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# BRIDGES AND BARRICADES: RETHINKING POLEMICS AND INTRANSIGENCE IN THE CAMPAIGN AGAINST FEMALE CIRCUMCISION

*L. Amede Obiora*<sup>†</sup>

## I. INTRODUCTION

*Walls turned sideways are bridges.*

Angela Davis

### *A. On Cultural Self-Determination: Whose Culture? Which Self?*

The United Nations World Conference on Women, held in Beijing in 1995, was hailed as a milestone in the quest for gender equality. The proceedings at the forum focused on an agenda that included issues pertaining to the sexual and reproductive rights of women, with emphasis on freedom from coercion, discrimination, and violence.<sup>1</sup> Denouncing culture as a principal source of gender-based violence and exploitation, the majority of participants insisted that states have a duty, regardless of their particular cultural sys-

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<sup>†</sup> *The author is an Igbo woman conducting research and teaching in the United States. Versions of this article were presented to the faculty at Northwestern University Law School, Washington and Lee Law School, SUNY Law School and at the Midwestern People of Color Law Teachers Collective Meeting at Case Western Reserve School of Law. The author appreciates the constructive comments of the participants at those forums. The author would also like to thank the American Association of University Women, Jesus, three anonymous Law & Society reviewers, and Professors Lawrence Freidman, Peggy Radin, Kathy Abrams, Detlev Vagts, Stewart Maculay, Deborah Rhode, Isabelle Gunning, Lucinda Finley, Sabrina McCarthy, Linda Ammons, Sarah Jenkins, Sophie Pirie, Bill Maurer, Richard Perry, and Obi Nnaemeka.*

1. See *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF. 177/20 (1995) [hereinafter *Fourth World Conference*].

tems, to protect women's human rights.<sup>2</sup> This sentiment was succinctly captured by Norwegian Prime Minister Gro Harlem, who observed that "the State becomes an accomplice if violence against women is seen as a separate cultural category of behavior outside the realm of justice and law enforcement."<sup>3</sup>

Notwithstanding the resonance of this view, the representatives of some constituencies perceived that women's individual rights were being reified and privileged at the expense of crucial socio-cultural rights.<sup>4</sup> This perception precipitated passionate contestations of the Declaration and Platform for Action that emerged from the conference.<sup>5</sup> After sustained deliberations and negotiations, the impasse was eventually resolved with a commitment by governmental and non-governmental agencies to, inter alia, reaffirm that the "human rights of women and the girl-child are an inalienable, integral and indivisible part of universal human rights."<sup>6</sup>

This commitment is, without doubt, a noble one. However, the lack of consensus regarding the substance and scope of human rights poses a serious threat to its implementation. Traditional justifications for the international human rights regime typically posit the universality of human rights.<sup>7</sup> This position engenders counter-claims of sovereignty, domestic jurisdiction, and cultural autonomy, especially from some post-colonial regimes.<sup>8</sup> A recur-

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2. See *id.* at 11. This view articulates the substance of the Platform for Action, Chapter II, Paragraph 9.

3. Report of the Committee on the Elimination of Discrimination Against Women on the Progress Achieved in the Implementation of the Convention, CEDAW/C/1995/7 (Nov. 14, 1994). This sentiment was echoed by the Committee on the Elimination of Violence Against Women, which observed that "women . . . face[] many disabilities in law and in fact, and [are] subjected to discrimination in most countries." *Id.*

4. See, e.g., Nancy Seufert-Barr, *Seeking Action for Equality, Development, Peace*, 32 U.N. CHRON 39, 43 (1995).

5. See *id.*

6. Fourth World Conference *supra* note 1, ¶ 93.

7. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 205-228 (1989). See also David Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in ESSAYS ON HUMAN RIGHTS 88 (David Sidorsky ed., 1979).

8. An illustration of this position is evident in the Bangkok Governmental Declaration which some Asian nations issued in anticipation of the Vienna World Conference on Human Rights. The Declaration emphasizes the principles of national sovereignty, territorial integrity, and non-interference. See *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, 14 HUMAN RTS. L.J. 370 (1993). These regimes, for historical and other reasons, profess an unequivocal aversion to projections and interventions which they consider imperialistic and inimical to their identity and survival as distinct cultural groups. See *id.*

rent theme in the views that espouse relativity tends to run along the lines of the argument that the preponderance of human rights bear a Western imprint and evince paradigms, philosophies, and ideologies that are more resonant with the West.<sup>9</sup> Due to this difference in perspectives, seemingly straight forward human rights formulations are not readily amenable to interpretation.<sup>10</sup>

Article 5 of the Universal Declaration of Human Rights provides an apt illustration of this point. It stipulates: "No one shall be subjected to torture, or to cruel, inhuman, or degrading treatment or punishment."<sup>11</sup> The meaning of this provision, though, is not self-evident. Conceptions of human dignity tend to be indeterminate and contingent, and what may appeal to one school as torture may be absolved or approved of by another as culture. An act one may condemn as depreciative of human dignity may have been enacted by its practitioners as an enhancement of human dignity. The very act that one may construe as cruel and violative of Article 5 may be embraced in cultures where it is practiced as a "technology of the body"<sup>12</sup> that is integral to a scaffolding network of equilibrating social values.<sup>13</sup>

What then does Article 5 mean in a universe of competing values and moralities? Is there an objective technique for evaluating systems of morals and cultures? Given the specificity of cultural standards and values, and given the predisposition of human beings to generalize from their situated perspectives and realities,

9. See Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Adamantia Pollis & Peter Schwab eds., 1979); Josiah A.M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 9 HUMAN RTS. Q. 309 (1987); Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 735 (1993); see also Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 819 (1987) (discussing the tendency to conceive of the shared vision of a specific community as the universal experience of a transcendental subject).

10. In the opinion of Rosalyn Higgins, the non-universal, relativist view of human rights is state-centered and "rarely advanced by the oppressed, who are only too anxious to benefit from the perceived universal standards." ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 96 (1994).

11. Universal Declaration of Human Rights, art. 5, G.A. RES. 217 (III), U.N. GAOR, 3d Ses., U.N. Doc. A/810, at 5 (1948).

12. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 26 (Alan Sheridan trans., 1979).

13. See Francoise Lionnet, *Women's Rights, Bodies and Identities: The limits of Universalism and the Legal Debate Around Excision in France*, in INSCRIPTIONS, VOL. 6: ORIENTALISM AND CULTURAL DIFFERENCES 98, 107-09 (Mahmut Mutman & Meyda Yegenogin eds., 1992).

how can we ensure that our presumptions and assertions of universality are not veiled projections onto others of our moral categories? How can we develop a transcultural system of human rights that is sensitive to cultural ambiguities, respectful of empirical differences among cultures, and responsive to enforcement? How do we reconcile the need for nuanced contextualism and sensitivity to culture with our commitment to demonstrably cross-cultural universals? Or do we beg the question here? Should we begin by asking if any cross-cultural universals exist and how we go about ascertaining them?<sup>14</sup>

These interrogatories speak to several issues; two of which are particularly relevant for the purposes of the present discussion. The first revolves around the fact that the right to self-determination, a fundamental human rights value, entitles every people to determine and adopt measures that best facilitate the enjoyment and enrichment of their cultural heritage, values, and identity.<sup>15</sup> Juxtaposed against this is a second issue, which derives from the fact that human rights rest on a view of the legal subject as an individual distinct from the community and endowed with inalienable rights.<sup>16</sup> Respect for the integrity of these rights constrains cultural impositions that impinge on the autonomy of the individual.<sup>17</sup> It is reasonable to extrapolate from these propositions an assumption that each mutually defines the outer limits of the other, such that the right of cultural self-determination ends where individual human rights begin. However, this assumption is not always borne out in reality. Historically, the cultural embeddedness of some practices have been invoked to negate or mitigate liability for human rights infringements. This has been the case with rape, domestic abuse, and sexual harassment, although current trends reflect a growing intolerance.<sup>18</sup>

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14. See American Anthropological Association, *Statement on Human Rights*, in AMERICAN ANTHROPOLOGIST 539 (1947).

15. See *International Covenant on Civil and Political Rights*, G.A. Res. 2000, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); *International Covenant on Civil and Political Rights*, 6 INT'L L. MATERIALS 368, 369 (1967); see also James Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'?*, in THE RIGHTS OF PEOPLES 55-67 (James Crawford ed., 1988).

16. See ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD (1990); DONNELLY, *supra* note 7.

17. Charles Taylor, *Human Rights: The Legal Culture*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 49 (1986) (Recognizing certain personal rights is "as though the individual were given a 'trump' card that enables him to invalidate the results of the normal social decision-making process whenever it encroaches on his protected sphere.").

18. See Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and*

Conceptualizing individual and collective rights in terms of mutual checks and balances creates definite quandaries, one of which is the implicit suggestion that individual and collective rights are binary opposites. To the contrary, individual and collective rights are not binary opposites. They do not merely function to threaten and repudiate each other. In many respects they affirm and reproduce each other; they can be convergent, interdependent, and mutually reinforcing. Insofar as the individual's formation of a sense of humanity, self, and identity is invariably contingent on a cultural context, respect for the totality of individual human rights necessarily entails some degree of respect for the variability and specificity of culture.<sup>19</sup> In a non-linear perspective in which the individual is constructed as a cultural being, the rights of peoples to self-determination then becomes a complement of individual liberty and self-expression.<sup>20</sup> Yet, to acknowledge the relationship between individual and collective rights is not to refute the points of dissonance that exist between them.

Before elaborating on the issue, it is important to underscore the compelling significance of the issues raised by this discussion,

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*Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Eugenie Anne Gifford, "The Courage to Blaspheme": Confronting Barriers to Resisting Female Genital Mutilation, 4 U.C.L.A. WOMEN'S L.J. 329 (1994); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); Rorie Sherman, *Cultural Defenses Draw Fire: Double Standard?*, NAT'L L.J. Apr. 17, 1989, at 3; Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994); Alice J. Gallin, *Note: The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723 (1994); *Note: The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

19. This understanding is highlighted by the Beijing Platform for Action, whose implementation "is the sovereign responsibility of each state, in conformity with . . . and full respect for various . . . cultural backgrounds. . . ." *Fourth World Conference, supra* note 1, at 11; see also CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); MELVILLE HERSKOVITS, *MAN AND HIS WORKS: THE SCIENCE OF CULTURAL ANTHROPOLOGY* (1948); LUCIAN W. PYE, *ASIAN POWER AND POLITICS: THE CULTURAL DIMENSIONS OF AUTHORITY* 20 (1985).

