

Legislation on Female Genital Mutilation in the United States

Female genital mutilation (FGM), has increasingly been the subject of legislative activity both in African countries in which it has traditionally been practiced and in nations where African immigrants have settled. As have other legislatures around the world, the U.S. Congress and a number of state legislatures have enacted statutes penalizing the practice and supporting the global movement to abandon FGM.

FGM violates the human rights of girls and women to non-discrimination, health and physical integrity. However, the question of how to prevent FGM in the U.S. is a complex one. This briefing paper summarizes the legislative approaches taken by the U.S. federal government and the 16 states that have adopted legal measures specifically targeting FGM.

Most FGM statutes in the U.S. were enacted between 1996 and 1999. As of October 2000, no court cases involving any of these new statutes have been reported as published court decisions.¹ While the prevalence of FGM in the U.S. is not fully known, it is essential that efforts to prevent its practice include culturally sensitive education and outreach to the relevant communities. The deeply ingrained cultural attitudes underlying FGM cannot be changed simply by outlawing the practice.

FGM has serious health consequences for girls and women. The immediate complications include severe pain and bleeding that can lead to hemorrhaging. Long-term complications include chronic infections, infertility, problems during pregnancy, and pain during sexual intercourse. There have been few studies on the psychological effects of FGM. Some women, however, have reported a number of problems, such as disturbances in sleep and mood.

Various justifications for the practice are given by the communities in which it is prevalent. These include:

- **Custom and tradition:** Communities that practice FGM maintain their customs and preserve their cultural identity by continuing the practice.
- **Women's sexuality:** In some societies, FGM is thought to control women's sexuality by reducing their sexual fulfillment.
- **Religion:** While religious duty is commonly cited as a justification for the practice of FGM, it is important to note that FGM is a cultural, not religious, practice. In fact, while FGM is practiced by Jews, Christians, Muslims, and members of other indigenous religions in Africa, none of these religions require it.

- **Social pressure:** In a community in which most women are circumcised, family and friends create an environment in which the practice of circumcision becomes a requirement for social acceptance.

FGM has received increasing attention from the international community during the past 20 years. FGM was raised as a matter of concern at the United Nations Commission on Human Rights in 1981.¹⁰ Since the late 1970s, WHO has repeatedly spoken out against the practice of FGM by any member of the health profession.¹¹ In 1993, the World Health Assembly passed a resolution calling for action

WHAT IS FGM?²

FGM³ is the collective name given to several different traditional practices that involve the cutting of female genitals.⁴ The procedure is commonly performed upon girls anywhere between the ages of four and 12 as a rite of passage. In some cultures, it is practiced as early as a few days after birth and as late as just prior to marriage or after the first pregnancy.⁵

The World Health Organization (WHO) has grouped the types of FGM into four broad categories:

- **Type I (commonly referred to as “clitoridectomy”):** the excision of the prepuce with or without excision of the clitoris;
- **Type II (commonly referred to as “excision”):** the excision of the prepuce and clitoris together with partial or total excision of the labia minora;
- **Type III (commonly referred to as “infibulation”):** the excision of part or all of the external genitalia and stitching or narrowing of the vaginal opening.
- **Type IV:** all other procedures involving partial or total removal of the female external genitalia for cultural or any other non-therapeutic reasons.⁶

Worldwide, an estimated 130 million girls and women have undergone FGM. At least two million women a year are “at risk” of undergoing some form of the procedure.⁷ Currently, FGM is practiced in 28 African countries in the sub-Saharan and Northeastern regions of Africa. Prevalence varies significantly from one country to another. For example, the prevalence rate is over 90% in Mali, compared to 20% in Senegal. Women who have undergone FGM also live in African immigrant communities around the world, including in Australia, Europe, New Zealand, and North America.⁸ The prevalence of FGM in the United States is not fully known.⁹

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against harmful traditional practices affecting the health of women and children.¹² Since then, several UN human rights committees have also condemned FGM.¹³ The international community addressed the human rights implications of FGM at a series of international conferences, including the International Conference on Population and Development (ICPD) in Cairo in 1994, and the Fourth World Conference on Women in Beijing (Beijing Conference) in 1995.¹⁴

In recent years, there has been a heightened focus on the manner in which the practice of FGM violates women's rights. Increasingly, law is being used to combat the practice, and legislation criminalizing FGM has been adopted in 16 countries, including nine in Africa.¹⁵

FEDERAL LEGISLATION ON FGM

In 1996, Congress passed several legislative measures relating to FGM.¹⁶ First, the practice of FGM on a minor was defined as a federal criminal offense, unless necessary to protect a young person's health. Second, the Department of Health and Human Services (HHS) was required both to compile data on FGM and to engage in education and outreach to relevant communities. Third, the Immigration and Naturalization Service (INS) was directed to provide information to all aliens issued U.S. visas on the health and psychological effects of FGM, as well as on the legal consequences of FGM under criminal or child-protection statutes. Finally, U.S. executive directors of international financial institutions, such as the World Bank, were required by federal law to oppose non-humanitarian loans to countries that have not undertaken educational measures designed to prevent FGM.

