state could not prevent children from attending private or parochial schools).

<sup>143</sup> 262 U.S. 390 (1923).

<sup>144</sup> *Id.* at 403.

and morally. Nevertheless, the Court ruled that Nebraska could not justify the statute under any of these objectives.<sup>145</sup>

In subsequent cases, the Court considered the privacy interests of parenthood in combination with a claim of freedom of religious exercise.<sup>146</sup> When these interests are combined, “more than merely a reasonable relation to some purpose within the competency of the State is required to sustain the validity of the State’s requirement under the [First] Amendment.”<sup>147</sup> The right to privacy cases clearly establish that when the government acts to invade an individual’s fundamental right to privacy, the government has the burden of showing that its interference is narrowly tailored to fulfill a compelling public interest. Although most of the right to privacy cases involve state laws, the same standard applies to federal laws that interfere with the right to privacy.

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<sup>145</sup> *Id.* at 401.

<sup>146</sup> For example, in *Wisconsin v. Yoder*, the Court upheld Amish parents’ right to refuse to educate their children beyond the eighth grade. 406 U.S. 205 (1972). The plaintiffs challenged the Wisconsin law under the Free Exercise Clause and the traditional interest of parents in directing the rearing of children. *Id.* at 213-14. However, the Court held that the state’s interest in preparing children to become self-reliant and self-sufficient in society via education beyond the eighth grade was not compelling in light of the evidence adduced by the Amish that their own informal vocational education best served the interests of their children. *Id.* at 221-22. The Court asserted that general and sweeping claims regarding the public interest would not suffice. *Id.* “[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Id.* at 215.

*Yoder* suggests that courts will strongly consider the welfare of the child—the physical and mental health of the child—when evaluating a parental right to autonomy in raising children combined with a free exercise claim. *Id.* at 234. The Court noted that “[t]he record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child . . . .” *Id.*

<sup>147</sup> *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 n.1 (1990) (referring to the holdings in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

For example, in *Prince v. Massachusetts*,<sup>148</sup> the Court upheld the conviction of a Jehovah's Witness for violating a Massachusetts law prohibiting street solicitation by children. The plaintiff challenged the conviction under the Due Process Clause and the Freedom of Religion Clause.<sup>149</sup> The Court emphasized 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."<sup>150</sup> However, the Court added that neither the rights of religion nor the rights of parenthood are beyond limitation in matters affecting the child's welfare or when state action is necessary to protect the child against some clear and present danger.<sup>151</sup> The Court stated that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, 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."<sup>152</sup>

*Prince* makes clear that the parental right to autonomy in raising children, even when combined with a free exercise claim, does not allow a parent to exercise these rights without regard for the welfare of the child.<sup>153</sup> The right of parents to direct the upbringing of their children is not absolute.<sup>154</sup> When the health and safety of the child are in jeopardy, the state may intervene in the child-parent relationship.<sup>155</sup>

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<sup>148</sup> 321 U.S. 158 (1944). A Jehovah's Witness was charged with violating the child-labor laws of Massachusetts by allowing her nine-year-old niece to sell religious pamphlets on the street. *Id.* at 161-62.

<sup>149</sup> *Id.* at 164.

<sup>150</sup> *Id.* at 166.

<sup>151</sup> *Id.* at 167.

<sup>152</sup> *Id.* at 170.

<sup>153</sup> *Id.* at 166.

<sup>154</sup> *Id.*

<sup>155</sup> Disagreeing with the majority, Justice Frank Murphy suggested that the Court utilize a stricter standard of review. Justice Murphy suggested that the rights guaranteed in the First and Fourteenth Amendments are presumed to be invulnerable to legislative infringement. *Id.* at 173 (Murphy, J., dissenting). To overcome Justice Murphy's presumption, the state must provide "convincing proof that such a practice constitutes a grave and immediate danger to the state

The practice of FGM is similar to the scenario in *Prince*, as FGM is a physically and emotionally harmful action taken by parents and imposed on their young daughters without regard to the wishes of the child. Once a parent subjects a child to FGM, the physical consequences are irreversible and cannot be remedied at a later point.<sup>156</sup> FGM is a violation of a child's right to health, and in some instances, the right to life.<sup>157</sup> FGM also denies young girls of their right to sexual and corporal integrity.<sup>158</sup> Ultimately, FGM deprives adult women who were subjected to the operation as children the right to control their own body and sexuality; FGM permanently impairs and degrades women's sexual organs.<sup>159</sup>

Moreover, the compelling governmental interest to protect female children from physical mutilation overcomes the fundamental rights of parents to direct the upbringing of their children and the religious practices of their children. A less restrictive alternative to criminalizing FGM to protect female children from its harms, in contravention of parental religious beliefs, does not exist. Therefore, the free exercise of religious beliefs and parental rights to control the upbringing of their children must yield to the government's compelling interest to protect these children.

