Justifying the Unjustifiable: Rite v. Wrong

Abbie J. Chessler

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# Justifying the Unjustifiable: Rite v. Wrong

**ABBIE J. CHESSLER†**

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The baby's screams fill the entire building! ... The end of his penis is bright red!! There is blood on the diaper!! He is crying pitifully, a high-pitched wail that I have never heard out of him before.¹

Never will I forget the sound as scissors separated the flesh between my legs from my body. It haunts me.²

¹ Rosemary Romberg, Circumcision: The Painful Dilemma xix (1985). Male circumcision is performed routinely; it is the most frequently performed elective operation.  
² Soraya Mire, A Wrongful Rite, Essence, June 1994, at 42. An estimated 85 to 114 million African women are circumcised.
It's perverse to excuse one cruelty by invoking a worse one. The genitals of both sexes should be left intact, without encouraging a "dreadfulness competition" between assaults on little girls or boys.\(^3\)

**INTRODUCTION**

Guests began arriving around 2 p.m., all bearing gifts of joy.\(^4\) The mood was celebratory as men, women, and children, from as far north as Haifa, came to witness the sacred ceremony. Eight days\(^6\) before, a Jewish boy was born and the time had finally arrived for the covenant to be formed between the infant and God; the boy was to be circumcised.\(^6\) Shortly after all the guests arrived, they were ushered into the tiny living room.

***CALL FOR GLOBAL ACTION*** 21 (1993). In 1995, seventy percent of the thirty million women in Egypt were circumcised. Sarah Gauch, *Egyptian Documentary Film Fights Female Circumcision*, PLAIN DEALER, Oct. 24, 1995, at 6E. Currently, two million young women (infants and adolescents) per year are at risk of circumcision. TOUBIA, supra, at 21; see also Robbie McClaran, *Facts About Female Circumcision*, DALLAS MORNING NEWS, May 22, 1994, at 1F. Statistically, this results in five females every minute being circumcised. Benjamin K. Lim, *Female Circumcision Remains A Curse, Workshop Says*, REUTERS LTD., (Aug. 31, 1995). However, there is a lack of definitive data as a result of the difficult nature of gathering such statistics, especially when the procedure is illegal in several countries. TOUBIA, supra, at 22. Female circumcision is currently practiced in twenty-six African countries, a few communities in Asia, and by African immigrants to the Americas, Australia, and Europe. Id. at 21. The procedure is practiced by Muslims, Christians, some animists, and by Ethiopian Jews. Id.; see infra notes 197-220 and accompanying text. Although practiced by these religions, it is not a religious requirement. *Day One: Scarred for Life* (ABC television broadcast, Sept. 20, 1993); see also TOUBIA, supra, at 21. The distribution of the practice demonstrates a strong correlation between similar cultures and countries where performed. Id.

3. NOHARMM COMPARISON, supra note 1.

4. The following is a first-hand account of a circumcision I attended in 1990 at Kibbutz Sde Boqer in the Negev Desert of Israel.

5. Jewish law requires male children to be circumcised on the eighth day following birth. This requirement is traced to the Old Testament. Bereshit/Genesis 17:12 reads: "And he that is eight days old shall be circumcised among you, every manchild in your generations;" and Vayyiqra/Leviticus 12:2-3 reads: "If a woman have conceived seed, and born a manchild . . . [a]nd on the eighth day the flesh of his foreskin shall be circumcised." Bereshit/Genesis 17:12, Vayyiqra/Leviticus 12:2-3. All biblical references throughout this comment are to the Jerusalem Bible.

6. Judaism refers to circumcision as Brit Milah or Bris. Brit means "covenant" and milah means "circumcision." The Jewish religion traces the sacred ritual of circumcision to Bereshit/Genesis 17:9-12:

And God said to Avraham, Thou shalt keep my covenant therefore, thou, and thy seed after thee in their generations. This is my covenant, which you shall keep, between me and you and thy seed after thee; Every manchild among you shall be circumcised. And you shall circumcise the flesh of your foreskin; and it shall be a token of the covenant between me and you.

Bereshit/Genesis 17:9-12.
The room, hot from the Israeli sun, was filled with chatter and excitement.

As the mohel entered, silence spread across the house. The Sandak held the child while the mohel evoked an erection from his tiny penis and then placed it in pincers. The pincers kept the foreskin separate from the rest of the penis. A short prayer was recited and then the mohel cut the foreskin with the stroke of a small knife. A piercing scream echoed throughout the house and into the bright, beautiful summer day. No anesthesia was used to numb the pain as the baby was cut. His penis began to bleed profusely as he wailed helplessly. The mother too cried while the guests, incongruously, shouted and clapped their hands in celebration.

At the same time this newborn boy entered into his covenant with God, a little girl in Africa was undergoing her ritual circumcision:

The little girl, entirely nude, is immobilized in the sitting position on a low stool by at least three women. One of them with her arms tightly around the little girl's chest; two others hold the child's thighs apart by force, in order to open wide the vulva... The traditional operator says a short prayer... Then she spreads on the floor some offerings to Allah... Then the old woman takes her razor and excises the clitoris. The in-

7. A mohel is an observant Jew trained specifically to perform circumcisions. However, a mohel is not medically trained and therefore, much controversy surrounds his qualifications for performing the procedure. ROMBERG, supra note 1, at 51.

8. Sandak is the Hebrew word for "Godfather" or the one who holds the baby at a circumcision. See NEW BANTAM-MEGIDDO HEBREW & ENGLISH DICTIONARY 165 (6th ed. 1988-89). The grandfather held the child at this particular ritual.

9. Frequently female circumcision is referred to as female genital mutilation (FGM). For purposes of this comparative analysis, this comment will use the term circumcision, a choice not loosely decided upon. Contrary to prevailing opinion, the word circumcision is not a misnomer. Although many disagree with this choice of language because the male equivalent of female circumcision is often viewed as nonmutilating, an analogy can be, and should be, made between the two acts. The use of the term circumcision draws a parallel between the male and female acts and their cultural and religious justifications. There is extensive literature on female circumcision which criticizes the use of the term circumcision because it is viewed as either "nonmutilating" or the removal of the foreskin should be considered insignificant in light of female circumcision. However, there should be no right to take a child, male or female, against his or her will and remove a body part that is perfectly healthy; this is clearly a double standard. To deny one, and overlook the obvious analogy, is to deny human rights. For differing opinions on terminology, see Robbie D. Steele, Silencing the Deadly Ritual: Efforts to End Female Genital Mutilation, 9 GEO. IMMIGR. L.J. 105, 116-18 (1995); Robyn Cerny Smith, Female Circumcision: Bringing Women's Perspectives into the International Debate, 65 S.CAL. L. REV. 2449, 2449 n.7 (1992); Hope Lewis, Between IRUA and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide, 8 HARV. HUM. RTS. J. 1 (1995).
The little girl howls and wriths in pain... The operator wipes the blood from the wound, and the mother as well as the guests, "verify" her work...¹⁰

She, like the infant boy, just took part in her rite of passage.¹¹ Both youngsters were now initiated into adult society and considered full members of their religious and cultural order. These rites of passage serve "as the chief vehicle to link generations in the transmission of the culture complex[.]"¹² Acceptance took two barbaric acts of blood, fear, and agonizing pain. Although both had achieved their rite of passage through similar pain and anguish, a difference exists in the perception of human rights activists and the Western legal world regarding these procedures.

While concerns about female circumcision are at the forefront of human rights law, male circumcision, amazingly, continues to be virtually ignored. Although many activists and writers throughout the world condemn female circumcision, they fail to acknowledge the similarity between male and female circumcision, and to consequently reconsider the role of routine male circumcision in Western society. This hypocritical condemnation of one form of circumcision, merely because the act is considered "more" extreme, demonstrates a basic denial and ignorance of human rights law. There appears to be a "hypersensitivity" to female human rights at the expense of male human rights; this double standard, which accepts and condones male circumcision but condemns female circumcision, makes the concept of human rights meaningless.

This comment examines the similarities and differences between female and male circumcision, arguing that the global community adamantly opposes female circumcision, while neglecting to similarly construe male circumcision. Part I explains the types, history, and procedures of male and female circumcision and the resulting physical and psychological complica-

¹⁰. HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA 53 (1989) [hereinafter PRISONERS].
¹². BRUNO BETTELHEIM, SYMBOLIC WOUNDS 69 (1954) (quoting N. Miller, Initiation, ENCYCLOPEDIA OF THE SOCIAL SCIENCES (1932)). As one author states:

It's a festive, beautiful and intimate family ceremony where—bagels and cream cheese close by—the infant boy loses a foreskin and gains his official religious name. This may strike some people as a tough trade, but thus it has been among Jews for thousands of years.

tions. Part II examines the various cultural and religious justifications for the acts, as well as the medical justifications for male circumcision. Part III discusses the legal remedies for the eradication of female circumcision and how these legal arguments, as well as other remedies, should be applied to male circumcision. In Part IV and the conclusion, this comment suggests several recommendations for the eradication of male circumcision and the importance of officially recognizing male circumcision as a human rights abuse.

I. TYPES OF MALE AND FEMALE CIRCUMCISION AND THE PHYSICAL AND PSYCHOLOGICAL COMPLICATIONS

Male and female circumcisions are performed differently. Rarely, however, does either involve the use of anesthesia. Instead, the victim suffers tremendous pain from the invasive and inhuman act of pulling and slashing off his or her genitalia. The resulting complications differ between the two procedures, but both male and female circumcision have drastic physical and psychological consequences.

A. Female Circumcision (Infibulation, Clitoridectomy, Sunna): The History, Procedures, and Complications

Female circumcision is a practice dating back to antiquity. Several ancient cultures, including the Phoenicians, Hittites, and ancient Egyptians, practiced the act. Female circumcision was, and still is for some groups, a symbol of distinction, enslavement and even subjugation. Originating in Egypt, the practice of female circumcision migrated from the Red Sea

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13. Lightfoot-Klein writes:
Excision practices can be assumed to date back thousands of years, conceivably to the early beginnings of mankind. Quite conceivably also, circumcisions at some early point in human history replaced human sacrifices as a way of placating hostile forces and spirits. At what period these practices came into conjunction with the obsessive preoccupation with virginity and chastity that today still characterizes Islamic-Arabic cultures is not known, but infibulation clearly appears to be a result of that meeting.

PRISONERS, supra note 10, at 27; see also Steele, supra note 9, at 113-15.

14. TOUBIA, supra note 2, at 21. In the fifth century B.C., Herodotus reported on female circumcision and thought its origin was Ethiopian or Egyptian. The custom is further reported in a Greek papyrus dated 163 B.C. and by a Greek geographer in 25 B.C.; both implied that the procedure was a premarital rite for women of a high caste. PRISONERS, supra note 10, at 27.

15. Id. at 27-28.
coastal tribes to Arab traders and then to eastern Sudan. There are several traditional practices and techniques of female circumcision. Generally female circumcision entails the incision and removal of all or part of a woman’s external genitalia. Female circumcision may be “minor” in form, a painful prick of the clitoris, or “major” in form, the cutting and removal of all genitalia. The act is frequently performed on infants, although it is most commonly performed on girls four to six years old, depending upon a community’s cultural norm. Other groups may wait until a girl reaches adolescence, or marrying age to perform the circumcision.

Female circumcision can take three forms: infibulation, clitoridectomy and sunna. Infibulation is considered the most...
severe form of female circumcision while *sunna* is generally viewed as the least severe form of excision.\(^2\) The operations have usually been performed by traditional birth attendants and, in more recent years, by traditional surgeons and trained midwives.\(^2\) The practitioners' medical training, however, varies by community and region.\(^2\) Procedures are performed with a variety of available instruments,\(^2\) although most surgical implements are crude and unsanitary.\(^3\)

Regardless of the patient's age, the method used, or the type of practitioner, female circumcision results in physical and psychological complications.\(^1\) The procedures have both immediate and long-term effects. Common short-term complications\(^3\) include bleeding,\(^3\) infection,\(^4\) pain,\(^5\) urine retention,\(^1\) and stress wherein one or more parts of the female external genitalia are removed. In this procedure, the clitoris is either partially or fully removed or the clitoris and the inner lips, labia minora, of the vagina are removed. The labia majora is left entirely intact and the vulva is unsutured. Eighty-five percent of women who are circumcised undergo clitoridectomies. \(^4\) **TOUBIA**, *supra* note 2, at 10.

25. *Sunna* is the least severe and rarest of the three practices. "*Sunna* [tradition] refers to any practice regularly required of Muslims. Many religious scholars contend that belief that female circumcision is required of Muslims is a serious misunderstanding in the interpretation of Islam, and has contributed to the spread of the practice." See **TOUBIA**, *supra* note 2, at 10 n.1; **Funder**, *supra* note 22, at 434; *see also infra* notes 198-214 and accompanying text. This procedure involves the removal of the clitoral tip and/or prepuce. The reason this is so rarely performed is due to practitioners' lack of anatomical knowledge, crude tools, and environmental conditions. **HOSKEN, supra** note 22, at 33.

26. **HOSKEN, supra note** 22, at 33. In countries like Sudan, Somalia, and Djibouti, eighty to ninety percent of female circumcision is infibulation. It is also practiced, albeit to a lesser extent, in parts of Mali, Ethiopia, Eritrea, Gambia, and Egypt. **TOUBIA, supra** note 2, at 11.

27. **SISTERS, supra** note 22, at 20-21; *see also TOUBIA, supra* note 2, at 29; **WOMAN, supra** note 23, 14-21.

28. **TOUBIA, supra** note 2, at 29.

29. **WOMAN, supra** note 23, at 6-8; **HOSKEN, supra** note 22, at 33.

30. In Sudan, for example, the main instrument used is a knife, followed by razors and then scissors. Generally, the knife is cleaned by only an old rag and is rarely, if ever, sterilized. The instruments are often rusty or have been used in succession. Occasionally, sharp, dirty stones are used to cut the genitalia. After the operation, the incision may be cleaned and treated with kerosene, engine oil, palm oil, vaseline, or soap. **Culture, supra** note 18, at 1947.


32. *See TOUBIA, supra note 2, at 13-14; LEWIS, supra note 9, at 12; KOSO-THOMAS, supra note 31, at 25-28.*

33. The clitoral artery which is cut in the process has a strong flow of blood and may lead to hemorrhaging. The bleeding may also lead to anemia and if unstopped, death. **TOUBIA, supra** note 2, at 13.
and shock, damage to the urethra or anus, and keloid scarring. Long-term complications, which generally occur as a result of infibulation, include repeated urinary tract infections, urethra and bladder stones, keloid scarring and dermoid cysts. Infibulated women are also often cut and restitched several times throughout their lives, resulting in additional physical complications and health risks. Besides these physical effects, women experience both sexual and psychological effects from circumcision. Some of the psychological complications include anxiety, melancholy, and depression, as well as frigidity and insatiability. Often, however, psychological complications may not appear until years after the precipitating event.

34. Infection is very likely to occur due to unsanitary conditions—if the girl cannot move she lays in her own urine and fecal matter. Infections such as pus, ulcerating wounds and the toxic infection, septicaemia, are the most common. Due to unsterilized instruments, tetanus may also occur. Id.