Criminalization of the Practice of FGM

On September 30, 1996, Congress enacted a provision criminalizing the practice of FGM as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.¹⁷ With two exceptions, it provides that "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."¹⁸ The statute exempts a surgical operation if such operation is "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."¹⁹ The term "health" in this exemption is to be interpreted narrowly. The statute states that "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."²⁰ The statute also exempts an operation if it is "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 . . . as a medical practitioner, midwife, or person in training to become such a practitioner or midwife."²¹ The above provisions became effective on April 1, 1997, 180 days after enactment.²²

Data Compilation, Education, and Outreach on FGM

On April 26, 1996, prior to imposing criminal penalties for the practice of FGM, Congress passed legislation requiring the Secretary of HHS to undertake a study on FGM in the U.S. and to conduct instructional outreach on FGM to relevant communities.²³ Specifically, the legislation provides that HHS shall “[c]ompile data on the number of females living in the United States who have been subjected to female genital mutilation (whether in the United States or in their countries of origin), including a specification of the number of girls under the age of 18” who have undergone FGM.²⁴ HHS is also mandated to “[i]dentify communities in the United States that practice female genital mutilation, and design and carry out outreach activities to educate individuals in the communities on the physical and psychological health effects of such practice.”²⁵ HHS is further instructed to design and implement its outreach activities “in collaboration with representatives of the ethnic groups practicing such mutilation and with representatives of organizations with expertise in preventing such practice.”²⁶ Finally, HHS is required to develop and disseminate “recommendations for the education of students of schools of medicine and osteopathic medicine regarding [FGM] and complications arising from” FGM.²⁷ HHS was obligated to begin implementation of this legislation no later than 90 days after its enactment.²⁸

At the request of HHS, the Centers for Disease Control and Prevention (CDC) undertook a study to determine the prevalence of FGM in the United States. Using data from the 1990 U.S. Census, along with country-specific prevalence data on FGM, the CDC estimated that in 1990, there were approximately “168,000 girls and women living in the United States with or at risk for FGM/FC.”²⁹ To fulfill the education and outreach component of the legislation, the HHS Office of Women’s Health (OWH) organized a series of community meetings in Washington, DC and in other parts of the country.³⁰ With respect to the provision regarding dissemination of recommendations to medical and osteopathy students on treating FGM and its complications, HHS provided funding to the Research, Action and Information Network for the Bodily Integrity of Women (RAINBO), a non-governmental organization, to develop training materials.³¹ These materials, which include a technical manual for health care providers,³² have since been distributed widely to health professional schools and organizations.³³

Provision of Information on FGM to Aliens

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress enacted a provision requiring the INS, in cooperation with the Department of State, to “make available [information on FGM] for all aliens who are issued immigrant or nonimmigrant visas, prior to or at the time of entry in the United States.”³⁴ Such information should relay “the severe harm to physical and psychological health caused by [FGM],” and it should be “compiled and presented in a manner which is limited to the practice itself and respectful to the cultural values of the societies in which such practice takes place.”³⁵ In addition, the information must explain to each immigrant “the potential legal consequences in the United States for (A) performing [FGM], or (B) allowing a child under his or her care to be subjected to [FGM], under criminal or child protection statutes or as a form of child abuse.”³⁶ The INS is to limit the provision of information to aliens from countries that it, in consultation with the Secretary of State, has iden-

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tified as those where FGM is commonly practiced.³⁷ As of April 2000, the INS had produced and distributed information on FGM in six languages to overseas embassies in designated countries.³⁸

Limitation on U.S. Voting at International Financial Institutions

As part of the fiscal year 1997 Omnibus Appropriations Spending Bill, Congress enacted legislation requiring the U.S. executive directors of international financial institutions³⁹ (IFIs) to oppose non-humanitarian loans to countries where FGM is practiced but where the government has not “taken steps to implement educational programs designed to prevent the practice” of FGM.⁴⁰ Specifically, the Secretary of the Treasury must instruct the U.S. executive directors of the relevant IFIs to “use the voice and vote of the United States” to oppose loans or other utilization of funds, “other than to address basic human needs,” where the government of such a country has not taken steps to implement educational programs relating to FGM.⁴¹ The legislation took effect on September 30, 1997, one year after it was enacted.⁴²

U.S. STATE LEGISLATION ON FGM

Since 1994, 16 states have passed legislation relating to FGM.⁴³ In general, the statutes address FGM in a manner similar to that of the federal law, by prohibiting its practice and instituting criminal sanctions. Minnesota, Rhode Island, and Tennessee prohibit the practice of FGM on adult women as well as on females under the age of 18. The statutes enacted in California, Colorado, Delaware, Maryland, Missouri, New York, Oregon and West Virginia explicitly address the conduct of a parent or guardian who permits or allows FGM to be performed on her or his daughter. In Nevada, a person may be prosecuted for the removal of a child from that state for the purpose of performing FGM. California, Colorado, Minnesota, New York, and Oregon have enacted legislation addressing the need for culturally sensitive education and outreach to the relevant communities.

A. California. The California Prohibition of Female Genital Mutilation Act⁴⁴ (the “California FGM Law”) was passed in 1996 and became effective on January 1, 1997. The Act contains extensive findings,⁴⁵ noting, for example, that preliminary research indicates that incidents of FGM have occurred in California, and that other young girls in several immigrant populations in California remain at risk of FGM.⁴⁶ The legislature also declares its commitment to join with other states, nations, and major health care and human rights organizations in condemning FGM.⁴⁷ The California FGM Law amends the State Penal Code, providing that any person who commits a felony violation of a provision prohibiting any person from endangering a child or permitting a child to suffer physical pain, mental suffering, or injury⁴⁸ by an act constituting “female genital mutilation,”⁴⁹ “shall be punished by an additional term of imprisonment in the state prison for one year.”⁵⁰ The penalty for endangering a child ranges from one to six years imprisonment.⁵¹

The California FGM Law also requires the State Department of Health Services, in consultation with the State Department of Social Services and appropriate federal agencies, to commence “appropriate education, preventative, and outreach activities” for the purpose of informing members of, in particular, new immigrant populations, of the “health

risks and emotional trauma inflicted by” FGM, and informing these populations and the medical community, of the prohibition of FGM.⁵²