FGM also directly compromises the rights of children.<sup>160</sup> It is "unjust that the decision to have an operation performed on a baby

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or to the health, morals or welfare of the child." *Id.* at 174. Justice Murphy criticized the majority's conclusion that the activity engaged in by *Prince* was likely to adversely affect the health, morals and welfare of the child. *Id.* at 174. He argued, "[n]or can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child." *Id.* at 175.

Nevertheless, a federal law criminalizing FGM could withstand Justice Murphy's higher standard of review, as FGM constitutes a grave and immediate danger to the health, morals and welfare of these young girls.

<sup>156</sup> FGM is distinguishable from the facts of *Wisconsin v. Yoder* as the loss of education by Amish children can at least be partially remedied at a later point if the child so chooses. See William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 349 (1984).

<sup>157</sup> Slack, *supra* note 6, at 465-66.

<sup>158</sup> Slack, *supra* note 6, at 466-67; Gunning, *supra* note 62, at 233-34.

<sup>159</sup> Slack, *supra* note 6, at 466.

<sup>160</sup> Slack, *supra* note 6, at 466.

girl—one that could risk her life or health, one that will permanently change her physical characteristics and may even harm her future children—should be made without her understanding or her consent.”<sup>161</sup> It is unacceptable for these children to have no choice in a matter that concerns their own sense of health, well-being, and physical existence.<sup>162</sup>

In contrast, some advocate that:

to challenge female circumcision as a violation of the rights of the child suggests that women who permit the operation are incompetent and abusive mothers who, in some ways, do not love their children . . . it conflicts with parents’ desires to rear children independently and their notions of what is in their children’s best interest.<sup>163</sup>

This rationale posits that FGM will later give these children social and economic benefits and acceptance in their native communities.<sup>164</sup> Although parents may have the best interests of their daughters in mind when following the tradition of FGM, the physical and emotional harm done to a child when she undergoes FGM override parental interests in autonomy in rearing their children.

FGM clearly violates the child’s right to physical and sexual integrity and warrants governmental interference into the private sphere of the family.<sup>165</sup> Feminist jurisprudence advocates the abolition of the distinction between the public and private sphere in right to privacy issues.<sup>166</sup> In effect, the conventional distinction between the public and private sphere has served as a justification for noninterference with family autonomy.<sup>167</sup> However, the

<sup>161</sup> Slack, *supra* note 6, at 470.

<sup>162</sup> Slack, *supra* note 6, at 470.

<sup>163</sup> Boulware-Miller, *supra* note 26, at 166.

<sup>164</sup> Boulware-Miller, *supra* note 26, at 167.

<sup>165</sup> In *Eisenstadt v. Baird*, the Court ruled that the right of privacy is “the right of the individual . . . to be free from government intrusion,” rather than a right granted to the family as an entity. 405 U.S. 438, 453 (1972).

<sup>166</sup> See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 35-36, 194 (1989).

<sup>167</sup> Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287, 292 (1987).

principle of noninterference with family autonomy is not fully accepted, as many family relations—marriage, divorce, adoption, inheritance—are subject to legal regulation.<sup>168</sup> The emotional and physical harms inflicted on young girls by FGM also warrant interference into the private sphere of the family by the federal government.

#### *D. Defenses to Criminal Prosecution*

##### *1. Cultural Defense to Criminal Prosecution*

Congress should enact a federal law criminalizing the practice of FGM within the United States. But, if a cultural defense<sup>169</sup> to mitigate or exonerate criminal liability for practicing FGM were allowed, it would completely undermine the purpose of such a law. The law must specifically seek to eradicate this cultural tradition practiced in immigrant communities in the United States.

Many women who have undergone FGM argue that FGM must continue in order to preserve tradition, and that it is their right of cultural self-determination to carry on this tradition.<sup>170</sup> Many African and Islamic societies have deeply embedded FGM into their cultures, and it is argued that to eliminate the practice would impose outside values on these communities which may result in a disruption of their intricate and complex cultural system.<sup>171</sup> A

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<sup>168</sup> *Id.* at 293.

<sup>169</sup> “A cultural defense negates or mitigates criminal responsibility for acts that are committed under a reasonable, good faith belief in their propriety based upon the defendant’s cultural background.” Gallin, *supra* note 23, at 725.

<sup>170</sup> Slack, *supra* note 6, at 462. *See generally* Engle, *supra* note 116 (arguing that the voices of women who wish to maintain and participate in the practice of FGM in their culture should be heard).