35. Anesthesia is rarely if ever used, and due to the sensitive nature of the vaginal area, pain is extreme. Id. at 14.

36. As a result of the pain and swelling, urine passage is extremely difficult in the days following the procedure and can lead to infection. Id.

37. There are documented instances of children who entered a state of shock due to the immense pain and swelling and ultimately died. Id.

38. These complications, which can lead to long-term problems, may be the result of a practitioner's inexperience or the result of the child moving during the procedure. Id.

39. Koso-Thomas, supra note 31, at 26. Keloid scarring is "[a] sharply elevated, irregularly shaped, progressively enlarging inelastic scar due to excessive collagen formation in the skin during connective tissue repair; or, an overgrowth of scar tissue, which produces a contraction deformity." Id. at xiii.

40. Other long-term complications are pelvic infection, infertility, painful intercourse, and prolonged labor during childbirth. Id.

41. Id.

42. Prisoners, supra note 10, at 98-102; see also Toubia, supra note 2, at 15; Culture, supra note 18, at 1945.

Recircumcision or refibulation is performed on women who have given birth, are widowed, or divorced, to simulate a virginal vagina. It is called adla (tightening) and it is mostly performed on those women who have had a previous pharaonic or intermediate circumcision. The edges of the scar are pared and sewn together.

Prisoners, supra note 10, at 35.

43. Koso-Thomas, supra note 31, at 37-42; see also Sisters, supra note 22, at 24-26. However, "[t]he assumption that all circumcised women have sexual problems or are unable to achieve orgasm has no scientific evidence to substantiate it." Nahid Toubia, Female Genital Mutilation and the Responsibility of Reproductive Health Professionals, 46 Int'l J. of Gynecology & Obstetrics 127, 131 (1994).

44. Toubia, supra note 2, at 17-19; Sisters, supra note 22, at 27-28.

45. Complications range from trauma to psychoses. Sisters, supra note 22, at 27. See also Funder, supra note 22, at 435-36.

46. Toubia, supra note 2, at 19.
B. Routine Infant Male Circumcision: The History, Procedures, and Complications

The Hebrew patriarch Abraham’s covenant with God is said to be the first written account of male circumcision. The Old Testament’s account, however, is preceded by pictorial narratives on ancient Egyptian tombs and temples. Even six thousand year old Egyptian mummies show evidence of circumcision. Some historians speculate that the practice dates back 5,000 years to native tribes of the African west coast, while others postulate that the practice evolved in the Stone Age. Like female circumcision, however, there is no precise date as to when the procedure of cutting the foreskin actually began.

There are four types of male circumcision: (1) simple circumcision or routine infant circumcision which is the removal of the foreskin or prepuce; (2) subincision which is simple circumcision followed by a slitting of the penis to expose the glans; (3) salkh which entails the skin being flayed from just below the navel to the upper thigh; and (4) superincision “which involves longitudinally cutting the preputium from the upper surface and extending the cut to the pubic region.” Simple circumcision (routine infant circumcision) as practiced in most parts of the world differs from certain types of female circumcision in

47. ROMBERG, supra note 1, at 1. The event is said to have occurred in approximately 1713 B.C. Id.; see supra note 6 and accompanying text.
48. The dating of these artifacts has been estimated anywhere from 2400 to 2600 B.C., 3503 to 3335 B.C., and 1300 to 1280 B.C. ROMBERG, supra note 1, at 1.
49. Id.
50. Id.
51. See generally WALLERSTEIN, supra note 1, at 8-9 (providing an extensive historical analysis).
52. WALLERSTEIN, supra note 1, at 7; see also William E. Brigman, Circumcision as Child Abuse: The Legal and Constitutional Issues, 23 J. Fam. L. 337, 338 (1984). The word circumcision is used throughout this comment to refer to simple (routine infant) circumcision.
53. WALLERSTEIN, supra note 1, at 7. The application of the term circumcision to this procedure stems from its use in anthropological studies. In subincision, the wound remains open through adulthood. These procedures are usually performed by Australian aborigines or Bedouin communities. Id. The Aranda of Central Australia refer to the subincised penis with the same name as the female vulva. “Subincision was designed to cause the male organ to resemble the vulva, and [the] effusion of blood was regarded as serving the same function as menstruation, which in the female enabled her naturally to dispose of the evil humors that accumulate in the body.” Ashley Montagu, Mutilated Humanity, 55 HUMANIST 12, July 1, 1995.
54. WALLERSTEIN, supra note 1, at 7.
55. Brigman, supra note 52, at 338. Superincision is performed in Polynesia. Id.
56. Id.
that it does not involve the removal of all genitalia.  

The penis, like a woman's genitalia, is formed at birth without the need for alteration or "improvement." The male and female external genitalia are developed from "identical embryological structures," consisting of "similar cell and nerve tissues." An uncircumcised penis consists of the shaft, the glans or rounded head at the end, the sulcus, the meatus, and the foreskin. Male circumcision is the removal of the entire foreskin, which consists of two layers of tissue covering the more delicate glans. The traditional method of removal can be performed in a number of ways. The two most common procedures are direct surgery and the squeezing technique.

In both procedures, presurgery preparation involves restraining the infant and sterilizing the genitals. In most cases, no anesthesia is used. The foreskin must be separated from the glans before the procedure; sometimes this is done forcibly. In direct surgery, the foreskin is held in a clamp away from the glans while

one blade of a scissor (or a scalpel) is inserted between the foreskin and glans and the foreskin is first cut along its full length . . . . The incision is spread apart to expose the glans. Then, using a scalpel or scissors, the foreskin is completely cut off close to the groove.

If there is any bleeding, it is controlled by applying pressure to the area. This procedure takes only about five minutes and is most often used for adolescent and adult circumcisions.

The two methods used in the squeezing technique are the Gomco clamp and the plastic bell. Both procedures involve

57. WALLERSTEIN, supra note 1, at 7. Simple circumcision or routine infant circumcision is most analogous to the sunna circumcision performed on women.
58. Id. at 210.
59. The shaft refers to the length of the organ. WALLERSTEIN, supra note 1, at 198.
60. The sulcus separates the glans from the shaft. Id.
61. The meatus is the opening at the tip of the penis. Id.
62. The foreskin is also referred to as prepuce. "[It] can be visualized as cone-shaped with the base of the cone encircling the penile shaft, close to the groove." Id.
63. ROMBERG, supra note 1, at 1.
64. WALLERSTEIN, supra note 1, at 205.
65. There are variations within these two major categories. Id. at 207.
66. Id. at 205.
67. See infra notes 107-117 and accompanying text.
68. WALLERSTEIN, supra note 1, at 205.
69. Id.
70. Id.
71. Id.
72. The Gomco method begins with cutting the foreskin to expose the glans and
the literal squeezing of the foreskin for its removal. The Gomco clamp procedure usually lasts about ten minutes, while the plastic bell technique takes five to ten days. The method chosen generally depends on the physician; all procedures are considered “satisfactory,” but each has its complications.

In Judaism, neither of these two procedures is used; the act is ceremonial, generally practiced outside of the hospital. In a ritual circumcision, there are three phases: “meelah (the surgical removal of the foreskin), periah (the tearing of the genital membrane underneath the foreskin, back to the corona), and metzitzah (suction).” Blood must be drawn in every circumcision and therefore the third phase is “usually of distinctive interest.” Originally, the mohel sucked the blood himself from the infant’s penis; however, alternative procedures were devised in response to the transmission of diseases in the latter part of the nineteenth century and the early part of the twentieth century. More sanitary methods for suctioning now involve using a cotton swab or a small glass tube to draw out the blood. After the suctioning of blood, a sterile dressing is applied to the penis and the newborn is wrapped in a diaper.

Some of the complications of male circumcision are meatal ulceration, hemorrhaging, infection, retention of the plastic placing a cap over the glans. The cap is then covered by the stretched foreskin which is tied to the cap handle.

The hole in the base plate is placed over the cap handle, and the flange on the handle is fitted into a groove in the screw device. The foreskin is now firmly held between the metal cap and the rim of the hole in the metal plate. By turning the screw device, the handle and cap are raised, squeezing the foreskin tightly against the plate opening. While the clamp is squeezing the base of the foreskin, the bulk of the foreskin is cut off. The clamp remains in place for at least 5 minutes, and when it is released, the base of the foreskin usually can be easily separated from the penile shaft.

WALLERSTEIN, supra note 1, at 207.

73. The device used in this procedure is called the Plastibell. This has a urine opening and deep groove and is made of plastic. In this procedure, the squeezing is done by a string, but the method is virtually identical to the Gomco clamp. Id.
74. Id.
75. Id.
76. Id. at 210.
77. See author’s first-hand account, supra notes 4-8 and accompanying text.
79. Id.
80. Id.
81. Id.
82. Id.
83. ROMBERG, supra note 1, at 200-03.
84. There is an estimated eight percent to thirty-one percent chance of hemorrhage
bell ring, concealed penis, urethral fistula, urinary retention, glans necrosis, injury and loss of glans, excessive skin loss, skin bridge, and preputial cysts. Meat al ulceration oc-
dvelopment, but this statistic is probably depressed due to under reporting. Approximately two percent of all circumcisions result in excessive bleeding which can lead to death. \textit{Id.} at 208-08.

85. Infection is common, and since the circumcised penis has contact with wet and dirty diapers, there is an increased danger of infection. The common symptoms are fever, pus, redness, and swelling. \textit{Id.} at 208-10.

86. \textit{Id.} at 210-11.

87. At times following circumcision, the penile shaft will retreat into the skin surrounding the area and cannot be seen at all. In order to produce a “normal” penis, surgery and skin grafting must occur. \textit{Id.} at 211-14.


89. Occasionally infants will not urinate for several hours following the procedure. \textit{Id.} at 217-18.

90. Necrosis, the death of body tissue, may occur on the glans as a result of a tight bandage or from the wrong size plastibell ring. \textit{Id.} at 218.

91. Permanent deformity results when a glan is injured or cut off entirely during the procedure. ROMBERG, \textit{supra} note 1, at 219. One of the most notable circumcision mishaps was addressed in a landmark case “in the annals of sex research.” Dick Thompson, \textit{A Boy Without a Penis: The Experts Had it All Wrong, Says the Beleaguered Survivor of a Landmark 1960s Sex-Change Operation}, \textit{Time}, Mar. 24, 1997, at 83. In 1963, an infant twin boy's penis was “damaged beyond repair by a circumcision that went awry.” \textit{Id.} As a result, doctors castrated the infant and constructed a “kind of vagina” with the remaining tissue. \textit{Id}. Although this is a rare case, it is one too many, especially when there is no justification for the practice. There are many other cases that illustrate the physical complication of male circumcision. See, e.g., Felice v. Valleylab, 520 So.2d 920 (La. Ct. App. 1987) (child's penis was burned off by electrosurgical unit during circumcision); Wilson v. Lockwood, 711 S.W.2d 545 (Mo. Ct. App. 1986) (damages sought against physician, hospital, and manufacturer of the circumcision device for the injuries child suffered—the device which was supposed to fall off in eight days did not and instead had to be surgically removed); Valentine v. Kaiser Foundation, 194 Cal. App. 2d 282 (1st Dist. 1961) (infant lost tip of his penis as a result of a circumcision through the negligent use of Gomco clamp); In Australia, a 21 year-old was awarded $195,000 for the loss of one-third of his penis after a botched circumcision following his birth. \textit{Man Who Lost Part of Penis Can Keep Damages Award}, \textit{REUTERS}, May 14, 1987.

92. ROMBERG, \textit{supra} note 1, at 219-20; see, e.g., Circumcision Suit Settled for $1.2 M, \textit{THE RECORD} (Northern New Jersey), Nov. 30, 1995, at A4. A recent study by the Department of Pathology at the University of Manitoba looked at the amount of tissue missing from an adult circumcised penis. The study focused on the inner surface of the foreskin (mucosa) and its loss to circumcision. The results showed that “[s]kin and mucosa sufficient to cover the penile shaft was frequently missing from the circumcised penis.” The study concluded that “[t]he amount of tissue loss estimated . . . is more than most parents envisage from pre-operative counseling. Circumcision also ablates junctional mucosa that appears to be an important component of the overall sensory mechanism of the human penis.” J.R. Taylor et al., \textit{The prepuce: specialized mucosa of the penis and its loss to circumcision}, 77 \textit{BRIT J. UROLOGY} 291 (Feb. 1996). This lining of the foreskin also has specific function during masturbation or sexual relations. It provides nontraumatic sexual stimulation by its ability to roll back and forth. \textit{HUMAN SEXUALITY: AN ENCYCLOPEDIA} 120 (Vern L. Bullough & Bonnie Bullough eds., 1994).
curs as a result of ammonia from urine burning an infant's exposed glans. An ulcer, covered by a crust, can be anywhere from 2 millimeters in depth to more than 5 millimeters wide. When a plastic bell ring is used to remove the foreskin, the foreskin should dry and fall off with the ring. Retention of the plastic ring is a result of the failure of the ring to fall off, becoming buried under the skin. This is extremely painful and the cosmetic results are horrific. Moreover, as a result of circumcision, a fistula, an abnormal opening of the body, may occur on the underside of the penis from "accidental crushing of the urethra by the circumcision clamp, an abnormality in the urethra, or from a stitch placed in the underside of the penis to control excessive bleeding at the site of the frenulum." In addition, when too much skin is removed during circumcision, the result is devastating since the newborn's penis is very tiny and its future growth is indeterminable.

Most complications that accompany male circumcision occur infrequently. The risks, however, are relatively great given that the procedures are considered easy to perform. There is a ninety to ninety-five percent chance that a circumcision will heal rapidly with little bleeding or infection. Although most complications that occur are easy to resolve, many result in extreme and disastrous consequences such as pain, trauma, psychological ill effects, lifelong mutilation, and death. 