B. Colorado. On May 24, 1999, Colorado amended its Criminal Code to classify FGM as a form of child abuse, effective on the date of the law’s enactment.⁵³ Defining the term “child” as a person under the age of 16, the law provides that a person commits child abuse if he or she “excises or infibulates, in whole or in part, the labia majora, labia minora, vulva, or clitoris of a female child.”⁵⁴ A “parent, guardian, or other person legally responsible for a female child or charged with the care or custody of a female child” commits child abuse if he or she “allows” the procedure to be performed on the child.⁵⁵ The Criminal Code expressly rules out a defense that cites custom, ritual, or standard practice.⁵⁶ Nor is the consent of the minor, her parent, or legal guardian to be considered a defense to a charge under this law.⁵⁷ The law does not prohibit a procedure that is necessary to “preserve the health” of a child or that is performed on a child “who is in labor or who has just given birth and is performed for medical purposes connected with that labor or birth” by a licensed medical practitioner.⁵⁸ An act of child abuse carried out “knowingly or recklessly” that results in “serious bodily injury to the child” is considered a class three felony⁵⁹ and is punishable by a minimum of four years imprisonment.⁶⁰

The Colorado legislation also calls for the creation of a fund to support education and outreach activities, although it does not authorize appropriation of State money for these activities. Subject to available funding, the Department of Public Health and Environment is to implement “culturally sensitive education, prevention, and outreach activities” regarding the health risks and the emotional and psychological trauma involved in the practice of FGM.⁶¹ Funds are also to be used to inform the medical community and other appropriate communities of the criminal penalties for performing FGM, as well as to inform the medical community about the “recommended standards of practice involving the recognition and treatment of FGM.”⁶²

C. Delaware. Section 780 of the Delaware Criminal Code⁶³ relating to FGM was passed in 1996 and became effective on July 3, 1996.⁶⁴ FGM is classified as a class E felony,⁶⁵ which is punishable by up to five years imprisonment.⁶⁶ The law states that a person is guilty of FGM if he or she “knowingly circumcises, excises, or infibulates the whole or any part of the labia majora, labia minora, or clitoris of a female minor.”⁶⁷ In addition, a “parent, guardian, or other person legally responsible or charged with the care or custody of a female minor” is also guilty of the same if he or she “allows” such acts to be performed on his or her daughter.⁶⁸ A surgical procedure deemed necessary to the “health” of a minor or which is “performed on a minor who is in labor, or who has just given birth,” and that is performed by a licensed physician, physician-in-training, or a licensed midwife is not considered FGM and is not subject to criminal prosecution.⁶⁹ A defense citing custom, ritual, or standard practice, or the consent of the minor’s parent or legal guardian, is expressly disallowed.⁷⁰

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D. Illinois. Illinois added the offense of FGM to the Criminal Code of Illinois, effective January 1, 1998.⁷¹ The law states that “whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another commits the offense of female genital mutilation.”⁷² The offense is a class X felony, punishable by not less than six years or more than 30 years imprisonment.⁷³ The statute prohibits the performance of FGM on both minors and adults. Consent to the procedure by a minor’s parent or guardian is not considered a valid defense.⁷⁴ Exceptions to the prohibition include surgical procedures that are performed by a licensed physician for “the health of the person”⁷⁵ or “on a person who is in labor or who has just given birth and [are] performed for medical purposes connected with that labor or birth.”⁷⁶

E. Maryland. In 1998, Maryland adopted a law making FGM a felony offense, effective from the date of the law’s enactment on April 28, 1998.⁷⁷ Those convicted of FGM are subject to imprisonment for up to five years and/or a fine of no more than five thousand dollars.⁷⁸ Maryland’s law assigns criminal liability to any person who “knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris” of a person under the age of 18.⁷⁹ A parent or guardian is also guilty of FGM if he or she is “legally responsible and charged with the care or custody” of a minor and “knowingly consents” to the procedure.⁸⁰ A procedure does not violate this law if it is “necessary to the health” of the minor and is performed by a licensed medical practitioner.⁸¹ The belief that the procedure is required “as a matter of custom or ritual” may not be considered when determining “whether an operation is necessary to the health of the individual.”⁸²

F. Minnesota. Minnesota was the first state to enact legislation related to FGM. In 1994, the state amended its criminal code to declare that “whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony.”⁸³ Thus the statute prohibits the performance of FGM on adult women, as well as on minors. Consent to the procedure by a minor on whom it is performed or by the minor’s parent is not considered a valid defense.⁸⁴ Exceptions to this ban include surgical procedures performed by a licensed physician that are deemed necessary for the health of a person, or are performed for medical purposes on a person who is in labor or who has just given birth.⁸⁵

Minnesota also enacted legislation in 1994 requiring the commissioner of health to carry out “appropriate education, prevention, and outreach activities” in communities that traditionally practice FGM.⁸⁶ The aim of these activities is to inform such communities of the “health risks and emotional trauma”⁸⁷ resulting from FGM, as well as to inform them and the medical community of the criminal penalties associated with the practice.