<sup>171</sup> Slack, *supra* note 6, at 463. Western attempts to address the implications and harmful results of FGM are often met with charges of cultural imperialism and racism, “of presuming that the moral dictates of their own, dominant society are the ‘right’ ones, and that cultural practices which depart from these dictates are ‘wrong’ and should be eradicated.” Gifford, *supra* note 1, at 332. Despite these criticisms, Gifford urges Westerners not to let our well-meaning concern to avoid the labels “cultural imperialist” and “racist” coax us into accepting too willingly the practice of FGM and the justifications advanced in favor of FGM

society generally maintains a cultural tradition when the original justifications for its existence continue to validate its persistence today.<sup>172</sup> “Conversely, those practices that have neither factual, historical validity nor contemporary legitimacy in terms of societal values, and that furthermore inflict harm and injury on their adherents, must be abandoned.”<sup>173</sup> Modern societal beliefs do not support the arguments for the continuation of FGM based on religious requirements, control of female sexuality, aesthetics and cleanliness; these arguments do not validate the continued existence of an undeniably harmful tradition.<sup>174</sup> Moreover, immigrant communities within the United States should not have the right to carry on a tradition, simply for the sake of tradition, which is physically and emotionally harmful, and possibly fatal, to young girls.<sup>175</sup>

Due to the large influx of immigrants into the United States, the criminal justice system encounters defendants who commit acts of violence that are illegal here, but which the defendants’ native lands condone.<sup>176</sup> The criminal justice system often responds by allowing a cultural defense to mitigate criminal liability. For

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which do not comport with factual evidence of the physical and emotional harms which result. Gifford, *supra* note 1, at 335. We cannot be complicit in FGM under the “guise of political correctness” when faced with the atrocities of FGM. Gifford, *supra* note 1, at 336.

Moreover, this Note advocates criminalization of FGM in the United States, rather than criminalization of FGM in foreign countries. It is Congress’ privilege to impose certain values and morals on those living within the United States via legislation.

<sup>172</sup> Simms, *supra* note 38, at 1960. For example, traditional engagement and wedding ceremonies derive from custom, yet they maintain contemporary validity because of their practical utility and their reinforcement of shared values in modern society in a manner that is neither physically nor mentally injurious. Simms, *supra* note 38, at 1960.

<sup>173</sup> Simms, *supra* note 38, at 1960.

<sup>174</sup> Simms, *supra* note 38, at 1960.

<sup>175</sup> “Imposing certain values on people living in this country is our prerogative. There are a number of practices that immigrants are required to leave at home when they move here. Polygamy and slavery are two very obvious examples.” Patricia Schroeder, *Female Genital Mutilation—A Form of Child Abuse*, 331 NEW ENG. J. MED. 739, 739 (1994).

<sup>176</sup> Gallin, *supra* note 23, at 723.

example, in *People v. Moua*,<sup>177</sup> the California Superior Court reduced rape charges against a Hmong defendant after concluding that the defendant's cultural practices had mistakenly led him to believe that his victim was consenting to his sexual advances. In the defendant's culture, marriage rituals involved abducting a woman and consummating the relationship despite her protests.<sup>178</sup> The defendant successfully combined a mistake of fact defense theory with evidence regarding his cultural background, ultimately persuading the court to reduce the charges to false imprisonment.<sup>179</sup>

Similarly, in *People v. Wu*,<sup>180</sup> the California Court of Appeal held that the jury could *consider* the defendant's cultural background when determining whether the relevant state of mind existed in deciding whether the defendant was guilty of murdering her son. Upon discovering her husband's infidelity, Wu killed her young son and then attempted to kill herself.<sup>181</sup> The defendant successfully argued that at the time of the killing, she was in a highly emotional state, explained in part by the effect her cultural background had on her perception of the circumstances surrounding her son's death.<sup>182</sup> The court indicated that the defendant's

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<sup>177</sup> Gallin, *supra* note 23, at 728 (discussing *People v. Moua*, No. 315972 (Fresno Super. Ct. 1985)).

<sup>178</sup> Gallin, *supra* note 23, at 728. The defendant in *Moua* was practicing the Hmong tradition of marriage by capture which calls for the man to abduct a woman and take her to his home where the marriage is consummated. The woman is supposed to protest the man's sexual advances in a display of virtuousness, while the man is to continue his sexual advances to demonstrate that he is worthy of being her husband. Gallin, *supra* note 23, at 728. In *Moua*, the defendant abducted his intended bride from the Fresno City College Campus and had sexual intercourse with her despite her protests. The victim's complaint charged kidnapping and rape. Gallin, *supra* note 23, at 728.

<sup>179</sup> In *Moua*, the defendant argued that he did not have the requisite intent for rape because he mistakenly believed that the victim was consenting to his sexual advances. Gallin, *supra* note 23, at 728.

<sup>180</sup> 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

<sup>181</sup> Gallin, *supra* note 23, at 732. According to Asian culture, the mother was left without any alternative. Moreover, if a mother commits suicide, leaving her child behind, she is considered irresponsible. *Wu*, 286 Cal. Rptr. at 885; see Gallin, *supra* note 23, at 734.

