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## Contemporary Aspects of Female Genital Mutilation Prohibitions in the United States

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# CONTEMPORARY ASPECTS OF FEMALE GENITAL MUTILATION PROHIBITIONS IN THE UNITED STATES

LIMOR EZIONI\*

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## I. INTRODUCTION

Female genital mutilation (FGM) is a term used to describe a wide range of cultural practices involving partial and/or total removal of external female reproductive organs for traditional, religious, and social reasons.<sup>1</sup> Traditionally, there are four terms to define this heinous act—each one consists of some form of cutting and then stitching of the vaginal opening.<sup>2</sup> All four types have become a cultural tradition disconnected from religious practice itself. This cultural practice violates the basic human rights of both women and children.

Historically, the origins of FGM can be traced to ancient Egypt and other parts of North Africa and Arabia.<sup>3</sup> Although FGM can be traced back to the Levant, FGM occurred in Britain, in the 18th century to prevent masturbation, to cure hysteria, and to cure a variety of psychiatric conditions.<sup>4</sup> Most recently, the use of FGM is concentrated throughout parts of West and North Africa, the Middle East, and parts of Southeast Asia.<sup>5</sup> As this article and others before it have noted, FGM has spread to parts of Europe and the United States.<sup>6</sup>

FGM is a disturbing practice prevalent amongst some communities within the U.S. and is a heinous act that requires even harsher legal punishment. The practice of FGM, as it is performed within these communities, is brutal, graphic, and constitutes child abuse.<sup>7</sup> For context, FGM involves:

[t]he child, completely naked, is made to sit on a low stool. Several women take hold of her and open her legs wide . . . With her kitchen knife the

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1. Alexia Lewnes, *Changing a Harmful Social Convention: Female Genital Mutilation/Cutting*, United Nations Children's Fund (UNICEF) (2005).

2. Waleed M. Sweileh, *Bibliometric analysis of literature on female genital mutilation: (1930–2015)*, 13 REPROD. HEALTH. 130, 132 (2016) (showing four common terms as “female genital mutilation”, “female genital circumcision”, “female genital cutting”, and “female circumcision”).

3. United States Department of State, *Ethiopia: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC)* (Jun. 1, 2001), <https://www.refworld.org/docid/46d57877c.html> (last accessed July 23, 2019).

4. Baker Brown, ON SURGICAL DISEASES OF WOMEN (1861); Baker Brown, ON THE CURABILITY OF CERTAIN FORMS OF INSANITY, EPILEPSY, CATALEPSY AND HYSTERIA IN FEMALES (1866).

5. Sexual Reproductive Health, WORLD HEALTH ORGANIZATION, <https://www.who.int/reproductivehealth/topics/fgm/prevalence/en/> (last visited Nov. 21, 2019).

6. See Carol M. Messito, *Regulating Rites: Legal Responses to Female Genital Mutilation in the West*, 16 IN PUB. INTEREST 33 (1997).

7. Karen Hughes, *The Criminalization of Female Genital Mutilation in the United States*, 4 J. L. & POL'Y 321, 328-29 (1995).

operator first pierces and slices open the hood of the clitoris. Then she begins to cut it out. While another woman wipes off the blood with a rag, the operator digs with her sharp fingernail a hole the length of the clitoris to detach and pull out the organ. The little girl, held down by the women helpers, screams in extreme pain.<sup>8</sup>

This article revisits the topic of FGM analyzed by other authors to provide a contemporary analysis and highlight the lack of progress over the past two decades.<sup>9</sup> This article discusses the origins and social effects of FGM, as well as the US laws regarding FGM. Additionally, this article will examine the practice of FGM as a violation of human rights. Lastly, this article will review the progress of FGM criminalization and prosecution of those that practice the procedure on women in the United States. Further, to demonstrate this progress, this article will review the criminal laws that played a major role in attempting to eradicate the FGM phenomena. In recent years, a legal discourse has emerged in western countries focusing on FGM practices in certain migrant communities. While this practice appears more within migrant communities, it is understood that this practice is not endorsed by the majority of migrants.

## II. FGM AS A FORM OF CHILD ABUSE

According to the World Health Organization, FGM is typically performed on young girls between birth and age fifteen.<sup>10</sup> Depending on the tradition, FGM is used to initiate girls into adulthood and to ensure their marriageability.<sup>11</sup>

FGM is recognized as a damaging ritual with cultural, economic, political and social characteristics afflicted on girls and women.<sup>12</sup> Moreover, it is a hostile embodiment of gender inequality and discrimination “related to the historical suppression and subjugation of women.”<sup>13</sup>

Human rights law protects children who cannot speak for themselves. The purpose of the Convention on the Rights of the Child is to consider the best interest of the child.<sup>14</sup> Western countries should criminalize FGM because

8. *Id.*

9. *See id.*; *see also* Messito, *supra* note 6, at 33.

10. UNICEF, *Female Genital Mutilation/Cutting: A Global Concern*, (2016).

11. Frances A. Althaus, *Female Circumcision: Rite of Passage or Violation of Rights?* 23 INT’L FAMILY PLANNING PERSPECTIVES 130, 131 (1997).

12. World Health Organization, *supra* note 5, at 8.

13. *Policy on female genital mutilation (FGM)*, ONTARIO HUMAN RIGHTS COMMISSION., (Nov. 22, 2000).

14. *Eliminating female genital mutilation: an interagency statement - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO.*

there are no benefits to FGM—it only causes health issues.<sup>15</sup> The complications of genital mutilation range from excessive bleeding and fever to more life-threatening, long-term effects including menstrual problems, growing risk of childbirth complications, and even death.<sup>16</sup> However, despite health risks, a collective of social justice activists argue that the practice of FGM on individuals must be tolerated in the name of “tradition” or “culture.”<sup>17</sup> This cultural relativism regarding the practice of FGM is a dangerous argument because FGM is typically imposed on young females against their will.<sup>18</sup>

Child abuse is a serious crime in most societies because it affects a population without adequate means to defend itself.<sup>19</sup> The definition of child abuse is constantly evolving because of both cultural and social norms that change over time.<sup>20</sup> For example, the World Health Organization today defines child abuse as follows:

“all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to the child’s health, survival, development or dignity in the context of a relationship of responsibility, trust or power.”<sup>21</sup>

There are many types of abuse ranging from physical to emotional and all leave visible and invisible scars.<sup>22</sup> FGM leaves an emotional and visible scar on the young girls who are forcibly restrained while their genitals are being damaged or entirely removed using a knife, scalpel, or any sharp

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World Health Org. (2008), <https://apps.who.int/iris/handle/10665/43839>.

15. *Id.*

16. WORLD HEALTH ORGANIZATION, *A Systematic Review of the Health Complications of Female Genital Mutilation, including Sequelae in Childbirth* 10 (2000).

17. Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 *Universal Human Rights versus Cultural Relativity J. of Anthropological Research* 319, 323 (1997).

18. *What is Cultural Relativism?*, WORLD ATLAS, <https://www.worldatlas.com/articles/what-is-cultural-relativism.html> (last visited Nov. 18, 2019).