G. Missouri. Missouri adopted legislation making “genital mutilation” a crime on July 13, 2000.⁸⁸ A person is guilty of a Class B Felony when he or she “[e]xcises or infibulates, in whole or in part, the labia majora, labia minora, vulva or clitoris of a female child less than seventeen years of age”⁸⁹ Equally culpable is a parent, guardian or other person legally responsible for a female child below the age of 17 who “permits” that child to undergo

the procedure.⁹⁰ Under Missouri law, a Class B Felony is punishable by imprisonment of 5 to 15 years.⁹¹ The law expressly rules out a defense based on “[b]elief that [FGM] is required as a matter of custom, ritual or standard practice.”⁹² Nor is it a defense that the procedure was performed with the consent of the child or her parent or legal guardian.⁹³ A person prosecuted under this law may raise the “affirmative defense” that the genital mutilation was “necessary to preserve the health of the child” on whom it was performed or performed on a child “in labor or who has just given birth . . . for medical purposes connected with such labor or birth.”⁹⁴ In both cases, the procedure must be “performed by a person licensed to practice medicine” in Missouri.⁹⁵

H. Nevada. On June 26, 1997, Nevada adopted a law making “mutilation of genitalia of [a] female child” a criminal offense, effective on the date of the law’s enactment.⁹⁶ The prohibited procedure is defined as “the removal or infibulation in whole or in part of the clitoris, vulva, labia major, or labia minor for nonmedical purposes.”⁹⁷ Under this Act, a person who willfully “[m]utilates, or aids, abets, encourages or participates in the mutilation of the genitalia of a female child” is guilty of a Category B felony and shall be punished by imprisonment for two to 10 years and may also be subject to a fine of up to ten thousand dollars.⁹⁸ In addition, a person who willfully “[r]emoves a female child from [the] state for the purpose of mutilating the genitalia of the child”⁹⁹ is subject to the same penalties. The law expressly disallows a defense citing custom, ritual, or standard practice,¹⁰⁰ or the consent of the child, parent, or legal guardian of the child.¹⁰¹

I. New York. In 1997, the New York State Prohibition of Female Genital Mutilation Act was adopted, adding section 130.85 to New York’s Penal Code.¹⁰² The criminal provisions of the act, which was signed on September 29, 1997, took effect 45 days after becoming law.¹⁰³ The Act states that a person is guilty of FGM when he or she “knowingly circumcises, excises, or infibulates, the whole or any part of the labia majora, labia minora, or clitoris of another person who has not reached eighteen years of age.”¹⁰⁴ In addition, “a parent, guardian, or other person legally responsible and charged with the care and custody of a child less than eighteen years old, [who] knowingly consents to the circumcision, excision or infibulation of whole or part of such child’s labia minora or labia majora or clitoris” is also guilty of FGM.¹⁰⁵ FGM is classified as a class E felony, which is punishable by up to four years imprisonment.¹⁰⁶ The law exempts from this prohibition circumcision, excision, or infibulation that is “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.”¹⁰⁷ FGM is also permissible when it is “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.”¹⁰⁸ However, the law does not permit any account to be taken of “the effect on the person on whom such a procedure is to be performed of any belief on the part of that or any other person that such procedure is required as a matter of custom or ritual.”¹⁰⁹

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The Act also calls for the Department of Social Services and the Department of Health to complete a study of the health risks and emotional trauma associated with FGM and establish and implement appropriate education, preventive, and outreach activities in communities that traditionally practice FGM.¹¹⁰ The Department of Health has worked with RAINBO to prepare educational programs and materials addressing the health, cultural, and legal implications of FGM, targeting both relevant immigrant communities and health professionals.¹¹¹

J. North Dakota. A provision added to North Dakota's criminal code entitled "Female Genital Mutilation"¹¹² became effective on August 1, 1995.¹¹³ This law states that "any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor is guilty of a class C felony,"¹¹⁴ which is punishable by up to five years imprisonment, a fine of five thousand dollars, or both.¹¹⁵ A surgical operation performed by a licensed medical practitioner to correct "an anatomical abnormality or to remove diseased tissue that is an immediate threat to the health of the female minor"¹¹⁶ does not violate this law, but beliefs about FGM that are based on custom, ritual, or standard practice may not be taken into consideration in determining liability.¹¹⁷

K. Oregon. An act adopted and entered into force on July 15, 1999 states that any person who "circumcises, excises or infibulates the whole or any part of the labia majora, labia minora, or clitoris of a child" commits a Class B felony,¹¹⁸ punishable by up to 10 years imprisonment and/or a fine of up to \$200,000.¹¹⁹ Equally culpable is a "parent, guardian, or other person legally responsible" for the child who "knowingly allows" the procedure to take place.¹²⁰ A procedure that is performed by a licensed physician and is deemed "medically necessary for the physical well-being of the child" is not a violation of this law.¹²¹ This Act specifically disallows the consideration of the "child's belief that the surgery is required as a matter of custom or ritual" in determining "medical necessity."¹²²

Furthermore, under the 1999 law, the Health Division of the Department of Human Services is required to establish and implement "appropriate education, prevention, and outreach activities in communities that traditionally practice" FGM in order to raise awareness of the "health risks and emotional trauma" involved.¹²³ Outreach activities should also aim to inform these communities of the "existence and ramifications" of the criminal prohibition of FGM and that FGM is considered a form of abuse under Oregon's child protection statute.¹²⁴

L. Rhode Island. The Criminal Offenses Act of Rhode Island was amended in 1996¹²⁵ to include a description of FGM in the definition of "serious bodily injury."¹²⁶ Rhode Island's felony assault statute provides that where assault or battery, or both, result in "serious bodily injury," the person committing such act "shall be punished by imprisonment for not more than 20 years."¹²⁷