<sup>182</sup> *Wu*, 286 Cal. Rptr. at 881.

cultural background was relevant because it could have provided the jury with a reasonable doubt as to whether the requisite mental state for murder existed.<sup>183</sup>

As evidenced in *Moua* and *Wu*, courts may consider a defendant's cultural background and practices when determining criminal culpability, even in cases of violent crimes such as rape and murder. Although a cultural defense may be appropriate in cases where generally applicable laws are involved, a cultural defense clearly is not appropriate where the law involved specifically seeks to eradicate a particular cultural practice such as FGM. It would be inappropriate to allow a jury to consider a defendant's cultural background in order to mitigate criminal liability for practicing FGM.

## 2. Religious Exemption to Criminal Prosecution

Criminal defendants prosecuted under federal legislation prohibiting FGM may attempt to circumvent criminal liability under a claim of religious exemption via the Free Exercise Clause of the First Amendment.<sup>184</sup> A claim of religious exemption appears very similar to a traditional claim of First Amendment freedom of religious exercise protection, however, religious exemptions are used as defenses, most often in criminal prosecutions.<sup>185</sup> Similar

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<sup>183</sup> *Id.* at 883.

<sup>184</sup> U.S. CONST. amend. I.

<sup>185</sup> The scope and meaning of religious exemptions was first examined by the Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878). The indictment charged the defendant with bigamy; however, the defendant claimed that it was his religious duty as a Mormon to practice bigamy. *Id.* at 145, 161. According to the defendant's trial testimony, bigamy is an accepted doctrine of the Mormon Church and a male church member who fails or refuses to practice bigamy will be punished. *Id.* at 161. The penalty for such failure or refusal is damnation in the life to come. *Id.*

"Bigamy" is the crime of having two wives or husbands at the same time. BLACK'S LAW DICTIONARY 163 (6th ed. 1990).

The Court concluded that the defendant's conduct was a violation of social duties and upheld the federal government's right to make bigamy a crime in the United States. *Reynolds*, 98 U.S. at 166. The Court specifically refused to grant the defendant a religious exemption from criminal liability, stating that "[t]o

to a cultural defense, a religious exemption should not be allowed as a defense to criminal liability for practicing FGM, as this would completely undermine the purpose of the law.

For example, in *Commonwealth of Pennsylvania v. Barnhart*, a two-year-old boy died as a result of an untreated cancerous tumor because his parents had relied on God, to the exclusion of modern medicine, to cure the child.<sup>186</sup> The boy's parents, who were members of the Faith Tabernacle Church, believed that life rested ultimately in God's hands.<sup>187</sup> The parents were subsequently charged and convicted of involuntary manslaughter.<sup>188</sup> The defendants challenged their conviction under the First Amendment Freedom of Religious Exercise Clause and the state's traditional deference to the parents' authority over the child.<sup>189</sup> The Pennsylvania court held that the parents' rights were not absolute and that criminal liability was proper where defendants failed to seek medical help to save their child's life.<sup>190</sup> The court did not allow a spiritual healing exemption (religious exemption) to criminal liability.<sup>191</sup>

In addition, many state child neglect or endangerment statutes provide a defense under spiritual healing exemptions for parents

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permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id.* at 167. The Court further asserted that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166.

<sup>186</sup> 497 A.2d 616, 619 (Pa. Super. Ct. 1985), *appeal denied*, 538 A.2d 874 (Pa. 1988), *cert. denied*, 488 U.S. 817 (1988).

<sup>187</sup> *Id.* at 621.

<sup>188</sup> *Id.* at 619-20.

<sup>189</sup> *Id.* at 622.

<sup>190</sup> *Id.* at 622, 624. "We recognize that our decision today directly penalizes appellants in the practice of their religion. We emphasize that the liability attaches not to appellants' decisions for themselves but rather to their decision effectively to forfeit their child's life." *Id.* at 624. The court relied specifically on the reasoning in *Prince v. Massachusetts*, "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children . . ." *Id.* at 625 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

<sup>191</sup> Note that Pennsylvania did not have a spiritual healing exemption statute.

who refuse to provide medical treatment for their children.<sup>192</sup> Read literally, the spiritual healing exemptions seem to provide an absolute defense to all criminal liability; however, courts disfavor absolute immunity and go to great lengths to circumvent these statutes, particularly where the child is afflicted with a life-threatening condition.

In *Walker v. Superior Court*, a four-year-old girl died as a result of treatment by prayer in lieu of medical attention for meningitis.<sup>193</sup> The girl's mother challenged her conviction of involuntary manslaughter under the Free Exercise Clause and a spiritual exemption provided in section 270 of the California Penal Code.<sup>194</sup> The court held that "the plain language, purpose, and legislative history of section 270 fail[ed] to establish a discernible legislative intent to exempt prayer treatment, as a matter of law, from the reach of the manslaughter and felony child endangerment statutes."<sup>195</sup> Moreover, the court held that the First Amendment Free Exercise Clause did not provide a defense to the defendant's criminal liability.<sup>196</sup> The court balanced the gravity of the state's

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<sup>192</sup> CAL. PENAL CODE § 270 (West 1995); FLA. STAT. ANN. § 415.503(10)(f) (West 1995); N.J. STAT. ANN. § 9:6-1.1 (West 1995); 23 PA. CONS. STAT. § 6303 (1994); VA. CODE ANN. § 16.1-228(5) (Michie 1994).