93. This occurs as a complication to healing "by which a piece of skin from the shaft of the penis has become attached to the glans, or another point along the shaft, forming a "bridge" that must be surgically corrected." Romberg, supra note 1, at 221-22.
94. A cyst, "an abnormal, closed pocket of body tissue which contains fluid or solid material," may form where the skin was cut and require surgery for removal. Id. at 223; see also Johnson v. Hammond, 589 N.E.2d 65 (Ohio 1990) (Gomco circumcision clamp slipped when removed causing bleeding, a subsequent infection, and a cyst).
95. Romberg, supra note 1, at 200-03.
96. Id.
97. Id. at 207-09; see, e.g., Olson v. Bellina, 544 So.2d 449 (La. Ct. App. 1989) (damages sought when plastibell device did not fall off in four to five days, but eighteen days later, resulting in a slight blemish).
98. Romberg, supra note 1, at 210-11.
99. Id.
100. Id. at 214-15.
101. Id. at 219-20; see, e.g., Jorge Fitz-Gibbon & Jane Furse, Botched Bris Costs 1.2M, Daily News, Nov. 29, 1995, at 22.
102. Romberg, supra note 1, at 198.
103. Id.
104. See Fitz-Gibbon & Furse, supra note 101, at 22.
105. Romberg, supra note 1, at 198.
When viewed in terms of percentages—the fact that some of these complications occur in one out of several hundred or thousand infant circumcisions—the risks seem insignificant. But when viewed in terms of individuals and families involved in these tragic events—particularly when the operation is unnecessary—the risks seem quite significant.\textsuperscript{106}

Besides the physical complications, male circumcision, most often performed with no anesthesia, results in pain and psychological trauma. The theory that the procedure results in pain was questioned in the past, but there is no longer any doubt that newborns suffer great pain and physiological stress.\textsuperscript{107} Many physicians support the use of local anesthesia because "[i]f neonatal circumcisions are . . . performed, they should be done as humanely as possible."\textsuperscript{108} Dr. Greg Miller, a neonatolo-

\textsuperscript{106} Id. at 198-99.
Circumcision surgery has a complication rate of 1 in 500 and a reported death rate of 1 in 500,000. The potential for surgical complications to be tragic and irreparable is high. The infliction of such a high surgical risk for non-therapeutic reasons is unethical since the individual who must live with the consequences of this non-therapeutic amputative surgery has not consented to its performance.


\textsuperscript{108} Snellman \& Stang, supra note 107, at 705-08. The most commonly used form of anesthesia for circumcision are EMLA cream and the dorsal penile nerve block. Marilyn Marchone, \textit{Circumcision: Ancient Rite, New Debate}, \textit{Milwaukee J. Sentinel}, Apr. 7, 1997, at 1. EMLA cream “contains a [five percent] mixture of the numbing medications lidocaine and prilocaine.” \textit{Id.} The dorsal penile nerve block is “an injection of lidocaine at the base of the penis.” \textit{Id.} Dorsal penile nerve block (DPNB) is a local anesthesia that may reduce the physiologic response, but there are inherent risks and concerns about its safety that have been expressed by the American Academy of Pediatrics. The procedure has not been widely adopted. Snellman \& Stang, supra note 107, at 705-08. "Perhaps the most significant function of the dorsal nerve block is that it alleviates the consciences of the adults involved." Romberg, supra note 1, at 389. \textit{See also} Nancy Wellington, M.D. \\& Michael J. Rieder, M.D., \textit{Attitudes and Practices Regarding Analgesia for Newborn Circumcision}, 92 \textit{Pediatrics} 541, 541-43 (1993); C. Anthony Ryan and Neil N. Finer, \textit{Changing Attitudes and Practices Regarding Local Analgesia for Newborn Circumcision}, 94 \textit{Pediatrics} 230, 230-233 (1994); Kathleen B. Weatherstone et al., \textit{Safety and Efficacy of a Topical Anesthetic for Neonatal Circumcision}, 92 \textit{Pediatrics} 710, 710-714 (1993).

Although the [EMLA] cream certainly is better from the patient’s point of view, many doctors . . . do the nerve blocks mostly because the procedure is more convenient for them. The cream must be applied half an hour to an hour ahead, but doctor’s don’t usually schedule circumcisions; they work them in
gist teaches residents from the Medical College of Wisconsin about circumcision anesthesia. Dr. Miller says that excuses for not using anesthesia "‘drive[] me up the wall. You wouldn’t do that to an adult. You wouldn’t do it to an animal,’ he said of performing the procedure without pain relief.”109 He further adds that “it doesn’t take a medical study to prove that experiencing intense pain, even briefly, is something you never forget. And it’s certainly something you’d rather avoid.”110

A recent study conducted by Canadian researchers further supports the use of anesthesia to reduce the pain of circumcision.111 The study, published in the New England Journal of Medicine, concludes that newborns who had “an anti-pain cream applied to [their] penises . . . before their foreskins were sliced off . . . cried less and half as often as a comparable group of babies that weren’t given an analgesic.”112 The newborns with the analgesic “also closed their eyes, furrowed their brows and pursed their lips less. And their heart rates didn’t jump nearly as high.”113 Circumcision “is still all too often barbaric,” wrote Dr. Thomas E. Wiswell of Thomas Jefferson University in an editorial accompanying the study.114 Wiswell added that painkillers should always be given, and “parents and physicians should demand no less.”115

These statements and study obviously suggest the nature of circumcision is inhumane. A newborn’s reaction is illustrative of the immense pain and trauma suffered.116

That newborn circumcision is a psychologically traumatic experience is obvious. The infant, after living in the protected uterine environment for [nine] months, goes through the birth trauma and usually is almost immediately separated from the mother. . . . After [two] or [three] days of

around other duties.

Marchone, supra, at 1.

109. Id. at 1. Dr. Miller analogizes the procedure, saying: “Imagine having a tooth pulled without anesthesia. Now imagine you’re a 2-day-old boy, and instead of a tooth being removed, it’s the foreskin of your penis being clamped and cut away for about two minutes.” Id.

110. Id.


112. Id.


115. Id.

116. WALLERSTEIN, supra note 1, at 136-41.
such separation, the infant is firmly restrained, placed under strong lights, and subjected to a surgical procedure without anesthesia. The only question is whether the trauma is short-lived, as is generally believed, or of longer, possibly permanent, duration, as is suggested by some research.117

Infliction of male circumcision on a newborn may result in long-term psychological and developmental effects.118 Ample evidence demonstrates that the experience of a newborn affects his behavioral patterns throughout his lifetime.119 Opponents of circumcision argue that cutting an infant imprints violence on the baby's brain. James Prescott, a psychologist, contends that circumcision "encod[es] [the] primitive, immature, developing brain with pain when it was designed to be encoded with pleasure. This is one of the beginning stages of establishing the sadomasochistic personality."120 Men, circumcised as newborns, have recently come forward in an attempt to document the harm they suffered as a result of circumcision.121 Although a relatively small group has participated in the documentation, the statistics clearly imply what men are feeling, but are too ashamed to express. Respondents report physical, sexual, emotional, and psychological harm due to removal of their foreskin.122 The highest

117. Id. at 142.
118. Id.; ROMBERG, supra note 1, at 277-327.
119. WALLERSTEIN, supra note 1, at 142-43. The studies discussed were based on skin, electric, light, touch, and taste stimuli. Animal experimentation was used for some tests, while others focused on gender behavioral differences between Europeans and between Americans. Id.
120. Emily Benedek, Unkindest Cut? How Circumcision Came Full Circle, N.Y. TIMES, May 19, 1996, at E3. In an editorial in the Seattle TIMES, one man, questioning the cultural practice and its effects, wrote:

I’ll never know how the trauma of circumcision as an infant has affected me and wish that my own genitals hadn’t been surgically “altered.” I can’t help but wonder how much male violence is simply passing on that childhood wound to society; bound and helpless, the child’s screams go unheeded as the doctor continues to rip and cut . . . .

121. NOHARM, Awakenings: A Preliminary Poll of Circumcised Men (1994) [hereinafter Awakenings] (partial report on file with the Buffalo Law Review) This was a grassroots ongoing survey of 313 men compiled in 1993. The questions were based upon the harm described by men who had previously contacted a circumcision organization in the past ten years. The vast percentage of men who submitted the questionnaire were Caucasian, Christian, between the ages of 40-49, and had been circumcised at infancy. Id.

122. Id. Some of the adverse outcomes reported by survey respondents included: prominent scarring (29%), progressive glans insensitivity (55.3%), excess stimulation need to orgasm (38%); low-self esteem or inferiority to intact men (47.3%), and anger over circumcision (54.3%). Id.
percentage of respondents reported dissatisfaction with circumcision, resentment over the surgery, and feelings of mutilation and a lack of natural wholeness. Moreover, a large percentage of these men suspect that circumcision has reduced their sexual pleasure.

The effect circumcision has on sexuality and sexual experience is a controversial area of study. As early as the thirteenth century, Rabbi Moses Maimonides recognized that the objective of circumcision was to limit sexual intercourse and curb sexual excitement:

The bodily injury caused to that organ is exactly that which is desired; it does not interrupt any vital function, nor does it destroy the power of generation. Circumcision simply counteracts excessive lust; for there is no doubt that circumcision weakens the power of sexual excitement, and sometimes lessens the natural enjoyment; the organ necessarily becomes weak when it loses blood and is deprived of its covering from the beginning.

Studies show the foreskin is an erogenous zone consisting of "naked nerve endings" which are destroyed as a result of the procedure. The removal of the foreskin also results in the loss of a "natural gliding mechanism helpful with [sexual intercourse];" and in the development of thicker, drier tissue sur-

123. Id.
124. Id.
126. Id.
127. ROMBERG, supra note 1, at 171-73. Masters and Johnson attempted a study of sexual sensation in circumcised and uncircumcised men and found no difference. Dr. Foley, however, is just one of the doctors to have refuted this finding:

Normally the surface of the glans is composed of a smooth, glistening membrane only a few cells in thickness. The surface cells are alive, and naked nerve-endings are distributed among those cells. After circumcision when the glans is exposed to soiled diapers and rough clothing, this membrane becomes 10 times thicker, and the free nerve-endings disappear.

John M. Foley, M.D., The Unkindest Cut of All, FACT MAG., July-Aug. 1966, at 3-9. Dr. William K. Morgan provides support for the theory that sexual pleasure is reduced and reports:

The subcutaneous tissue of the glans is provided with special sensory receptors that are concerned with appreciating pleasurable sensations occurring during coitus. They are stimulated normally only when the glans is exposed. In the circumcised subject, these receptors are constantly stimulated and lose their sensitivity.

William K. Morgan, M.D., Penile Plunder, 1 MED. J. AUSTL. 1102 (May 27, 1967); see also WALLERSTEIN, supra note 1, at 56.
128. ROMBERG, supra note 1, at 173.
rounding the glans which can necessitate the need for synthetic lubricants during sexual intercourse.\textsuperscript{129} “Often, it is erroneously considered the woman’s lack of lubrication that makes intercourse painful rather than the lack of natural male lubrication, which is more likely the cause.”\textsuperscript{130} Therefore, an uncircumcised man probably has improved sexual experiences as opposed to the circumcised male.\textsuperscript{131}

II. JUSTIFICATIONS FOR FEMALE AND MALE CIRCUMCISION

Male circumcision is as invasive as female circumcision. Although complications differ between the two, there is a naive and uninformed belief that little boys do not suffer, but little girls do—a function of the differing roles the sexes are “assumed” to play in society. The extent of removal should not make a difference. Neither child asks for the abrupt ripping and tearing of his or her genitals. Interestingly similar justifications have been advanced for each procedure—a further demonstration of the correlation between the two abuses.

The brutal nature of female circumcision makes it too difficult, if not impossible, for Westerners to imagine any justification for the act. Practicing communities claim to adhere to both cultural values and religious doctrine in their continuation of the practice. Deeply embedded cultural arguments range from the continuing survival of the tribal group to the need for initiation into adulthood.\textsuperscript{132} Generally, identical or similar justifications are given throughout the regions and communities in which female circumcision is performed.\textsuperscript{133} Similarly, male circumcision is an invasive and mutilating act that has been justified for thousands of years. Like female circumcision, the procedure has both significant cultural and religious justifications. Explanations for the practice range from tribal symbol to hygiene. The justifications for male and female circumcision vary only with regard to religious orientation and asserted medical necessity for the male procedure.

\begin{itemize}
  \item \textsuperscript{129} Human Sexuality: An Encyclopedia, supra note 92, at 121.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id. at 120.
  \item \textsuperscript{132} See generally Smith, supra note 9, at 2451; Koso-Thomas, supra note 31, at 5-14; Culture, supra note 18, at 1949; Woman, supra note 23, at 71.
  \item \textsuperscript{133} Culture, supra note 18, at 1949.
\end{itemize}
A. Cultural Justifications for Female and Male Circumcision

Female circumcision advocates continue to offer several justifications for the practice. The logical underpinnings of these justifications are erroneous. Some of these reasons include the following: cleanliness; genital aesthetics; still birth prevention; the promotion of socio-political cohesion; the deterrence of female promiscuity by virginity preservation; male sexual enhancement; the increasing of marital opportunities; health maintenance; and fertility enhancement. Circumcision opponents contend these reasons have no validity; female circumcision is done to control women, keeping them subordinate to men.

Like its female counterpart, similar cultural justifications are offered in support of male circumcision. Male circumcision supporters suggest that circumcision improves hygiene, in-
creases cosmetic value,\textsuperscript{147} diminishes sexual desire,\textsuperscript{148} enhances sexual pleasure,\textsuperscript{149} increases fertility,\textsuperscript{150} indicates a tribal identity by signifying adulthood,\textsuperscript{151} and physiological purity,\textsuperscript{152} or demonstrates a sacrifice,\textsuperscript{153} pain endurance,\textsuperscript{154} or enslavement.\textsuperscript{155} These justifications, like those provided for female circumcision, are inaccurate and insufficient reasons for the continued removal of healthy body parts. Just as institutional racism and sexism were falsely justified through pseudo-scientific “authority,” these dubious reasons also serve to perpetuate circumcision.

\textbf{B. Male Circumcision: The Medical Justifications and Medical Counterarguments}

The only major difference between the justifications offered for male and female circumcision is the strong reliance on “medical evidence” supporting the justification for male circumcision. Controversy surrounds this justification. Of the circumcisions performed in the United States, over ninety percent are performed as a medical procedure.\textsuperscript{156} However, “[t]here are few situations in which circumcision is justified for medical reasons.”\textsuperscript{157}

\begin{enumerate}
\item at 4. Hygiene, one of the traditional justifications, is most likely grounded in the fear of masturbation. It was thought that a boy cleaning under the foreskin would learn to masturbate, thus leading to insanity or other mental illnesses. Brigman, \textit{supra} note 52, at 339.
\item Circumcision is thought to reduce masturbation. \textit{Wallerstein}, \textit{supra} note 1, at 2. Others think the foreskin causes an involuntary erection and its removal will counteract excessive lust. \textit{Romberg}, \textit{supra} note 1, at 6.
\item The idea is that circumcision prevents or reduces premature ejaculation. \textit{Wallerstein}, \textit{supra} note 1, at 2.
\item The idea is that circumcision increases or is necessary for fertility. The procedure is often a part of fertility ceremonies. \textit{Romberg}, \textit{supra} note 1, at 8.
\item Social value surrounds the procedure. For some it is a way of determining to which tribe someone belongs. \textit{Romberg}, \textit{supra} note 1, at 5-6.
\item Some consider circumcision a holy act, that of purification. \textit{Romberg}, \textit{supra} note 1, at 9.
\item Circumcision is often connected with religious rituals and removing the foreskin, for some, it is considered a sacrifice to the gods. \textit{Id.} at 12.
\item Primitive societies believed male circumcision was an initiation rite and that pain and torture was a test of endurance. \textit{Id.} at 12-13.
\item The act may have been a way of identifying slaves. \textit{Id.} at 8.
\item Ronald E. Kotzsch, \textit{Hold that Scapell}, \textit{Natural Health}, May 1995, at 60.
\item \textit{Id.} (quoting James Snyder, M.D., a urologist and member of the American College of Surgeons, who practices in Low Moor, Virginia) “According to Snyder, circumcision is medically justified for a mature male whose foreskin has not retracted. It might also be appropriate for diabetics—about two percent of the population—who are some-
In the 1970s, both the American College of Obstetrics and Gynecology and the American Academy of Pediatrics issued a policy against routine circumcision of newborns, stating that there is a lack of medical indications for the procedure. Male circumcision, however, continues to be linked to the prevention of venereal disease, cervical cancer, urinary tract infections and penile cancer, but "in the absence of well designed prospective studies, conclusions regarding the relationship of [such diseases or infections] to circumcision are tentative."

