FEMALE GENITAL MUTILATION

Other legal writers[134] have suggested that male circumcision should be treated no differently than "female circumcision." The 104th Congress recently outlawed the rite of female genital cutting.[135] Seven states have similarly enacted measures banning the practice of female genital cutting[136] or legislating educational programs designed at eliminating the rite. At least 4 additional states, including New York, have similar measures pending.

As expected, equal protection challenges have already been raises in law suits contending that the state should not differentiate between male and female circumcisions.[137]

Female genital cutting has been portrayed as a barbaric, and abusive act. Because it is not part of the American culture, legislatures and courts can easily regard it as odious and therefore ban its practice, just as polygamy and peyote use were proscribed. Once male circumcision is linked with this unfavorable rite, calls for its banning cannot be too far behind.

CIRCUMCISION V. FEMALE GENITAL MUTILATION

The proponents of an outright ban of male circumcision maintain that if female genital cutting is abuse, so too is male circumcision. In fact, treating the two as gender complementary procedures only invites this equal protection challenge. Yet it is important to recognize that female genital cutting is not the comparable to male circumcision.[138]

They are distinct rites performed for vastly different reasons.

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134. James G. Dwyer, *The children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to children of Religious Objectors*, 74 N.C.L.Rev. 1321, note 160.

135. Omnibus Appropriations Act (1997), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30 1996); H.R. Conf. Rep. No. 863, 104th Cong., 2nd Sess. 1996, 1996 WL 562036 (Leg.Hist.).

136. *See, e.g.*, N.D. Crim. Code 12.1-36-01; (1995); Minn. Stat. Ann. § 609.2245 (1995); Tenn. Code Ann. T.C.A. § 39-13-110 (1996).

137. *See Suit Says Circumcision Reflects Bias*, The Bismarck Tribune, June 8, 1996; Kevin Helliker, *Anxious Parents Question Merits of Circumcision*, Wall Street Journal, May 28, 1996 at A21 (citing the attempt in North Dakota to ban routine male circumcision).

138. *But see* Dwyer, 74 N.C.L. Rev., note 160.

Linking the two is an attempt to portray male circumcision as a barbaric rite. Some of the significant differences can be found in a careful reading of the relevant portions of the federal statute. Sec. 645(a)(1) notes that "the practice of female genital mutilation is carried out by members of certain cultural and religious groups within the United States." The statute does not assert that female genital cutting is a religious practice or tenet of faith. On the contrary, the statute notes that female cutting is carried out by members of certain faiths for cultural reasons. As a result, it is not protected under the First Amendment of State Constitutional counterparts. "There is no such thing as female circumcision in Islam. Female circumcision is only practiced in a few countries and is very much a cultural thing [as opposed to a ritual requirement of Islam]."[139]

SO-CALLED FEMALE CIRCUMCISION

The federal statute criminalizes female genital mutilation "of any person who has not attained the age of 18." The age requirement is significant. Unlike Jewish ritual circumcision, female genital cutting is usually performed as a pre-pubescent or puberty rite. "In Egypt and elsewhere in Africa and some parts of the Middle East, circumcision is the cruel and unusual punishment for being an adolescent female."[140]

The newly enacted federal statute carefully avoided using the term "female circumcision." Instead, it adopted the phrase "female genital mutilation." This was no accident. Rep. Pat Schroeder (D-Colo.) noted that "you keep trying to explain that this is not circumcision. . . . This is more like Lorena Bobbit."[141]

ANTI MALE CIRCUMCISION PROPONENTS

Proponents of a ban on circumcision fall into 3 broad categories: (a) members of the medical community who sees no benefit

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139. *Islam and Circumcision*, The News & Observer Raleigh, N.C., (October 4, 1996).

140. Charles W. Holmes, *The Plight of Women Around the World Sexuality: Painful, Ritual Procedure Tied to Tradition in Egypt*, The Atlanta Constitution, Sept. 3, 1995.

141. Celia W. Dugger, *Congress Bans Genital Rite*, New York Times, Oct. 12, 1996 at A1.

(and a possible detriment) to routine neonatal circumcisions, (b) members of the legal community who genuinely believe that both medical circumcision and bris milah constitute abuse, and (c) anti-Semites.

Just as there is a wide body of medical and legal literature on the subject of circumcision, there is a plethora of non-medical, non-legal supporters of a ban on male circumcision. A cursory scan of the Internet reveals hundreds of web-pages maintained by anti-circumcisionists. Many of these web sights are overtly anti-Semetic and are linked with unrelated anti-Semitic web pages.

CONGRESSIONAL PHILOSOPHY

Rep. Schroeder noted that Congress delayed for years the passage of legislation banning female genital mutilation because (a) some members simply did not believe that the practice went on; (b) Some feared that it would lead to proposals calling for the abolishment of male circumcision.[142] Her first point implicates the cultural norms of the practice, and her second point raises the serious concern of equal protection.