<sup>193</sup> 763 P.2d 852, 855 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

<sup>194</sup> *Id.* Section 270 of the California Penal Code enumerates certain necessities that parents must furnish their children and imposes misdemeanor liability for failure to do so. *Id.* at 856. Section 270 reads in pertinent part:

If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor . . . . If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute "other remedial care," as used in this section.

CAL. PENAL CODE § 270.

<sup>195</sup> *Walker*, 763 P.2d at 862. The court held that the spiritual healing exemption did not apply to the state's manslaughter and felony child endangerment statutes. The exemption specifically applied to section 270 which imposes misdemeanor liability on parents who fail to furnish medical attendance for their children. *Id.* at 856, 862.

<sup>196</sup> *Id.* at 871.

interest against the severity of the religious imposition and concluded that "parents have no right to free exercise of religion at the price of a child's life, regardless of the prohibitive or compulsive nature of the governmental infringement."<sup>197</sup>

The religious exemption cases, in particular the spiritual healing cases involving parents and children, provide a framework in which to analyze a federal law criminalizing FGM. In each of the aforementioned cases, the courts took note of the religious beliefs involved, but nevertheless, imposed criminal liability where the parents' religious beliefs resulted in the child's death. The courts consistently held that the overriding interest was the health and welfare of the children. Although these cases involve nonfeasance by the parents, as opposed to affirmative actions, they suggest how the courts would view the imposition of criminal liability on parents and physicians who inflict FGM on female children. Similar to the cases cited, courts will likely limit both parental rights and the right to free exercise of religion in favor of the children's physical and mental health.<sup>198</sup>

Moreover, while faith healing may not always result in endangerment to the child, FGM is an action that always endangers and harms the child and may even result in death.<sup>199</sup> The only similarity in spiritual healing and FGM is that parents impose their religious belief system onto their children because they believe it is in the child's best interest.<sup>200</sup> These children, however, are

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<sup>197</sup> *Id.* at 870. The court emphasized the gravity of the governmental interest involved in this case, stating that

[i]mposition of felony liability for endangering or killing an ill child by failing to provide medical care furthers an interest of unparalleled significance: the protection of the very lives of California's children, upon whose "healthy, well-rounded growth . . . into full maturity as citizens" our "democratic society rests, for its continuance . . ."

*Id.* at 869 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)). Moreover, the court emphasized that there was no reason to conclude that parents may insulate themselves from criminal liability so long as their life-threatening religious practice takes the form of an omission rather than an act. *Id.* at 870.

<sup>198</sup> Schroeder, *supra* note 175, at 740.

<sup>199</sup> Schroeder, *supra* note 175, at 740.

<sup>200</sup> Schroeder, *supra* note 175, at 740.

often harmed by the imposition of their parents' belief systems onto their rights to bodily integrity and to live healthy lives.

Consequently, a religious exemption to the practice of FGM should not be allowed because such an exemption would not only undermine the intended purpose of a federal law criminalizing FGM, but it would also blatantly overlook the gravity of the government's interest in protecting the health and lives of these young girls. By enacting federal legislation criminalizing FGM, Congress would send a message to immigrants within the United States who practice FGM that American society will not tolerate cultural and religious diversity to the extent that it encourages and allows violence to be propagated against young girls.

### *E. Drafting Federal Legislation Criminalizing FGM*

#### *1. Federal Prohibition of Female Genital Mutilation Act of 1995*

Representative Patricia Schroeder authored and introduced legislation in the United States House of Representatives which would make the practice of FGM a federal crime.<sup>201</sup> The relevant text of the Federal Prohibition of Female Genital Mutilation Act of 1995 is as follows:

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

(b) A surgical operation is not a violation of this section if the operation is

(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner;  
or

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<sup>201</sup> H.R. 941, *supra* note 25. The Act was also introduced in the United States Senate as S.1030, 104th Cong., 1st Sess. (1995).

(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife.

(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.

(d) Whoever knowingly denies to any person medical care or services or otherwise discriminates against any person in the provision of medical care or services, because

(1) that person has undergone female circumcision, excision, or infibulation; or

(2) that person has requested that female circumcision, excision or infibulation be performed on any person;

shall be fined under this title or imprisoned not more than one year or both.

....

... The Secretary of Health and Human Services shall . . . [i]dentify communities in the United States that practice female genital mutilation, and design and carry out outreach activities to educate individuals in the communities on the physical and psychological health effects of such practice. Such outreach activities shall be designed and implemented in collaboration with representatives of the ethnic groups practicing such mutilation and with representatives of organizations with expertise in preventing such practice.<sup>202</sup>

## 2. *Proposals for a New Bill*

Congress must pass a federal, criminal law specifically prohibiting FGM. Prosecuting FGM under existing child abuse laws

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<sup>202</sup> H.R. 941, *supra* note 25.

is not an adequate alternative to unequivocally stating that Americans will not tolerate FGM. In fact, it is not clear whether FGM would fall under existing child abuse laws in the United States.<sup>203</sup> Although the Schroeder bill makes a statement that Congress will not tolerate FGM within the United States, the bill should be modified in the following ways to be more effective.