20. Taylor, *supra* note 17, at 56; see also ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* (1985); RONALD DWORKIN, *LAW'S EMPIRE* 206 (1986); DONNELLY, *supra* note 7, at 154-60; WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 48-9 (1982); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 221 (1981); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179 (1982); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* (1989); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615 (1992); Karl Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. OF BRIT. COLUM. L. REV. 69, 97 (1991); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6 (1990).

not just for the purposes of international law, but also for the sociological study of law and for the resolution of conflicts of laws. One example of this deeper understanding is the manifestations of related issues in the context of domestic law. One illustrative case is *Santa Clara Pueblo v. Martinez*,<sup>21</sup> which involved a challenge of tribal rules that determined tribal membership of children of mixed marriages.<sup>22</sup> Pursuant to these rules, children of female members of the Pueblo who marry non-members of the Pueblo, unlike children of similarly situated Pueblo men, were denied membership, including land rights and other material benefits.<sup>23</sup> In spite of the gender biased determination of membership, the court declined to grant the petitioner's request for a finding of a violation of equal protection and due process. Instead, the court upheld the rule favoring patriliney on the basis of its implications for the cultural autonomy and sovereignty of the tribe.<sup>24</sup>

Conflicts between individual and cultural rights are also recurrent in the areas of the regulation of immigration and public health. With increasing globalization, the recent past has witnessed a massive movement of people.<sup>25</sup> This development has led either to the fusion or collision of cultural horizons.<sup>26</sup> In adjudicating resulting conflicts, some courts have demonstrated a sensitivity to the tenets of liberal democracy that protect diversity and promote the assertion of positive group differences.<sup>27</sup> These courts recognize

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21. 436 U.S. 49 (1978).

22. See *id.* at 51.

23. See *id.* at 52, 53.

24. See *id.* For a critique of this decision, see CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 63-69 (1987). For a critique of MacKinnon, see Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990).

25. L. Amede Obiora, *Feminism, Globalization, and Culture: After Beijing*, 1996 *IND. J. GLOBAL L. STUDIES* (forthcoming 1997).

26. In its endeavor to circumvent xenophobia and accommodate the challenges of multiculturalism, the United Nations General Assembly adopted Resolution 48/126 designating 1995 the International Year for Tolerance. See U.N., *Why an International Year for Tolerance*, DPI/1626/Tol-95-93235-April 1995.

27. Central to liberal thought is the concept of freedom from which the idea of tolerance flows. Thus, "[t]he liberal state, by definition committed to pluralism, must accommodate different types of groups, and maintain the framework in which they can struggle for recognition, power, and survival." HENRY J. STEINER & PHILLIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 191 (1996); see also Bhikhu Parekh, *Superior People: The Narrowness of Liberalism from Mills to Rawls*, in *TIMES LITERARY SUPPLEMENT*, Feb. 25, 1994, at 11; ANTHONY ARBLASTER, *THE RISE AND DECLINE OF WESTERN LIBERALISM* 66 (1984). For a discussion of the implicit politics of difference that encourage a laissez-faire approach *vis-à-vis* the demarcations of cul-

that in pluralistic societies cultural traditions, beliefs, and values are seldom transcendental, and that legal codes may be informed by norms that are at odds with the cultures of some enclaves. In the perpetual tug between the center and margin that marks such contexts, persons from marginal enclaves straddle the fine line of remaining allegiant to their cultural roots of origin and running afoul of specific laws. The issue is further complicated by the fact that the imperatives of optimal dispensation of justice enjoin the application of a "one-size-fits-all" standard of justice. This preclusion of monolithism presupposes attendance to contextual particularities.

Over the years, criminal courts appear to have vacillated between insisting on assimilationist standards and deferring to cultural specificity. For example, in *Reynolds v. United States*,<sup>28</sup> the Supreme Court refused to accommodate the practice of plural marriages among Mormons as a valid form of religious expression.<sup>29</sup> Emphasizing the supremacy of the local criminal code, the Court upheld the defendant's bigamy indictment.<sup>30</sup> As the Court stated, "Polygamy has always been odious among the northern and western nations of Europe and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."<sup>31</sup>

*Reynolds* is somewhat of a far cry from recent cases such as *People v. Moua*,<sup>32</sup> *People v. Chen*,<sup>33</sup> and *People v. Wu*.<sup>34</sup> In *Moua*, the court factored the defendant's cultural background into consideration in reducing charges of rape and abduction to a finding of false imprisonment.<sup>35</sup> In *Chen*, the State accused a Chinese

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tural boundaries, see Iris M. Young, *Difference and Policy: Some Reflections in the Context of New Social Movements*, 56 U. CIN. L. REV. 535 (1987), and Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration Driven Society*, 81 CAL. L. REV. 863, 880-82 (1993).

28. 98 U.S. 145 (1878).

29. *See id.* at 166.

30. *See id.*

31. *See id.* at 164.

32. *See Chiu, supra* note 18.

33. *See id.*

34. 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).

35. The accused alleged that the rituals of marriage-by-capture which was a legitimate practice in his Hmong culture involved consummating the relationship despite protests by the woman. *See Chiu, supra* note 18.



man of murdering his wife.<sup>36</sup> The defendant maintained that in his culture the infidelity that provoked him to kill his wife was an affront to his manhood.<sup>37</sup> The defendant succeeded in persuading the judge of his assertions of a culture-based defense and diminished capacity; the judge entered a sentence of five years probation for second degree murder.<sup>38</sup> *Wu* also involved rage-induced killing.<sup>39</sup> The jury convicted the defendant of second degree murder after the trial court failed to instruct the jury about the possible implications of the defendant's cultural background.<sup>40</sup> The Court of Appeals of California held that the trial court erred and that the defendant's cultural background raised a flag of caution that bore on the determination of whether the defendant possessed the requisite mental state for the crime.<sup>41</sup> These decisions have provoked much debate in the legal academy.<sup>42</sup>

One may appreciate the value of attending to cultural specificities without discounting the problems that arise from essentializing culture. To the extent that culture is socially constituted, it tends to be structured by disparate power configurations, shot through with vested interests, and experienced differently by members of the same community. Social stratification means that culture is seldom neutral.<sup>43</sup> Consequently, prioritizing or espousing the inviolability

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36. *See id.*

37. The reasoning was that in China, a man who is thus "castrated" would be restrained from executing the killing by the intercession and intervention of the community. This community ameliorative was not available to the couple who were resident in the United States. *See id.*

38. *See id.*

39. The defendant learned of her husband's sexual impropriety and child abuse. Distraught, she strangled her child and attempted to take her own life. To negate a claim of premeditation, malice, and specific intent to kill, she introduced evidence to establish that in her Asiatic culture, it was irresponsible for a mother to commit suicide unaccompanied by her children who would then be left to fend for themselves. Accordingly, a mother must take both her life and the life of her children so that she can provide them with proper care in the after-life. *See Wu*, 286 Cal. Rptr. at 886.

40. *See id.* at 870-71.

41. *See id.* at 887.

42. *See supra* note 18 for a list of articles illustrating this debate.

43. *See* Douglas Lee Donoho, *Relativism Versus Universalism in Human Rights: The Search For Meaningful Standards*, 27 STAN. J. INT'L L. 345, 381 n.139 (noting that human rights may serve the interests of the most powerful in society); Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710 (1990) (proposing that it is possible to have a coherent legal system, based on historical institutions and tradition, that reflects racial and gender biases); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 414 (1987) ("The differences in experience between blacks and whites . . . are differences

of culture runs the risk of foisting contested claims as universal and consensual, the risk of occluding real social inequities and tensions, the risk of perpetuating the voicelessness and powerlessness of persons who do not have an equitable input in the constitution of the culture in question precisely because their marginalization had rendered them voiceless and powerless.

This explanation is the classic understanding that informs the concerns articulated at the United Nations Women's Conference in Beijing. Feminist scholars and activists are commendably united in the struggle to eliminate gender-based discrimination. In keeping with the feminist objective, the Declaration and the blueprint for action that were issued in Beijing furnish a framework for challenging situations in which the rights of women are compromised for the benefit of cultural traditions that institutionalize and reproduce patriarchal hegemony, gender asymmetry, violence, and oppression. The Declaration can also be read as implicating certain cultural practices that women themselves deliberately appropriate and celebrate. The following discussion is motivated by the dilemmas presented by the international campaign against female circumcision.

The discussion attempts to engage questions such as: What does the preference of some women for a cultural practice such as female circumcision which has been adjudged problematic by diverse parties connote? Whose culture are these women really affirming? Does such affirmation have significance for their self-determination as individuals or for the proscription of the practice in question? How can we achieve a semblance of balance between validating a multiplicity of cultural expressions and realizing the global commitment to protect the cardinal rights of women? The following is an attempt to engage these and related questions.

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rooted firmly in race, and in the unconsciousness of racism."); Nira Yuval-Davis, *Identity Politics and Women's Ethnicity*, in *IDENTITY POLITICS AND WOMEN* 408 (Valerie Moghadam ed., 1994). Communities are heterogenous and often fraught with internal contradictions such that hegemonic transactions occur within, as much as between, collectives. Phillip Corrigan, *Race/Ethnicity/Gender/Culture: Embodying Differences Educationally*, in *BREAKING THE MOSAIC* (Jon Young ed., 1987). Multiculturalism can be based on a static, ahistorical concept of "ethnic culture" and its promotion through safe encounters with the dominant culture. These static assumptions feed off assumptions of monolithic communities and incorporate stereotypes about cultures.

### B. *The Anti-Circumcision Campaign in Africa*

Western legislation and cultural criticism have placed female circumcision at the center of a world-wide controversy concerning how states may best act to protect the interests of women within a universal framework of human rights.<sup>44</sup> Emotional charges and symbolism combined with an overwhelming emphasis on individualistic assumptions about the body, lead critics to insist that all African practices of genital markings and reconstructions be designated a crime against women. The debate is divided between universalists, who invoke monolithic categories and constructions of dignity, integrity, and empowerment to condemn genital surgeries, and relativists, who argue for locally autonomous and culturally sensitive reformatory strategies.

Female circumcision does not easily fall within the traditional definition of a gender-specific human rights violation,<sup>45</sup> nor does it seem completely analogous to violent coercion of women by men. It is usually performed for socio-cultural reasons by predominantly female private actors with the apparent consent of the circumcised or her proxy.<sup>46</sup> In moderate forms, only a drop of blood or the prepuce is extracted from the clitoris—and with medical supervision the procedure need not engender health complications.<sup>47</sup> Some efforts have been made in Egypt and Sudan to officially recognize these attenuated forms of the practice.<sup>48</sup> In the Nether-

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44. See *infra* Part II.B.