M. Tennessee. The Prohibition of Female Genital Mutilation Act of 1996¹²⁸ became effective on July 1, 1996.¹²⁹ This Act states that “whoever knowingly circumcises, excises, or infibulates in whole or in part, the labia majora, labia minora, or clitoris of another commits a Class D felony.¹³⁰ A Class D felony is punishable by not less than two years nor more than 12 years imprisonment and a fine not to exceed five thousand dollars.¹³¹ Consent to the procedure “by a minor or by the minor’s parent” cannot be used as a defense.¹³² Surgery that is performed by a licensed physician or physician-in-training, and that is deemed “necessary to the health of a person on whom it is performed,” or that is “performed on a person in labor or who has just given birth” for medical purposes, is not considered a violation of this law.¹³³

N. Texas. Texas amended its Health and Safety Code to prohibit FGM, effective from the date of the law’s enactment on June 19, 1999.¹³⁴ Under this provision, a person commits an offense if he or she “knowingly circumcises, excises, or infibulates any part of the labia majora or labia minora or clitoris of another person who is younger than 18 years of age.”¹³⁵ A violation under this law constitutes a “state jail felony,” punishable by imprisonment from 180 days to two years and possibly a fine of up to \$10,000.¹³⁶ It is a “defense to prosecution” under this law if the procedure was performed for medical purposes by a “physician or other licensed health care professional and the act is within the scope of the person’s license.”¹³⁷

O. West Virginia. West Virginia adopted legislation prohibiting FGM, effective 90 days after the law’s enactment, on February 23, 1999.¹³⁸ The law states that “any person who circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of a female under the age of 18, or any parent, guardian or custodian of a [child] who allows the [surgery], shall be guilty of a felony...”¹³⁹ The penalties for violating this act include imprisonment for “not less than two nor more than 10 years” and fines “not less than one thousand dollars nor more than five thousand dollars.”¹⁴⁰ There is no crime if the procedure is performed by a licensed medical professional and is deemed “necessary to preserve the health of the child,” or if the procedure is performed “on a child who is in labor or has just given birth and is performed for legitimate medical purposes connected with that labor or birth.”¹⁴¹ Neither the consent of the minor, nor the belief that the act is required as a matter of custom, ritual, or standard practice can be asserted as a defense.¹⁴²

P. Wisconsin. The act prohibiting the “circumcision, excision, or infibulation” of the “labia majora, labia minor, or clitoris of a female minor” was passed in Wisconsin on May 28, 1996.¹⁴³ The penalty for violating this act is a fine of up to ten thousand dollars or five years in prison, or both.¹⁴⁴ Exceptions are made when the procedure is “performed by a physician . . . and is necessary for the health of the female minor” or is “necessary to correct an anatomical abnormality.”¹⁴⁵ Neither consent of the minor, or of a parent of the minor, nor requirements of custom or ritual can be asserted as a defense.¹⁴⁶

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Endnotes

1 Westlaw® state and federal court databases were searched for published court decisions related to female circumcision/female genital mutilation (FGM).

2 The information in this section has been drawn primarily from ANIKA RAHMAN & NAHID TOUBIA, *FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE* 3-13 (2000).

3 While the term “female genital mutilation” is most commonly used by advocates of women’s rights and health who wish to emphasize the damage caused by the procedure, it can be offensive to women in communities in which the practice is prevalent. Out of respect and sensitivity, many organizations use local terminology or more neutral terms such as “female circumcision” or “female genital cutting.” In recognition of these two approaches, CRLP uses the dual term FGM.

4 NAHID TOUBIA, *A CALL FOR GLOBAL ACTION* 9 (2d ed. 1995).

5 *Id.*

6 WORLD HEALTH ORGANIZATION (WHO), *FEMALE GENITAL MUTILATION: A JOINT WHO/UNICEF/UNFPA STATEMENT* 3 (1997).

7 TOUBIA, *supra* note 4, at 5.

8 *Id.* at 26.

9 As part of the Department of Health and Human Services’ mandate, the Centers for Disease Control and Prevention (CDC) has estimated that 168,000 females in the U.S. have either been subjected to or may be at risk for FGM and that 48,000 of those are under age 18. CDC used 1990 census data and estimated prevalence rates in Africa, a method CDC acknowledges yields only a very rough estimate. See Wanda K. Jones et al., *Female Genital Mutilation/Female Circumcision: Who Is at Risk in the U.S.?*, 112 *PUB. HEALTH REP.* 368, 372 (1997) [hereinafter *FGM Risk in the U.S.*].

10 *Report of the Working Group on Traditional Practices Affecting the Health of Women and Children*, U.N. Economic and Social Commission, 42nd Sess., Provisional Agenda Item 19, at 1, U.N. Doc. E/CN.4/1986/42 (1986).

11 See, e.g., WHO, *supra* note 6; WHO, *FEMALE CIRCUMCISION: STATEMENT OF WHO POSITION AND ACTIVITIES* (1982).

12 WHO, *Female Genital Mutilation: World*

Health Assembly Calls for the Elimination of Harmful Practices, Press Release WHA/10 (May 12, 1993).

13 See, e.g., *Report of the Committee on the Elimination of All Forms of Discrimination Against Women*, General Recommendation No. 14, U.N. GAOR, 45th Sess., Supp. No. 38, at 80, ¶ 438, U.N. Doc.A/45/38 (1990).

14 *Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 September 1994*, in *REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT*, para. 7.35, U.N. Doc. A/CONF.171/13/Rev.1, U.N. Sales No. 95.XIII.18 (1995) [hereinafter *ICPD Programme of Action*]; *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, Beijing, China, 4-15 Sept. 1995, para. 93, U.N. Doc. DPI/1766/Wom (1996) [hereinafter *Beijing Platform for Action*].