19. See Deborah Wise, *Child Abuse Assessment*, in HERSEN, MICHEL. *CLINICIAN’S HANDBOOK OF CHILD BEHAVIORAL ASSESSMENT* 549, 550 (2006).

20. COGHILL, D. ET AL., *CHILD AND ADOLESCENT PSYCHIATRY*, 412 (2009).

21. Desmond Runyan, et al., *Child abuse and neglect by parents and other caregivers*, in WORLD REPORT ON VIOLENCE AND HEALTH, 59 (World Health Organization 2002).

22. David D. Vachon, et al., *Assessment of the harmful psychiatric and behavioral effects of different forms of child maltreatment*, 72 *J. AM. MEDICAL ASS’N PSYCHIATRY* 1135, 1136-40 (2015).

instrument.<sup>23</sup> Physical child abuse involves direct and deliberate violence aimed at a child by an adult. Most nations with child-abuse laws consider abuse a serious crime that causes or places a child at risk of serious injury or death.<sup>24</sup> However, while child abuse is illegal in most countries, the law can still fail victims in the United States because of a divide between the law and different cultures.<sup>25</sup> The law may advocate worldwide for the welfare of children, but even now, around the world, the lines of justice are blurred when child abuse clashes with law and cultural relativism.

There are many forms of child abuse; however, the definition of what exactly constitutes child abuse varies by country and culture. The less traditional forms of abuse are perceived less as child abuse because of the cultural viewpoint and social morals that influence the treatment of children within the culture. While less severe forms of child abuse may be subject to debate, there can be no debate that the prevalence of FGM in some countries requires more intense scrutiny. For example, in Egypt, from 2004 to 2015 87% of females between the ages of 15 and 49 years old endured FGM.<sup>26</sup> Meanwhile, to date, only twenty-six of the fifty states in the United States currently have legislation criminalizing FGM or that classify FGM as child abuse.<sup>27</sup> The focus is on FGM; however, it is only one of many ills plaguing children worldwide, specifically, in jurisdictions where FGM practices remain commonplace. This violence cannot be eradicated throughout the globe, but in the United States, we should regard the safety of children as paramount; they must be protected by the laws, and their abusers must be put on trial.

Catherine Bell, a religious scholar and anthropologist, writes about how traditional behavior can shape one's mind and influence it in such a way that the belief in the ritual is stronger than the faith itself.<sup>28</sup> However, it has been

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23. WORLD HEALTH ORGANIZATION, *supra* note 5, at 158-60.

24. Patricia Leigh Brown, *In Oakland, Redefining Sex Trade Workers as Abuse Victims*, N.Y. TIMES (May 23, 2011), <https://www.nytimes.com/2011/05/24/us/24oakland.html> (stating, "[o]nce viewed as criminals and dispatched to juvenile centers, where treatment was rare, sexually exploited youths are increasingly seen as victims of child abuse, with a new focus on early intervention and counselling.").

25. Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37.1 CHILDREN'S LEGAL RIGHTS JOURNAL 1 (2017).

26. A Global Concern, *supra* note 10.

27. Abbey Schubert, *24 states have no laws against female genital mutilation. Here's why that needs to change*, MIC (July 14, 2017), <https://www.mic.com/articles/182161/24-states-have-no-laws-against-female-genital-mutilation-heres-why-that-needs-to-change>.

28. CATHERINE M. BELL, *RITUAL THEORY, RITUAL PRACTICE* 218, Oxford University Press (2009).

proven that while FGM has no religious standing in any of the Abrahamic religions, religion is still too often used as a defense when charges are made.<sup>29</sup> This also explains low prosecution rates, despite the widely known prevalence of this form of abuse, not only in parts of Africa and the Middle-East, but in the United States.<sup>30</sup> As human beings, we must understand that the forced cutting of female genitals is nothing short of inhumane.

### III. “CULTURAL RELATIVISM” OR “MORAL RELATIVISM”?

Philosopher John Cook believed cultural relativism “is aimed at getting people to admit that although it may *seem* to them that their moral principles are self-evidently true, and hence *seem* to be grounds for passing judgement on other peoples, in fact, the self-evidence of these principles is a kind of illusion.”<sup>31</sup> Cultural relativism and moral relativism cannot be confused, and the law should conform with moral relativism and penalize those practicing FGM. In regards to FGM, lawmakers must dismiss cultural relativism when enacting laws involving certain religious practices that are abusive, immoral, and life-threatening. For example, girls forced to marry before their teenage years suffer medical, educational, and social consequences.<sup>32</sup> In 2013, the United Nations Human Rights Council passed a resolution declaring that forced child marriages are a violation of basic human rights.<sup>33</sup> While child marriage is illegal throughout parts of the world, certain cultures still allow the practice.<sup>34</sup> Although child marriage is illegal in the United States, Pew Research Centre estimates that nearly 5 in every 1,000 15–17 year olds in the United States are married.<sup>35</sup> These statistics raise the question: is American society, historically protective of different cultures, equipped to

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29. Ellen Gruenbaum, *The Female Circumcision Controversy: An Anthropological Perspective* 60 (2001) 208-209.

30. *Id.*

31. John Cook, *Cultural Relativism as an Ethnocentric Notion*, in *THE PHILOSOPHY OF SOCIETY* 294 (Rodger Beehler & Alan Drengson eds., 1978).

32. Jennifer Ludden, *Five Things You May Not Know About Child Marriage*, NPR (Dec. 1, 2013), <https://www.npr.org/sections/parallels/2013/12/01/247843225/5-things-you-may-not-know-about-child-marriage>.

33. *UN Takes Major Action to End Child Marriage*, CENTER FOR REPRODUCTIVE RIGHTS (Oct. 16, 2013), <https://reproductiverights.org/story/un-takes-major-action-to-end-child-marriage>.

34. Nawal M. Nour, *Child Marriage: A Silent Health and Human Rights Issue*, 2 *REVIEW IN OBSTETRICS AND GYNECOLOGY* 51, 51 (2009).

35. David McClendon & Aleksandra Sandstrom, *Child marriage is rare in the U.S., though this varies by state*, PEW RESEARCH CENTER. (Nov. 1, 2016), <https://www.pewresearch.org/fact-tank/2016/11/01/child-marriage-is-rare-in-the-u-s-though-this-varies-by-state/>.

properly protect children from abusive practices like FGM?

Two Universal Declaration of Human Rights articles specifically refer to children: Article 25 and Article 26. Article 25 states, “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”<sup>36</sup> Meanwhile, Article 26 calls for the right to education for all, and deals both with the access and the aims of education.<sup>37</sup>

Cultural relativists argue that all customs, traditions, practices, and beliefs must be recognized and treasured; a subjective moral code cannot apply.<sup>38</sup> Additionally, cultural relativists argue that FGM must be given cultural validity and personal bias should be left out of the assessment of cultural practices.<sup>39</sup> Despite the argument of the cultural relativists, there must be a clear law stating that this is a crime against all women and not just those who were unwillingly mutilated.