45. See *infra* Part IV.A.

46. See Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture and the Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 417, 436 (1993); Andrew Brynes, *Women, Feminism and International Human Rights Law: Methodological Myopia, Fundamental Flaws or Meaningful Marginalization?* 12 AUSTL. I.Y.B. INT'L L. 205 (1992); Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 20 (1995).

47. See *infra* note 58 and accompanying text.

48. See Marie Bassili Assaad, *Female Circumcision in Egypt: Social Implications, Current Research and Prospects for Change*, 11 STUD. FAM. PLAN. 3, 5 (1980); El A.S. Hakim, *Traditional Practices Affecting the Health of Women: Female Circumcision in Egypt*, in SEMINAR ON TRADITIONAL PRACTICES AFFECTING THE HEALTH OF WOMEN AND CHILDREN IN AFRICA 253 (WHO/EMRO Technical Publication: 1982); Asma M. A'Haleem, *Claiming our Bodies & Our Rights: Exposing Female Circumcision as an Act of Violence*, in FREEDOM FROM VIOLENCE: WOMEN'S STRATEGIES FROM AROUND THE WORLD 141 (Margret Schuler ed., 1992); *A Daughter; 4 Men Arrested in the Circumcision of 10-Year-Old Girl*, WASH. POST, Sept. 13, 1994 available in LEXIS, News Library, Washpost file.

lands, a Welfare, Health and Culture Ministry report recommended a comparable accommodation.<sup>49</sup>

Apparently some African immigrants in Holland circumcised themselves in often unhygienic and harmful circumstances because, while they could not afford the cultural alienation of not being circumcised, the Dutch medical and social workers denied them assistance with the procedure.<sup>50</sup> To address the needs of these women, the Ministry, on the basis of the findings of a study it sponsored among 500 Somali refugee women, recommended a distinction between mutilating or tissue-impairing circumcision and non-mutilating ritual incisions. The report further argued for official stipulation of conditions under which doctors might be allowed to perform simple incisions or ritual perforations of the clitoral covering as an alternative to infibulation. The report drew a storm of protests and was eventually superseded.<sup>51</sup>

In the opinion of Berhane Ras-Work, the Ethiopian chair of the Inter-African Committee ("IAC"), official approval of the Dutch compromise would have set a dangerous precedent, reconfirming the subjugation of women.<sup>52</sup> The IAC is one key organization facilitating the eradication of traditional practices negatively affecting women and children. To the credit of Ras-Work's dynamic leadership and good offices, the IAC has engaged and positively reoriented potentially volatile traditional issues.<sup>53</sup> Nonetheless, Ras-Work's reaction to the Dutch proposal is somewhat misconceived and over-

49. See Henrietta Boas, *Problem of Female Circumcisions in Holland*, JERUSALEM POST at Features, May 10, 1992; *Women: Dutch Government Ends Debate on Circumcision Proposal*, INT'L PRESS SERVICE, Nov. 11, 1992. A similar controversy erupted in Seattle, Washington, when at the insistence of some Somalian immigrants, pediatricians at Harborview Medical Center took under advisement the possibility of performing sunna-circumcision on girls. See Carol M. Ostrom, *Hospital Debates Issue of Circumcising Muslim Girls*, TIMES-PICAYUNE, Sept. 29, 1996, at A14. Beseiged by outraged opponents, Harborview decided not to offer the scaled-down procedure. See *Hospital Won't Circumcise Girls*, SEATTLE TIMES, Dec. 5, 1996, at B2.

50. See Boas, *supra* note 49.

51. See Guido de Bruin, *Women: Dutch Government Ends Debate on Circumcision Proposal*, INT'L PRESS SERVICE, Nov. 11, 1992.

52. See *id.*

53. See CLAUDE WELCH, PROTECTING HUMAN RIGHTS IN AFRICA: ROLES AND STRATEGIES OF NON-GOVERNMENTAL ORGANIZATIONS 87 (1995); Berhane Ras-Work, *Traditional Practices that Inflict Disability*, in WOMEN AND DISABILITY 23 (Esther Boylan ed., 1991); Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, REPORT ON REGIONAL CONFERENCE, 19-24 (Nov. 1990, Addis Ababa, Ethiopia) [hereinafter REGIONAL CONFERENCE REPORT]; Halima Embarek Warzazi, *Study on Traditional Practices Affecting the Health of Women and Children*, U.N. Doc. E/CN.4/Sub.2/1991/6 at 35 (1991).

broad. Incidentally, Ras-Work's reaction has some resonance. The World Health Assembly as well as the International Federation of Gynaecology and Obstetrics are among other entities that have unequivocally condemned female circumcision and called for coalitions to abolish it.<sup>54</sup>

While the lessons of history counsel vigilance against state acquiescence in gender oppression, relief lies at the heart of the recommended Dutch compromise. Rejecting it as an option without critical evaluation of the merits of the voices it echoes is problematic. Any number of procedures could qualify as "incision"—and where the benefits of a certain kind of incision outweigh the burdens, form need not occlude substance. To undermine the significance of the voices and agency of the women directly implicated by ritualized surgeries in the guise of protecting them is to erect obstacles to the development of pragmatic efforts to transform the manner and health consequences of the surgeries. A nuanced account of how indigenous participants understand female circumcision suggests the need to cede prominence to grassroots involvement in both the tailoring and implementation of reform. Reform strategies that prioritize notions of individual autonomy and choice must be rigorously attentive to the reality of what bodies, individuals, and communities are (and have been) in African societies and what they mean to women who participate in circumcision.

This article seeks to reconcile conflicting positions in the circumcision controversy by elaborating a middle course underscoring how an acute sensitivity to cultural context and indigenous hermeneutics balances efforts to protect the interests of women. This assertion of local context compensates for an emerging radical feminist consensus that overwhelmingly ignores the incommensurability of cultural motivations and meanings by projecting Western understandings of female circumcision onto African cultures.

This article argues that positions opposed to the modification of female circumcision are more appropriate for drastic forms of the practice. Although there is a dearth of scientific research on female

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54. See World Health Organization, *Female Genital Mutilation: World Health Assembly Calls for the Elimination of Harmful Traditional Practices* (Geneva: WHO Office of Information, Press Release WHA/10, May 12, 1993) [hereinafter WHO Press Release]; United Nations Population Fund, *Report of the Round Table on Women's Perspectives on Family Planning, Reproductive Health and Reproductive Rights, Ottawa, Canada, 26-27 August 1993*, at 4.

circumcision, the available data does not implicate mild forms of the practice as dangerous.<sup>55</sup> Without compelling health hazards, the case for total prohibition loses its force. This article will demonstrate that the value of eliminating mild forms of circumcision, in spite of the affirmative meanings they may express for the women and the cultures concerned, remains to be seen.

Part II of this article sets out the basic definitional framework of the female circumcision discourse. Part III provides indigenous understandings and feminist critiques of the practice. This section highlights the extent to which the antagonism between the two positions captures recurrent tensions in the theoretical and normative bases of trans-cultural critique.

After an exploration of indigenous perspectives, the section analyzes the functionalist premises of the feminist "patriarchy" thesis and its corollary "male sexual control" hypothesis. Addressing how relevant circumcision protestations contradict feminist principles, the section concludes with a reading of popular western literature on female circumcision. This reading suggests that cultural imperialism and orientalism may well lurk behind tendentious exposés of female circumcision without giving meaningless lip-service to the social fabric.

Part IV makes a case for transitional transformations. Examining international accords and Western legislative and judicial activities regulating female circumcision, this section explores legal, feminist, and pragmatic considerations for a reformist strategy emanating from both a contextual analysis of the issue and close consultation with the affected communities. To establish the expediency of such a strategy, evidence of the adverse nature and effects of the operation is juxtaposed against a critique of the dismal failure of previous attempts to eradicate the culturally embedded practice. Identifying education and clinicalization as more feasible modalities than coercive intervention, Part V provides a discussion of the merits of these alternatives. In Part VI this article concludes that this middle-course is neither an endorsement nor a condemnation of female circumcision. It is instead an attempt to enrich the debate by giving voice to heretofore muted perspectives.

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55. See *infra* Part II.C.

## II. DEFINITIONS

### A. *What is Female Circumcision?*

Genital scarification and reconstruction are time-honored and worldwide practices.<sup>56</sup> As extant cultural traditions, the practices are particularly prevalent in Africa where they are reported to occur in about twenty-six countries; the exact number of women affected is unknown, but it is estimated between 80 and 110 million.<sup>57</sup> Within the African context, the age at which it is performed varies between localities and it is possible to distinguish at least four major forms of incidence.<sup>58</sup> The ritualized marking of female genitalia begins with the mildest forms of the procedures, where the clitoris is barely nicked or pricked to shed a few drops of blood.<sup>59</sup> This procedure is innocuous and has a strictly symbolic connotation.<sup>60</sup>

The next range of surgeries extend to the removal of the clitoral prepuce, hood, or outer skin.<sup>61</sup> This is the form that ritual Muslims refer to as *sunna*, and medical data indicates that it poses minimal health risks if scientifically performed and monitored.<sup>62</sup>

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56. See RAQIYA HAJI DUALEH ABDALLA, SISTERS IN AFFLICTION: CIRCUMCISION AND INFIBULATION OF WOMEN IN AFRICA 13-17, 72-75 (1982); ASMA EL DAREER, WOMEN WHY DO YOU WEEP? (1982); BELKE WOLD GIORGIS, FEMALE CIRCUMCISION IN AFRICA: RESEARCH AND SOCIAL IMPLICATIONS (1981); Robin Morgan & Gloria Steinem, *The International Crime of Genital Mutilation*, in OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 293 (Gloria Steinem ed., 1983); ELIZABETH WILLIAMS MOEN, GENITAL MUTILATION: EVERYWOMAN'S PROBLEM 1 (Mich. State Univ. Working Papers on Women in International Development, Nov. 22, 1983).

57. WHO Press Release, *supra* note 54; United Nations General Assembly, *Vienna Declaration and Programme of Action, Note by the Secretariate, A/CONF.157/23* 5 (12 July, 1993); United Nations High Commissioner for Refugees, *Memorandum: Female Genital Mutilation* (10 May, 1994); United Nations Population Fund, *Report of the Round Table on Women's Perspectives on Family Planning, Reproductive Health and Reproductive Rights, Ottawa, Canada, 26-27 August 1993*, at 4.

58. See DAREER, *supra* note 56, at 48; SCILLA MCLEAN & STELLA E. GRAHAM, FEMALE CIRCUMCISION, EXCISION AND INFIBULATION: THE FACTS AND PROPOSALS FOR CHANGE, (Minority Rights Group Report, no. 47, 1980); EFUA DORKENOO & SCILLA ELWORTHY, FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE 7 (1992); WORLD HEALTH ORGANIZATION, SEMINAR ON TRADITIONAL PRACTICES AFFECTING THE HEALTH OF WOMEN AND CHILDREN (Taha Baasher et al. eds., 1982).