CONCLUSIONS

Governmental action is necessary in order to remedy the shortcomings of New York's case law on bris milah. New York's approach is rather vague and can lead to unjust results. A parent whose son was negligently circumcised has a largely unenforceable legal remedy against the Mohel since there is no available or required malpractice insurance. While highly unlikely, a Mohel could find himself being prosecuted for practicing medicine without a license if he deviates from the halakhic requirements outlined in the Code of Jewish Law. Finally, the court could become a de facto *Bet Din,*[143] ruling on the validity of Jewish laws and rituals.

In addition, prevailing cultural norms and attitudes are constantly being rehsaped. The acceptability of routine circumci-

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142. *Id.*

143. A tribunal composed of a panel of rabbis for the purpose of adjudicating matters of law.

sion changes with each passing season. A growing anti-circumcision trend could have an adverse impact on the public perception of medical and ritual circumcisions, which in turn could influence the legislatures and courts. Finally, federal and state constitutional provisions could be interpreted in such a way as to severely limit or even ban circumcisions.

The state government need not resort to the draconian measure of banning ritual circumcision in order to protect its citizenry. Still, New York should do more than it currently does to protect the public. Mohalim are generally well trained and dedicated, but like all professions, there are enough bad ones to warrant state action.

Firstly, New York should adopt a certifying procedure, akin to licensing, to weed out the untrained, poorly trained, or dangerous Mohel. The easiest and perhaps best model is the Delaware statute:

> (e) Nothing contained in this chapter shall prevent:
>
> . . . (4) The practice of ritual circumcision performed pursuant to the requirements or tenets of any religion; provided, however, that a person licensed to practice medicine in this State shall have certified in writing to the Board that in his opinion the practitioner has sufficient knowledge and competence to perform such procedures according to accepted medical standards, and shall not have withdrawn such certification;[144]

Editor's Comment:

CIRCUMCISION

Circumcision apparently offers virtually no health benefits, but men who are circumcised tend to have more varied sex, researchers reported. The researchers found no significant differences between circumcised and uncircumcised men in their likelihoodof contracting sexually transmitted diseases. But their study did find significant differences between circumcised and uncircumcised men in terms of their sexual practices. The difference was greatest for masturbation—ironically, a practice that

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144. Del. Code Ann. tit. 24 § 1703(e)(4) (1995).

circumcision was once thought to limit. It said 47 percent of circumcised men reported masturbating at least once a month compared to 34 percent for their uncircumcised peers. The difference in frequency cannot be explained but it does cast doubt on the Victoria-era notion that circumcision reduces the urge to masturbate. In addition, circumcised men were found to be nearly 1.4 times more likely to engage in heterosexual oral sex than uncircumcised men. They were also more likely to have had homosexual oral sex and heterosexual and intercourse. The study also found circumcised men have a slightly lower risk of sexual dysfunction, especially later in life.

The study was based on an analysis of data collected from a sample of 1,410 men, ages 18 to 59, in the United States. Circumcision rates rached 80 percent in the United States after World War II but peaked in the mid-1960s and have since declined.

There is other evidence that circumcision practically eliminates cancer of the penis. Furthermore, women who have intercourse exclusively with circumcised men do not develop cancer of the cervex. Bacteriologic studies have shown abundant bacteria and viruses in the smegma under the foreskin which are undoubtedly one of the sources of cervical cancer.

CIRCUMCISION AND SENSITIVITY

Many parents agonize over whether to have their newborn sons circumcised. Some parents have clear religious reasons. Other wonder whether any health benefits are worth the pain of the procedure.

Researchers have produced new evidence that baby boys may experience long-lasting sensitivity to pain after circumcision if they are not anesthetized. The researchers studied 87 infant boys who were either not circumcised, circumcised without anesthesia, or circumcised using anesthetic cream. The parents were present, but were not allowed to comfort their sons. Videotapes of the babies when they were vaccinated four or six months later showed the boys who had been circumcised without anesthesia appeared more sensitive to pain than the other children. They cried longer and behaved in other ways that indicated elevated sensitivity, such af furrowing their brows and squeezing their eyes shut.

Circumcision may induce long-lasting changes in infant pain behavior because of alterations in the infant's central neural processing of painful stimuli. They recommend always using anesthesia during circumcisions.

A recent study is reported in the April 12, 1997 issue of *JAMA*, Vol. 277, No. 13, pages 1052-1057, entitled "Circumcision in the United States: Prevalence, Prophylactic Effects and Sexual Practice." The article reviewed the practice of neonatal male circumcision.