#### IV. FEDERAL LEGISLATION AGAINST FGM IN THE UNITED STATES

In 1996, the United States government passed its first federal law prohibiting FGM.<sup>40</sup> This legislation derived from a multitude of factors, most notably the increased public awareness of FGM within the United States, including immigration of populations that practice FGM.<sup>41</sup> Congress criminalized FGM as a means of reforming the Illegal Immigration and Immigrant Responsibility Act of 1996.<sup>42</sup> Throughout the early 1990s, tens

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36. The Universal Declaration of Human Rights, A/RES/217(III) (Dec. 10, 1948) [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

37. *Id.*

38. Sandra Danial, *Cultural Relativism vs. Universalism: Female Genital Mutilation, Pragmatic Remedies*, 2.1 THE J. OF HISTORICAL STUDIES 1, 2, 5 (2013).

39. Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQUALITY JOURNAL 367 (1989).

40. See 18 U.S.C. § 116 (1996); see also Christopher T. Paresi, *Examining the Adequacy of Federal Legislation Addressing the Problem of Female Excision in the United States*, 8 BUFF. HUM. RTS. L. REV. 163, 164 (2002).

41. See Blake M. Guy, *Female Genital Excision and the Implications of Federal Prohibition*, 2 W. & M. J. OF RACE, GENDER & SOCIAL JUSTICE 125, at n. 10 (1995) (showing the increased media coverage of FGM in the United States).

42. 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. § 116 (1996). 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



of thousands of immigrants fled from wars and extreme famine in West, North, and East Africa and immigrated to the United States.<sup>43</sup> While the vast majority of immigrants did not practice FGM, the few who did forced the United States Congress to act.<sup>44</sup>

One of the first prominent cases to shed light on the prevalence of FGM in the United States occurred in 1996, when Fauziya Kasinga requested political asylum due to the threat of FGM, causing controversy in the United States.<sup>45</sup> The judge presiding over the case found that the young woman was not entitled to seek asylum because she had not met the necessary criteria for granting her legal entry into the United States.<sup>46</sup> Massive public pressure and a barrage of media coverage lead to the Board of Immigration appeals reversing the lower court decision, leading to Kasinga finally having legal status.<sup>47</sup> This case continued the public discussion regarding FGM and brought to light the realities of FGM to the American public.<sup>48</sup> This case led to the recognition of FGM as an act of persecution justifying political asylum.<sup>49</sup> Cultural clashes make it difficult for the law, as it evolves to include new cultures, not to fall prey to cultural relativism.<sup>50</sup>

FGM is unique because it mainly affects young girls.<sup>51</sup> In the spirit of multiculturalism, defenders of FGM argue that the following terms can

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Health Equity Act but it did not pass until 1996, after Senator Harry Reid (DNV) offered it as an amendment to the Senate version of immigration reform legislation.

43. See Refugees, United Nations High Commissioner for “Africa,” UNHCR (retrieved Mar. 3, 2018); see also John Logan & Glenn Deane, *Black Diversity in Metropolitan America*, LEWIS MUMFORD CTR. FOR COMP URB. & REGIONAL RES. (Aug. 15, 2003), <http://mumford.albany.edu/census/BlackWhite/BlackDiversityReport/BlackDiversityfinal.pdf>; see also Messito, *supra* note 6, at 40.

44. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 645, 110 Stat. 3009-546 (1996).

45. See *In re Kasinga*, No. A73 476 695, 1996 BIA LEXIS 15 (BIA June 13, 1996).

46. Hope Lewis & Isabelle R. Gunning, *Cleaning Our Own House: “Exotic” and Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123, 130 (1998).

47. *Id.* at 131; see also Messito, *supra* note 6, at 41-42.

48. Carol R Horowitz & J. Carey Jackson, *Female “Circumcision” African Women Confront American Medicine*, 12 J. OF GEN. INTERNAL MED. 491,491 (1997).

49. Anika Rahman & Nahid Toubia, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide*, 23 HUM. RTS. Q. 836, 839 (2001).

50. Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. 367, 370 (1989).

51. See Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437, 445 (1988).

justify its use.<sup>52</sup>

*Custom and tradition* - The primordial belief is that this ritual of cutting is closely tied to the idea of maintenance and the promoting of chastity. This act is more of a tool for preventing promiscuity within the culture rather than an instrument of pain.<sup>53</sup>

*Women's sexuality* - FGM is performed on young girls in order to conserve their virginity, prevent promiscuity, and also as a form of cleanliness while supposedly controlling waywardness.<sup>54</sup>

*Religion* - Religion is often used to justify FGM. However, neither Christianity nor Islam promote it as a practice. It is purely a geo-cultural practice woven into the fabric of some cultures throughout the world.<sup>55</sup>

*Social pressure* - Among immigrant communities living outside of their culture, there is a certain amount of understandable pressure to preserve and protect traditions from their homeland. Cultural Relativists and multiculturalists use this rationale, notably the most challenging obstacle to criminalizing FGM.<sup>56</sup>

In the United States, both states and the federal government have had to address FGM because of religious justifications.<sup>57</sup> Until 2018, federal legislation criminalizing FGM appeared in the U.S. code.<sup>58</sup> The law carried a mandatory sentence of five years and/or financial penalties.<sup>59</sup> This sentencing could be enforced against perpetrators and victims' legal guardians.<sup>60</sup> The law defined FGM and highlighted the procedure's severe physical and mental health implications. A legal guide that informs at-risk

52. Eric K. Silverman, *Anthropology and Circumcision*, 33 ANN. REV. OF ANTHROPOLOGY 419, 428-29 (2004) (outlining a handful of arguments justifying the use of FGM).

53. See Wanda K. Jones et al., *Female Genital Mutilation/Female Circumcision: Who Is at Risk in the U.S?*, 112 PUB. HEALTH REP. 368, 370 (1997).

54. *Id.*

55. Sarah R. Hayford & Jenny Trinitapoli, *Religious Differences in Female Genital Cutting: A Case Study from Burkina Faso*, 50 J. FOR THE SCI. STUDY OF RELIGION 252, 255 (2011).

56. Jones, *supra* note 53, at 371.

57. Howard Goldberg et al., *Female Genital Mutilation/Cutting in the United States: Updated Estimates of Women and Girls at Risk, 2012*, 131 PUB. HEALTH REP. 340, 341 (2016).

58. 18 U.S.C. § 116 (1996).