59. See BELKE WOLD GIORGIS, *supra* note 56; Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437, 441 (1988).

60. *Id.*

61. See Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 NEW ENG. J. MED. 712, 712 (1994); Slack, *supra* note 59.

62. See E.A. Ismail, *Female Circumcision: Physical and Mental Complications*, in

*Sunna* is most comparable to male circumcision and there is some suggestion that it may serve the purpose of hygiene and cleanliness.<sup>63</sup> A more radical form of female genital surgeries is known as excision or clitoridectomy. In this procedure, the clitoral glans and some of the *nympha* or *labia minora*, the narrow lip-like enclosures of the genital anatomy, are severed. The most extreme form of the surgeries is called infibulation, and it has been identified as the form that presents the most significant risks and hazards. This procedure entails scraping the *labia majora*, the two rounded folds of tissue that contour the external boundaries of the vulva, and stitching the remaining raw edges together in a manner that ensures that only a tiny opening will be left after the surgery heals.<sup>64</sup>

### B. The Aura of a Name

The debate over the nomenclature of African genital surgeries reveals that Western-biased themes of bodily "integrity" and tightly bounded individuality tend to confuse and distort the issue. Several critics quarrel with the term "female circumcision," insisting that it is a misnomer for the more extensive practices of clitoridectomy and infibulation.<sup>65</sup> Pontificating that any irreversible removal of a healthy organ or tissue is inherently mutilative,<sup>66</sup> many of these critics maintain that "female genital mutilation" is the only appro-

Baasher et al., *supra* note 58, at 267; see also AMNA ELSADIK BADRI, FEMALE CIRCUMCISION IN THE SUDAN 9 (1984).

63. See Robert Cook, *Damage to Physical Health from Pharonic Circumcisions in Infibulation of Females*, in Baasher et al., *supra* note 58, at 145; see also A.A. Shandall, *Circumcision and Infibulation of Females*, 5 SUDAN MED. J. 178 (1967). For a comparison of female circumcision to that of males, see Slack, *supra* note 59, at 449, and EL DAREER, *supra* note 56, at 2.

64. See HANNY LIGHTFOOT-KLEIN, PRISONERS OF RITUAL: AN ODYSSEY INTO FEMALE GENITAL CIRCUMCISION IN AFRICA 33 (1989); Leonard Kouba & Judith Muasher, *Female Circumcision: An Overview*, 28 AFR. STUD. REV. 95 (1985); NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION (1993).

65. See Paula Giddings, *Alice Walker's Appeal*, ESSENCE, July 1992, at 59 (book review and interview); Melvin Konner, *Mutilated in the Name of Tradition*, N.Y. TIMES, Apr. 15, 1990, § 7, at 5; see also LILLIAN PASSMORE SANDERSEN, AGAINST THE MUTILATION OF WOMEN (1981); Eugenie Anne Gifford, "The Courage to Blaspheme": *Confronting Barriers to Resisting Female Genital Mutilation*, 4 U.C.L.A. WOMEN'S L.J. 329, 332-34 (1994); Robyn Cerny Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449, 2450 n.7 (1992).

66. See MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978); see also MOEN, *supra* note 56; EFUA DORKENOO, CUTTING THE ROSE: FEMALE GENITAL MUTILATION, THE PRACTICE AND ITS PREVENTION 4 (1994).



priate characterization.<sup>67</sup> Mary Daly, caught in a hyperbole of monocultural indignation, even goes so far as claiming that the varied surgeries all share the “common [slashing and mutilating] features of contemporary gang rape.”<sup>68</sup>

Describing a vital aspect of African cultural identity as “mutilation” has proven offensive, if not psychically mutilating, to critical African constituencies like the Premier Group des Femmes D’Afrique who prefer to employ the term “female circumcision.”<sup>69</sup> This semantic tug-of-war is emblematic of the constellation of misunderstandings that surround the practice. Ironically, the catch-all phrase of “genital mutilation” favored by Western-influenced critics is potentially as much a misnomer as “female circumcision,” because not all forms of the genital surgeries are impairing. “Circumcision,” which literally means “cutting around,”<sup>70</sup> accurately describes *sunna* and actually overstates symbolic prickings. In light of the relative inadequacies of the terms “mutilation” and “circumcision,” more than comity and expedience urge deference to the euphemism that resonates with the affected population. The perception and meaning of the practices for the women who exist within the domain they define are of utmost relevance for deliberating constructive nomenclature and strategy. Consequently, I will use the term “circumcision,” which indigenous African coalitions prefer. Where necessary for emphasis, a differentiation will be made between the respective forms of circumcision.

### C. Potential Health Hazards

Any surgery is a delicate procedure, and far-reaching consequences may result from one as intricate as female circumcision. There is some consensus among scholars that because the specialized sensory tissue of the clitoris is concentrated in a richly-en-

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67. See *supra* note 65.

68. See DALY, *supra* note 66, at 155, 172.

69. See Marie-Angélique Savanne, *Why We Are Against the International Campaign*, 40 INT’L. CHILD WELFARE REV. 37 (1979); see also GIORGIS, *supra* note 56; Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN’S L.J. 155, 164 (1985) (characterizing the United Nations’ use of the term “mutilation” as reflecting intolerance). Despite contending that the male equivalent of the more radical procedure, clitoridectomy, would be the amputation of the penis, a renowned African authority on the subject opted to employ the term female circumcision as a recognition of the terms of reference of the communities where it occurs, and as a starting point to initiate the process of change. See TOUBIA, *supra* note 64 at 9; see also GIORGIS, *supra* note 56, at 26, 37.

70. WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 328 (2d ed. 1983).

dowed neurovascular area of a few centimeters, its removal is inherently fraught with risks.<sup>71</sup> Aftermaths, however, are typically compounded by crude circumstances of operation, such as the lack of anaesthesia and the use of unsterile instruments.<sup>72</sup> Badri suggests that the reports of gynecologists may overstate the prevalence of complications, because their views reflect their experiences in treating complicated cases.<sup>73</sup> On the other hand, one could argue that medical records may underestimate the actual incidence of complications and death since many of the victims never have recourse to the formal health care system.<sup>74</sup> There is considerable unanimity that aggravated and protracted complications are more attendant of infibulation than clitoridectomy.<sup>75</sup>

Although information on deaths directly associated with circumcision is not readily available, there are reports of post-operative tetanus.<sup>76</sup> Other immediate consequences may include excruciating pain, shock, gangrene, local infection and septicemia, hemorrhage and anemia in cases of unchecked loss of blood, bladder incontinence or urine retention due to actual pain or a reflex spasm from fear of pain, rupture of the vaginal walls, accidental damage to urethra and anus, and haematocolpos.<sup>77</sup> Among those patients with seriously infected circumcisions, further gynecological and genito-urinary complications may develop; for example, scarring, keloid and calculus formation, abscess and cysts, chronic pelvic infection, dyspareunia, dysmenorrhea, infertility, urinary tract infection, and coital difficulty.<sup>78</sup> The most grievous complication aris-

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71. See Toubia, *supra* note 61; see also EL DAREER, *supra* note 56, at 39.

72. See, e.g., EL DAREER, *supra* note 56, at 6-8.

73. See BADRI, *supra* note 62, at 5.

74. See EL DAREER, *supra* note 56, at 27 (suggesting that prevalent data may be unrepresentative). Note, however, that in her landmark survey of 3,210 Sudanese women, only twelve women out of the entire sample population were willing to submit to physical examination as a part of El Dareer's study. One commentator aptly construed this as "meaning that all information on operation type and on sequelae was reported and could not be corroborated." Daniel Gordon, *Female Circumcision and Genital Operations in Egypt and the Sudan: A Dilemma for Medical Anthropology*, 5 *MED. ANTHROPOLOGY Q.* 3, 5 (1991); see also Melissa Parker, *Rethinking Female Circumcision*, 65 *AFRICA* 506, 515 (1995) (criticizing El Dareer's research data).

75. See Toubia, *supra* note 61, at 713.

76. See MAHID AL DIRIE, *FEMALE CIRCUMCISION IN SOMALIA: MEDICAL AND SOCIAL IMPLICATIONS* (1985); see also EL DAREER, *supra* note 56; GIORGIS, *supra* note 56; TOUBIA, *supra* note 64; ABDALLA, *supra* note 56, at 21-28; SANDERSEN, *supra* note 65, at 33-44.

77. WHO Press Release, *supra* note 54.

78. See TOUBIA, *supra* note 64, at 713; see also *REPRODUCTIVE TRACT INFECTIONS:*

ing from infibulation relates to childbirth, although there is hardly a record of interference where the operation was performed in infancy.<sup>79</sup> Obstetric complications include perineal lacerations, anterior episiotomy, and prolonged labor with consequent fetal distress. However, neither infections nor fatalities in childbirth due to obstructed labor, hemorrhage, or infection have been generally recorded.<sup>80</sup>

### III. THE QUEST FOR LOST ORIGINS

#### A. *Indigenous Perspectives*

##### 1. Sociological Framework

*For the original adoption of any practice there is always some reason, though subsequently different reasons may be substituted from time to time, and the original reasons may be completely forgotten and lost.*

Ashley Montague

*Just as one can speak a language correctly without being able to formulate its grammatical rules, so one can play one's part in social life and in a ceremony without understanding how all the parts and principles fit together.*

. . . .

*If we do not necessarily expect any member of a speech community to be able to give a comprehensive analytical account of its language, why should we expect it in the case of ritual or mythology? . . . It is not much use asking people point-blank what it means any more than it would be useful to ask an individual what his dream means. . . .*

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GLOBAL IMPACT AND PRIORITIES FOR WOMEN'S REPRODUCTIVE HEALTH 307 (Adrienne German et al. eds., 1992); *Female Circumcision: Female Genital Mutilation*, 37 INT'L J. OF GYNAECOLOGY & OBSTETRICS 149 (1992); OLAYINKA KOŞO-THOMAS, THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION 45-49 (1987).

79. See CHARLES BOWESMAN, SURGERY AND CLINICAL PATHOLOGY IN THE TROPICS 547 (1960) (unequivocally asserting, which to this date has not been refuted, that infant operations created no obstetric or gynaecological complications).

80. See Fran P. Hosken, *Female Circumcision in the World Today: A Global Review*, in Baasher et al., *supra* note 58, at 195. According to Melissa Parker, the only study that investigated the impact of female circumcision on mortality found no correlation between the two. See Parker, *supra* note 74, at 519, referring to O.A. Mohamud, *Female Circumcision and Infant Mortality in Urban Somalia*, 67 GENUS 203 (1991).