(A) THE FEDERAL PROHIBITION OF FEMALE GENITAL MUTILATION ACT SHOULD BE MODIFIED TO CRIMINALLY PROSECUTE ANYONE WHO PERFORMS OR AIDS IN THE PERFORMANCE OF FGM ON A FEMALE UNDER EIGHTEEN YEARS OF AGE.

This modification will allow for the prosecution of doctors who perform FGM, as well as parents who subject their daughters to FGM. The issue of prosecuting doctors, nurses and midwives is straightforward as they are generally bound by professional ethics to aid in the health of their patients, rather than to harm their patients.<sup>204</sup> The long held myths that FGM enhances female fertility and feminine hygiene are no longer valid justifications for the continuation of the practice in light of modern medical facts.<sup>205</sup> To the contrary, young girls experience numerous medical problems, such as urine retention and accumulation of menstrual blood in the vagina, post-FGM.<sup>206</sup> Many difficulties in childbirth are also reported by women who have undergone FGM, such as delays in labor, obstructed labor, brain damage or death to the baby.

Several thought provoking and controversial issues surround prosecuting parents, particularly mothers, who subject their daughters to FGM. The United States constantly strives to eradicate

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<sup>203</sup> *Nightline*, *supra* note 9. For an alternative perspective which suggests that each state prosecute FGM under existing child abuse laws, see generally Kellner, *supra* note 19, at 125-32. As of the date of this writing, however, no state in the U.S. has prosecuted a FGM case under existing child abuse laws.

<sup>204</sup> The physicians' Hippocratic Oath begins with the statement, "First, do no harm." STEDMAN'S MEDICAL DICTIONARY 716-17 (25th ed. 1990). The Hippocratic Oath requires physicians to act for the benefit of the patient according to the physician's ability and judgment. *Id.*

<sup>205</sup> Simms, *supra* note 38, at 1950-51, 1953.

<sup>206</sup> Simms, *supra* note 38, at 1953.

the subordination of women in American society. The criminal prosecution of a woman for exercising her choice in how to raise her child may be viewed as the subjugation of the rights of women to the desires or control of the government. However, the physical and emotional harms inflicted on the young victims of FGM warrant governmental intervention into the parental sphere of raising a family.

One must also consider whether these mothers are involuntary victims perpetuating a harmful cultural tradition or proud agents championing a cultural tradition that allows them societal acceptance and approval. Many women advocate and embrace FGM as a celebration of womanhood which bestows economic, social and cultural benefits upon them.<sup>207</sup> However, the women who engage in and perpetuate FGM may not be fully aware of the consequences of FGM; therefore, they may be said to be "involuntary participants" in the practice.<sup>208</sup> Many of the women who engage in

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<sup>207</sup> Boulware-Miller, *supra* note 26, at 166. "Women perpetuate the oral tradition containing ancient justifications for the practice, demand it for their daughters, perform the mutilations as village 'midwives', criticize or ostracize those who resist the procedure, and ask to have their wound re sewn to pinhole size after childbirth." Gifford, *supra* note 1, at 336. Gifford questions why women are complicit in their own subjugation, but Gifford does not engage in victim blaming; instead, she suggests that mutilated women have been "possessed in being," that mutilated women have been "invade[d] and occup[ied] . . . treat[ed] . . . as territory before [they] can achieve autonomous, [s]elf-centering." Gifford, *supra* note 1, at 336-37 (quoting MARY DALY, *GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM* 232-33 (1978)).

<sup>208</sup> Slack, *supra* note 6, at 470-71.

Many of the immigrant mothers who are making these decisions about their daughters know little or nothing about their own anatomy. They are told that if the clitoris is left alone, it will grow and drag on the ground; that if their daughters are left uncircumcised, they will be wild, and will crave men; that no man from their home country will marry them uncircumcised . . . . And so these women and their husbands come to the United States filled with misinformation, and remain blindly dedicated to continuing this torturous tradition.

Burstyn, *supra* note 10, at 30.