59. *Id.*

60. *Id.*; Elizabeth A. Syer, *The Status of the Crusade to Eradicate Female Genital Mutilation: A Comparative Analysis of Laws and Programs in the United States and Egypt*, 22 PENN ST. INT'L L. REV. 843, 846 (2004).

populations, was created to collect data from the US population who are most subject to FGM.<sup>61</sup> The guide is also used to create educational plans for the populations from FGM prevalent countries to create awareness regarding the illegality of FGM.<sup>62</sup> The law also informed and trained medical staff on how to handle FGM and the specific health issues related to the phenomena.<sup>63</sup>

Despite the federal criminalization of FGM, the law was criticized for not going far enough.<sup>64</sup> In fact, just as other state laws have been deemed symbolic,<sup>65</sup> the federal law also was symbolic and did not effectively eradicate FGM.<sup>66</sup> First, the law did not prohibit parents from taking their children outside of the United States to undergo the female circumcision procedure.<sup>67</sup> In so doing, the FGM law essentially applied to poor families who could not afford to travel outside the United States.<sup>68</sup> Additionally, the FGM law did not have an affirmative reporting requirement.<sup>69</sup> Specifically, doctors, teachers, and social workers were not required to report to a state or federal agency when they suspected a child had been subjected to FGM; protection from future incidents was scant.<sup>70</sup> Lastly, the FGM law did not have a specific enforcement mechanism— agencies were not required to collect data or create educational programs that required reporting.<sup>71</sup>

Recently, the United States District Court in Michigan held the federal FGM law unconstitutional.<sup>72</sup> In *United States v. Nagarwala*, the court struck down 18 U.S.C. § 116 on the basis that Congress did not have authority to overreach its constitutional limits.<sup>73</sup> The Court reasoned that in enacting the FGM law, Congress violated both the Necessary and Proper Clause and the

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61. Emmanuel Kabengele Mpinga et al., *Female genital mutilation: a systematic review of research on its economic and social impacts across four decades*, 9 GLOBAL HEALTH ACTION 1, 6 (2016); see also Paresi, *supra* note 40, at 178 (describing the medical guide published in 1990).

62. See Paresi, *supra* note 40, at 164.

63. See *id.* at 167.

64. See *id.* at 168; see also Alison Renteln, *Relativism and the Search for Human Rights*, in 90 AMERICAN ANTHROPOLOGIST 56–72 (1988).

65. See Messito, *supra* note 6, at 47.

66. Paresi, *supra* note 40, at 168.

67. *Id.*

68. *Id.*

69. 18 U.S.C. § 116 (1996).

70. See Paresi, *supra* note 40, at 177.

71. See *id.* at 167–68.

72. See *United States v. Nagarwala*, 350 F.Supp.3d 613, 616 (E.D. Mich. Nov. 20, 2018).

73. See *id.*

Commerce Clause of the Constitution, while also calling into question the issue of federalism.<sup>74</sup> Despite the sound reasoning that the court provided, it seems harsh to erase a means by which women, young or old, could seek justice for their unwilling participation in FGM. Surely few things are more necessary and proper than the protection of young women.

By striking down the federal law, the courts have left it to the states alone to combat FGM. While many states have laws to prevent FGM, the elimination of the federal law unreasonably shut a door through which vulnerable women could find protection.

## V. FGM STATE LEGISLATION IN THE UNITED STATES

State laws regarding FGM have assumed greater significance since the nullification of the federal law. More than half the states have enacted state laws to prevent FGM.<sup>75</sup> Despite the prevalence of many state laws, the practice of FGM remains.<sup>76</sup> The following provides an outline of the state laws and common themes designed to prevent FGM.

### A. *Religious Freedom is Not a Defense: California*

The state of California specifically criminalizes FGM, but like the federal law, it is only applicable to minors.<sup>77</sup> What distinguishes this law from other state laws is the clear position against the religious freedom defense.<sup>78</sup> California law explicitly states that FGM is not a religious requirement in

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<sup>74</sup>. *See id.*

<sup>75</sup>. ARIZ. REV. STAT. ANN. §§ 12-513, 13-705, 13-1214, 13-3620 (2014); CAL. PEN. CODE § 273 (2019); COL. REV. STAT. § 18-6-401 (2018); DEL. CODE ANN. at § 780 (2019); FLA. STAT. § 794 (2019); O.C.G.A. § 16-5-27; 720 ILL. COMP. STAT. § 5/12-34 (2019); KAN. STAT. ANN. § 21-5413 (2019); LA. STAT. ANN. § 14:43.4 (2019); MD. CODE HEALTH-GEN. § 20-601, 602; MINN. STAT. § 144.3872 (2019); MO. REV. STAT. § 568.065 (2019); NEV. REV. STAT. ANN. § 200.5083 (2019); N.J. STAT. § 2C:24-10 (2019); N.Y. PENAL LAW § 130.85 (2019); N.Y. PUBLIC HEALTH LAW § 207 (2019); N.D. CENT. CODE § 12.1-36-01 (2019); OR. REV. STAT. § 163.207 (2019); R.I. GEN. LAWS § 11-5-2 (2019); TENN. CODE § 39-13-110 (2019); TEX. HEALTH & SAFETY CODE § ANN. § 167.001; (2019); W. VA. CODE § 61-8D-3A (2019); WIS. STAT. § 146.35. (2019).

<sup>76</sup>. *See Michelle Krupa, The alarming rise of female genital mutilation in American*, CNN, (July 14, 2017, 10:06 AM), <https://www.cnn.com/2017/05/11/health/female-genital-mutilation-fgm-explainer-trnd/index.html>

<sup>77</sup>. Mark Mather & Charlotte Feldman-Jacobs, *Women and Girls at Risk of Female Genital Mutilation*, Population Reference Bureau (Feb. 5, 2016), <https://www.prb.org/us-fgmc/>.

<sup>78</sup>. Messito, *supra* note 6 at 45-46.

any of the major religions, despite the practice existing.<sup>79</sup> Therefore, freedom of religion is not an exception under the law for individuals claiming FGM as a religious practice.<sup>80</sup> This provision of the law is controversial as some religious leaders still believe that FGM is a central part of their religious rituals.<sup>81</sup> California recently reformed the State Penal Code, stating that anyone who commits a felony violation of a stipulation forbidding anyone from endangering a child or allowing a minor to suffer physical pain, mental suffering, or injury by an act constituting “female genital mutilation” will be punished by an additional term of imprisonment in the state prison for one year.<sup>82</sup>

Even though California has many women at risk of FGM, evidence of enforcement against FGM is non-existent.<sup>83</sup> This oddity should not be overlooked; instead, questions should be asked and avenues should be opened to ensure that all vulnerable women are protected.

### *B. FGM Defined as Child Abuse: Colorado*

On May 24, 1999, Colorado amended its Criminal Code to classify FGM as a form of child abuse.<sup>84</sup> This provision states that a person commits child abuse if the perpetrator “excises or infibulates, in whole or in part, the labia majora, labia minora, vulva, or clitoris of a female child.”<sup>85</sup> Further, 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 they “allow” the child to undergo the procedure.<sup>86</sup> As a result, the statute protects all minors from FGM.<sup>87</sup> An act of child abuse carried out “knowingly or recklessly” that results in “serious bodily injury to the child” is considered a class three felony<sup>88</sup> and is punishable by at least four years in

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79. *Id.*

80. STANLEY DIAMOND, *IN SEARCH OF THE PRIMITIVE: A CRITIQUE OF CIVILIZATION* 110 (2017).

81. Messito, *supra* note 6, at 45-46.

82. CAL. PEN. CODE § 273.4 (2011).

83. See Sanctuary for Families, *Female Genital Mutilation in the United States - Protecting Girls and Women in the U.S. from FGM and Vacation Cutting* (2013), <https://www.sanctuaryforfamilies.org/wp-content/uploads/sites/18/2015/07/FGM-Report-March-2013.pdf>; see also Mather *supra* note 77, at 22.