*What one should not do, either with a dream or a ceremony, is plunge headlong into arbitrary interpretations of symbolism. . . . To understand a ceremony one needs to know something about the social context.*

Elizabeth Bott

Anthropologists have had some success in establishing that no culture exists as a meaningless jumble of odd behaviors.<sup>81</sup> Each culture articulates its own patterns of practices and philosophies to conceptualize the raw data of their peculiar experiences and to manipulate the objective conditions of their realities.<sup>82</sup> Different cultures may accomplish, and even conceive of, social purposes and goals by diametrically opposed means, or apply similar means to different ends. By and large, adopting a practice may be the consequence of perceiving that in comparison to other alternatives, it enhances the capacity of the society to function.<sup>83</sup> Nascent generations affirm and appropriate practices that they consider to be a microcosm of accumulated wisdom and heritage.<sup>84</sup> Concerned that diminutions of their cultural values may occasion a loss of necessary exactness or disintegrate familiar terrains, they may attempt to freeze customs by ritual legitimation.<sup>85</sup> Often, however, these attempts only minimize without eliminating the dynamics of change.<sup>86</sup>

Although a particular custom may not appear beneficial to a proportion of its adherents, seasoned commentators argue for assessments of the custom in the context of the broader culture in which it obtains.<sup>87</sup> Such appraisal may reveal that the ultimate utility of the custom is muddled by superficial and inordinately static cultural portrayals that falsely elevate what prevails at a

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81. See June Nash & Juan Corradi, *Myth and Ideology in the Andean Highlands*, in *IDEOLOGY AND SOCIAL CHANGE IN LATIN AMERICA* 116 (1977).

82. See EDWIN MEYER LOEB, *THE BLOOD SACRIFICE COMPLEX* 22 (Am. Anthropological Assoc. Memoirs, 1923).

83. See CHARLES C. CASE, *CULTURE, THE HUMAN PLAN: ESSAYS IN THE ANTHROPOLOGICAL INTERPRETATION OF HUMAN BEHAVIOR* 157 (1977); see also BECK ULRICH ET AL., *REFLEXIVE MODERNIZATION: POLITICS AND AESTHETICS IN THE MODERN SOCIAL ORDER* (1994).

84. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1977); Harry C. Triandis, *The Self and Social Behavior in Differing Cultural Contexts*, 96 *PSYCHOLOGICAL REV.* 506, 511 (1989).

85. See GEERTZ, *supra* note 84, at 153.

86. See L. Amede Obiora, *Reconsidering African Customary Law*, 17 *LEGAL STUD. F.* 217, 226 (1993).

87. See ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 32-33 (1949).

particular point in time or among a particular set of actors as representative. A variant of this argument demonstrates that rationales may be effective precisely because they are not formally logical and that imposing discursive categories to disconfirm intuitive systems obscures valid social and psychological operations.<sup>88</sup> These insights are apposite for analyzing ritual beliefs and acts.

The interpretation of ritual activity by its participants may not correspond to objective facts or empirical reality and may be logically incoherent in the strictest sense. Insofar as rituals are understood as symbolic statements, it is absurd to attempt to falsify them by regarding them as assertions "of fact" and then confronting participants with contrary evidence.<sup>89</sup> By the same token, the fact that people hold a particular world-view and act accordingly hardly suffices as an explanation for ritual performances; instead, it is the interaction of belief and action in ritual, as a statement of what people do, that needs to be explained.<sup>90</sup> Ritual processes of thought and action belong to specific symbolic frames of reference and they cease to appear like untranslatable metaphysics when considered within the totality of their natural context.<sup>91</sup> Abstracting them from this context and transposing them to alien rational categories risks destroying their internal code of meaning.<sup>92</sup> These insights are brought home by Lawrence Friedman, who, drawing on the works of Robert Merton, discusses the latent functions of seemingly irrational ancestral practices.<sup>93</sup> Illustrating with the example of the rain dance, Friedman points out that the ceremony may fail in its manifest purpose of making rain but create instead a sustaining and sustainable sense of community that helps the group to cope with social and environmental problems.<sup>94</sup>

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88. See ERNEST GELLNER, *THOUGHT AND CHANGE* (1964).

89. See J.H.M. Beattie, *On Understanding Ritual*, in *RATIONALITY* 240, 252 (Bryan R. Wilson ed., 1979).

90. See *id.* at 243.

91. See Martin Hollis, *Reason and Ritual*, in *RATIONALITY*, *supra* note 89, at 214, 222; DOROTHY LEE, *FREEDOM AND CULTURE* 74 (1959).

92. See Bryan R. Wilson, *Introduction*, in *RATIONALITY*, *supra* note 89, at xvii; I.C. Jarvie, *Explaining Cargo Cults*, in *RATIONALITY*, *supra* note 89, at 50, 60.

93. See Lawrence M. Friedman, *On Legal Development*, 24 *RUTGERS L. REV.* 11, 39 (1969). Merton uses the phrase "latent functions" to describe the phenomenon whereby social behaviors turn out to have unintended, unrecognized, and subtle ramifications which were not foreseen as part of the primary or manifest function of the behavior. MERTON, *supra* note 87 at 51.

94. See Friedman, *supra* note 93, at 39.

The indigenous explanations for female circumcision are analogous to these contextual schemes. An outsider who has the advantage of distance (or even a participating insider who, although possessed of experiential hindsight, opts to focus exclusively on only visible or physical manifestations) might be tempted to dismiss the practice as irrational or self-fulfilling and perpetuating.<sup>95</sup> Participants who are more steeped in the indigenous psychosocial context are more prone to holistic appraisals and less enchanted with the worship of rationality. Accordingly, they may perceive the significance and efficacy of female circumcision differently.

## 2. Initiation and Beliefs: Regional and Variations

Female circumcision is embedded in an intricate web of habits, attitudes, and values, along with having both functional and symbolic connotations. In Africa, the practice is validated and undergirded by a wide spectrum of principles, in addition to temporal and spiritual beliefs. Recurring themes such as sexuality and fertility express preeminent indigenous values like solidarity among women, public recognition of lifecycle change, and procreation for social continuity. Some of these themes are not peculiar to cultures that practice circumcision. Adherence to rites of passage, for example, is an abiding phenomenon in the West.<sup>96</sup>

In communities that perform circumcision as an integral element of the rites of passage, one is not simply born a "woman." One becomes a respected person and an integrated female only after implementing the socially designated course to dignity and status.<sup>97</sup> Initiates are removed from the common mass of humanity by a rite of separation that includes some form of circumcision.<sup>98</sup> This rite automatically incorporates the initiate into a discrete community and facilitates adjustment into the necessary status and role.<sup>99</sup> The rite also serves the multiple purpose of expressing, inculcating, and ensuring the maintenance of cultural values and identity.<sup>100</sup> The Sande women's religious society is an example of

95. See L. Amede Obiora, *The Little Foxes That Spoil the Vine: Revisiting the Feminist Critique of Female Circumcision*, 1996 CAN. J. WOMEN & L. (forthcoming 1997).

96. See ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* (Monica B. Vizedom & Gabrielle L. Caffee trans., 1960); see also MONIKA VIZEDOM, *rites and relationships: RITES OF PASSAGE AND CONTEMPORARY ANTHROPOLOGY* 4 (1976) (offering the analogy of basic Euro-American rituals such as the wedding).

97. See Lionnet, *supra* note 13, at 107.

98. See VAN GENNEP, *supra* note 96, at ix, 72.

99. See *id.* at 71-72.

100. See Margaret Mead, *The Mountain Arapesh*, in 37 ANTHROPOLOGICAL PAPERS OF

a group that practices circumcision as part of educative initiation rites targeted at preserving customs and effecting conformity to community norms and folkways.<sup>101</sup> Commenting on the Sande initiation process, Carol MacCormack observes that to avoid becoming merely streamlined reproduction machines, initiates spend months in seclusion being instructed on the cultural secrets of successful motherhood, living, and traditional medicine.<sup>102</sup>

Other authors maintain that circumcision serves as a test of courage and endurance in simulation and preparation for birth labor pains. Sandersen relates that among the Chagga, relatives witness the operation; if the woman exhibits any fear, her marriage arrangements are canceled.<sup>103</sup> According to Carol Hoffer, the mutual experience of pain helps to forge a cohesive bond and instill a strong spirit of solidarity and cooperative assistance in the initiates.<sup>104</sup> In the same vein, Hudson gives a vivid account of a female circumcision "blood bond," where initiates, through dance, "re-create everything they know of themselves, from before the British, before the Arabs, before recorded history."<sup>105</sup> Among the Mandingo, Massai, and Swahili, it is believed that female circumcision renders the body fertile and fit for its assigned place within the social order.<sup>106</sup> The practice may be condoned as a sacrifice to the fertility deity with the view that by sacrificing a part, the well-being of the whole is safeguarded and reproduction is ensured.<sup>107</sup> The Bambara and Mossi groups engage in female cir-

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THE AMERICAN MUSEUM OF NATURAL HISTORY 317, 418 (1940); see also SANDERSEN, *supra* note 65, at 46-55; TOUBIA, *supra* note 64 (noting on the inside front cover that "in Mali, a young girl receives a decorated cloth for her initiation with designs which encode medical, historical, and moral precepts decipherable only by the women who are the specialized custodians of esoteric knowledge.").

101. See Carol P. MacCormack, *Biological Events and Cultural Control*, 3 SIGNS 93, 98 (1977).

102. See *id.* at 98-99.

103. See SANDERSEN, *supra* note 65, at 46.

104. See Carol P. Hoffer, *Mende and Sherbro Women in High Office*, 6 CANADIAN J. AFR. STUD. 151, 159 (1972).

105. MARK HUDSON, *OUR GRANDMOTHERS' DRUMS* 187 (1990).

106. See Rose Oldfield Hayes, *Female Genital Mutilation, Fertility Control, Women's Roles and Patrilineage in Modern Sudan: A Functional Analysis*, 2 AM. ETHNOLOGIST 617 (1975); see also Mirghany El Sayed, *Reasons for and Purposes of Female Circumcision*, in Baasher et al., *supra* note 58, at 155, 158.