Moreover, the continuation of the practice of female genital mutilation by mutilated mothers upon their own daughters may be viewed as following an identifiable child abuser psychological pattern. The mother, who was once

FGM or have their daughters subjected to FGM make the decision based on myths, false religious requirements and inadequate medical information.<sup>209</sup> The extreme social pressures which these women are subjected to must also be considered when evaluating whether the behavior is voluntary.<sup>210</sup> Many women fear that if they do not follow tradition and subject their daughters to the surgery, their daughters will be ostracized in their communities and stigmatized as ill fit for marriage.<sup>211</sup> Therefore, the victims of FGM are often the strongest proponents of its continuation, as they have supposedly realized the social benefits from being circumcised.<sup>212</sup>

If these mothers are in effect involuntary victims who have succumbed to a long-held cultural belief and practice, one must also consider whether it is just to prosecute mothers who choose to impose FGM on their daughters.<sup>213</sup> The dilemma is between blaming the mother for subjecting her daughter to FGM and holding the mother unaccountable for the decision due to her own embeddedness within a culture which fosters violence against young women. Adult women who have undergone FGM must become consciously aware of the pains and losses that they have

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victimized and mutilated as a child, repeats the mutilating procedure on her own child. Kellner, *supra* note 19, at 126-27.

<sup>209</sup> Slack, *supra* note 6, at 471.

<sup>210</sup> Slack, *supra* note 6, at 471.

<sup>211</sup> Slack, *supra* note 6, at 472.

<sup>212</sup> Slack, *supra* note 6, at 472.

<sup>213</sup> Kellner argues that the state has an interest in the maintenance of the family unit, and in the case of FGM, but for the genital mutilation these are "fit parents." Kellner suggests that long-term imprisonment for the mutilating parent is not the answer. Kellner, *supra* note 19, at 130. Alternatively, this Note advocates mandatory sentencing of parents and physicians who perform or aid in the performance of FGM on girls under the age of 18, as the physical and psychological well-being of these young girls is the overriding concern. Yet, this Note does not advocate permanent termination of parental rights. The expectation is that the certainty of punishment and the fact that a prosecution will have taken place under this type of legislation will deter others in the community from performing FGM. As Kellner suggests, it is unlikely that FGM will occur more than once to an individual child, but parents who escape prosecution are likely to mutilate their other female children within the family. Kellner, *supra* note 19, at 130.

experienced as a result of FGM, and must avoid reproducing those injuries in the lives of their daughters. Accepting rationalizations and explanations for the continuation of FGM will never result in the eradication of the immense harm that FGM inflicts on women of all ages.<sup>214</sup>

Finally, women over the age of eighteen should have the option to have the surgery performed on them if they so choose.<sup>215</sup> Adults can make these decisions for themselves, whereas a child has no choice if the parent chooses to subject the child to FGM. Moreover, a child will have to live with the decision made by her parent(s) for the rest of her life. Hopefully, through an educational outreach program, women over the age of eighteen will be able to make informed decisions whether to undergo the surgery, rather than decisions based on myths and false information.

(B) THE FEDERAL PROHIBITION OF FEMALE GENITAL MUTILATION ACT SHOULD BE MODIFIED TO INCLUDE MANDATORY IMPRISONMENT FOR FIVE YEARS AND TO ELIMINATE FINES FOR VIOLATORS.

Mandatory sentencing is essential, as it increases the certainty of punishment for performing or aiding in the performance of FGM. In addition, mandatory sentencing sends a strong message to immigrant communities that the United States will not tolerate FGM. Mandatory criminal prosecution of FGM will inform immigrants of the laws of their adopted country and that FGM is

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<sup>214</sup> A tension exists between portraying mothers who choose to practice FGM on their daughters as agents in the continuation of the practice or as involuntary victims embedded in a cultural tradition. The complex realities of these women's lives cannot be adequately explained by solely portraying these women as one or the other. For a general discussion of the agent versus victim dilemma, see Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992).

<sup>215</sup> Women over the age of 18 are competent to give their legal consent to FGM. Subjecting a child to FGM is an involuntary and nonconsensual surgical operation which renders the child abused in an area central to her personal dignity. Kellner, *supra* note 19, at 126.

an unacceptable practice and contrary to American public policy.<sup>216</sup>

### 3. *Importance of Education and Outreach Provision*

Education in the immigrant communities which practice FGM is essential to the success of eradicating FGM in the United States. Activities must be designed to educate communities about the harmful short- and long-term health consequences of FGM.<sup>217</sup> Moreover, if FGM is criminalized, practicing communities must be aware of the law in particular. The eradication of FGM in immigrant communities in the United States depends upon the support and commitment of those within the communities. "One of the most important aspects of any program to encourage change is that it is supported, if not initiated, on a local level."<sup>218</sup>

A law criminalizing FGM could be a powerful instrument of social and cultural transformation,<sup>219</sup> but coercion alone will not eradicate the tradition.<sup>220</sup> For example, when Sudan passed its first law prohibiting FGM largely due to pressure from the British, the people of Sudan resisted and demonstrated against the prosecution of a midwife and a mother for practicing FGM.<sup>221</sup> The law did not reflect the desire of the local people to suppress the

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<sup>216</sup> See generally Malek-Mithra Sheybani, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987).