84. COL. REV. STAT. § 18-6-401 1(b)(I) (2018).

85. *Id.*

86. *Id.*

87. § 18-6-401(1)(b)(III)(A-B).

88. § 18-6-401(7)(III)

state prison.<sup>89</sup> The Colorado legislation also created a fund to support education and outreach activities. The statute also tasked the Department of Public Health and Environment to reach at-risk communities through “culturally sensitive education, prevention, and outreach activities” highlighting the health risks and the emotional and psychological trauma involved in the practice of FGM.<sup>90</sup> Colorado’s FGM law serves as an example for all states to follow.

### C. “Ritualized Abuse of Child” Law: Idaho

Idaho does not have a specific FGM statute, but it has a “ritualized abuse of a child” law, potentially covering both FGM and other types of abuses that can be inflicted on minors.<sup>91</sup> This extensive law covers all these crimes which are either committed on a child or in the presence of a child.<sup>92</sup> A few examples pertaining to FGM are: (1) when a rite or ceremony is performed; (2) actual torture of a living animal or a human being or the simulation of the latter;<sup>93</sup> and (3) the forceful ingestion, injection or application of any drug that could dull the senses of said child or tamper with their recollection.<sup>94</sup>

### D. Felony in the First Degree: Florida

Florida, despite having a small percentage of women at risk of FGM<sup>95</sup>, classifies FGM as a first degree felony.<sup>96</sup> The law is very clear on this issue and it is divided into 6 parts each covering an aspect of the crime.<sup>97</sup> In section 1, the law defines the act of female genital mutilation as: “excising, or infibulating, in whole or in part, the labia majora, labia minora, or clitoris of a female person.”<sup>98</sup> Section 2 states that anyone who commits or attempts to commit FGM on a minor is committing a felony of the first degree punishable by a prison sentence in addition to a fine.<sup>99</sup> Section 3 notes that if someone knowingly removes or tries to remove a minor’s body part, it

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89. §§ 18-6-401(c)(III)(7)(a)(II).

90. COL. REV. STAT. § 25-30-103 (1999).

91. IDAHO CODE ANN. § 18-1506A (2013).

92. *Id.*

93. *Id.*

94. *Id.*

95. See Mather *supra* note 77, at 22.

96. FLA. STAT. ANN. § 794.08 (2013).

97. *Id.*

98. *Id.*

99. *Id.*

becomes a felony in the second degree<sup>100</sup> but sentencing is less severe.<sup>101</sup> In section 4, the law states that any parent or legal guardian who allows a minor to undergo the FGM procedure commits a felony in the third degree,<sup>102</sup> punishable by imprisonment and/or fine if the individual is found guilty.<sup>103</sup> Section 5 outlines the very few medical exceptions for the procedure, such as if it is performed by a licensed medical professional in order to save a life.<sup>104</sup> According to section 6, consent by a minor or their guardian does not constitute a defense.<sup>105</sup>

### *E. FGM as a Sex Crime: New York*

New York criminalizes the practice of FGM on minors, holding both the perpetrator and the victim's parents or guardians, if applicable, criminally liable. The law enables a sentence of up to one year in prison and creates a program of educational activities in at-risk communities to raise awareness of the criminal prohibition.<sup>106</sup> Similar to other states, New York's ban on FGM classifies FGM as a sex crime.<sup>107</sup> Additionally, the state's Department of Health has partnered with many groups to organize educational programs and materials addressing the health, cultural, and legal implications of FGM, targeting both relevant immigrant communities and healthcare providers.<sup>108</sup> The state does provide a narrow exception of FGM in cases of medical emergencies where it is performed by a doctor or licensed midwife on a woman in labour.<sup>109</sup>

### *F. Maiming Law: Oklahoma*

Oklahoma has a law specifically criminalizing FGM and maiming.<sup>110</sup> Maiming is defined as: "Any person who, with premeditated design to injure

100. *Id.*

101. § 775.082.

102. § 794.08.

103. § 775.082.

104. § 794.08.

105. *Id.*

106. N.Y. PENAL LAW § 130.85 (2019).

107. *Id.*; *Girl's Genital Mutilation is a Felony in New York*, N.Y. TIMES (Sep. 30, 1997), <https://www.nytimes.com/1997/09/30/nyregion/metro-news-briefs-new-york-girls-genital-mutilation-is-a-felony-in-new-law.html>).

108. Legislation on Female Genital Mutilation in the United States briefing paper by The Center For Reproductive Rights, Pg. 11. Available at: [https://www.reproductiverights.org/sites/default/files/documents/pub\\_bp\\_fgmlawsusa.pdf](https://www.reproductiverights.org/sites/default/files/documents/pub_bp_fgmlawsusa.pdf)

109. N.Y. PENAL LAW § 130.85 (2019).

110. OKLA. STAT. ANN. TIT. 21, §760 (2014).

another, inflicts upon his person any injury which disfigures his personal appearance or disables any member or organ of his body or seriously diminishes his physical vigor, is guilty of maiming.”<sup>111</sup> Clearly, if someone cuts in whole or in part the clitoris or one or both labia, they are maiming the girl and disfiguring her. Therefore, this law should apply to FGM.<sup>112</sup>

In addition, Oklahoma has a much more severe law specifically criminalizing female genital mutilation.<sup>113</sup> The law is straightforward: anyone who in part or in whole cuts the labia minora, labia majora or the clitoris and who is convicted of this felony can serve from 3 years in prison to life (depending on the severity of the offense). The law further imposes a fine of \$20,000 or less, again, depending on the damage done to the victim.<sup>114</sup> The only exception to the criminalization of FGM is FGM that is performed by a licensed physician *only* for a medical purpose. The consent of the girl or the parent/guardian is not an acceptable defense.<sup>115</sup> The Oklahoma legislature also imposed a removal of a physician’s medical license should they illegally perform the FGM procedure.<sup>116</sup> This provision seems equitable given that physicians know about risks relating to FGM, such as the high risk of infection and complications that may occur.<sup>117</sup>

#### G. Assault: First Degree: Alabama

Alabama does not have a statute specifically targeting FGM, but its statute for first degree assault states that: “A person commits the crime of assault in the first degree if, with intent to cause serious physical injury to another person, he/she causes serious physical injury to any person by means of a deadly weapon or dangerous instrument.”<sup>118</sup> Clearly, FGM involves the removal or partial removal of a young girl’s clitoris and other parts of the external genitalia and permanently disfigures the victim undergoing the procedure.<sup>119</sup> FGM easily falls under Alabama’s assault provision because of the physical and mental effects.<sup>120</sup>

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111. §751.

112. *Id.*

113. §760.

114. *Id.*

115. *Id.*

116. *Id.*

117. Carla Obermeyer, *The consequences of female circumcision for health and sexuality: An update on the evidence*, J. of Culture, Health & Sexuality 443 (Sep. 2005).