107. See Asim Zaki Mustafa, *Female Circumcision and Infibulation in the Sudan*, 73 J. OF OBSTETRICS AND GYNAECOLOGY BRITISH COMMONWEALTH 302, 303 (1966); JOHN S. MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 120 (1969); see also GIORGIS, *supra* note 56, at 9.

cumcision to reduce mortality and morbidity.<sup>108</sup> The appeal of this rationale is animated by the fact that procreation is a preeminent purpose of African marriages and that infant and maternal mortality on the continent can be of epidemic proportions.<sup>109</sup>

Some of the Bantu and Sudanese, among others, practice circumcision for purification.<sup>110</sup> In fact, *tahur*, the generic Sudanese term for circumcision, literally means "purification."<sup>111</sup> As the materialization of thought, *tahur* reflects the sociocultural and religious implications of the practice.<sup>112</sup> In this context, it is not atypical to hold the uncircumcised in contempt. Some other ethnic groups harbor a fear of a primal hermaphroditic human nature, and therefore circumcise to differentiate between the sexes.<sup>113</sup> Other ethnic groups justify the practice on grounds of aesthetics, as they consider the normal female genitalia unsightly and prefer occluded or attenuated body orifices.<sup>114</sup> Other groups and individuals resort to circumcision for self-definition. Worsley explains that the adult Sudanese woman considers circumcision indicative of her femininity or personhood and proudly refers to it as *nafsi*, literally "myself."<sup>115</sup> In some other areas, circumcision is perceived as a status-conferring "tribal badge," the equivalent to an ornamental tattoo.<sup>116</sup> Some women describe the practice as a kind of cosmetic surgery akin to ear-piercing.<sup>117</sup>

Among some of the Yoruba, circumcision is considered a contraceptive device.<sup>118</sup> Some communities subscribe to the belief

108. See GIORGIS, *supra* note 56, at 21.

109. See Achola O. Pala, *Definitions of Women and Development: An African Perspective*, 3 SIGNS 9, 10-11 (1977); see also CARLA ABOUZAHAR & ERIKA ROYSTON, *MATERNAL MORTALITY: A GLOBAL FACTBOOK*, (1991); Amartya Sen, *More than 100 Million Women are Missing*, N.Y. REV. OF BOOKS, Dec. 20, 1990, at 61.

110. See Mustafa, *supra* note 107 at 302.

111. See Taha Baasher et al., *Psycho-Social Aspects of Female Circumcision*, in Baasher et al., *supra* note 58, at 162, 165.

112. See *id.*

113. See MARCEL GRIAULE, *CONVERSATIONS WITH OGATAMELLI: AN INTRODUCTION TO THE DOGON* 16-18, 23 (1965).

114. See JANICE BODDY, *WOMBS AND ALIEN SPIRITS* 52-56 (1989).

115. See Allan Worsley, *Infibulation and Female Circumcision: A Study of a Little-known Custom*, 45 J. OBSTETRICS & GYNAECOLOGY BRITISH EMPIRE 686, 688 (1938); see also BODDY, *supra* note 114, at 56-60.

116. See SANDERSEN, *supra* note 65, at 45 (citing correspondence from Germaine Greer to Montgomery, Aug. 21, 1995).

117. See *Women's Wound: Whose Will?*, MONEYCLIPS, July 8, 1993, at A1 [hereinafter MONEYCLIPS].

118. See Bertha C.A. Johnson, *Seminar on Traditional Practices Affecting the Health of Women and Children in Nigeria*, in Baasher et al., *supra* note 58, at 7.



that a girl is ripe for sexual relations only when ushered into womanhood by circumcision.<sup>119</sup> Finally, there are communities that, to enforce moral values and ethical standards, discourage pre-marital sex. These groups believe that circumcision attenuates sexual desire.<sup>120</sup> Although this belief is merely one of the many that must be enumerated for any adequate characterization of the wide panoply of African constructions of female sexuality, it has proven to be the almost exclusive focus of Western feminist critics. What is surprising is that the idea of circumcision as an effective mechanism for regulating sexual desire and pleasure maintains its persuasive power without the kind of scientific confirmation that would support it. The particular history of female circumcision in the Western medical tradition has undoubtedly contributed to this radical insistence on singularly associating female genital scarifications with gender politics or male social prerogatives and hegemonic attempts to regulate the sexualization of bodies.

*B. The Fetishization of Sexuality: Female Genital Reconstruction in the West—A Source of Bias*

Female circumcision is not the African 'anomaly' that critics would have one believe. Practices of genital alteration have existed in recent times in Australia, Asia, Latin America, America, and Europe. In fact, Western surgeons claimed to have invented clitoridectomy. English gynecologist Isac Baker Brown, notable for his innovative acumen, promoted excision in the early 1800s. Although the practice was repudiated by the British medical establishment in 1867, it persisted in the United States through the 1950s. Clitoridectomies are currently infrequent in the West, but in rare instances they are inappropriately prescribed as treatment for sexual dysfunction.<sup>121</sup>

Most commentators are unanimous that in the West, circumcision was implemented for patriarchal control of female sexuality.<sup>122</sup> It was also foisted as a "remedy" for female masturbation which some believed to be a cause of insanity. The removal of the

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119. See Assaad, *supra* note 48, at 6.

120. See STEINEM, *supra* note 56, at 295.

121. See LIGHTFOOT-KLEIN, *supra* note 64, at 179-81.

122. See, e.g., *id.* Melissa Parker, however, argues that female circumcision generates fears and anxieties about castration, not only on account of women whose genitalia is removed, but also because of the attack on masculinity. See Parker, *supra* note 74, at 519.

clitoral prepuce is sometimes performed in the United States to counter failure to attain orgasm, a failure which is associated with redundancy or phimosis of the female prepuce. During the 1970s, "clitoral relocation" or "love surgery" was employed by some medical practitioners, supposedly, to enhance sexual pleasure.<sup>123</sup> An Ohio gynecologist, James Burt, was recently convicted of performing this procedure without the informed consent of several patients.<sup>124</sup>

The focus of Western feminists on sexuality and gender can be understood as part of a historical preoccupation with male control of sexuality in the industrialized world. The peculiar power that men wield over social relations in this region has been developed through rigid separations of domestic and public life. The bifurcation of public and private life into hierarchized yet relatively autonomous "spheres" clearly has origins in the onset of modernization in Western Europe.<sup>125</sup> The functionalist bent of much feminist analysis of how the dichotomized structure organizes the sexualization of bodies orients the perception of rituals that give form to the meaning of sex and sexuality as inherently about male social control. In the final analysis, however, blind assertions of female subordination and male control may not adequately describe the complexity of gender relations in other worlds.

### *C. The Patriarchal Explanatory Paradigm*

*Sometimes a cigar is just a cigar.*

Sigmund Freud

*[W]hen you took time to really notice my flower you hung all your own associations with flowers on my flower and you write about my flower as if I think and see . . . [the Freudian sexual symbolism] you think and see of the flower—and I don't.*

Georgia O'Keefe

*One need cite only the famous example of a rapid closing and opening of a single eyelid, used by Gilbert Ryle and*

123. See STEINEM, *supra* note 56, at 296.

124. See *Burt Says His Patients Were Fully Informed*, COLUMBUS DISPATCH, Sept. 30, 1994 at C4.

125. See ROSALING COWARD, PATRIARCHAL PRECEDENTS: SEXUALITY AND SOCIAL RELATIONS 7, 17, 253 (1983).

*elaborated on by Clifford Geertz, to illustrate the problem. Is it a twitch or a wink? Mere observation of the physical act gives no clue. If it is a wink, what kind of wink is it: one of conspiracy, of ridicule, of seduction? Only a knowledge of the culture, the shared understandings, of the actor and his or her observers and confederates can begin to tell us; and even then we must allow for possible misunderstandings.*

James C. Scott

Although customs and ritual processes are founded on a mirror of accepted usage, they are by definition not static, but organic and dynamic in terms of rationale, significance, social function, and ideology.<sup>126</sup> As observed in *Lewis v. Bankole*, "One of the striking features of West African native custom is its flexibility. It appears to have been always subjected to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character."<sup>127</sup>

A commonality of form is not self-explanatory or determinative of substance. As noted above, circumcision is subject to considerable variation; different forms of the operation affect the genitalia differently, even though some people regard the differences as immaterial "accidents."<sup>128</sup> Furthermore, at the same time, in closely-situated localities, female circumcision can mean different things to different actors and subjects.<sup>129</sup> While it may indicate both privilege and prestige in one historic moment or geographic point, it may signify low female social status and deprivation in another regime. Commenting on Chisungu, the girls' initiation rite among the Bemba, Audrey Richards writes:

Single explanations of ritual behavior . . . deny the nature of symbolism itself and its use in human society to express the accepted and approved, as well as the hidden and de-

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126. See Obiora, *supra* note 86, at 217; see also ABDALLA, *supra* note 56, at 84.

127. 1 NIGERIAN L. REP. 82 (1908).

128. See VICTOR W. TURNER, *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 153 (1967); see also ELLEN ISMAIL & MAUREEN MAKKI, *WOMEN OF THE SUDAN* 28 (1990) (explaining that the surgical details of the operation vary depending on the skills of the circumcisor and the wishes of the parents); Parker, *supra* note 74, at 514-15; Frank P. Hosken, *Female Circumcision in the World Today: A Global Review*, in Baasher et al., *supra* note 58, at 195, 203.

129. See EL DAREER, *supra* note 56, at 8-9.

nied, rules of society and the occasional revolt against them, the common interests of the community and the conflicting interests of different parts of it.<sup>130</sup>

Nobody can unequivocally identify where, when, or why the practice of female circumcision commenced. It is controvertible that the practice as it prevails in various localities originated from a common phenomenon.<sup>131</sup> The absence of historical records and other relevant data to verify assertions as to the origin and purpose of the practice pose an insurmountable constraint.<sup>132</sup> Even retroactive reconstruction via circumstantial extrapolation is problematic because an almost infinite variety of meanings can be projected upon almost any complex of circumstances.<sup>133</sup> Regardless of the diversity of context and meaning, some feminists campaigning against female circumcision explain the origin of the practice monolithically in terms of sexual politics and patriarchal control.<sup>134</sup>

The charge of patriarchy is used to explain a purportedly universal devaluation of women's status in societies. "Patriarchy" is said to be a structure that constrains agency and determines behavior.<sup>135</sup> This thesis postulates that the patriarchal social structure ultimately survived because of a whole range of cruel and ingenious devices that restrained the sexuality of women and assured genealogy.<sup>136</sup> In discussions about circumcision, the argument is expatiated with allegations that in polygamous societies it is physically impossible for a man to satisfy his numerous wives; therefore, he resorts to drastic mutilation of the genitals to stymie their sexual appetites. An analogue of this claim is that circumcision ensures that any child born by a woman is a legitimate child of

130. AUDREY I. RICHARDS, CHISUNGU 169 (1956).

131. See EL DAREER, *supra* note 56, at 8-9.

132. See F.M.H. Hussein et al., *Community Study on Female Circumcision in Somalia*, in Baasher et al., *supra* note 58, at 278, 291; see also KAREN SACKS, *SISTERS AND WIVES: THE PAST AND FUTURE OF SEXUAL EQUALITY* 94 (1979).