<sup>217</sup> Rendering appropriate care to women and children who have undergone FGM, and counseling and educating FGM practicing communities, requires that these counselors and educators understand the depth of cultural meaning and justifications that the tradition of FGM carries with it. Toubia, *supra* note 3, at 712. Only by our own efforts to understand the rationales for the continuation of FGM can we engage in knowledgeable and effective discourse with immigrant communities.

<sup>218</sup> Slack, *supra* note 6, at 483.

<sup>219</sup> Simms, *supra* note 38, at 1957.

<sup>220</sup> Education in FGM practicing communities as to the health risks associated with FGM coupled with the knowledge that FGM is against the law will give immigrant children greater protection from FGM than is present today. Kellner, *supra* note 19, at 127.

<sup>221</sup> HOSKEN, *supra* note 3, at 104-05.

tradition,<sup>222</sup> nor is there any evidence that an educational campaign was launched in Sudan to abolish the practice.<sup>223</sup> In contrast, international women's organizations have had success in their efforts to educate African women about the harmful consequences of FGM, resulting in a growing opposition to the practice.<sup>224</sup> Educational campaigns in the United States should provide dissemination of health information, facts about the practice and basic sex education.<sup>225</sup> "The education process should be targeted to health professionals, social and community health care workers, and local midwives and maternity personnel, who in turn can educate the people of their communities about the dangers of the practice."<sup>226</sup>

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<sup>222</sup> Slack, *supra* note 6, at 478.

<sup>223</sup> HOSKEN, *supra* note 3, at 105; Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. J. 367, 376 (1989).

<sup>224</sup> Brennan, *supra* note 223, at 397. The cultural meanings of FGM will likely provide the gravest difficulties in eradicating the practice in immigrant communities; however, this obstacle should be easier to overcome in immigrant communities living within the United States rather than in countries which traditionally practice FGM:

In poorer societies, where the extended family is the principal source of social and economic security and has not been replaced by the modern state, women have very few options outside marriage. Female circumcision is the physical marking of the marriageability of women, because it symbolizes social control of their sexual pleasure (clitoridectomy) and their reproduction (infibulation). Cultural identity is often stronger than individual interest, and it may take some time and much new information for people to abandon traditional customs.

Toubia, *supra* note 3, at 714.

<sup>225</sup> Slack, *supra* note 6, at 484.

<sup>226</sup> Slack, *supra* note 6, at 484. In addition, Toubia suggests developing guidelines and training materials to inform health care providers how to manage the health needs of circumcised women and how to appropriately counsel patients that request circumcision for themselves or for their children. She further suggests that professional associations publish guidelines that outline their members' obligations and responsibilities to their patients. Toubia, *supra* note 3, at 716.

#### 4. *Difficulty In Prosecuting Female Genital Mutilation Cases*

If FGM is criminalized in the United States, it may be practiced with greater secrecy and in less sterile environments.<sup>227</sup> Criminalization may also inhibit women and children who are experiencing health complications due to FGM from seeking professional health care.<sup>228</sup> The most successful solution to these potential problems is to educate immigrant communities about the physical and emotional harm caused by FGM, and to put an end to many of the myths that have justified FGM for centuries. Once the support of these communities is gained in eradicating FGM in the United States, prosecution will likely be less difficult.

#### CONCLUSION

The United States must join other Westernized countries in making a statement that although immigrant cultures are welcome here, the practice of female genital mutilation on young girls is not. Congress should use the power granted to it via the Commerce Clause to enact federal legislation criminalizing female genital mutilation. Moreover, legislation prohibiting FGM will not violate the First Amendment Free Exercise of Religion Clause or the fundamental right to privacy, as the federal government has a compelling interest to protect the physical and mental health of young women.

Congress must address difficult and controversial dilemmas in enacting legislation to prohibit and prosecute the practice of FGM. Congress must contemplate whether to allow a cultural defense or religious exemption in FGM prosecutions, whether parents who choose to have FGM performed on their daughters should be prosecuted and whether a federal law will drive the practice of FGM further underground. This Note offers solutions to each of these issues, however, further discussion and investigation amongst

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<sup>227</sup> Slack, *supra* note 6, at 478; Gunning, *supra* note 62, at 229.

<sup>228</sup> Slack, *supra* note 6, at 478; Gunning, *supra* note 62, at 229.

legal scholars, politicians, lobbyists, FGM practicing cultures and others is strongly urged prior to enacting legislation.

Female genital mutilation is no longer a taboo issue in the international community; moreover, Congress can no longer ignore the evidence that the mutilation of young girls is occurring in the United States. The physical and emotional well-being of these children must prevail over any cultural or religious justification for the continuation of female genital mutilation. Congress must take affirmative steps in championing the rights of female children, and give voices to those who are not yet able to speak for themselves. Congress has the duty to establish American public policy; moreover, it is incumbent upon our legislators to protect the rights and health of young girls living in practicing communities. Simply prosecuting FGM under existing child abuse laws is inadequate. Congress must enact federal legislation which unequivocally prohibits the practice of FGM within the United States.