118. ALA. CODE § 13A-6-20 (2010).

119. For the circumcisers and blade: UNICEF 2013, 2, 44–46; for the ages: 50.

120. I. Utz-Billing & H. Kentenich, Female genital mutilation: an injury, physical and mental harm, 29 J. of Psychosomatic Obstetrics & Gynecology 225, 226-7. (2009).



*H. “Vacation Cutting:” Nevada*

Nevada has a small percentage of individuals from countries where FGM is regularly practiced.<sup>121</sup> Despite this, Nevada specifically targets the FGM procedure. Committing FGM on a minor<sup>122</sup> is a class B felony<sup>123</sup> with a 2-10 year sentence and potentially a fine of up to \$10,000.<sup>124</sup> The law also classifies ‘vacation cutting’ – “[removing] a female child from this State for the purpose of mutilating the genitalia of the child” as a class B felony and is penalized similarly to those performing FGM.<sup>125</sup> Although vacation cutting was made illegal in the U.S. in 2013,<sup>126</sup> young girls are still transported across borders to undergo the procedure. FGM is still considered a rite of passage and a way to honor your family in countries that still partake in the practice.<sup>127</sup> Thus, “summer holidays” are often the perfect cover for vacation cutting.<sup>128</sup> Despite limited quantitative data, experts say that FGM is commonly practiced during the school vacation period in parts of Guinea, Nigeria and Somalia.<sup>129</sup> Young girls travel abroad to undergo the procedure, often a precursor to child marriage.<sup>130</sup> Nevada law clearly forbids custom, ritual, or standard practice or the consent of the child, parent, or legal guardian of the child to be used as a defense.<sup>131</sup>

*I. “Transport” Law: Texas*

Over the last two decades, females susceptible to FGM have been migrating to Texas.<sup>132</sup> The Texas law targeting FGM bars religion or cultural

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121. *Adults in Nevada*, PEW RESEARCH CENTER’S RELIGION & PUBLIC LIFE PROJECT (last visited Aug. 14, 2019) <https://www.pewforum.org/religious-landscapestudy/state/nevada/>.

122. NEV. REV. STAT. ANN. § 200.5083 (2019).

123. *Id.*

124. *Id.*

125. *Id.*

126. Goldberg, *supra* note 57, at 341.

127. Hughes, *supra* note 7, at 322, 344.

128. Pilirani Semu-Banda, *For many Girls, School Holidays school holidays mean FGM ‘Cutting cutting season’*, U.N. POPULATION FUND (Aug. 10, 2017), <https://www.unfpa.org/cuttingseason>. (stating that many girls are transported over borders during the summer months- “cutting season”- for FGM).

129. *Id.*

130. *Id.*

131. NEV. REV. STAT. ANN. § 200.5083 (West 2019).

132. Tim McKeown, *Muslim growth adds to Texas diversity*, Tex. Online, (May 21, 2011), <https://web.archive.org/web/20111108184800/http://www.texasonline.net/special-reports/muslim-growth-adds-to-texas-diversity>.

rituals as a defense to the procedure.<sup>133</sup> FGM is a state felony.<sup>134</sup> The law also criminalizes the transportation of girls to have the procedure performed.<sup>135</sup> Lastly, a parent or guardian's consent to the procedure is not available as a defense.<sup>136</sup> Texas utilizes 'risk abduction factors' in FGM cases.<sup>137</sup> The Texas Code prohibits conduct that:

Poses a risk that the child's physical health or safety would be endangered in the country because of specific circumstances relating to the child or because of human rights violations committed against children, including arranged marriages, lack of freedom of religion, child labor, lack of child abuse laws, female genital mutilation, and any form of slavery.<sup>138</sup>

### *J. Human Rights Law: Arkansas*

Arkansas does not specifically criminalize FGM procedures on adults. The state does criminalize the procedure on children under its human rights section of the code.<sup>139</sup> Additional sentencing for conducting FGM procedures can also be prosecuted under Arkansas' battery statute.<sup>140</sup> For example, a person can be prosecuted for committing battery in the first degree if:<sup>141</sup> (1) physical injury was caused with a deadly weapon;<sup>142</sup> (2) injury was caused with the intent of disfiguring, destroying, amputating, disabling or cutting of a person's body;<sup>143</sup> (3) if physical injury was caused with indifference to human life;<sup>144</sup> (4) when acting alone or in concert with others to attempt a felony, fleeing from the sight of said felony, if someone present attempts to physically harm someone and also by fleeing the scene of the crime they cause further damage;<sup>145</sup> (5) the intent to cause serious physical injury to an unborn child or to a pregnant woman;<sup>146</sup> (6) if the injury is caused to a pregnant woman during the commission of a class A felony or misdemeanor and harm comes to her and/or her baby which is then born

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133. TEX. HEALTH & SAFETY CODE ANN. §167.001 (2019).

134. *Id.*

135. TEX. FAM. CODE ANN. § 153.502 (2019).

136. TEX. HEALTH & SAFETY CODE ANN. § 167.001

137. TEX. FAM. CODE ANN. § 153.502 (c)(4)(J).

138. *Id.*

139. ARK. CODE ANN. § 9-13-402 (5)(B)(iv)(2019).

140. § 5-13-201(a)(2).

141. § 5-13-201(a)

142. § 5-13-201(a)(1).

143. § 5-13-201(a)(2).

144. § 5-13-201(a)(3).

145. § 5-13-201(4).

146. § 5-13-201(5).

alive;<sup>147</sup> (7) when a person commits a crime against a minor that is younger than 12 years old;<sup>148</sup> (8) when causing harm using a firearm;<sup>149</sup> and (9) when someone causes serious physical injury to someone under the age of 4.<sup>150</sup> Human rights violations, like FGM, are a felony in Arkansas.<sup>151</sup> FGM is often done without anesthetic, using razors, knives, and other blunt instruments while restraining the young girl during the procedure.<sup>152</sup> Therefore, FGM constitutes a battery under Arkansas law.

#### K. FGM Prohibited Statewide: Louisiana

Despite having a small percentage of women vulnerable to FGM,<sup>153</sup> the Louisiana legislature criminalized FGM statewide in 2016.<sup>154</sup> The law provides: “A person is guilty of female genital mutilation when any of the following occur: the person knowingly circumcises, excises, or infibulates the whole or any part of the labia majora, labia minora, or clitoris of a female minor.”<sup>155</sup> The law does not allow for any exceptions other than medical for the purpose of saving a life.<sup>156</sup> Additionally, culture, ritual, and religion cannot be used as defenses and imposes a sentence of up to 15 years in prison.<sup>157</sup> Culture and the free exercise of religion are protected fundamental rights, but the law should refuse to extend its protection when it involves physically harming women.<sup>158</sup>

#### L. Prevention Law: Oregon

In comparison to all other states, Oregon has one of the lowest population of women susceptible to FGM.<sup>159</sup> Oregon classifies FGM as a class B

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147. § 5-13-201(6).

148. § 5-13-201(7).

149. § 5-13-201(8).

150. § 5-13-201(9).

151. § 9-13-402 (5)(A).