A number of recent studies have attempted to assess the value of neonatal circumcision. Several have determined that the procedure has positive effects. For example, an association has been found between circumcision and lower rates of urinary tract infections in infancy, as well as lower rates of certain sexually transmitted diseases (STDs). As a result of these and other findings, the 1989 American Academy of Pediatrics (AAP) Task Force on Circumcision shifted its previous position, acknowledging that circumcision has potential medical benefits that must be weighed against its risks.

Male satisfaction has also been debated. Some believe that circumcision reduces male sensitivity and coital enjoyment while others argue that circumcision may afford greater ejaculatory control. Masters and Johnson reported no clinically significant difference in the tactile sensitivity of the glans. More recent reports suggest the sensitivity of the circumcised glans may in fact be reduced. Such claims of reduced sexual satisfaction for circumcised men have spurred a significant movement against the circumcision of infants and the reversing of circumcision in adult men. A technique of uncircumcising has even been introduced. Nevertheless, little consensus exists regarding the role of the foreskin in sexual performance and satisfaction.

The reported study by E. O. Laumann, C. M. Masi, and E. W. Zuckerman was undertaken to assess the prevalence of circumcision across various social groups and examine the health and sexual outcomes of circumcision. The subjects included 1,410 American men aged 18 to 59 years at the time of the survey. In addition, an oversample of black and Hispanic minority groups is included in comparative analyses. They measured the contraction of sexually transmitted diseases, the experience of sexual dysfunction, and experience with a series of sexual practices. The

investigators found no significant differences between circumcised and uncircumcised men in their likelihood of contracting sexually transmitted diseases. However, uncircumcised men appear slightly more likely to experience sexual dysfunctions, especially later in life. They also found that circumcised men engage in a more elaborated set of sexual practices. This pattern differs across ethnic groups, suggesting the influence of social factors. They concluded that there was a slight benefit of circumcision but a negligible association with most outcomes.

With respect to STDs, the investigators found no evidence of a prophylactic role for circumcision and a slight tendency in the opposite direction. Indeed, the absence of a foreskin was significantly associated with contraction of bacterial STDs among men who have had many sexual partners in their lifetimes.

The data suggest a benefit of circumcision with respect to sexual dysfunction. Circumcised men were slightly less likely than those who had not been circumcised to experience various sexual difficulties. This difference was significant among the oldest age group.

Regarding sexual practice, results reveal a clear pattern in that circumcised men report a more highly elaborated set of sexual practices. In particular, the association between circumcision status and masturbation frequency was quite strong. Similar results, at a somewhat weaker level, occurred for heterosexual oral sex.

This statute requires only a minimal governmental intervention, but it alleviates many of the difficulties enumerated above. By using the language "pursuant to the requirements or tenets of any religion" instead of "anciently practiced" and "by a qualified person," the Delaware statute preempts any of the intra-religious squabbles which could arise from New York's case law policy. The statute is clearly facially neutral and does not favor one religion, or denomination of Judaism, over another. In fact, unlike the other state statutes which exempt ritual circumcision, Delaware makes no specific reference to Mohels or rabbis.

Most importantly, the Delaware statute requires that the circumcisor be signed off by a qualified physician. Of course, the physician must know the extent of his or her potential liability should the Mohel act negligently. In addition, we would need to

know whether performing a ritual circumcision without complying with the certification process would be a per se criminal act of practicing without a license.

I suggest that the legislature enact a statute which would enable mohalim to obtain appropriate liability insurance. All things being equal, parents would favor an insured Mohel to an uninsured one. Also, market forces being what they are, the costs of such Mohel liability insurance would probably be relatively expensive. Thus, the part time or casual circumcisor would find it difficult to compete, leaving the field with more experienced Mohalim.

Finally, I suggest that in enacting statutes banning the practice of both female genital mutilation and ritual abuse of children, states explicitly distinguish and exclude the practice of male ritual circumcision. It is not enough for the legislatures to remain silent. They must actively assert that male circumcision is neither abusive nor violative of the Equal Protection clause.

Research References

West Group Tort and Personal Injury Library

Russ, Freeman & McQuade, Attorneys Medical Advisor § 14:75 (routine care of baby upon birth).

Ausman & Snyder's Medical Library, §§ 2:42 (obstetrics—routine care), 5:111 (pediatrics —routine care).

Am Jur

61 Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 197 (consent to treatment); 227 (unlicensed practitioner).

Annotations

Liability for medical malpractice in connection with performance of circumcision, 75 A.L.R.4th 710.

KeyCite™/Insta-Cite® Cases referred to herein can be further researched through the KeyCite™ and Insta-Cite® computer-assisted services. Use KeyCite or Insta-Cite to check citations for form, parallel references, and prior and later history. For comprehensive citator information, including citations to other decisions and secondary materials that have mentioned or discussed the cases cited, use KeyCite. ALR and ALR Fed

Annotations referred to herein can be further researched through the Westlaw Find service.