The latest findings come from a study published in the April 2, 1997, Journal of the American Medical Association, in which researchers indicate that there is no evidence that circumcision protects against contracting sexually transmitted diseases. Edward Laumann, one of the authors of the study, states that "[the researchers] were being very cautious in reporting those numbers because this is always a hot-button issue . . . . The claim has always been that being circumcised acted as a prophylactic against getting sexually transmitted diseases." Now, however, "[t]here doesn't seem to be a powerful medical or health reason to do it."

Laumann reports two benefits of the study's results. One,
that circumcision may reduce sexual disfunction.\textsuperscript{164} Another, that circumcised men engage in a "more elaborate set of sexual practices."\textsuperscript{165} Although the study does not firmly take one side or another in the debate over whether to circumcise, it does make it clear that "circumcision offers men little health benefit."\textsuperscript{166}

Edgar J. Schoen, a physician with the Kaiser Permanente Medical Center in Oakland, California, in an article on post-newborn circumcision, contends that newborn circumcision benefits a child the same way a vaccine benefits a child; it is a long-term procedure providing constant protection from disease.\textsuperscript{167} Schoen cites the beneficial effects of newborn circumcision, explaining how the benefits have led to an increase in post-newborn circumcision.\textsuperscript{168} He argues, however, against male circumcision later in childhood, which undermines his advocacy of newborn circumcision:

Although I believe newborn circumcision can be strongly recommended on medical grounds, circumcision later in childhood is more problematic. In later childhood, the greater danger from [urinary tract infections] is past. A fully retractable foreskin with good genital hygiene almost eliminates the possibility of phimosis and decreases the chance of developing local infection and penile cancer.\textsuperscript{169}

Schoen suggests that good hygiene is the only necessary measure to reduce the risks involved if a newborn is not circum-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{164} Id.; see also Laumann et al., supra note 161, at 1052.
\item \textsuperscript{165} Laumann et al., supra note 161, at 1052. Laumann states that the study "show[ed] really stark differences between circumcised and uncircumcised men with regard to experience of a variety of sexual practices." Id. However, "[c]ircumcised men . . . have more elaborate sexual scripts' although he was not sure why." Shankar Vedantam, \textit{Views in Conflict Over Circumcision: Study Finds No Major Health Benefit}, Cin. Enquirer, Apr. 2, 1997, at A4. Tim Hammond, founder of NOHARM, suggests that the elaborate sexual practices are an obvious result of circumcision. Hammond states that circumcision "reduces penile sensitivity, thus promoting 'more varied sex.'" Tim Hammond, \textit{Not Very Civilized}, Chi. Trus., Apr. 12, 1997, at 22T. For more information on NOHARM, see infra notes 389-91 and accompanying text.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id. Uncircumcised boys under the age of one have a very small increased risk of urinary tract infections (UTIs). Urinary tract infections are rare and only about one percent of infants that are uncircumcised get a UTI. UTIs are generally treated through the use of antibiotics. It is also important to note that a circumcised infant can still get a UTI. Just because the risk may be lower does not mean that a circumcised child is not susceptible to a UTI. Linda Berkhoudt O'Connor, \textit{The Circumcision Decision}, Buff. News, June 18, 1996, at C1.
\end{enumerate}
\end{footnotesize}
cised. If the medical profession is concerned about the benefits of circumcision and the prevention of certain infections in adulthood, it is contradictory that Schoen would state that the danger of urinary tract infection diminishes later in childhood and there is, therefore, no need for post-newborn circumcision. "Unequivocal proof that lack of circumcision is a risk factor for increased urinary tract infection is currently unavailable. . . . The behavior change suggested (circumcision) is not harmless and therefore cannot be recommended without unequivocal proof of benefit."170

Although there may be a possible causal link between circumcision and its "advantages" and "disadvantages," there is evidence to suggest that medical history, socioeconomic factors, and genetics are major factors contributing to the general medical trends regarding circumcision.171 The correlation between circumcision and lack of subsequent penile cancer is one of the biggest arguments put forth in favor of circumcision.172 The incidence of penile cancer, however, is a prime example of how other factors contribute to or possibly explain the trends in the disease. In the case of cancer of the penis:

[t]he overall annual incidence . . . in U.S. men has been estimated to be 0.7 to 0.9 per 100,000 men and the mortality rate is as high as [twenty-five percent]. This condition occurs almost exclusively in uncircumcised men. In five major reported series since 1932, not one man had been circumcised neonatally. The predicted lifetime risk of cancer of the penis developing in an uncircumcised man has been estimated at 1 in 600 men in the United States; in Denmark, the estimate is 1 in 909. In developed countries where neonatal circumcision is not routinely performed, the incidence of penile cancer is reported to range from 0.3 to 1.1 per 100,000 men per year. This low incidence is about half that found in uncircumcised U.S. men, but greater than that in circumcised U.S. men.173

These statistics suggest that factors other than circumcision cause a greater incidence of penile cancer.

An early study of the worldwide distribution of penile cancer showed low rates in Israel, "an exclusively circumcised male population," and the U.S., "a largely circumcised male population."174 In Canada and Europe, countries where the practice is

170. Thompson, supra note 160, at 195 (emphasis in original).
172. Id. at 239.
173. Schoen, supra note 167, at 386-91.
sporadic or rare, the rates were just as low.\textsuperscript{175} This evidence illustrates that similar standards of living rather than whether a male is circumcised may lead to consistent rates of penile cancer.\textsuperscript{176} Lower standards of living combined with poor hygiene can lead to disease and infection. Developing countries which have lower standards of living and have the lowest standards of hygiene have higher rates of penile cancer.\textsuperscript{177} "There is a direct relationship between the lack of hygienic care of the male genitals and the occurrence of penile cancer, and that it is most common among peoples in whom ignorance and poverty combine to maintain hygiene at its lowest standard."\textsuperscript{178} Surgery is unnecessary when optimal hygiene is an effective measure in preventing penile cancer.\textsuperscript{179} The effectiveness of hygiene is yet another factor which proves that circumcision proponents have not collected data from a broad range of the world's population. Male circumcision opponents suggest that pro-circumcision data on penile cancer and other diseases is not conclusory and the alleged need for the procedure is merely a fallacy;\textsuperscript{180} circumcised boys are not less likely to develop health problems as a result of the removal of their foreskin.\textsuperscript{181}

If the medical arguments for circumcision were sound, surely we would expect to see other medically advanced and technologically sophisticated societies in Europe and Japan implementing this practice, or, if not, suffering the dire consequences in statistically significant numbers which this highly flawed research would predict. Neither is true.\textsuperscript{182}

Although many believe that foreskin has no vital significance, it does have several important functions.\textsuperscript{183} The foreskin

\begin{itemize}
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} Id.
  \item \textsuperscript{177} Id.; Schoen, supra note 167, at 388-91.
  \item \textsuperscript{178} Romberg, supra note 1, at 237.
  \item \textsuperscript{179} "A girl's genitals are more difficult to keep clean than a boy's intact penis. Boys, like girls, can easily figure out for themselves the details on how to clean their own genitals." Common Myths about Circumcision and . . . Some Facts About Circumcision, 17 Midwifery Today 23 (1991).
  \item \textsuperscript{180} Wallerstein, supra note 1, at 15-25.
  \item \textsuperscript{181} Julie Brown, Ruling Out Circumcision for Her Boy, Plain Dealer, Aug. 8, 1995, at 4E. The medical focus is always on American or Jewish men. If there is a medical necessity for male circumcision, countries as advanced as the United States would routinely circumcise their children because if it did not, an epidemic proportion of men would die of penile cancer.
  \item \textsuperscript{182} Miriam Pollack, Circumcision: A Jewish Feminist Perspective, in JEWISH WOMEN SPEAK OUT: EXPANDING THE BOUNDARIES OF PSYCHOLOGY 175 (Kayla Weiner & Arinna Moon eds., 1995).
  \item \textsuperscript{183}
\end{itemize}
serves as an integral part of the penis. The intact penis does not require special care. The penis is as self-cleaning as the vagina and "smegma is not dirt, but rather 'beneficial and necessary.'" Conversely, circumcision has been considered harmful to hygiene as the wound demands constant care to avoid infections.

Nevertheless, the controversy over the alleged health benefits of circumcision continues. The American Academy of Pediatrics recently noted that "[n]ewborn circumcision has potential medical benefits and advantages as well as disadvantages and risks." The word "potential" should be noted; its use reiterates, once again, that there is no conclusive evidence or data which recommends circumcision out of medical necessity. As the debates intensify and uncertainty persists, the American Academy of Pediatrics will reconsider its neutral position in the latter part of 1997 and issue a statement to this effect.

First, it stretches to cover the penis which increases by fifty percent in diameter and length upon erection. Without this extra skin, the skin of the circumcised penis is pulled taut when erect and sometimes is bowed, causing discomfort during erection or intercourse. Secondly, the foreskin protects the glans (the head of the penis). In infancy it shields the glans from contamination of urine and feces, and throughout life, it maintains the glans as the internal organ it was intended to be. Without the foreskin, the sensitive mucous membrane of the glans becomes dried up and is keratinized, a process of unnatural thickening that occurs and lessens sensitivity. Thirdly, because the foreskin represents one third or more of the most erogenous tissue of the penis, having a greater concentration of fully developed, complex nerve endings than the glans, the pleasurable function of this delicate tissue is lost. Finally, the presence of the foreskin facilitates pleasurable intercourse by increasing sensitivity and enhancing the pleasure dynamic of the couple. Altering form inevitably alters function.

Pollack, supra note 182, at 175-76; see also Fleiss & Hodges, supra note 106, at 64.

184. Fleiss & Hodges, supra note 106, at 64-5.

185. Id. at 65:

Just as smegma is produced under the male foreskin, it is also produced under the clitoral foreskin and may come in contact with the female's urethra, vagina, cervix, and rectum. For that matter, since the penis may come in contact with female smegma during coitus, female smegma could be blamed for causing prostatic and penile cancer.

Wallerstein, supra note 1, at 90.

186. Fleiss & Hodges, supra note 106, at 65.

187. Schoen, supra 168, at 391.

C. "Fitting In": Mutilating Children in the Name of Conformity

There are several motivations for the perpetuation of both genital abuses. One of the greatest motivations for women and men to continue this practice is the fear of losing the moral, psychological, or material benefits of belonging. American parents of baby boys are often concerned that their child's penis looks like everyone else's, thereby making sure it is "aesthetically pleasing." Men perpetuate the mutilation of their sons. Circumcised fathers are obsessed with conformity, wanting their child's penis also to be circumcised. They worry about the social problems an uncircumcised child may confront as he matures.

Women from cultures where female circumcision is practiced often defend the damage incurred. Actions taken against circumcision raise the specter of the invasion and humiliation that accompanied colonialism. Moreover, criticism from the outside is considered less tolerable than criticism coming from within a culture. "When the demands of conformity conflict with rationality or individual need, denial intervenes as a mechanism for survival. In this way, many women [and men] justify their own oppression."

D. Religious Justifications for Female and Male Circumcision: To Mutilate in the Name of God

1. Legitimizing Female Circumcision Through Religion: Islam. Adherence to religious doctrine, like cultural continuity, is another theoretically unsound justification for female circumcision.

189. TOUBIA, supra note 2, at 37; Brown & Brown, supra note 159, at 215-19; see also Sonya Live, supra note 11.

190. ROMBERG, supra note 1, at 12; see also Sharon Bass, Circumcision Persists Despite Doctors' Disapproval, MAINE TIMES, Jan. 2, 1997, at 10.

191. Circumcision, supra note 147, at 280.

192. Some grown men are reacting in a manner which contradicts parents' concern with conformity. Some men are forming support groups to discuss the traumatic experience, while others are reconstructing penile foreskin. See generally John Taylor, The Long, Hard Days of Dr. Dick: Penis Enlargement Specialist Dr. Melvyn Rosenstein and Other Physicians Who Perform Male Cosmetic Surgery, ESQUIRE, Sept. 1995, at 120; Stephen Rodrick, Unkindest Cut, Anti-Circumcision/Penile Restoration Activism, NEW REPUBLIC, May 29, 1995, at 10.

193. TOUBIA, supra note 2, at 37.

194. This conjures up memories of colonialism. Id. Cultures often fear the threat of moral imperialism which occurred during colonial times.

195. Id.; see infra note 374 and accompanying text.

196. TOUBIA, supra note 2, at 37.

197. For purposes of this comment, only the three monotheistic religions (Judaism, Christianity, and Islam) will be analyzed.
sion. Since several predominately Muslim, African countries practice female circumcision, female circumcision is generally associated with Islam. In these countries, the performance of female circumcision is justified through Islam, although the act itself clearly preceded Islam in Africa.\textsuperscript{198}

Islamic law has two main sources, the Qur'an and the Hadith. The Qur'an is the most authoritative source of Islamic doctrine, while Hadith is religious commentary.\textsuperscript{199} The Qur'an is a compilation of the words of God as revealed to the Prophet Muhammed.\textsuperscript{200} The Hadith is a collection of the Prophet Muhammed's lifetime sayings and actions, also referred to as \textit{sunna},\textsuperscript{201} which "confirmed, extended, elaborated, explained, and complemented the revelation."\textsuperscript{202} Religious justification may stem from the misuse of the word \textit{sunna} in describing one of the types of circumcision.\textsuperscript{203} For Muslims, the failure to perform an act identified as \textit{sunna} is unacceptable.\textsuperscript{204}

There are different sayings of the Prophet Muhammed that address female circumcision.\textsuperscript{205} There is not, however, a single passage in the Qur'an mandating that a woman be circumcised.\textsuperscript{206} One saying of the Prophet Muhammed is: "Cut slightly without exaggeration (\textit{ikhtafidna wa-la tanhikna}), because it is more pleasant (\textit{ahza}) for your husbands."\textsuperscript{207} This saying, however, like other sayings, is not considered \textit{sunna}.