152. Hughes, *supra* note 7, at 327-8.

153. *Adults in Louisiana*, PEW RESEARCH CENTER’S RELIGION & PUBLIC LIFE PROJECT, (last visited August 15, 2019) <https://www.pewforum.org/religious-landscape-study/state/louisiana/>.

154. LA. STAT. ANN. § 14:43.4 (2019).

155. § 14:43.4 (1).

156. *Id.*

157. § 14:43.4 (C)(1) - (D).

158. THEORY, RITUAL PRACTICE 118 (2009) (ebook).

159. Nancy Haight, *The state of religion in Oregon*, THE OREGONIAN (Feb. 26, 2008).

felony,<sup>160</sup> holding anyone who conducts the procedure and parents or guardians criminally liable.<sup>161</sup> Similar to other state laws, Oregon provides an exception in the case of medical emergencies; the procedure must be performed by a physician who can practice in the state.<sup>162</sup> Oregon does not allow free exercise of religion as a defense during trial.<sup>163</sup> Alongside criminalization, the law also creates an extensive educational program geared towards prevention.<sup>164</sup> The law requires that: “The Oregon Health Authority shall establish and implement appropriate education, prevention and outreach activities in communities that traditionally practice female circumcision, excision or infibulation for the purpose of informing.”<sup>165</sup> This law requires the Oregon Health Authority to inform communities about the seriousness, ramifications,<sup>166</sup> and risks of using FGM, including information on why it is a form of child abuse.<sup>167</sup> While Oregon specifically criminalizes the practice of FGM, the small number of individuals from countries recognizing the practice indicates that the effects of the law are insignificant.

### *M. Explicit Law, Low Population: Georgia*

Georgia specifically classifies FGM as a criminal offense, despite having a predominantly non-FGM practicing population.<sup>168</sup> FGM is still recognized as a deplorable act of child abuse, despite the small number of cases in the state.<sup>169</sup> An example of a case highlighting the practice in Georgia occurred in 2006, when Khalid Adem was convicted and sentenced to prison for performing FGM on his two-year-old daughter.<sup>170</sup> Adem used scissors to remove his daughter’s clitoris in their Atlanta-area apartment in 2001. This case changed the perception of FGM as a foreign practice into one that can occur within the state. The female genital mutilation law penalizes one: “[w]ho knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of a female under eighteen years of

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160. OR. REV. STAT. § 163.207 (2019).

161. *Id.*

162. § 163.207(3)(B).

163. *Id.*

164. § 431.600.

165. *Id.*

166. *Id.*

167. *Id.*

168. 2010 Demographic Profile Data, U.S. CENSUS BUREAU (2010), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

169. Hughes, *supra* note 7, at 324.

170. *Adem v. State*, 686 S.E.2d 339, 340 (Ga. Ct. App. 2009).

age shall be guilty of female genital mutilation.”<sup>171</sup> Any parent or guardian who consents for their minor to undergo the procedure is also held criminally liable.<sup>172</sup> Georgia also prohibits a person under the age of 18 from consenting to the procedure, and also provides a limited medical emergency exception.<sup>173</sup>

#### *N. Straightforward Law & Education: Maryland*

Maryland also specifically criminalizes FGM,<sup>174</sup> despite having a low number of women susceptible to FGM.<sup>175</sup> The law provides only one exception: medical professionals who perform the surgery in order to save a life.<sup>176</sup> Parents and guardians are also held criminally liable for allowing a minor to undergo the procedure.<sup>177</sup> Maryland’s sentencing structure does not go far enough because it only imposed up to 5 years in prison and a \$5000 fine.<sup>178</sup> In extreme cases, courts both sentence a defendant to a fixed prison term and impose a fine.<sup>179</sup> FGM inflicts physical and psychological scars on victims, who then suffer dangerous repercussions in life.<sup>180</sup> In conjunction with FGM criminalization, Maryland also provides for “[e]ducation, prevention, and outreach” to inform local communities of the health risks involved with this practice. Every year, the Inter-African Committee USA hosts an event in Sharpsburg, Maryland to educate young Africans about the harms of FGM.<sup>181</sup>

#### *O. Specific Law, No Cases Reported: Missouri*

Missouri enacted a law to specifically address FGM,<sup>182</sup> although there have been no reported cases and immigration is low in the state.<sup>183</sup> Less than

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171. GA. CODE ANN. § 16-5-27(a) (2013).

172. *Id.*

173. *Id.*

174. MD. CODE HEALTH-GEN. § 20-602 (2019).

175. 2010 Demographic Profile Data, U.S. CENSUS BUREAU (2010), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

176. MD. CODE HEALTH-GEN. § 20-602.

177. § 20-601(b)(1).

178. § 20-603.

179. *Id.*

180. Hughes, *supra* note 7, at 328-29.

181. Courtney Columbus, *A Day Camp That Teaches Kids In The U.S. About Female Genital Mutilation*, KPBS (Aug. 25, 2017) <https://www.kpbs.org/news/2017/aug/25/a-day-camp-that-teaches-kids-in-the-us-about/>.

182. MO. REV. STAT. § 568.065 (2019).

183. U.S. CENSUS BUREAU, Centers of Population for the 2000 Census,

1% of Missourians come from countries that practice FGM.<sup>184</sup> In Missouri this barbaric practice constitutes as a class B felony<sup>185</sup> and the only exceptions to the law are procedures done by medical professionals in cases where it is performed to preserve a life.<sup>186</sup> Cultural, religious, and traditional defenses are not accepted, and all forms of female genital mutilation are a class B felony,<sup>187</sup> whether it is a type 1 (where there is a cut, but no flesh removed), type 2 (where there is a cut and only a small amount of flesh is removed), type 3 (there is a cut and it's been sewn back together), or type 4 (encompasses all procedures and cuts performed near the vaginal area).<sup>188</sup>

*P. First FGM Prosecution: Michigan*

Michigan was one of the first U.S. states to prosecute an individual for conducting an FGM procedure. Jumana Nagarwala, a doctor from Michigan, was charged with performing FGM at the Burhani Medical Clinic in Livonia, Michigan.<sup>189</sup> The state charged Nagarwala on three counts: 1) female genital mutilation<sup>190</sup> 2) transportation with intent to engage in criminal sexual activity and conspiracy<sup>191</sup> and 3) making a false statement to a Federal officer.<sup>192</sup> Regardless of the outcome of this case, hopefully this case will spark other states to pass similar FGM laws. This story gathered nationwide attention, highlighting FGM's barbaric practice and informing the American people of its existence in the United States. Nagarwala, to this day, claims that she had religious justification and was merely practicing a tradition passed on for generations.<sup>193</sup>

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<https://www.census.gov/geographies/reference-files/2000/geo/2000-centers-population.html>.

