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Prosecution of Female Genital Mutilation in the United States

By Rena Marie Justice[1]

"You can have scars and also socially it is really strong because all of your life you know you've been violated, mutilated, abused."
— Salimata Knight, Senegalese FGM survivor

Background

The practice known as Female Genital Mutilation (FGM), often referred to as "female circumcision" or "female genital cutting" (FGC), is forced on girls from infancy up to marriage. FGM is known to exist in 28 African countries, as well as places in Asia and the Middle East, and increasingly among immigrant groups in Europe, Canada, and the United States. Eighteen African countries have prevalence rates of 50% or higher, including Ethiopia, Mali, and Sierra Leone. Worldwide, it is estimated that 100-140 million women have been genitally cut, and each year another 2 million girls are at risk.[2]

There are several forms of FGM and all involve partial or total removal of the external female genitalia for non-therapeutic reasons.[2] One of the milder forms has been compared to amputation of the penis in males.[4] "Clitoridectomy" involves removal of the clitoral hood and part of or the entire clitoris. "Excision" involves removal of the clitoris and part or all of the labia minora. "Infibulation" involves removal of most or all of the external genitalia, including the clitoris, labia minora, and labia majora, while the sides of the vagina are stitched together so that only a small opening for both urine and menstruation remains. Infibulation involves a healing period of several weeks during which the girl's legs are bound together so the wound is immobilized.[5]

FGM can leave girls with a host of complications such as severe infections; HIV contraction; incontinence; shock; painful sexual intercourse, urination, and menstruation; and great difficulty in childbirth. Depression and other devastating psychological effects are common.[6] Despite these effects, the cultural beliefs surrounding the practice are strong and include curbing promiscuity, ensuring marriageability, and initiation of girls into womanhood.[7] Today, the practice is condemned by individual countries, human rights groups, and international law as a violation of the human rights of children.[8]

FGM in the United States

FGM occurs in American jurisdictions where members of immigrant communities reside who traditionally perform the practice. For example, a city with a large Somali community will want to note that in Somalia, there is a 90-98% FGM rate among girls of nearly all ethnic groups, with most being infibulated.[9] A child can be cut either in the U.S. or by sending her abroad for the procedure. The last assessment from the Centers for Disease Control and Prevention estimated in 1990 that 168,000 females in the U.S. were with or at risk for FGM, with 48,000 being girls under 18 years old.[10] As immigration increases, these numbers grow.[11] According to medical research based on the 2000 census, approximately 228,000 women and girls are with or at risk for FGM in the U.S.[12]

Female Genital Mutilation was put on the radar of the American public with a U.S. Board of Immigration Appeals case.[13] In 1994, a 17-year-old girl from Togo fled to the U.S. via Germany, upon being forced into a polygamous marriage and told she was to undergo mutilation.[14] Finally, after 18 months, she was granted asylum based on her "membership in a particular social group" under U.S. and international asylum law.[15]

Then on September 30, 1996, Congress enacted the "Federal Prohibition of Female Genital Mutilation Act" under 18 U.S.C.S. §116, which became effective in April 1997. This statute prohibits "knowingly circumcising, excising, or infibulating the whole or any part" of the female genitalia on persons under 18 years old, excludes "custom or ritual" as a defense,[16] and provides an exception for health care.[17] To date, there are no published prosecutions under § 116.

State Legislation and Local Prosecution

Currently, 18 states have specific statutes relating to the practice of FGM.[18] Most contain minor variations to the federal statute. For example, the federal statute restricts criminal liability to those who perform FGM on girls, while some states widen liability to cover those who "permit"[19] or "allow"[20] such a procedure to take place. These statutes would, therefore, impose liability on both guardians and practitioners. A few states have legislated educational outreach programs, geared toward immigrants and medical personnel, on physical and mental health effects of FGM as well as criminal sanctions.[21]

In 1994, Minnesota became the first state to amend its criminal code.[22] The Minnesota statute prohibits FGM on both women and girls, as does Illinois, Rhode Island, and Tennessee.[23] The most recent legislation comes from Georgia[24] and encompasses the various components seen in the states thus far, such as holding both practitioners and consenting guardians responsible[25] and prohibiting removal of a girl from the state for the purpose of FGM.[26] Prosecutors in states that do not have FGM-specific statutes can bring charges using other child abuse, battery, and assault laws. FGM can be prosecuted, for instance, where abuse or substantial bodily injury is defined as "permanent disfigurement"[27] or "…protracted impairment of physical or emotional health, or protracted loss or impairment of the function of any bodily organ…."[28]

Social workers and victim advocates can also assist a child in a case involving FGM. For example, many African countries now have educational programs, alternative ceremonies, and laws in use as tools of prevention.[29] If a girl is sent to her country of origin to be cut, a Victims' Services department can contact an anti-FGM organization in that country for assistance. This is

one way to help prevent a child from being subjected to mutilation elsewhere when parents are faced with prosecution in the U.S.