Generally Orthodox religious scholars do not advocate the practice of female circumcision.\textsuperscript{208} The Qur'an itself bans the alteration of the human body in Verse 4:119: "[Satan said, "I shall] mislead them and tempt them and order them to slit the ears of animals and order them to alter God's creation."\textsuperscript{209} Another Qur'anic verse forbids followers to harm themselves: "Spend in the way of God, and do not seek destruction at your

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\textsuperscript{198} See generally TOUBIA, supra note 2.
\textsuperscript{199} FREDERICK M. DENNY, AN INTRODUCTION TO ISLAM 175 (1985).
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} See WOMAN, supra note 23, at 71; see discussion supra notes 24, 25.
\textsuperscript{204} See WOMAN, supra note 23, at 71.
\textsuperscript{205} SAMI A. ALDEEB ABU-SAHHIEH, TO MUTILATE IN THE NAME OF JEHOVAH OR ALLAH: LEGITIMIZATION OF MALE AND FEMALE CIRCUMCISION 10-12 (1994) [hereinafter MUTILATE] (Occasional Paper No. 21, on file with the Buffalo Law Review).
\textsuperscript{206} WOMAN, supra note 23, at 72; see also Catherine L. Annas, Irreversible Error: The Power and Prejudice of Female Genital Mutilation, 12 J. CONTEMP. HEALTH L. & POL'Y 325, 328 (1996).
\textsuperscript{207} MUTILATE, supra note 205.
\textsuperscript{208} TOUBIA, supra note 2, at 31.
own hands." These are just two of the scripture-based religious arguments which demonstrate that Islamic law does not mandate female circumcision. Predominately Islamic countries do not practice female circumcision. Moreover, the "transmission" of the practice helps to explain why the practice is not religiously based. "When Islam entered Asian countries from Arabia or Iran, it did not carry 'female circumcision' with it, but when it was imported to Asia through Nile Valley cultures, [female circumcision] was a part of it."

2. Judaism, Christianity and Female Circumcision. Besides the Islamic justification, it is important to look at other religious sects that perform and justify female circumcision. The Bible, like the Qur'an, does not mention female circumcision. There are, however, Christian groups in Africa which practice female circumcision. To accommodate this practice, these groups founded churches independent of Western sects of Christianity. In an attempt to combat Christian missionary condemnation of African culture, these groups promote traditional customs and support female circumcision as a link to the past. Like Islam and Christianity, there is no religious doctrine that mandates female circumcision in Judaism. Ethiopian Jews, are the only known Jews to practice female circumcision. Female circumcision, however, can be interpreted as forbidden by Judaism.

3. Judaism and Male Circumcision: The Bible and its Contradictions. Unlike its female counterpart, adherence to male circumcision is based upon religious doctrines. In Judaism, male circumcision finds its origins in both oral and written traditions. Several passages from the Old Testament prescribe the

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211. These two verses could also serve as valid scriptural arguments against male circumcision.
212. Countries such as Saudi Arabia, Iraq, the Gulf States, Kuwait, Algeria, and Pakistan do not practice female circumcision. TOUBIA, supra note 2, at 32.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 32. Christian groups which practice female circumcision are the Coptic Christians of Egypt and the Ethiopian Orthodox Church. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* Nearly all of the population now resides in Israel. *Id.*
221. ROMBERG, supra note 1, at 33.
rite which began with Abraham.\footnote{222}{Bereshit/Genesis 17:12; Vayyiqa/Leviticus 12:2-3.}

Abraham was commanded by God to circumcise himself and his offspring.\footnote{223}{LUTSKE, supra note 78, at 37; see also Bereshit/Genesis 17:12.} For Jews, circumcision is the divine covenant formed between God and Israel and God's chosen people.\footnote{224}{Jim Bigelow & Tim Hammond, Uncircumcising: Undoing the Effects of an Ancient Practice in a Modern World, MOTHERING, June 22, 1994, at 56; see also supra text accompanying notes 5-6.} A circumcised penis is a symbol of identity among Jews; it distinguishes the Jew from the non-Jew. It not only signifies the covenant, but also signifies a people that have suffered persecution throughout the ages.\footnote{225}{"The precept of circumcision is a most major one. Failure to circumcise one's son subjects the individual to the penalty of karet, or extirpation. The Torah relates that even Moses nearly forfeited his life because he was late in fulfilling the command of having his son circumcised."} The ritual circumcision always takes place on the eighth day following birth.\footnote{226}{If the eighth day falls on the Sabbath or Yom Kippur, the Day of Atonement, the ritual still takes place. In order to be circumcised, the child must be healthy; the mohel is generally the one who determines whether the child can undergo the ritual.}

Aside from the religious rationale that circumcision is a God-given command, several other reasons for the perpetuation of the practice have been advanced.\footnote{227}{The procedure, in the first century, was said by Philo to be performed for reasons of cleanliness and health benefits. Maimonides, in the twelfth century, said that circumcision "counteracted excessive lust."} The divine injunction, however, is the true origin of male circumcision in Judaism.\footnote{228}{Although religious scholars interpret the Old Testament to mandate male circumcision, and mention of male circumcision can be found throughout the text, significant passages exist.

\footnote{229}{Romberg, supra note 1, at 38.}

\footnote{230}{LUTSKE, supra note 78, at 38.}

\footnote{231}{See sources cited supra note 5.}

\footnote{232}{Id. at 37-38.}
which do not support the procedure. The Bible is opposed to body mutilation or deformation. Leviticus 19:28 reads: "You shall not make any cuttings in your flesh for the dead, nor print any marks upon you: I am the Lord." Genesis 1:27 also states, "[s]o God created Mankind in his own image, in the image of God he created him." If human beings were created in the image of God, it would appear that no corrections to the human body are necessary unless the act of circumcision signifies a flaw in God's design.

4. Islam and Male Circumcision. Islamic circumcision differs slightly from Jewish circumcision in that the procedure most often occurs only after a Muslim boy can recite the entire Qur'an. However, the age of the boy varies depending upon family and region; the earliest it is ever performed is on the seventh day following birth. There is no direct mention of circumcision in the Qur'an; however, according to the sayings of Muhammad, God tested Abraham, commanding him to circumcise himself.

Most Muslims consider circumcision essential and a sunna, an action of the prophet, which indicates that all past prophets performed it. There are many narrative reports which demonstrate that circumcision was a sunna at the time of Muhammad. One sunna in particular states that when a convert came before Muhammad, "Muhammad told him: 'Shave off your unbeliever's hair and be circumcised.'" Another report records that Muhammad stated that an uncircumcised man could not go on the pilgrimage to Mecca. Muhammad is also quoted as saying circumcision is a norm taught by God to His creation. Islamic proponents of male circumcision, however, acknowledge that these narrative reports are not credible and may not be authentic. Moreover, Islam, like Judaism, offers several religious

233. ROMBERG, supra note 1, at 55.
234. Id.; Vayyiqra/Leviticus 19:28; Bereshit/Genesis 1:27.
236. Bereshit/Genesis 1:27.
237. ROMBERG, supra note 1, at 55.
238. DENNY, supra note 200, at 297.
239. Id. at 299.
240. MUTILATE, supra note 206, at 9 (citing The Cow 2:124).
241. DENNY, supra note 200, at 299.
242. MUTILATE, supra note 206, at 11.
243. Id.
244. Id.
245. Id.
arguments against circumcision such as banning the alteration of the human body. 246

5. Christianity and Male Circumcision. Christian doctrine is grounded in the scripture of both the Old Testament 247 and the New Testament, which states in several sections that circumcision is unnecessary. 248 The Old Testament may justify the procedure for Christians based upon the fact that Jesus was circumcised. Since Jesus is a "most perfect being" in Christian theology, Christians themselves must be circumcised. 249 Most Christian parents in today's society, however, are more apt to rely on medical justifications rather than religious ones. 250

Although several groups rely on a religious justification for female circumcision, none have a strict textual doctrine mandating the brutal act. As for male circumcision, at least in the Jewish religion, there is doctrine, which on its face is supportive, although contradicts other areas of Jewish law. 251 Such religious justification demonstrates that communities are most hesitant "to break with age-old practices that symbolize the shared heritage of a particular ethnic group." 252 Be it tradition or religion, neither reason can justify the infliction of pain on innocent men, women and children. The call for the eradication of male circumcision must be made, as it has with female circumcision.

III. LEGAL ARGUMENTS AGAINST FEMALE AND MALE CIRCUMCISION

Human rights activists and the media have been successful in advancing legal arguments against female circumcision. The international community has taken a stance against the procedure, creating international and domestic remedies. Fortunately for women, there is hope of eventual eradication. The same response has not occurred for male circumcision, exhibiting the Western legal world's hypocrisy. In the West, where routine male circumcision proceeds unnoticed and unquestioned, female circumcision is now widely understood as a human rights abuse.

246. Id. at 14.
247. Romberg, supra note 1, at 86.
248. Id. at 86-88. Romberg cites several sections of the New Testament which denounce circumcision: Galatians 5:1, Philippians 3:2.
249. Romberg, supra note 1, at 88.
250. Id. at 91.
251. See sources cited supra note 6; see supra text accompanying notes 221-37.
Legal arguments advanced in opposition to female circumcision may likewise be utilized against male circumcision. There are several international laws, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 253 the Convention on the Rights of the Child (CRC), 254 the African Charter on Human and Peoples' Rights (ACHPR), 255 as well as domestic and foreign statutes that provide a sound basis for arguing for the eradication of female circumcision. Except for the CRC, these international laws, unlike domestic and foreign statutes, provide support for eradication, but do not ban the practice. The best legal remedy to address male circumcision on a worldwide scale, however, may be the combined application of the CRC, customary international law, and existing domestic laws. The establishment of a convention for the protection of men seems unlikely. In the United States, the largest performer of routine infant circumcision, and the focus of this analysis, the best solutions include the use of existing domestic child abuse laws, a federal law banning the procedure, and civil litigation.

A. Legal Remedies for Female Circumcision: Utilizing International Documents, Foreign Legislation, and Domestic Legislation 256

1. International Documents and Foreign Legislation. Female circumcision is most often linked to issues of sexual equality, 257 since its justification has been connected to claims that women are inferior and subordinate to men. 258 CEDAW is the most promising convention calling for an end to this type of dis-


256. This section does not discuss the constitutional issues surrounding domestic remedies for female circumcision. The purpose here is to make an analogy between female and male circumcision, demonstrating the ways in which various international documents can and cannot be applied to male circumcision. Additionally, this section reiterates the tremendous strides being made towards the eradication of female circumcision, while the abuse of male circumcision is virtually ignored.


258. Id. at 541.
Crimination against women. CEDAW focuses on traditional practices which violate women and their human rights. Articles 1 and 5 specifically call for the elimination of discrimination against women based on cultural practices impairing women's human rights and fundamental freedoms. The cultural justifications for female circumcision continue to perpetuate the inequality of women in society. "[T]he elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles" are addressed in Article 5. In addition, Article 12 of CEDAW focuses on the health of women, while Article 10, similar to Article 5, calls for the elimination of stereotypical conceptions of the role between the sexes. These articles illustrate the need for the elimination of female circumcision. The abuse results in drastic health complications and continues to allow men to dominate women by destroying their genitalia. CEDAW signatories are in direct violation of these articles when they permit the practice of female circumcision.

The Committee responsible for implementing CEDAW has made several recommendations which specifically address the eradication of female circumcision. General Recommendation No. 14 calls for its eradication through a variety of means. This recommendation is said to take a normative approach; its language follows that of the CRC by linking the practice to health. CEDAW urges that measures be taken which are educational in nature and that women's groups take the lead in the eradication. There is no call, however, for drafting legislation or implementing an enforcement body for protection.

259. Lewis, supra note 9, at 45; see also Funder, supra note 22, at 422.
260. CEDAW, supra note 253, at art. 1, art. 5.; see also Lewis, supra note 9.
261. "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care ..." CEDAW, supra note 253, at art. 12(1).
262. "States Parties shall take all appropriate measures ... for the elimination of any stereotyped concept of the roles of men and women ..." CEDAW, supra note 253, at art. 10(c).
263. See supra notes 31-42 and accompanying text.
264. These methods are the collection and dissemination of materials about traditional practices, support of women's organizations working for the eradication of female circumcision, encouragement of an integrated and team approach toward eradication, educational and training programs, new health policies, and calling upon international bodies for assistance. Report of the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 14; Female Circumcision, U.N. GAOR, 45th Sess., U.N. Doc. A/45/38 (1990); see also Lewis, supra note 9, at 46.
265. Fitzpatrick, supra note 257, at 543.
266. Id.
267. Id.
Although CEDAW appears promising, one of the greatest barriers to its implementation is the lack of an enforcement mechanism. Like other U.N. documents, CEDAW is difficult to enforce, for example, in rural African communities.268 Even though CEDAW has been widely ratified by countries practicing female circumcision, the convention still contains the largest number of reservations of all the human rights treaties and conventions.269 The majority of reservations are founded upon the convention’s direct conflicts with Shari’ah (Islamic Law) and traditional practices.270 Such strong reservations make the eradication of female circumcision by the application of this treaty more difficult. Efforts to combat the abuse, however, must include CEDAW’s application.

Continued female circumcision also violates several provisions of the more recent Convention on the Rights of the Child (CRC).271 The CRC contains the only “codified prohibition” of female circumcision in international human rights law.272 Article 24(3) requires nations to abolish traditional practices that jeopardize the health of children.273 The article’s scope is said by its drafters to encompass female circumcision274—although not specifically highlighted, the term ‘harmful traditional practices’ is meant as a prohibition on female circumcision.275

In addition, there are three other CRC articles with which female circumcision conflicts: Article 19 proscribes child abuse;276 article 16 provides children a right to privacy;277 and article 37 prohibits the torture or cruel, inhuman, or degrading

268. Lewis, supra note 9, at 47.
269. Id.; see also TOUBIA, supra note 2, at 45; “Of the UN human rights treaties, CEDAW has attracted the greatest number of reservations with the potential to modify or exclude most, if not all, of the terms of the treaty . . . [and so it is] the human rights instrument least respected by its states parties.” Belinda Clark, The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women, 85 AM. J. INT’L L. 281, 317-18. (1991).
270. FUNDER, supra note 22, at 422.
271. TOUBIA, supra note 2, at 45.
272. Fitzpatrick, supra note 257, at 542.
273. Id. “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” CRC, supra note 254, at art. 24(3).
274. Fitzpatrick, supra note 257, at 542.
276. “States Parties shall take all appropriate . . . measures to protect the child from all forms of physical or mental violence.” CRC, supra note 254, at art. 19(1).
277. “No child shall be subjected to arbitrary or unlawful interference with his or her privacy . . . ” CRC, supra note 254, at art. 16(1).
treatment of children. Subjected to circumcision, a child's privacy is violated. Moreover, the child falls victim to extreme physical and mental violence. It is difficult, at the very least, to deny that the vicious ripping of a child's genitalia with a dirty knife constitutes a form of torture or cruel treatment. The international community should be called upon to declare that female circumcision violates all four applicable CRC articles.

The African Charter on Human and Peoples' Rights is another international instrument which can be utilized to eradicate female circumcision. Several articles of the treaty can be interpreted to proscribe female circumcision. Although the African Charter recognizes the importance of traditional practices in numerous articles, its purpose is to protect human rights. Since the fundamental basis of the African Charter is to protect human and peoples' rights, it is contradictory if female circumcision is considered a legitimate traditional practice. Article 29(7) clearly reiterates the aim of the Charter: "[t]o preserve and strengthen positive African cultural values." Many practicing communities may, from a cultural perspective, view female circumcision as a positive value worthy of preservation. The Western world and many international organizations, however, would disagree.