15 The following countries have adopted legislation criminalizing FGM: Australia (six of eight states), Burkina Faso, Canada, Central African Republic, Côte d’Ivoire, Djibouti, Ghana, Guinea, New Zealand, Norway, Senegal, Sweden, Tanzania, Togo, the United Kingdom, and the United States. In addition, three states in Nigeria have criminalized the practice. CENTER FOR REPRODUCTIVE RIGHTS, *FEMALE CIRCUMCISION/FEMALE GENITAL MUTILATION (FGM): GLOBAL LAWS AND POLICIES TOWARDS ELIMINATION* (2000).

16 This briefing paper does not discuss FGM as the basis for a grant of political asylum under the Immigration and Nationality Act. In June 1996, the Board of Immigration Appeals granted asylum to a Togolese woman on the grounds that the obligation to undergo FGM gave rise to a well-founded fear of persecution. See *In re Fauziya Kasinga*, Bd. of Immig. Appeals, File A73 476 695, 1996 BIA LEXIS 15 (June 13, 1996).

17 See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. 104-208, § 645, 110 Stat. 3009-546 (1996). The statute amends chapter 7, entitled “Assault,” of title 18 of the U.S. Code by adding a new section 116. See 18 U.S.C.A. § 116 (Supp. 1997). This legislation was part of the fiscal year 1997 omnibus appropriations bill. Legislation criminalizing FGM was first introduced in 1993 during the First Session of the 103rd Congress by Representative Pat Schroeder (D-CO) as part of the Women’s Health Equity Act but it did not pass until 1996, after Senator Harry Reid (D-NV) offered it as an amendment to the Senate ver-

sion of immigration reform legislation. See H.R. 3075, 103rd Cong. §§ 261-264 (1993); S. 1664, 104th Cong. (1996); WOMEN'S POLICY, INC., THE RECORD: GAINS AND LOSSES FOR WOMEN AND FAMILIES IN THE 104TH CONGRESS 95-96 (1997) [hereinafter GAINS AND LOSSES FOR WOMEN].

18 18 U.S.C.A. at § 116(a).

19 *Id.* at § 116(b)(1).

20 *Id.* at 116(c).

21 *Id.* at § 116(b)(2).

22 Pub. L. No. 104-208, § 645(c), 110 Stat. 3009-546, 709 (1996). In passing the statute, Congress made several findings regarding FGM, namely that it "is carried out by members of certain cultural and religious groups" within the U.S.; that it "often results in the occurrence of physical and psychological health effects that harm the women involved;" and that it "infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional." Pub. L. 104-208, at § 645(a). Congress also found that "the unique circumstances surrounding the practice of [FGM] place it beyond the ability of any single State or local jurisdiction to control;" that its practice "can be prohibited without abridging the exercise of any rights guaranteed under the first amendment to the Constitution or under any other law;" and that Congress has the power to enact the FGM legislation under "section 8 of article I, the necessary and proper clause, section 5 of the fourteenth Amendment, as well as under the treaty clause, to the Constitution." *Id.* at § 645(a).

23 Pub. L. 104-134, § 520, 110 Stat. 1321 (1996). These provisions were part of H.R. 3019, the fiscal year 1996 omnibus spending bill. In March 1996, senators approved by voice vote an amendment to criminalize FGM performed on girls under age 18, which included the provisions requiring a study and outreach. The conference report dropped the criminalization provision but included the study and outreach provisions. See GAINS AND LOSSES FOR WOMEN, *supra* note 17, at 95-96.

24 Pub. L. 104-134, at § 520(b)(1). The legislation defines FGM as "the removal or infibulation (or both) of the whole or part of the clitoris, the labia minor, or the labia major." *Id.* at § 520(c).

25 *Id.* at § 520(b)(2).

26 *Id.*

27 *Id.* at § 520(b)(3).

28 *Id.* at § 520(d).

29 FGM Risk in the U.S., *supra* note 9, at 372.

30 Office of Women's Health, Department of Health and Human Services, OWH: Programs and Activities, Reproductive Health (visited Jan. 7, 2000) <<http://www.4women.gov/owh/prog/reprod.htm>>.

31 *Id.*

32 NAHID TOUBIA, CARING FOR WOMEN WITH CIRCUMCISION (1999).

33 Office of Women's Health, Department of Health and Human Services, *supra* note 30.

34 See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 644, 110 Stat. 3009-546 (1996). "Female genital mutilation" is defined in this section as "the removal or infibulation (or both) of the whole or part of the clitoris, labia minora, or labia majora." *Id.* at § 644(c). In October 1995, the House Judiciary Committee approved this provision as part of H.R. 2202, but it was not passed until the following year as part of the fiscal year 1997 omnibus appropriations bill. See GAINS AND LOSSES FOR WOMEN, *supra* note 17, at 95-96.

35 Pub. L. 104-208, at § 644(a)(1).

36 *Id.* at § 644(a)(2).

37 *Id.* at § 644(b).

38 The information has already been translated from English into French, Arabic, Somali, Swahili and Portuguese. The Amharic translation is in the process of completion. Telephone conversation with Marta Rothwarf at the Office of International Affairs and Asylum, Immigration and Naturalization Service (INS), Washington, D.C., April 25, 2000.

39 The legislation defines these to include the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the Asian Development Fund, the African Development Bank, the African Development Fund, the International Monetary Fund, the North American Development Bank, and the European Bank for Reconstruction and Development. See 22 U.S.C.A. § 262k-2(b)(1996).

40 Pub. L. 104-208, § 101(c), 110 Stat. 3009 (1996) (codified as 22 U.S.C.S. § 262k-2(a) (1996)).

41 22 U.S.C.S. at § 262k-2(a). The legislation enacted did not include a provision contained in a

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Senate version of the legislation that would have required countries where FGM is practiced to legally ban its practice in order to avoid the statute's restrictions. See H.R. REP. NO. 104-863, § 8 (1996).