133. See generally Obiora, *supra* note 86 at 227-38 (illustrating the various meanings that different methodological approaches give to the African customary law surrounding marriage).

134. See Daly, *supra* note 66, at 157-160; ALICE WALKER, *POSSESSING THE SECRET OF JOY* (1992); MCLEAN, *supra* note 58, at 7; STEINEM, *supra* note 56, at 295.

135. See GERDA LERNER, *THE CREATION OF PATRIARCHY* 239 (1986); ADRIENNE RICH, *OF WOMAN BORN* 57 (1976).

136. See NAWAL SAADAWI, *THE HIDDEN FACES OF EVE: WOMEN IN THE ARAB WORLD* 41 (1980).

her husband.<sup>137</sup> This claim is tenuous because some polyandrous and matrilineal societies observe the practice. The idea that the concept of legitimacy, to the extent that it obtains in any particular indigenous African context, provides a universal justification for the practice, which must be examined in light of cases which demonstrate the continuing negotiation over the affiliation of children.<sup>138</sup> In most communities, the rights of a person are not predicated on or jeopardized by the marital status of the mother. Indeed, there are established traditions that celebrate child-bearing out of wedlock.<sup>139</sup>

It is certainly curious that female circumcision has endured the test of time, despite its allegedly endemic gynecological and obstetrical sequelae that are fundamentally irreconcilable with, and regressive of, the natalistic orientation of African value systems. Allegations that masculinity and virility are proved by achieving the difficult act of penetrating the circumcised woman pale against the backdrop of widely documented accounts of reciprocal male frustration. Furthermore, the explanation for the practice must be sought elsewhere in areas where it obtains in mild forms that do not interfere with the penetration of the vagina. It stands to reason that invoking a conflating abstraction such as "patriarchy" neither captures nor explains the complexity of circumcision.

The patriarchal paradigm can be criticized for contradictory and circular propositions that are intrinsic in the idea that men exert a totalized control over the construction of social life.<sup>140</sup> It obscures the variable ways in which men and women are bound together in social units, institutions, and categories that cross-cut gender divisions.<sup>141</sup> It essentializes social tensions even when they defy gender boundaries and manifest along generational, socio-economic, or other lines. The intricate meshing of gender, age, and rank is particularly apparent in initiation rites.<sup>142</sup> In gerontocratic settings, ritual circumcision may connote age hierarchy. The physical hard-

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137. See ABDALLA, *supra* note 56, at 52-60.

138. See Pauline Peters, *Gender, Developmental Cycles and Historical Process: A Critique of Recent Research on Women in Botswana*, 10 J. SOUTHERN AFRICAN STUDIES 100, 115 (1983).

139. See IFY AMIDUME, *MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AFRICAN SOCIETY* 31-34, 94 (1987); VICTOR UCHENDU, *THE IGBO OF SOUTHERN NIGERIA* 50 (1965).

140. See BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 9, 11 (1984).

141. See Peters, *supra* note 138, at 101, 121.

142. See *id.* at 121.

ship which both young men and women endure may essentially speak to them of the authority of age.<sup>143</sup> Female circumcision may not be perpetuated just for its constrictive effect, but for its cohesive effect. Women's control over rituals can be located as a source of strength and power. This control is particularly apparent in initiation societies that have a reputation for acting as a religious counterbalance to the secular male power. One such society is the Sande, which has an age-old history for disciplining even intransigent chiefs.<sup>144</sup>

Despite abundant evidence to the contrary, Western analyses continue to be informed by misconceived notions of African women as nothing but subjugated and devoid of agency. They are objectified "only as victims and preyers-upon each other"<sup>145</sup> in negation of their "old traditions of power and strength and nurturance found in the female bonding."<sup>146</sup> Myths about their complacency and passive submission perpetuate the stereotype of the quintessential African woman as a beast of burden. This perception is epitomized by Winwood Reade's suggestion that the map of Africa resembles a woman with a huge burden on the back.<sup>147</sup> Echoing this sentiment, another author who opines that "[i]n many African communities the female is delegated a derogatory role from the day she is born, and she stays without redemption until her death . . . circumcision is an additional burden."<sup>148</sup> In a similar vein, Mark Hudson surmises that Dulaba Gambian women live in rounds akin to slavery and are unable "to make even the most basic decision concerning their own lives."<sup>149</sup> Yet, in an apparently contradictory swoop, he concedes that female circumcision is an exclusive and jealously guarded province of the far-from-bject women who "had about them a vigour and vitality that made their husbands seem mean, insubstantial, even shadow-like in comparison."<sup>150</sup>

143. *See id.*

144. *See Hoffer, supra* note 104 (recording that as far back as the 1920s, members of the society abducted and rehabilitated a voyeuristic paramount chief, and in 1957, another male chief who infringed on the rules of the society was deposed).

145. AUDRE LORDE, *An Open Letter to Mary Daly*, in *SISTER OUTSIDER* 67 (1984).

146. *Id.* at 69.

147. *See* WINWOOD READE, *SAVAGE AFRICA* 383 (1967), *quoted in* DOROTHY JABLOW & ALTA HAMMOND, *THE AFRICA THAT NEVER WAS: FOUR CENTURIES OF BRITISH WRITING ABOUT AFRICA* 72 (1970).

148. KOSO-THOMAS, *supra* note 78, at 13.

149. HUDSON, *supra* note 105, at 10.

150. *Id.*

Most of these sentiments allude to the role of African women as wives and mothers. It may be true that this is the key role of the women, but it is not necessarily a subordinate role. It has led to a strong self-concept among many of the women; it has been a source of strength and impetus. Efforts to analyze gender stratification may be seriously flawed by uncritical ratifications of the female subordination and male control theories which erroneously assume that the contemporary nature of relationships between men and women replicate the past.<sup>151</sup> Such theories are better qualified in terms of women's relative authority, rights and responsibilities as well as the ritual and ideological dimensions of women's social roles and of gender relations.<sup>152</sup> Even where they operate within the clearly defined parameters of a male-dominated homestead system, women's enculturated qualities of initiative and self-reliance motivate them to play vital roles in politics, production, accumulation, and in the many exchanges that constitute social relations.<sup>153</sup>

Research demonstrates the extent to which the entangled reality of many African women has been reconstituted by a multitude of contradictory structures and processes. Primarily, it is evident that the political economy of European patriarchal and colonialist hegemony restructured indigenous African sex-gender systems and transformed the significance of the "domestic" sphere.<sup>154</sup> Accordingly, some scholars take issue with the radical feminist "since the beginning of humankind male supremacy" doctrine. They argue that, although the doctrine may be applicable *writ large* to western societies, the historical data on Third World social structures refutes the universality of the stereotype of female dependency and male monopoly of the "public" realm. Using data from African

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151. See THE CROSS-CULTURAL STUDY OF WOMEN: A COMPREHENSIVE GUIDE 29 (Margot I. Duley & Mark I. Edmonds eds., 1986).

152. See Peters, *supra* note 138, at 100-21.

153. See *id.*; see also WOMEN AND GENDER IN SOUTHERN AFRICA TO 1945 (Cheryl Walker ed., 1990) [hereinafter Walker]; Kamene Okonjo, *The Dual-Sex Political System in Operation: Igbo Women and Community Politics in Midwestern Nigeria*, in WOMEN IN AFRICA: STUDIES IN SOCIAL AND ECONOMIC CHANGE 45 (Nancy J. Hafkin & Edna G. Bay eds., 1976).

154. See Walker, *supra* note 153, at 27; see also Nawal El Saadawi, *Circumcision of Girls*, in Baasher et al., *supra* note 58, at 227. One account documents how women's deteriorating social status and growing economic dependence on men due to "development" increased the popularity of circumcision among people who believe that it enhances the prospects and longevity of marriage. See Ellen Greenbaum, *The Islamic Movement, Development, and Health Education: Recent Changes in the Health of Rural Women in Central Sudan*, 33 SOC. SCI. & MED. 637, 637-456 (1987).

farming systems, Boserup reveals that women enjoy greater relative mobility, and economic and social autonomy where capitalist relations of production are less extensive.<sup>155</sup> Eleanor Leacock also contests the "myth of male dominance" as distortive of the nature of women's position in societies that maintain "household economy."<sup>156</sup> In these societies, power, authority, and influence within the female "domestic" sphere permeate, mediate, and compliment certain levels within the public sphere.<sup>157</sup> The epoch-making political demonstrations of Igbo women at the turn of the century offer a clear example of how the "public sphere" is not conceptualized as masculine.<sup>158</sup>

Rosaldo, on the other hand, quarrels with the view that the relegation of women to the domestic sphere was invented by capitalist relations of production. Instead, she contends that, although capitalism intensifies the domestic/public asymmetry, the asymmetry is a universal characteristic of human economic organization; despite cross-cultural variations in sex roles, the roles and activities of men are regarded in higher esteem than those of women.<sup>159</sup> In this vein, notwithstanding functionalist interpretations that often stress ritual and gender relational ideals, it is conceivable that female circumcision may be susceptible to flagrant abuse and that rationalizing it solely as an expression of "female power" may precipitate oppression. Along these lines, some writers psychologize that the reason why it is predominantly women themselves who perpetuate the practice relates to their own past suffering. McLean alleges that the attitude of circumcised women becomes that of "if I submitted to this and bore it, then so shall those who fol-

155. See generally ESTER BOSERUP, *WOMAN'S ROLE IN ECONOMIC DEVELOPMENT* (1970).

156. See Eleanor B. Leacock, *Women's Status in Egalitarian Society: Implications for Social Evolution*, 19 *CURRENT ANTHROPOLOGY* 247, 250 (1978). For a comparative perspective, see June Nash, *The Aztecs and the Ideology of Male Dominance*, 4 *SIGNS* 349 (1978).

157. See *id.*; see also Okonjo, *supra* note 153.

158. See Judith van Allen, "Aba Riots" or "Igbo Women's War?" *Ideology, Stratification and the Invisibility of Women in Africa*, in *WOMEN IN AFRICA*, *supra* note 152, at 59.