The African Charter in article 4 states: "Human beings are inviolable. Every person shall be entitled to respect for his life and the integrity of his person." Article 5 proclaims that "torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." Article 16 declares that all are entitled to the highest level of physical and mental health. Article 18 calls for state assurance of non-discrimination against women as well as "the protection of the rights of the woman and the child as stipulated in international declarations and conventions." Fn

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278. "States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment." CRC, supra note 254, at art. 37(a).

279. Culture, supra note 18, at 1954-56. Male circumcision is practiced in several western African countries among various tribal groups. The ACHPR could be utilized in these countries against male circumcision. Most of the articles applicable to female circumcision, with the exception of article 18, can be applied to protect infant males from this abusive practice. Although most people who practice male circumcision view it as a positive traditional value that should be preserved, the infliction of pain and suffering on infant males is torture and an inhuman social practice, mandating abolition.

280. ACHPR, supra note 255, at arts. 17, 29.

281. Id. at art. 4; see also Culture, supra note 18, at 1954.

282. ACHPR, supra note 255, at art. 5; see also Culture, supra note 18, at 1955.

283. ACHPR, supra note 255, at art. 16, art. 18; see also Culture, supra note 18, at 1955.
male circumcision is clearly in violation of the terms of these articles. If women are entitled to the highest level of health maintenance, female circumcision must be considered a violation of this right. Women experience great physical and psychological complications as a result of the inhuman treatment inflicted upon them. The procedure is intrusive, violating bodily integrity, and inflicting agonizing torture.

In addition to the variety of international documents which provide a useful framework for banning female circumcision, a number of countries prohibit the practice. Burkina Faso, Great Britain, Sweden, and Switzerland are just a few of the countries which have actively responded to the abuse. Countries such as Canada, France, the Netherlands, Belgium, Australia, and Switzerland punish the practice under child abuse laws, while Great Britain and Sweden have explicitly outlawed the procedure. African countries such as Cameroon, Djibouti, Egypt, Ghana, and Sudan have also enacted legislation which prohibits female circumcision.

284. See supra notes 31-42 and accompanying text.

285. Rene Tempest, Ancient Traditions vs. the Law, L.A. TIMES; Feb. 18, 1993, at A10; Mary Winter, Questions & Answers About Female Genital Mutilation, ROCKY MTN. NEWS, Jan. 31, 1996, at 8D. Sweden has the oldest law in Europe criminalizing female circumcision, passed in 1982. Mariam Isa, London Clinic Fights Myth and Practice of Female Circumcision, REUTERS WORLD SERV., Mar. 12, 1995. In Great Britain, the Prohibition of Female Circumcision Act of 1985 makes it illegal for anyone to “excise, infibulate or otherwise mutilate” or to “aid, abet, or procure the performance of another person of any of these acts.” J.A. Black & G.D. DeBelle, Female Genital Mutilation in Britain, 310 BRITISH MED. J. 1590, 1591 (1995). Individuals found guilty of violating the law are liable for a fine and up to five years imprisonment. Id. Although the law comprehensively bans female circumcision, no one has been prosecuted since its passage. Id.


287. Hughes, supra note 286, at 325. Although the practice continues in Sudan, female circumcision was banned in 1940. Gilles Laffon, UN Welcomes “will to act” on Genital Mutilation of Girls, AGENCE FRANCE PRESS, Aug. 11, 1996.
2. **Recent Domestic Legislation.** As new immigrants have brought the practice of female circumcision within the borders of the United States, the government and individual states, in similar fashion to foreign legislation, are outlawing female circumcision. Not only has President Clinton signed legislation criminalizing female circumcision, but several states have specifically enacted legislation prohibiting the practice. Congressional response to the issue of female genital mutilation is not surprising in light of the state's interest in child welfare.

The federal ban on female circumcision is a result of the tireless efforts of Senator Harry Reid, a democrat from Nevada,


(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

(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 person, or any other person, that the operation is required as a matter of custom or ritual.

Id.


and retired Representative Patricia Schroeder, a democrat from Colorado. In September 1994, Senator Reid introduced a "Sense of the Senate" resolution condemning the practice of female circumcision. Following this resolution, Senator Reid introduced the bill banning the practice. In June 1995, the United States House of Representatives passed retired-Representative Schroeder's resolution, "urging the President to help end the practice of female [circumcision] worldwide." However, it was not until September 30, 1996, that President Clinton signed the Department of Defense Omnibus Appropriations Bill which contained a provision criminalizing female genital mutilation. Although the law is now in effect, it contains no specific enforcement provisions.

B. Legal Remedies for Male Circumcision: Utilizing International Documents, Customary International Law, and Domestic Law

1. International Documents and Customary International Law. The international community has failed to view male circumcision as a human rights abuse. A call for eradication of this physical and psychological abuse is necessary and may be developed through interpretation of a combination of treaties, customary international law, and American domestic law. The CRC is one example of a convention applicable to male circumcision. Male circumcision, like female circumcision, is a 'harmful traditional practice.' The act itself may constitute child abuse because of its non-accidental physical and psychological infliction on children. The procedure is generally done without an-

294. The focus of this examination of domestic laws will be the United States, as it is the leader in routine infant circumcision. Conversely, it should be noted: The European medical community condemns the U.S. for a practice they call a barbaric violation of human rights. Europeans believe that males have a basic human right to an intact penis, a right to keep the body they were born with, and a right to body ownership and autonomy. For them it is a question of respect and dignity.
295. Brigman, supra note 52, at 338.
esthesia and consequently a child is subject to cruel and torturous treatment. Moreover, a child is an individual and does have a right to privacy. The CRC's articles are directly applicable to the case of male circumcision and should be utilized to seek its eradication.

The Universal Declaration of Human Rights (UDHR), which is generally accepted as customary international law, could also be utilized. The human rights principles referred to in the Charter of the United Nations are articulated in the UDHR. The UDHR provides for universal standards of human rights for all peoples and all nations. Common practice by nations over the past fifty years has established these rights as customary international law. "A customary norm binds all governments, including those that have not recognized it, so long as they have not expressly and persistently objected to its development." Some of these rights have even reached the status of peremptory norms; freedom from torture is one such example. Article 5 of the UDHR prohibits acts of torture and inhuman treatment. Although male circumcision takes less than ten minutes to perform, the duration of the abuse is superfluous; ten minutes of unnecessary and violent treatment which removes a perfectly healthy body part should be recognized and treated as torture. Therefore, the fundamental guarantees of the UDHR should protect these infants and be utilized in the abolition of circumcision.

Two other articles of the UDHR are applicable to male circumcision: article 12 provides a right to privacy, and article 3 provides a right to security of person. A newborn is entitled to the same privacy rights as any human being. Circumcision is a

296. Eisenstadt v. Baird grants individuals the right to privacy. 405 U.S. 438, 453 (1972). In the case of the right to privacy in the United States, the child too should remain free from this invasion. See generally Brigman, supra note 52, at 355.


298. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 320 (1990).

299. Id. at 320-21.

300. Id. at 595.

301. Id. A peremptory norm is generally referred to as a "jus cogens" norm. Jus cogens norms take precedence over conflicting rules and agreements and can only be modified by another norm of the same character. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987). See generally Anthony D'Amato, It's a Bird, It's a Plane, It's Jus Cogens!, 6 CONN. J. INT'L L. 1 (1990) (discussing growing number of human rights being referred to as peremptory norms).

302. UDHR, supra note 297, at art. 5.

303. Id. at art. 3, art 21.
violation of a child’s bodily integrity, privacy, and security. The unwarranted removal of a child’s healthy foreskin can be likened to amputation and "if one wishes to practice an amputative type of preventative medicine, one could find many more rewarding structures to cut off rather than the foreskin."304 The U.N. has called upon governments, urging the act of amputation to be abolished.305 Male circumcision, like amputation, is another form of torture or inhumane treatment that violates the security of person. Subjecting a child to this invasive and mutilating procedure is a violation of these norms. The U.N. should acknowledge male circumcision as an act of torture and inhumane treatment and call for its eradication. The difficulty, however, remains that there is no mechanism to enforce such customary norms.

2. Domestic Remedies. The United States is the only Western country that still routinely circumcises infant boys for non-religious reasons.306 An obvious response to this abuse is the invocation of domestic remedies that criminalize the practice under existing child abuse statutes or authorize damages and recourse through civil law.307 State statutes prohibiting assault and battery and conspiracy to commit assault and battery could be possible methods of combating male circumcision.

The difficulty in applying these statutes is that most Americans do not perceive male circumcision as a human rights abuse, let alone child abuse.308 Moreover, establishing the requisite mental state for the crime would be difficult.309 It is difficult to prove that a parent who chose to circumcise a child out of religious fealty or a sincerely held desire to protect the child from

304. Romberg, supra note 1, at 247; see also Fleiss & Hodges, supra note 106, at 65-66.
306. It should be noted that Israel also routinely circumcises newborn boys, but the procedure is for religious reasons.
307. "[M]odern international law recognizes that individuals may invoke domestic remedies for violations of certain fundamental norms of international human rights law . . . " Newman & Weissbrodt, supra note 298, at 616-17. Note that the U.S. has not signed the CRC. Id. at Supp. 133 (1994). One letter to the editor, condemning a woman's dismissal of male circumcision in light of female circumcision, perfectly reiterates the hypocrisy that exists in American society: "For a nation that has become obsessed with child abuse, it is ironic that male children in the United States continue to be subjected to genital mutilation in the form of circumcision without a second thought. Any comparable form of child torture would generate howls of outrage." Kevin Miller, A Case of Selective Outrage, WASH. POST, Dec. 15, 1992, at A22.
308. Brigman, supra note 52, at 356.
309. Id.
disease intended to "purposely, knowingly or recklessly cause[] bodily injury" to that child.\textsuperscript{310} Given these difficulties, the best remedy would be the passage of a law specifically outlawing the practice of male circumcision, much like the statute criminalizing female circumcision.

C. Constitutional Issues

The criminalization of circumcision presents formidable constitutional problems.\textsuperscript{311} Constitutionally derived rights of privacy, autonomous parental rights, and the protection of the free exercise of religion cut against, in some capacity, the criminalization of circumcision. Any attempt to prohibit male circumcision would have to pass vigorous constitutional tests.

Constitutional challenges could make criminal sanctions difficult to apply. The Constitution does not expressly state that parental decision-making regarding the care, custody, and control of children constitutes a fundamental right. However, the Supreme Court has recognized that the Constitution protects such decisions, limited by the requirement that parents "may not endanger the lives or physical well-being of their children simply to raise them within the confines of their own culture."\textsuperscript{312}

1. Parental Rights and The Right to Privacy. Unlike the free exercise of religion, the right of privacy is not expressly granted in the Constitution. However, the Supreme Court has interpreted the Constitution, specifically the first, second, third, fourth, fifth, and ninth amendments, to confer fundamental pri-

\textsuperscript{310} Model Penal Code § 211 (1985) (definition of assault).

\textsuperscript{311} As this comment was going to press, the Supreme Court struck down the Religious Freedom Restoration Act of 1993 (RFRA). See Boerne v. Flores, No. 95-2074, 1997 U.S. LEXIS 4035 (June 25, 1997). The Court's decision will have broad effect on any constitutional analysis of a religious freedom challenge to the criminalization of male circumcision. This comment will only briefly address the effect that \textit{Boerne} will have on such a challenge. See notes 344-47 and accompanying text.

\textsuperscript{312} Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (parents have a right to control the education of their children and the Fourteenth amendment includes a right to "bring up children"); May v. Anderson, 345 U.S. 528, 532 (1953) ("immediate right to the care, custody, management and companionship of . . . minor children" is a fundamental right.); Ginsberg v. New York, 390 U.S. 629, 639 (1968) ("[c]onstitutional interpretation has consistently recognized that the parent's claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."). See generally James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 CAL. L. REV. 1371 (1994); Layli Miller Bashir, Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law, 4 AM. U. J. GENDER & L. 415, 429 (1996).
vacy rights. The Court has extended fundamental privacy rights, in differing degrees, to areas of sex, marriage, childbearing, and child-rearing. If a right is deemed fundamental, government action that impinges on the right must pass a test of strict scrutiny. The criminalization of male circumcision, however, can survive the strict scrutiny required for government interference with parental rights, as the procedure renders extreme physical and often emotional damage to the infant.

Two of the Supreme Court’s strongest opinions favoring parental rights are Stanley v. Illinois and Griswold v. Connecticut. In Stanley, the Court struck down a statute that denied an unmarried father, upon the death of the mother, custody of his children. The decision focused on a parent’s interest in keeping his child and not on a child’s interest in staying with his parent. “Stanley made it very clear that the mere assertion of [the state’s] parens patriae interest in the protection of the child was insufficient to warrant abridgment of parental rights unless the potential harm to the child was significant.” In Griswold, the Supreme Court held that married couples have the right to obtain contraception; the Court based its decision not on the right to privacy, but on the constitutional safeguards protecting the home and family.

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence from the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

The Supreme Court, however, has limited parental rights “if it appears that parental decisions will jeopardize the health or
safety of the child, or have a potential for significant social burdens.\textsuperscript{232} Furthermore, the Supreme Court in \textit{Roe v. Wade} held that the State has a significant interest in safeguarding health and safety in the maintenance of medical standards.\textsuperscript{234} Therefore, the State's interest in protecting the health, safety and welfare of children supplants the parents' fundamental rights to make decisions regarding their children when those decisions jeopardize the health or safety of the child.\textsuperscript{235}

Often the Supreme Court overrides family relationships in efforts to protect children.\textsuperscript{326} \textit{Prince v. Massachusetts} is the preeminent case affirming that the government may intercede on behalf of children by undercutting parental rights.\textsuperscript{327} \textit{Prince} held that, "[P]arents may be free to become martyrs themselves. But it does not follow that they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."\textsuperscript{328} Therefore, parents do not have the constitutional authority to consent to superfluous practices, such as male circumcision, that jeopardize the health and safety of children.