42 *Id.*

43 See CAL. PENAL CODE § 273.4 (West 1996); CAL. HEALTH & SAFETY CODE

§ 124170 (1996); COLO. REV. STAT. tit. 18, art. 6, § 401 (1999); DEL. CODE ANN. tit. 11, § 780 (1996); ILL. COMP. STAT. ANN. § 5/12-34 (1997); MD. CODE ANN., HEALTH—GEN. I § 20(601) (1998);

MINN. STAT. §§ 609.2245(1) & 144.3872 (West 1996); 2000 Mo. Legis. Serv. S.B. 602, § 568.065 (Vernon's); N.D. CENT. CODE § 12.1-36-01 (1995); NEV. REV. STAT. ANN. § 200.5083 (1999); N.Y. PENAL LAW § 130.85 (1997); OR. REV. STAT. 163.207 (1999); R.I. GEN. LAWS § 11-5-2 (1996); TENN. CODE ANN. § 39-13-110 (1996); TX HEALTH & SAFETY CODE ANN. § 1(H)(2), ch. 166.001 (West 1999); W. VA. CODE § 61(8)(D)(3)(a) (1999) and WIS. STAT. § 146.35 (West 1995). In addition, Louisiana's legislature passed a resolution condemning the practice and urging the President of the United States and the Congress of the United States "to utilize the influence of the United States in international relations to end" FGM and "to grant political asylum to individuals who flee their homelands to escape the custom or ritual." The resolution was to be transmitted to the President, the presiding officers of Congress, and Louisiana's congressional delegation. H.C.R. 52, Reg. Sess. (La. 1996). This year, the Hawaii legislature passed a similar resolution, condemning FGM and expressing support for efforts to stop the practice by WHO, Waris Dirie, and other individuals and international agencies and organizations. H.C.R. 47, Twentieth Legislature (HI 2000).

44 1996 Cal. Adv. Legis. Serv. 790 (Deering) (A.B. No. 2125).

45 *Id.* at § 2.

46 *Id.*

47 *Id.*

48 Section 273a of the statute provides:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or

having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

CAL. PENAL CODE § 273a(a) (West 1996). In addition, the statute provides for a misdemeanor where the same elements of willfulness and harm are present, but the harm occurs in circumstances *other than* those likely to produce great bodily harm. *Id.* at § 273a(b). Neither the California FGM Law, the relevant chapter of the Penal Code, nor the Penal Code generally defines "child." California's Child Abuse and Neglect Reporting Act defines "child" for purposes of the act as "a person under the age of 18 years." CAL. PENAL CODE

§ 11165 (West 1992). California's Family Code defines a minor as "an individual who is under 18 years of age." CAL. FAMILY CODE § 6500 (West 1994).

49 "Female genital mutilation" is defined as "the excision or infibulation of the labia majora, labia minora, clitoris, or vulva, performed for nonmedical purposes." See CAL. PENAL CODE § 273.4 (b) (West 1996).

50 *Id.* at § 273.4(a). The legislation also specifies that nothing shall preclude prosecution under any other provision of law and, specifically, under Sections 203, 205, or 206 of the Penal Code which relate to mayhem, aggravated mayhem, and torture, respectively. One commits "mayhem" when he or she "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures or renders it useless . . ." *Id.* at § 203.

51 *Id.* at § 273a(a).

52 CAL. HEALTH & SAFETY CODE § 124170 (West 1996).

53 1999 Colo. Legis. Serv. Ch. 216, §§ 2,4 (99-96) (West).

54 COLO. REV. STAT. tit. 18, art. 6 § 401(1)(b)(I), (2) (1999).

55 *Id.* at § 401(1)(b)(I).

56 *Id.* at § 401(1)(b)(II).