Defenses

Possible defenses to FGM include custom, consent, medical necessity, and constitutional arguments such as parental rights and freedom of religion. Many statutes expressly exempt, as defenses, both consent of the parents or guardian and any claim to FGM as a custom, ritual, or standard of practice.[30] In situations where a parent is unaware of the health risks and criminality of FGM, however, custom may be considered as a mitigating factor in sentencing for a first offense. Coupled with mandatory education, this route will maintain the family structure upon prosecution.[31] Likewise, a medical necessity exception is common, which limits procedures to health related reasons such as birthing complications, as seen in the federal statute. However, the American Academy of Pediatrics (AAP) and the World Health Organization formally oppose the practice.[32]

Constitutional challenges can be rebutted using a strong history of case law and delineating public health and child protection goals. For example, parental rights have been held by the Supreme Court to be limited when the health or safety of a child is at stake.[33] Laws prohibiting FGM would clearly fit into this governmental purpose to protect children from harm. Regarding religious freedom arguments, FGM proponents often cite Islamic tradition as a reason for cutting girls. This argument can be overcome by educating the court that FGM is not prescribed in the Quran, and it is believed that FGM predates Islam.[34] A minority of followers of Islam, Christianity, Judaism, and Indigenous African religions genitally mutilate girls. Therefore, the practice is by far more cultural than religious.[35] Finally, under the Establishment Clause, FGM prohibitions would not entangle government in any specific religion and would advance purely secular purposes; in addition, the laws are neutral and of general applicability and thus do not violate the Free Exercise Clause.[36]

Conclusion

American prosecutors must understand what FGM is so they can determine the best course of action in order to protect other female children within the family or community. Other issues not addressed here, such as the result of a felony conviction on the immigration status of parents, should also be considered when using prosecutorial discretion. Criminalization alone will not effectively serve these children, and attention to community outreach is necessary.[37] The message implicit in the existing statutes, however, is clear – the practice of female genital mutilation of children in this country, under the guise of cultural prerogative, will be considered abuse.

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[2] U.S. Department of Health and Human Services' National Women's Health Center, *Female Genital Cutting* (February 2005) available at http://www.4woman.gov/faq/fgc.htm [hereinafter U.S. Informational Sheet]; World Health Organization, *Female Genital Mutilation* (June 2000) available at http://www.who.int/mediacentre/factsheets/fs241/en/ [hereinafter WHO Fact Sheet].

[3] WHO Fact Sheet, *supra* note 2; United Nations Office for the Coordination of Humanitarian Affairs, *Razor's Edge - The Controversy of Female Genital Mutilation: When Culture Harms the Girls-The Globalisation of Female Genital Mutilation* (March 2005), available at http://www.irinnews.org/webspecials/FGM/default.asp [hereinafter *Razor's Edge*].

[4] Dr. Nahid Toubia, *Female Circumcision As A Public Health Issue*, 331(11) New England Journal of Medicine 712 (1994) [hereinafter Toubia, *Female Circumcision*].

[5] WHO Fact Sheet, *supra* note 2; *Razor's Edge, supra* note 3; Rosemary Stewart, *Female Circumcision: Implications for North American Nurses*, 35(4) J PSYCHOSOCIAL NURSING 35, 35 (1997).

[6] Toubia, *Female Circumcision, supra* note 4; WHO Fact Sheet, *supra* note 2; *Razor's Edge, supra* note 3; Emily Banks, et al, *Female genital mutilation and obstetric outcome: WHO collaborative prospective study in six African countries,* 367 THE LANCET 1835 (2006).

[7] Parents often subject their daughters to FGM out of a desire to protect them form otherwise severe social ostracism. If the family has permanent residency in the U.S., however, this ostracism is arguably lessened. *See* U.S. Informational Sheet, *supra* note 2.

[8] FGM is denounced by the World Health Organization and other United Nations agencies, as well as the Organization of African Unity. *See Razor's Edge, supra* note 3 for a look at other countries' and the international responses to FGM.