2. \textit{Freedom of Religion—The Free Exercise Clause}. The United States Constitution guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."\textsuperscript{329} The First Amendment confers two different religious protections by way of the Establishment Clause and the Free Exercise Clause. The Establishment Clause protects minority religions from government endorsement of the majority’s religion, while the Free Exercise Clause grants wide-ranging protection to an individual’s personal religious choices.\textsuperscript{330} The government, however, maintains a compelling interest in protecting children from harmful religious practices.

\begin{itemize}
\item \textsuperscript{323} Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).
\item \textsuperscript{324} 410 U.S. 113, 153-54; Charles A. Bonner & Michael J. Kinane, \textit{Circumcision: The Legal and Constitutional Issues}, TRUTH SEEKER SUPP. S1 (July/Aug. 1989).
\item \textsuperscript{325} \textit{Yoder}, 406 U.S. at 234. In addition to the holdings of the above-cited Supreme Court cases, the concept that the government needs to protect children is also repeated in such laws as custody, child abuse, and labor.
\item \textsuperscript{326} Bonner & Kinane, supra note 324, at S2.
\item \textsuperscript{327} 321 U.S. 158 (1944) (parents' actions which are harmful to their children are subject to judicial and state intervention).
\item \textsuperscript{328} Id. at 170.
\item \textsuperscript{329} U.S. CONST. amend. I. The Free Exercise clause of the First Amendment also applies to the states through the due process clause of the Fourteenth Amendment. \textit{Cantwell v. Connecticut}, 310 U.S. 296 (1940).
\item \textsuperscript{330} U.S. CONST. amend. I.
\end{itemize}
The Supreme Court's free exercise line of law begs the question whether the criminalization of circumcision would apply to those who justify the practice on religious grounds. The Supreme Court's 1990 decision in Employment Division v. Smith demonstrated a break with most past free exercise theory, holding enforceable laws not intended to burden religious activity but nevertheless placing a substantial burden on the free exercise of an individual's religion. The Smith majority stated: "the right to free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes." The issue in Smith was whether the State of Oregon could criminalize the possession of peyote without exempting those Native American Indians for whom the use of peyote constituted a central part of their religious rituals. The majority held that the State could decline to exempt Native American Indians and that, as long as the ban on the possession of peyote was neutrally enforced, the Court was not required to balance the state's interest in criminalizing the possession of peyote against an individual's religious beliefs. Moreover, the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." That the record of free exercise jurisprudence is not contrary to such a proposition was clearly articulated by Justice Frankfurter in Minersville School District Board of Education v. Gobitis:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of po-

331. 494 U.S. 872 (1990). The Smith decision announced a new approach to the Free Exercise Clause from that previously asserted in Sherbert v. Verner, 374 U.S. 398 (1963). In Sherbert, the Supreme Court set forth the "compelling state interest" test—asserting that before an infringement on religious liberty will be upheld, the government must demonstrate that it has a compelling interest. Id. "[I]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" See Brigman, supra note 52, at 349-55.
332. Smith, 494 U.S. at 872.
333. Id.
334. Id.
335. Smith, 494 U.S. at 878-79.
3. **Religious Freedom Restoration Act.** The *Smith* decision demonstrates the Rehnquist Court's trend toward curtailing the free exercise of religion. Following *Smith*, religious lobbies expressed concern that the decision limited the free exercise of religion. "For the first time, the Court held that the compelling state interest test should be invoked in religious exemption cases only when the governmental action at issue is neither neutral nor generally applicable, that is, when the law facially persecutes a particular religion." In response to the controversial decision, Congress enacted the Religious Freedom Restoration Act (RFRA). RFRA provides that the "government shall not substantially burden a person's exercise of religion" unless it first demonstrates that the "application of the burden to the person" is the "least restrictive means" in the furtherance of "a compelling governmental interest." RFRA, in contrast to the *Smith* decision, "privileges religiously motivated conduct." At the signing of RFRA, President Clinton indicated "that the bill was an exercise of Congress's 'extraordinary' power to 'reverse by legislation a decision of the United States Supreme Court.'"

On June 25, 1997, the Supreme Court reaffirmed its holding in *Smith* and struck down RFRA. Ruling that Congress had

336. *Id.* at 879 (quoting Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)).
337. See *infra* notes 344-47 and accompanying text (discussing the Supreme Court's decision in *Boerne*, striking down the Religious Freedom Restoration Act of 1993, the legislature's response to *Smith*). See also *Goldman* v. Weinberg, 475 U.S. 503 (1986). In *Goldman*, the Supreme Court held that an Orthodox Jewish Air Force Captain did not have the right to wear a yarmulke while on duty and in uniform. Although the prohibition caused the Captain to violate a religious tenet, the Court held that "the First Amendment does not require the military to accommodate such practice in the face of its view that they would detract from the uniformity sought by the dress regulation." *Id.*
341. *Id.* § 2000bb-1 (a)-(b).
343. *Id.* at 438.
overstepped its bounds in eschewing judicial precedent—the line of Supreme Court decisions stemming from *Smith*—the Court held that "[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." While many religious leaders and civil rights advocates will see *Boerne* as the Court's further departure from "vigorously protecting religious rights," others are in accord with the high court's decision, maintaining that "RFRA did not vindicate constitutionally recognized religious liberty; it heretically exalted believers above the ordinary commands of the law . . ." Even by the standards set in RFRA, however, the government has been permitted to protect public health and safety in derogation of some religious freedoms.

In *Jehovah's Witnesses v. King County Hospital*, the Supreme Court, applying *Prince v. Massachusetts*, affirmed a district court ruling mandating that a child of Jehovah's Witness parents receive an emergency blood transfusion. Over the parents' due process and free exercise objections, the district court found the parent's conduct not constitutionally protected. The *King County* decision, like the decision in *Prince*, placed limitations upon parental free exercise rights, both holding that "these rights do not include a right to endanger seriously a child's physical health or safety." These cases establish the State's interest in protecting the welfare of children and promoting societal values. If the welfare of children is to be protected, circumcision cannot be performed as our society values humanity and not abuse.

The fact that circumcision is a tenet of certain religions is not a reason to provide an exemption from a generally applicable criminal law. The government's motivation for a criminal law would be the protection of the safety and health of newborns, not intentional discrimination against specific religions. As evidenced by the massive government regulatory system, protecting the health of the nation is a primary concern. The State is free

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345. *Id.* at *48.
347. Bruce Fein, *Year of Justice Scalia*, WASH. TIMES, July 1, 19997, at A15.
349. 321 U.S. 158.
353. *Id.* at 1383.
to regulate health standards and therefore, compliance with a
generally applicable law against circumcision would be
mandatory, regardless of the burden placed on individual relig-
ious beliefs.

Other major constitutional conflicts have arisen between
freedom of religion and secular law. In Reynolds v. United
States, the Supreme Court held that religious practices which
are harmful to society could be limited and stated that limitation is necessary in order to avoid "mak[ing] the professed doc-
trines of religious belief superior to the law of the land, and in
effect to permit every citizen to become a law unto himself." A
difficulty exists in arguing that circumcision is harmful to soci-
ety. However, abusing infants strikes against the core of societal
values. Male circumcision, performed as a religious practice of
for non-religious reasons, is an abuse, and if society refuses to
tolerate any form of child abuse, society must refuse to tolerate
male circumcision.

Cases involving the interplay between education and relig-
ion have also sparked constitutional conflicts. One case is Wis-
consin v. Yoder, in which the Supreme Court held that Amish
parents could not be prevented from withdrawing their children
from public schools, since they contended that public schooling
would lead to the destruction of their religion. There are, how-
ever, significant differences between the right of a parent to
deny education on religious grounds, and circumcision as a re-
ligious rite:

(1) denial of education is at least partly reversible, whereas the disfigure-
ment caused by the removal of a body part is not, and (2) the physical
pain and suffering, with potentially significant surgical and general
health complications, inflicted on infants by circumcision is not found in
parents denial of education to their adolescent children.

354. 98 U.S. 145 (1878).
355. Id. at 167. In Reynolds, bigamy was held to be a crime in federal territories
over the Free Exercise objection of a Mormon who argued that polygamy was his relig-
ious duty. The Court saw the conduct as a "violation of social duties" and thus prohib-
itable. Id. at 164.
statute requiring all students to stand in salute to the American flag in public schools as
violation of Establishment and Free Exercise Clauses of the First Amendment); Sher-
bert, 374 U.S. 398, 409-410 (requiring an employee to work on Saturday contrary to em-
ployee's religious belief does not foster establishment of religion).
359. Brigman, supra note 52, at 354-55.
A circumcised child cannot “technically” reverse the procedure, whereas a child may seek education later in life.

D. Civil Lawsuits and the Informed Consent Doctrine

Civil lawsuits may provide one of the best means of preventing male circumcision, since such suits will avoid the constitutional issues of parental rights and religious freedom. Under tort law, a patient has the right to exercise control over his or her body. The informed consent doctrine grants patients the right, absent extenuating circumstances, to decide whether to subject themselves to a medical procedure. Infants, however, are legally incompetent to consent to medical procedures. A physician must also provide the patient with all the medical information on the procedure so the patient can make an informed decision. Since there is no conclusive medical necessity for male circumcision, physicians have a responsibility to inform parents that the removal of the foreskin is unnecessary and that both extreme physical and psychological complications can result. A physician who does not fulfill his or her duty to disclose could be subject to a suit for damages by the parents or child. Moreover, it is the duty of the physician to serve the “child's interest and not the parents.”

360. Four elements that informed consent experts include in discussing the doctrine of informed consent are:

(1) Provision of information: patients should have explanations, in understandable language . . . the existence and nature of risks . . . . (2) Assessment of the patient's understanding of the above information. (3) Assessment . . . of the capacity of the patient or surrogate to make the necessary decision(s). (4) Assurance . . . that the patient has the freedom to choose . . .


362. Pauscher, 408 N.W.2d at 355; see also Brigman, supra note 52, at 356; W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 120-21 (5th ed. 1984).

363. Bonner & Kinane, supra note 324, at 53; KEETON ET AL, supra note 362, § 18, at 115.

364. Pauscher, 408 N.W.2d at 355; see also Brigman, supra note 52, at 356.

365. Brigman, supra note 52, at 356.

366. Id.; KEETON ET AL, supra note 362, § 18, at 120 & n.66 (failure to disclose consequences basis for suit in negligence); § 32, at 190.

ment of a civil remedy for those harmed by circumcision poses the same difficulties as criminalizing the procedure: American society possesses predetermined beliefs and cultural norms regarding male circumcision and its effects. The final potential legal remedy that could be used by those harmed by male circumcision is a civil rights class action suit against hospitals and doctors who perform circumcision. Filing a class action suit would place the blame directly on the perpetrators. Hospitals should be in the forefront of preventing routine infant circumcision, refusing to endorse male circumcision unless medically warranted. A large percentage of doctors are aware that routine infant circumcision is unnecessary; by performing the procedure, doctors are culpable. The advantage to a class action suit is that it avoids constitutional issues; the suit is not focused on parental rights or religious rights, but on the organizations and individuals who actually carry out the procedure. Such a class action suit, however, would fail to protect many Jewish newborns, since the procedure is generally performed outside a medical facility; only a criminal law could protect these children.

IV. Final Recommendations

Any strategy for eradication must utilize both domestic and international laws. Domestic laws, especially in democratic societies, have been approved by the people and are more likely to be enforced than international law. International law also presents the problem of the perception that outsiders are suggesting that traditions are wrong and should be abandoned; this can often lead to resistance and feelings of alienation and resentment. As with any cultural practice, those who advocate circumcision fear moral imperialism. Culture plays a significant role in any call for eradication of a cultural norm. Any prohibition of male circumcision will be debated by cultural relativists and universalists. There are two obvious opposing concerns: "the absolute right of 'cultural self-determination' and the right of the individual not to be subjected to a tradition or practice that might be harmful or fatal." Alison T. Slack, Female Circumcision: A Critical Appraisal, 10 Hum. RTS. Q. 437, 470 (1988). This comment, however, does not address the arguments made by cultural relativists. For a discussion of the interplay between cul-

368. Id.
369. Brigman, supra note 52, at 357.
370. Id.; see, e.g., Noe v. Kaiser Found. Hosp., 435 P.2d 306 (Or. 1967) (action made to recover for circumcision that was not consented to by parents).
371. Brigman, supra note 52, at 357.
372. Id.
373. Id.
374. Culture plays a significant role in any call for eradication of a cultural norm. Any prohibition of male circumcision will be debated by cultural relativists and universalists. There are two obvious opposing concerns: "the absolute right of 'cultural self-determination' and the right of the individual not to be subjected to a tradition or practice that might be harmful or fatal." Alison T. Slack, Female Circumcision: A Critical Appraisal, 10 Hum. RTS. Q. 437, 470 (1988). This comment, however, does not address the arguments made by cultural relativists. For a discussion of the interplay between cul-
The major difficulty in dealing with cultural practices occurs when entire nations overwhelmingly hold a belief with regard to such practices. The question of condemning such a cultural norm raises the issue of whether such countries deserve moral sovereignty and autonomy because of the overwhelming democratic legitimacy given to the practice within the nation's borders. Whether or not democratic legitimacy can take precedence over issues of moral consequence is difficult to answer. The solution, perhaps, in these nations and others fearing moral imperialism, lies in the use and dissemination of sound scientific knowledge. In contrast to moral condemnation, scientific knowledge, by pointing out biological and verifiable facts, could be used to contradict local myths. A country's general health and welfare policy fortified by scientific research would wield authority without making communities feel morally inferior.

Male circumcision in practice and by its justifications must be seen as comparable to female circumcision. Every child should have a birthright to his or her entire body. The size of the cut should not be an issue; the focus must be placed on the innocent children who are forced to suffer without consent. The penis should be left in its natural state; circumcision takes away something that belongs to a child and is a violation of basic human rights. The recent call for anesthesia is evidence of the increased awareness of the pain and suffering on infant faces. If anesthesia, however, were "deemed necessary for infant circumcision, this would force most parents and medical practitioners to [think] about the necessity of the operation."

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375. See Romberg, supra note 1, at 386.
376. Id. at 387. Romberg, in the conclusion of her book on circumcision, states:

tural relativism, universalism, and human rights, see ALISON D. RENTELM, INTERNATIONAL HUMAN RIGHTS UNIVERSALISM VERSUS RELATIVISM (1990); Amede L. Obiora, The Little Foxes that Spoil the Vine: Re-visiting the Feminist Critique of Female Circumcision in Africa (unpublished manuscript, on file with the Buffalo Law Review); I. Gunning, Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Rebecca J. Cook, State Responsibility for Violations of Women's Human Rights, 7 HARV. HUM. RTS. J. 125 (1994); Eugenie A. Gifford, "The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation, 4 UCLA WOMEN'S L.J. 329 (1994); Sandra D. Lane & Robert A. Rubenstein, Judging the Other: Responding to Traditional Female Genital Surgeries, 26 THE HASTINGS CENTER REPORT 31 (May 1996); Stephen A. James, Reconciling International Human Rights and Cultural Relativism: The Case of Female Circumcision, 8 BIOETHICS 1 (1994); Eike-Henner Kluge, Female Circumcision: When Medical Ethics Confront Cultural Values, 148 CAN. MED. ASSOC. J. 288 (1993); Barrett Breitung, Interpretation and Eradication: National and International Responses to Female Circumcision, 10 EMORY INT'L L. REV. 657 (1996); Lewis, supra note 9, at 3; Culture, supra note 18, at 1944; Funder, supra note 22, at 417.
A positive step has been taken towards the eradication of female circumcision. An equally positive step must be taken to end the practice of male circumcision. International doctrines and domestic remedies may prove helpful, but a better solution lies in a method similar to that being used to combat female circumcision by the Inter-African Committee on Traditional Practices Affecting the Health of Women and Children. The committee organizes seminars and workshops to educate practicing communities of the harmful act. The committee also lobbies in order to gain more recognition for the issue of female circumcision. Moreover, local programs of education are being instituted for women and birth attendants with the hopes of complete eradication by the year 2000. Similar outreach efforts should be conducted to educate communities about the misperceptions and dangers of male circumcision.