184. Rich Exner, *Americans Under Age 1 Now Mostly Minorities, but Not in Ohio: Statistical Snapshot*, [https://www.cleveland.com/datacentral/2012/06/americas\\_under\\_age\\_1\\_populatio.html](https://www.cleveland.com/datacentral/2012/06/americas_under_age_1_populatio.html)

185. MO. REV. STAT. § 568.065.

186. *Id.*

187. *Id.*

188. *Id.*

189. The United States Department of Justice, *Detroit Doctor and Wife Arrested and Charged with Conspiring to Perform Female Genital Mutilation* (Apr. 21, 2017), <https://www.justice.gov/opa/pr/detroit-doctor-and-wife-arrested-and-charged-conspiring-perform-female-genital-mutilation>.

190. 18 U.S.C. § 116 (1996).

191. §§ 2423(a), (c), (e).

192. § 1001.

193. Tresa Baldas & Robert Allen, *Another doctor, wife charged with female genital mutilation in Michigan*, CHICAGO TRIBUNE (Apr. 22, 2017), [14https://www.chicagotribune.com/nation-world/ct-detroit-female-genital-mutilation-](https://www.chicagotribune.com/nation-world/ct-detroit-female-genital-mutilation-)

Despite being one of the first states to prosecute the practice of FGM, in November 20, 2018, a federal court held that the anti-FGM federal law is unconstitutional. The court reasoned that no illegal products were used, and it was performed in a clinic. The court failed to consider the trauma inflicted on victims by such a procedure and put women at risk for the procedure.<sup>194</sup> The Justice Department—after having brought criminal charges against the defendants pursuant to a federal statute—declined to defend that criminal statute, prompting the U.S. House of Representatives to intervene in the case. This may be a significant step in stopping this violence.<sup>195</sup>

### *Q. Smaller State laws*

In the District of Columbia, FGM can potentially fall under “aggravated assault.”<sup>196</sup> Hawaii has “assault in the first degree,”<sup>197</sup> classified as a class B felony.<sup>198</sup> In Kentucky, FGM could be prosecuted as class C felony<sup>199</sup> under “assault in the second degree.”<sup>200</sup> FGM in Indiana could potentially fall under aggravated battery.<sup>201</sup>

Rhode Island does not specifically criminalize FGM, but could potentially fall under felony assault.<sup>202</sup> Under section 3 of the state’s code, serious bodily injury is defined as: “[p]hysical 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.”<sup>203</sup> An individual who commits this felony can receive a sentence of up to 20 years if convicted.<sup>204</sup>

Massachusetts does not specifically target FGM.<sup>205</sup> An individual can be held criminally liable under two types of laws: (1) mayhem—causing

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case-20170421-story.html.

194. *Id.*

195. This Case is currently being discussed in the United States Court of Appeals for the 6<sup>th</sup> District. The motion filed June 7<sup>th</sup> 2019 by The United States House of Representatives seeks to intervene solely to present argument in defense of the constitutionality of 18 U.S.C. § 116(a), whose defense the Department of Justice has abandoned. See *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

196. D.C. CODE ANN. § 22-404.01(a) (West 2019).

197. HAW. REV. STAT. §§ 707-710 (2019).

198. *Id.*

199. KY. REV. STAT. ANN. § 508.020(2) (West 2019).

200. *Id.*

201. IND. CODE. § 35-42-2-1.5 (2019).

202. 11 R.I. GEN. LAWS § 11-5-2 (2019).

203. *Id.*

204. *Id.*

205. MASS. GEN. LAWS ANN. § 265.14 (West 2019).

physical harm using a weapon or chemical substance,<sup>206</sup> and (2) assault—the intent to murder or maim.<sup>207</sup>

Mississippi also enacted a mayhem law allowing the criminalization of FGM.<sup>208</sup> The law itself is broad, encompassing any crime involving the disfigurement of any body part.<sup>209</sup>

In Montana, there is no specific law pertaining to FGM, but they do have a law regarding aggravated assault<sup>210</sup> which circumscribes a variety of felonies ranging from injury to death and the punishment can be up to 20 years in prison and a fine of \$50,000 or more.<sup>211</sup> Nebraska has a similar law which is classified under a class II felony, the first-degree assault charge describes any intentional act to harm another or cause injury.<sup>212</sup>

## VI. CONCLUSION

Female Genital Mutilation is an outdated religious practice that has no room in modern society.<sup>213</sup> Eradication starts by closing gaps in current legislation and educating at-risk communities.<sup>214</sup>

Currently, about half of the states have not enacted an anti-FGM bill; the Michigan federal court ruling may spark states to start passing legislation. Communities need to develop, strengthen, and support specific actions directed at ending the cutting and abuse targeting young girls from these immigrant communities.

Regardless of how FGM is performed, many survivors are left with physical, sexual, and psychological effects as a result of the procedure. The sexual and psychological impact of the practice cannot be ignored, nor can it be excused by traditional practices.<sup>215</sup> The consequences survivors suffer are typically complex, interlinked, often irreversible, and always very

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206. *Id.* (imposing a fine of a thousand dollars and up to 2 and a half years in jail).

207. § 265.15 (carrying the same penalties as mayhem).

208. MISS. CODE ANN. § 97-3-59 (West 2019).

209. *Id.* (punishment varies from 6 months to 7 years depending on the severity of the crime).

210. MONT. CODE ANN. § 455-2-202 (West 2019).

211. *Id.*

212. NEB. REV. STAT. § 28-308 (2019).

213. Linda. A. Morison et al., *How experiences and attitudes relating to female circumcision vary according to age on arrival in Britain: a study among Somalis in London*, 9 J. of Ethnicity and Health 75, 75-100 (2004).

214. *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018).

215. Hughes, *supra* note 7, at 328.



personal.<sup>216</sup> Although further studies are needed to make legislators aware of the effects of Female Genital Mutilation, anecdotal evidence strongly indicates that the number of girls in America at risk of FGM has increased steadily since the CDC's original report.<sup>217</sup>

It is time for the law to step in and stand up to the cultural relativism<sup>218</sup> currently serving as a significant barrier in the fight to eradicate FGM. The Freedom of Religion clause of the First Amendment protects the free exercise of religion.<sup>219</sup> This makes the eradication of FGM a constitutional issue<sup>220</sup> because of the religious justifications to the practice. Despite the religious justifications, FGM inflicts physical harm to women undergoing the procedure; this should be enough to remove First Amendment protection.<sup>221</sup>

According to the World Health Organization, 200 million women have undergone this procedure and an average of 3 million girls are at risk annually.<sup>222</sup> It is time to stop this war on women and protect innocent young girls from the scalpels that will forever change their lives. The time is now.

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216. *Id.*

217. Amnesty International, *What is female genital mutilation?*, AMNESTY INTERNATIONAL (Sept. 30, 1997), <https://www.amnesty.org/en/documents/ACT77/006/1997/en/>; Lynn Harris, *Our daughters should not be cut*, SALON (Jan. 25, 2010 6:59AM), [https://www.salon.com/2010/01/25/fgm\\_in\\_america/](https://www.salon.com/2010/01/25/fgm_in_america/)

218. Avishai Margalit & Moshe Halbertal, *Liberalism and the right to culture*, 71 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY, 491, 491-510 (2004).

219. U.S. CONST. amend. I.

220. Hughes, *supra* note 7, at 328.

221. *Id.*

222. A Global Concern, *supra* note 10.