57 *Id.*

- 58 *Id.* at § 401(1)(b)(III)(A), (B).
- 59 *Id.* at § 401(7)(a)(III).
- 60 *Id.* at tit. 18, art. 1, § 105.
- 61 *Id.* at tit. 25, art. 30, § 103(1)(a).
- 62 *Id.* at § 103(1)(b)(c).
- 63 DEL. CODE ANN. tit. 11, § 780 (1996).
- 64 70 Del. Laws ch. 438, § 1 (1996).
- 65 DEL. CODE ANN. at § 780(b).
- 66 DEL. CODE ANN. at § 4205(b)(5).
- 67 *Id.* at § 780(a)(1). The Delaware Code defines a minor as “a person who has not reached the age of 18 years.” DEL. CODE ANN. § 302(12) (1993).
- 68 *Id.* at § 780(a)(2).
- 69 *Id.* at § 780(d)(1) & (2).
- 70 *Id.* at § 780(c).
- 71 720 ILL. COMP. STAT. ANN. § 5/12-34 (1997).
- 72 *Id.* at § 12-34 (a).
- 73 *Id.* at § 12-34 (c); *See* ILL. COMP. STAT. 5/5-8-2(3) (West 1996). The court may also order a fine in addition to the minimum term of imprisonment. *Id.* at 5/5-5-3(2).
- 74 *Id.* at § 12-34 (a).
- 75 *Id.* at § 3-34 (b) (1).
- 76 *Id.* at § 13-34 (b) (2).
- 77 1998 Maryland Laws Ch. 128, §§ 1-2 (H.B. 161).
- 78 MD. CODE ANN., § 20-603 (1998).
- 79 *Id.* at § 20-601(a).
- 80 *Id.* at § 20-601(b)(1),(2).
- 81 *Id.* at § 20-602(a).
- 82 *Id.* at § 20-602(b).
- 83 MINN. STAT. § 609.2245(1) (West 1996). *See* 1994 Minn. Laws ch. 636, art. 9, § 9. MINN. STAT. at § 609.2245 (1). FGM was excluded from Minnesota’s Offense Severity Reference Trade; this occurs where it is believed that “prosecutions are rarely, if ever, initiated.” Judges are to exercise discretion by assigning an offense severity level they believe to be appropriate. *See* MINN. STAT. § 244 App. II & IV (West Supp. 1997).
- 84 MINN. STAT. at § 5609.2245(1).
- 85 *Id.* at § 609.2245(2).
- 86 *Id.* § 144.3872 (1996). *See* 1994 Minn. Laws ch. 636, art. 9, § 9.
- 87 MINN. STAT. at § 144.3872.
- 88 2000 Mo. Legis. Serv. S.B. 602, § 568.065 (Vernon’s).
- 89 *Id.* at § 568.065(1).
- 90 *Id.* at § 568.065(2).
- 91 MO. ANN. STAT. § 558.011 (West 2000).
- 92 2000 Mo. Legis. Serv. S.B. 602, § 568.065(3) (Vernon’s).
- 93 *Id.*
- 94 *Id.* at § 568.065(4)(1)(2).
- 95 *Id.*
- 96 1997 Nevada Laws Ch. 206, §§ 1-2 (S.B. 192).
- 97 NEV. REV. STAT. ANN., § 200.5083 (3)(b) (1999).
- 98 *Id.* at § 200.5083 (1)(a).
- 99 *Id.* at § 200.5083 (1)(b).
- 100 *Id.* at § 200.5083 (2)(a).
- 101 *Id.* at § 200.5083 (2)(b).
- 102 1997 N.Y. ADV. LEGIS. SERV. 618, § 2.
- 103 *Id.* at § 4; *Girl’s Genital Mutilation is a Felony in New York*, N.Y. TIMES, September 30, 1997, at B4.
- 104 N.Y. PENAL LAW § 130.85 (1997).
- 105 *Id.* at § 130.85 (1) (b).
- 106 *Id.* at § 130.85 (3).
- 107 *Id.* at § 130.85 (2) (a).
- 108 *Id.* at § 130.85 (2) (b).
- 109 *Id.* at § 130.85 (3).
- 110 1997 N.Y. ADV. LEGIS. SERV. 618, § 3.
- 111 Telephone conversation with Mary Applegate, M.D., M.P.H., Medical Director, Bureau of Women’s Health, New York State Department of Health, October 30, 2000.
- 112 N.D. CENT. CODE § 12.1-36-01 (1995).
- 113 1995 N.D. Laws ch. 140.
- 114 N.D. CENT. CODE at § 12.1-36-01(1). The North Dakota Century Code defines minors as “persons under eighteen years of age.” N.D. CENT.

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- CODE § 14-10-01 (1991).
- 115 *Id.* at § 12.1-32-01(4).
- 116 *Id.* at § 12.1-36-01(2).
- 117 *Id.*
- 118 1999 Oregon Laws Ch. 737, §§ 1,3 (H.B. 3608).
- 119 OREGON REV. STAT. § 161.605, §161.625.
- 120 *Id.* at § 163.207 (1)(b).
- 121 *Id.* at § 163.207 (3)(a)(A)(B).
- 122 *Id.* at § 163.207 (3)(b).
- 123 *Id.* at § 431.827 (1).
- 124 *Id.* at § 431.827 (2), (3).
- 125 1996 R.I. Pub. Laws ch. 81, § 1.
- 126 R.I. GEN. LAWS § 11-5-2 (1996). “Serious bodily injury” “means physical injury that . . . causes serious permanent disfigurement or circumcises, excises or infibulates the whole or any part of the labia majora or labia minora or clitoris of a person.” *Id.* at § 11-5-2(c).
- 127 *Id.* at § 11-5-2(a).
- 128 *See* 1996 Tenn. Acts ch. 857, § 3.
- 129 TENN. CODE ANN. § 39-13-110(a) (1996).
- 130 *Id.* at § 39-13-110(a).
- 131 *Id.* at § 40-35-111(b)(4).
- 132 *Id.* at § 39-13-110(a).
- 133 *Id.* at § 39-13-110(b)(1) & (2).
- 134 1999 Tex. Sess. Law Serv. Ch. 642, §§ 1-2 (H.B. 91) (Vernon’s).
- 135 TX HEALTH & SAFETY CODE ANN. § 1(H)(2), §166.001(a)(West 1999).
- 136 *Id.* at § 166.001(b); TX PEN. CODE, tit. 3, § 12.35(a)(b).
- 137 TX HEALTH & SAFETY CODE ANN. § 1(H)(2), §166.001(c)(1),(2).
- 138 1999 West Virginia Laws Ch. 78 (S.B. 82).
- 139 W. VA. CODE § 61-8D-3a (a) (1999).
- 140 *Id.*
- 141 *Id.* at § 61-8D-3a (b)(1), (2).
- 142 *Id.* at § 61-8D-3a (c).
- 143 1995 Wis. Laws 365 (A.B. 926). The statute provides that to “infibulate” is “to clasp together with buckles or stitches.” WIS. STAT. § 146.35(1) (1995). For purposes of FGM prosecutions, Wisconsin law defines “minor” as “a person who has not attained the age of 18 years.” WIS. STAT. § 990.01 (20) (West Supp. 1996).
- 144 WIS. STAT. at § 146.35(5).
- 145 *Id.* at § 146.35(3).
- 146 *Id.* at § 146.35(4)(a) & (b).

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