[9] Office of the Senior Coordinator for International Women's Issues, Office of the Under Secretary for Global Affairs, U.S. Department of State, *Prevalence of the Practice of Female Genital Mutilation (FGM); Laws Prohibiting FGM and Their Enforcement; Recommendations on How to Best Work to Eliminate FGM* (2001) available at http://www.state.gov/documents/organization/9424.pdf#search=%22Female%20Genital%20Mutilation%3A%20Report%20of%20a%20WHO%20Technical%20Working%20Group%22.

[10] U.S. Informational Sheet, *supra* note 2.

[11] African immigration has increased dramatically since 1990. *See* U.S. Census Bureau, *Ancestry 2000* (June 2004) available at http://www.census.gov/prod/2004pubs/c2kbr-35.pdf.

[12] Brigham and Women's Hospital's African Women's Health Center, *Number of women, girls with or at risk for female genital cutting on the rise in the United States* (2006) available at http://www.brighamandwomens.org/africanwomenscenter/research.aspx.

[13] In re Fauziya Kasinga, 21 I. & N. Dec. 357 (1996).

[14] Id. at 358-359.

[15] Id. at 368; *See also* FAUZIYA KASINDJA & LAYLI MILLER-BASHIR, DO THEY HEAR YOU WHEN YOU CRY (1998).

[16] 18 USCS § 116 (c) (2005).

[17] 18 USCS § 116 (b) (2005).

[18] These states include Arkansas, California, Colorado, Delaware, Georgia, Illinois, Maryland, Minnesota, Missouri, Nevada, New York, North Dakota, Oregon, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin. For a complete list of these statutes, see http://www.ndaa-apri.org/apri/programs/ncpca/statutes.html.

[19] CAL. PEN. CODE § 273a (2006).

[20] 11 DEL. C. § 780 (2005).

[21] See CAL. HEALTH SAF. CODE § 124170 (2005), MINN. STAT. § 144.3872 (2005) (no public money actually allotted), and O.R.S. § 431.827 (2005) (never fully enacted).

[22] MINN. STAT. § 609.2245 (1) (2005), *see also* 1994 MINN. LAWS ch. 636, art. 9, § 9.

[23] §720 ILL. COMP. STAT. 5/12-34 (2005), TENN. CODE ANN. § 39-13-110 (2005), and R.I. GEN. LAWS § 11-5-2 (2005).

[24] O.C.G.A. § 16-5-27 (2005).

[25] O.C.G.A. § 16-5-27 (a) (1) (2) (2005).

[26] O.C.G.A. § 16-5-27 (a) (3) (2005).

[27] ALM GL ch. 265, §13J (a) (2006).

[28] N.J. STAT. § 9:6-8.9 (a) (2005).

[29] *See* United Nations Population Fund, *A Safe Haven for Girls Escaping Harm in Kenya* (September 2005) available at http://www.unfpa.org/news/news.cfm?ID=672 and United Nations Office for the Coordination of Humanitarian Affairs, *Razor's Edge - The Controversy of Female Genital Mutilation: A case study of modern legislation against cultural identity* (visited August 24, 2006) available at http://www.irinnews.org/webspecials/FGM/45979.asp for examples of alternative ceremonies in Kenya.

[30] 17 out of 18 states and the federal statute include one or both of these defenses in the statutory language. R.I. GEN. LAWS § 11-5-2 (c) (3) (2006) describes FGM under felony assault.

[31] Lori Ann Larson, Note, *Female Genital Mutilation In The United States: Child Abuse Or Constitutional Freedom?*, 17 WOMEN'S RIGHTS L. REP. 237, 247 (1996).

[32] The AAP's Policy Statement is available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b102/1/153.

[33] Prince v. Massachusetts, 321 U.S. 158, 167 (1944); Wisconsin v. Yoder, 406 U.S 205, 233-234 (1972); *see also* Larson, *supra* note 31.

[34] U.S. Informational Sheet, *supra* note 2.

[35] *Razor's Edge*, *supra* note 3.

[36] Larson, *supra* note 31 will provide case law and a more in depth analysis of religious freedom and FGM.

[37] See www.rainbo.org and www.sautiyetu.org for more information on African immigrant and refugee community outreach in the U.S. *See* CAL. HEALTH & SAF CODE § 124170 (2005) and 8 U.S.C. § 1374 (2005) for examples of legislating outreach.

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