The anti-circumcision movement is slowly evolving, but more must be done to fight the practice. The application of domestic laws must be undertaken, especially in the United States. The United States' failure to take steps against male circumcision is hypocritical. The new federal law banning female circumcision demonstrates the unequal perceptions regarding male and female circumcision. Retired Representative Patricia Schroeder, one of the bill's sponsors, stated: "[t]here is no place for FGM here." By condemning one practice and not the other, the United States is misleading its citizens, virtually saying that there is a place in American society for mutilating boys but not for girls. This is also evident in Senator Reid's statement to the President regarding female circumcision:

Even if a method could be devised that would render neonatal circumcision totally painless and nontraumatic, a consideration of the horrendous complications that have resulted, the sexual advantages of possessing one's foreskin, the ethics of altering another person's body without his permission and the basic concept of leaving the body in its natural state should certainly convince most people that the operation should not be done.

Id. at 389.

377. Hosken, supra note 22, at 20-21; Funder, supra note 22, at 437.

378. Hosken, supra note 22, at 20-21; Funder, supra note 22, at 437. "The most successful endeavors to prevent [female circumcision] have been at the grassroots level led by women, many of whom have undergone this excruciating operation, with support from the World Health Organization, UNICEF, and other international human rights groups." Reid Press Release, supra note 290.

379. Hosken, supra note 22, at 20-21; Funder, supra note 22, at 437.

380. See supra notes 288-93 and accompanying text.

Although I believe this practice is a torturous act when performed on any woman, I am most concerned about it being performed on children and young girls under the age 18—in other words, below the age at which a child can give consent. A child does not have the ability to consent or understand the significance and the consequence this ritual will have on her life, on her health, or on her dignity. Young girls are tied and held down, they scream in pain and are not only physically scarred, but they are emotionally scarred for life.382

Male circumcision is also performed on children who cannot give their consent. These children scream in pain as well, and evidence exists that the ritual produces both physical and emotional scars. Senator Reid also states that “female [circumcision] is difficult to talk about, but ignoring this issue because of the discomfort it causes us does nothing but perpetuate the silent acquiescence to its practice.”383 This is exactly what the United States is doing with regard to male circumcision.

With the formation of DOC (Doctors Opposing Circumcision), a campaign to ban routine infant circumcision is underway.384 “These doctors recognize that no one has the right to forcibly remove sexual body parts from another individual. They also believe that doctors should have no role in this painful, unnecessary procedure inflicted on the newborn.”385 The first tenet of the medical practice is First, Do No Harm. Routine circumcision does harm and violates this oath.386 Dr. Benjamin Spock, the famous “baby doctor,” recommended in his early editions of Baby and Child Care, “the child care Bible,” that infant males should be circumcised.387 However, even the baby doctor changed his tune. “We now know that [circumcision] is not the only choice,” Spock has since written, “nor is it agreed that it is the most sensible choice. My own preference, if I had the good fortune to have another son, would be to leave his little penis alone.”388

Activist organizations such as NOCIRC (National Organization of Circumcision Information and Resource Center), and NOHARMM (National Organization to Halt the Abuse and Routine Mutilation of Males) are educating communities by docu-

382. Reid Press Release, supra note 290.
383. Id.
385. Id.
386. Id.
387. Benjamin Spock, M.D., Circumcision—It's Not Necessary, REDBOOK, Apr. 1989; see also WALLERSTEIN, supra note 1, at 47-48.
388. Id.
menting the ramifications of circumcision and lobbying for the addition of male circumcision to the law against female circumcision. NOCIRC regularly publishes a newsletter, sponsors symposiums on circumcision, and publishes several informational pamphlets for distribution at medical facilities.

389. Id.; Rodrick, supra note 192, at 10. NOCIRC publishes literature to inform the public that circumcision is unnecessary and of the physical and psychological effects that may occur as a result of circumcision. The organization has formed a public education campaign which targets prospective parents. Moreover, they attempt through a letter-writing campaign to "discourage insurance companies from covering the procedure." Laurie S. Anderson, Routine Circumcision Focus of Reconsideration, Protest, BATON ROUGE Advoc., July 4, 1993, at 9C. Tim Hammond is founder of NOHARMM which is a children's rights project of men against infant circumcision. Hammond states that the group has taken a strong stance against infant circumcision "because it violates body ownership rights of children." He thinks that a relatively small group of people "understand the purpose and function of the foreskin, and even many doctors think of it as redundant tissue." NOHARMM publishes literature about the purposes of the foreskin and the increased sexual pleasure that can be derived if it is left intact. Furthermore Hammond states that "circumcision has been blindly accepted for so long in this country because males have been more reluctant than females to talk about their bodies to their physicians, and often experience embarrassment and shame when discussing sexuality." Jill Sell, National Group Opposes Male Infant Circumcision, PLAIN DEALER, July 6, 1993, at 9D (quoting Tim Hammond).

390. Two pamphlets distributed by NOCIRC are NURSES FOR THE RIGHTS OF THE CHILD, ANSWERS TO YOUR QUESTIONS ABOUT INFANT CIRCUMCISION, and ANSWERS TO YOUR QUESTIONS ABOUT YOUR YOUNG SON'S INTACT PENIS. (Newsletters and pamphlets are on file with the Buffalo Law Review). NOCIRC sponsored the First International Symposium on Circumcision (ISC) in 1989, and on March 3, 1989, the general assembly adopted the Declaration of the First ISC. Several of declaration's tenets read as follows:

We recognize the inherent right of all human beings to an intact body. Without religious or racial prejudice, we affirm this basic human right.

We recognize the foreskin, clitoris and labia are normal, functional body parts. Parents and/or guardians do not have the right to consent to the surgical removal or modification of their children's normal genitalia.

Physicians and other health-care providers have a responsibility to refuse to remove or mutilate normal body parts.

The only persons who may consent to medically unnecessary procedures upon themselves are the individuals who have reached the age of consent (adulthood), and then only after being fully informed about the risks and benefits of the procedure.

We categorically state that circumcision has unrecognized victims . . . . Physicians who practice routine circumcisions are violating the first maxim of medical practice, Primum non nocere, "First, Do No Harm," and anyone practicing genital mutilation is violating Article V of the United Nations Universal Declaration of Human Rights: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment."

NOHARMM also distributes literature about male circumcision and its complications and produced a film which examines the ethics and human rights issues regarding infant male circumcision.391 Recent support groups, such as NORM (National Organization of Restoring Men) and BUFF (Brothers United for Future Foreskins), are informing the American public about the brutal removal of their foreskins.392 These groups are pioneering nonsurgical techniques for restoring foreskins.393 Although these groups demonstrate the negative effects of circumcision, time and money would be best spent campaigning against future male circumcision and not focusing on the restoration of lost foreskins.

Efforts are being made to study the cost effectiveness of male circumcision.394 A recent cost-utility analysis indicated:

[t]he net, discounted lifetime dollar cost of routine circumcision is $102 per person, while the net, discounted lifetime health cost is [fourteen] hours of healthy life. These results suggest that the financial and medical advantages and disadvantages of routine neonatal circumcision cancel each other and that factors other than cost or health outcomes must be used in decision making.395

An estimated $200 million per year is spent on male circumcision. As a result of the economics of circumcision, an intolerable

391. Nearly forty NOHARMM informational sheets on circumcision are on file with the Buffalo Law Review.

392. Rodrick, supra note 192, at 10; see also Bigelow, supra note 224, at 56; R. Wayne Griffiths, Restoration: Ball Bearing Method, UNCUT (July 1988) (edited Oct. 1991, on file with the Buffalo Law Review); NORM, Foreskin Restoration Support Group (Purpose, Goals, & Governing Policies & A Brief History Information Sheet, on file with the Buffalo Law Review); Information sheet supplied by NORM that lists devices that may be used for foreskin restoration (on file with the Buffalo Law Review); Electronic Mail Letter from Bernard W. Knott to Barrett, Restoration@foreskin.com (Mar. 25, 1996) (on file with the Buffalo Law Review); Electronic Mail Letter from Bernard W. Knott to Eric, Restoration@foreskin.com (Mar. 25, 1996) (on file with the Buffalo Law Review).


395. Ganiats et al., supra note 394, at 282. This analysis looked at the factors which fuel the debate over male circumcision such as the cost of the procedure, the pain associated with the procedure, the risk of urinary tract infections, and the risk of penile cancer. Lawler et al., supra note 394, at 587.
dynamic occurs as physicians seeking profits perpetuate the abuse. Male circumcision, then could be argued, is market driven as opposed to ideologically based—the notion that non-medical parents demand circumcision and that doctors provide the service is a guise created by both the physicians and insurance companies. A recent study in Madison, Wisconsin found the following: “[A] 30-minute circumcision goes for $260 a cut. The hospital takes half; the doctor takes the other half. If a doctor does just one circumcision a day, five days a week for an entire year, he or she will increase his or her annual income by $33,800.” These funds could be better spent on researching cures to life-threatening diseases or on other necessary health programs.

Most insurance companies cover routine infant male circumcision. Male circumcision opponents are reaching out to insurance carriers and notifying them that there is no medical necessity for the procedure. Several letters from insurance companies to male circumcision opponents indicate that male circumcision is covered because of artificial consumer “demand” and imbedded cultural norms. Positive efforts, such as writing to and lobbying insurance companies, must continue. Although insurance companies acknowledge that male circumcision is not a medical necessity and continue to cover the procedure, there must be hope that eventually some will take notice and cease issuing policies offering coverage—only then maybe “more doctors and parents will question the procedure.”

396. Clair Wiederholt, Genital Mutilation Not Confined to Girls, Wis. St. JRNl, May 12, 1996, at 2B.
397. It is estimated that the average cost of a circumcision in California is $100 which adds up to several million dollars a year. John M. Goldenring, M.D., Circumcision Debate, L.A. Times, Mar. 19, 1989, at pt. 6, 12.
398. Letter from John P. Hansen, Medical Director, Group Health Cooperative HMO, to Ph.D., Madison, Wisconsin (Mar. 23, 1994) (on file with the Buffalo Law Review, anonymity of addressee) In this letter the medical director states:

GHC has chosen to continue to cover these procedures because GHC feels that a substantial number of our members want this to be covered. In fact, there would likely be a significant consumer negative response if we refused to [perform] these . . . The support for circumcision in this country is cultural and societal, not medical. GHC is responding to societal and cultural expectations by covering this procedure.

Id.; Letter from W. Knox Fitzpatrick, M.D., Vice President, BlueCross/BlueShield of Utah, to Sandy, Utah (Sept. 21, 1994) (on file with the Buffalo Law Review, anonymity of addressee). In this letter the Vice President of Medical Affairs states that “[i]t has been known for decades that circumcision provides no demonstrably medically necessary purpose. It is rooted in our culture, however, and efforts to the contrary have done little to abolish this habit.” Id.
399. ROMBERG, supra note 1, at 114.
that insurance companies continue covering an unnecessary medical procedure, but often refuse to cover procedures which are of greater medical value. This too could be linked to a profit driven theory. Whether or not parents insist upon coverage of the procedure should be irrelevant.

Like uncircumcised women, uncircumcised men can clean their genitals to prevent infection and disease. Optimal hygiene is a necessary replacement for circumcision; surgery is not a solution. For this to be successful, however, people will have to begin discussing their genitalia in an open manner with their children and others. Frank discussion of sexuality is generally discouraged in American society; it is often taboo to speak of one's penis or vagina. The discourse must change. Both physicians and parents must begin to look at and discuss the real issue—the abuse of innocent children.

In religious communities, alternatives to traditional ceremonies must be suggested and incorporated; religious leaders must begin to speak out and question circumcision. For example, the Jewish community has begun to address the issues presented by circumcision. An Alternative Bris Support Group has been formed for parents who wish to consider a bris without circumcision. Parents are now beginning to perform these nontraditional “circumcision” ceremonies. "[T]hey want to emphasize that [the] covenant [is] made in the heart rather than on the body, and that it is equally binding." Moreover, Jewish feminists are speaking out against male circumcision, recognizing that circumcision is inconsistent with traditional Jewish values.

400. For a brief discussion, see Romberg, supra note 1, at 112-14.
401. Lisa Braver Moss, The Jewish Roots of Anti-Circumcision Arguments, Address at the Second International Symposium on Circumcision (Apr. 30-May 3, 1991) (on file with the Buffalo Law Review); Nelly Karsenty, A Mother Questions Brit Millah, 16 Humanistic Judaism 14 (Summer 1988). The debate over male circumcision is even occurring in Israel. Israelis are joining “the group against mutilation of genitals,” which started a public campaign calling for a ban on circumcision. Ohad Gozani, International World Bulletin, Daily Telegraph (London), May 5, 1997, at 12. The group describes male circumcision as “a primitive and barbaric act.” Id. One of the group’s organizers further states: “[t]his is plain abuse, particularly of babies.” Id.
404. Pollack, supra note 182, at 171.
Judaism places infinite value on life, particularly human life. The principal of pikuah nefesh is fundamental to Judaism; that is, for the sake of saving a life, even the Sabbath may be desecrated. Sh'mirat haguf, the protection of one's
These women contend that opposing circumcision is not just men's work, but is also women's and that the two must work together because "it is not possible to violate or suppress the sexuality of one gender without doing harm to the other." Women need to continue these efforts and begin working with male organizations to halt the abuse.

CONCLUSION

The bifurcation of male circumcision from female circumcision can no longer be tolerated. Claims that the two cannot be linked perpetuates the continued legitimacy of one human rights abuse, male circumcision, through the condemnation of another. An analogy must be made between the two; regardless of whether a child is male or female, neither should be subject to genital mutilation. The United States' criticism of other cultures and religions is self-righteous and ironic, especially since it continues to advocate its own abusive ritual based on unsound medical justifications. Physicians and parents must stop violating children's rights even if only a small percentage of children might develop a medical problem as a result of the procedure. Parents must stop being concerned that their son's penis look like Daddy's or the other children's in the neighborhood or locker-room. More activist organizations such as DOC, NOCIRC, and NOHARMM must be formed. The efforts of these groups, like those at the grassroots level led by women in Africa, will be instrumental in the eradication of male circumcision in the United States and other countries. In this campaign, the medical community shoulders a responsibility for conducting research about circumcision and better informing parents of newborns about the procedure and its risks. International or domestic legal measures are not enough to stop male circumcision. These measures must be combined with efforts to raise the level of consciousness of all peoples about the human rights abuse of male circumcision. People must be encouraged to ask questions about circumcision and then to question the answers they are given. The first and most instrumental step in the prevention of innocent suffering depends upon

body, is high priority. Tattooing, cutting the flesh and amputation are all forbidden. . . . The precept of ba-ai tashhit also informs biblical and Rabbinic thought. We are not to destroy the fruit trees, even during a war. . . . Circumcision is antithetical to this very powerful life-affirming tradition.

Id. at 183-84.

405. Id. at 185.
education and vocalization in an effort to gain public acknowledgment of male circumcision as a human rights abuse.