159. See *WOMEN, CULTURE, AND SOCIETY* 17-42 (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974); see also HESTER EISENSTEIN, *CONTEMPORARY FEMINIST THOUGHT* 20, 26 (1983); M.Z. Rosaldo, *The Use and Abuse of Anthropology: Reflections on Feminism and Cross-cultural Understanding*, 5 *SIGNS* 389, 394-95 (1980); Suellen Huntington, *Issues in Woman's Role in Economic Development: Critique and Alternatives*, 37 *J. MARRIAGE & THE FAMILY* 1001, 1008 (1975).



low."<sup>160</sup> To substantiate this opinion, McLean refers to Shandall's interview of 100 Sudanese women, all of whom are supposed to have admitted that they insisted on infibulation of their progeny out of spite.<sup>161</sup> Ironically, it was Shandall who recorded that women who suffered complications were unanimous in their decision not to have their daughters circumcised.<sup>162</sup>

The failure of "patriarchy" as an explanation for sexual stratification reveals the absence of a pragmatic dimension in monocausal accounts of human motivation and behavior; accounts that do not consider the social refraction of symbols and their meaning. The implicit functionalism of the patriarchy thesis ignores the dynamism and feedback between norms and performance that characterize symbolic ritual. Even in those cases where the practice is prone to abuse, the "bottom line" of meaning cannot be drawn securely around the plans and techniques that are used by a people to infer innate appetite for aggression or malice. Often these plans and techniques are tired responses to specific realities that are not always easy for outsiders to ascertain.<sup>163</sup> From historic and cultural distance they may appear devoid of justification. That does not mean that they are not pursued in sincere belief of their benefits and necessity.

Arbitrary imputations of conscious malevolence or misogyny distort and misrepresent the issue.<sup>164</sup> Such insinuations may only incite righteous indignation and thwart reformatory endeavors. Attitudes that have been misconstrued as evidence of malice may chiefly reflect the mindset that "nothing is being imposed on the young that their seniors have not fully and voluntarily assumed for themselves."<sup>165</sup> There are internal checks on bad faith, and violations of ritual procedures require ritual propitiation.<sup>166</sup> The relative power of the collective of women, the belief and value systems, and the multiplexity and interdependence of relationships variously interact to curb abuse. Women may recognize the violent bent of a procedure like circumcision, but they generally deny that the vio-

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160. See MCLEAN & GRAHAM, *supra* note 58, at 8.

161. See *id.*

162. See GIORGIS, *supra* note 56, at 18.

163. See CASE, *supra* note 83, at 44.

164. See Boulware-Miller, *supra* note 69, at 166; see also GIORGIS, *supra* note 56, at 36-37.

165. See LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 182 (1990).

166. See MBITI, *supra* note 107, at 210.

lence is deliberately contrived and gender biased. To this end, they are quick to emphasize repudiating comparisons between female and male circumcision and to underscore the point that in various African vernacular the term for male and female circumcision is the same.<sup>167</sup>

*D. The Sexual Control Hypothesis: Correlation Between Female Circumcision and Frigidity*

*Our present limited knowledge does not equip us with adequately founded arguments sufficiently convincing . . . We do not wish to lose credibility by making general statements refutable on the basis of personal experience. If we do not recognize and respect people's experiences and feelings and start a dialogue where they are, we will create a credibility gap which will inhibit any move for change.*

Marie Assaad

A focal point of the confusion that swarms around the subject of female circumcision stems from the assumption that its dilemmas can be resolved by merely invoking medical and scientific proof of its effects on a presumably pre-cultural or pristine natural body. Although documentations of health risks are germane, they are only a step in a process that revolves on a complex of meanings, values, and conditions. It is common to proceed from claims that circumcision is medically unnecessary to suggest that it is undertaken to stymie women's sexual prowess and to render them vulnerable to male control.<sup>168</sup> Female circumcision does not necessarily encode absolute pre-marital chastity or passive female sexual experience.<sup>169</sup> That it deals with the genitalia and is suffused with gender constructs does not unequivocally denote exclusive, or primary, concern with gender and sexuality.<sup>170</sup>

The fact that sexuality is grounded in the body does not exclusively determine its configuration or meaning; it is a complex phe-

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167. See Taha Baasher et al., *Psycho-Social Aspects of Female Circumcision*, in Baasher et al., *supra* note 58, at 165.

168. See MOEN, *supra* note 56, at 11-12; see also Richard T. Anthoun, *On the Modesty of Women in Arab Muslim Villages in the Accomodation of Tradition*, 70 AM. ANTHROPOLOGIST 672 (1973); Parker, *supra* note 74, at 519-20.

169. See SANDERSEN, *supra* note 65, at 53; see also FATIMA MERNISSI, *BEYOND THE VEIL* 4 (1973).

170. See BODDY, *supra* note 114, at 56-57.

nomenon rife with contradictions and tensions which are not absolutely verifiable through scientific interrogation. The question of orgasm among circumcised women has been discussed in a number of studies. A survey reported that the disparity in the responses of a representative sample of fifty Sierra Leonian women with post-excision (Group 1) and pre-excision (Group 2) sexual experiences occurred because Group 1 lacked previous sexual experiential frame of reference they were consequently unable to make the necessary comparison for quantifying degrees of stimulation that they did or did not experience. Lack of sensation to male sexual overtures may also have emanated from the effect of the womanhood training that emphasizes communal living and conditions women to suppress certain feelings. Another study shows that only a minute percentage of privileged urban women mentioned their persistent state of sexual-deprivation related anxiety which they attributed to circumcision; none of the villagers, nor the lower income respondents who were oblivious of the fury about the subject affirmed the "urban distress."<sup>171</sup> It appears that for persons conversant with the argument that circumcision inhibits erotic pleasure, it may become a self-fulfilling prophesy.

Neither sexual frigidity nor the absence of pleasurable sensation at the clitoris can be conclusively related to female circumcision.<sup>172</sup> In the absence of systematic objective research or anecdotal evidence, the correlation between female circumcision and lack of sexual satisfaction has become a matter for speculation and exaggeration.<sup>173</sup> Verzin, for example, insists that the absence of the clitoris is responsible for lack of sexual gratification.<sup>174</sup> Notwithstanding that the weight of his claim is diminished by his simultaneous claim that the African woman, *whether circumcised or not*, is a mere "vessel for the man's pleasure, being oblivious that there should be reciprocal enjoyment of sex."<sup>175</sup> A parallel conclusion is reached by Hudson on the basis of a sexual encounter with one Dulaba woman whose lack of passion, he claims, was just as prophesied: "[T]hey just lie there like a penny."<sup>176</sup>

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171. See generally Baasher et al., *supra* note 58.

172. See Mohammed Shaalan, *Clitoris Envy: A Psycho-dynamic Construct Instrumental in Female Circumcision*, in Baasher et al., *supra* note 58, at 191.

173. GIORGIS, *supra* note 56, at 31.

174. See J.A. Verzin, *Sequelae of Female Circumcision*, 5 TROPICAL DOCTOR 163, 167 (1975).

175. See *id.*

176. See HUDSON, *supra* note 105, at 165.

In another context, Dareer notes that, due to the residuary intractable pain of circumcision, only twenty-seven percent of the 2,375 Sudanese women interviewed admitted to having "sexual pleasure."<sup>177</sup> A report by Shandall tendered information elicited from opium addicts who claimed that they resorted to the drug as a result of frustration from delayed sexual arousal in their circumcised wives.<sup>178</sup> It has been counterargued that narcotic drugs skew users' sense of time and artificial euphoria induce a feeling of false prolongation in the time of coitus and sexual vigor.<sup>179</sup> Bakr believes that problematic arousal is a function of vulval nerve destruction.<sup>180</sup> Bakr's belief may be supported by Gerard's equation of infibulation to an anesthesia of the clitoris.<sup>181</sup> However, it seems to be challenged by submissions that amputation heightens sensitivity at the amputated stump.<sup>182</sup> The contrary findings of several scholars meaningfully question Western sexological literature that features the clitoris as the vital organ for female orgasm. These findings suggest that mental and emotional factors play a primary role in eliciting orgasm in clitoridectomized women and that the excitability of other parts of the body, including the breasts, lips, neck, and belly peak upon clitoridectomy.<sup>183</sup> Hanny Lightfoot-Klein's longitudinal study involving over 300 Sudanese

177. See EL DAREER, *supra* note 56, at 48; see also ABDALLA, *supra* note 56, at 25; SANDERSEN, *supra* note 65, at 39.

178. See Shandall, *supra* note 63, at 178-212.

179. See generally, Baasher et al., *supra* note 58.

180. See Salah Abu Bakr, *Circumcision in the Sudan*, in Baasher et al., *supra* note 58, at 140.

181. See ABDALLA, *supra* note 56, at 26.

182. See Baasher et al., *supra* note 58, at 191 n.3 (discussing a finding that "though in the intact limb the sensitivity increases toward the tip, amputation of that tip is generally followed by heightened sensitivity at the stump of the amputation," and suggesting that an analagous condition may be operative in the case of clitoridectomy).

183. See U. Megafu, *Female Ritual Circumcision in Africa: An Investigation of the Presumed Benefits Among Ibos of Nigeria*, 40 EAST AFRICA MED. J. 793, 793-800 (1983). Otto suggests that women are capable of experiencing seven distinct types of orgasm: the clitoral, vaginal/cervical, breast, oral, G-spot, anal and mental orgasm. See H.A. Otto, *The Extended Orgasm: New Perspectives* (Paper presented at the 31st Annual Meeting of the Society for the Scientific Study of Sex, San Francisco, Nov. 10-13, 1988). Another researcher espouses the view that sexual satisfaction entails enduring subjective gratification as opposed to rapid and climactic orgasm. See Baasher et al., *supra* note 58, at 225. Similarly, Ogden who attributes easy orgasm to emotional and spiritual connection, as in tantric yoga, relates anorgasmia to unhappiness. See G. Ogden, *Women and Sexual Ecstasy* (Paper presented at the 31st Annual Meeting of the Society for the Scientific Study of Sex, San Francisco, Nov. 10-13, 1988). Assaad's report that the bulk of circumcised women she interviewed in Egypt enjoyed sex and were happy with their husbands lends credence to this line of thought. See Assaad, *supra* note 48.

women and 100 Sudanese men catalogues vivid descriptions of sexual desire, pleasure, and orgasm by nearly ninety percent of all the women, in spite of any discernible physical and psychic trauma of infibulation. The women that Lightfoot-Klein monitored expressed their experiences in defiance of their cultural orientation to down-play sexual ecstasy.<sup>184</sup>

Taken together, the foregoing studies convey the contradictions that are paradigmatic of understandings of the causes and nature of orgasm. Given such inconsistencies, the extent to which female circumcision actually reduces sexual sensitivity or desire remains uncertain. In one breath, it is alleged that circumcision destroys the nerve supply of the vulva and occasions sexual antipathy and anorgasmia. In another, the claim is that libido and orgasm are subject to psychological, physiological, and socio-cultural variables. Can shifting and ambiguous findings sustain the dismissal of the circumcised woman as an "unfulfilled" and "degraded" being who "just lies like a penny?"<sup>185</sup> Do theories that elevate male experiences as the norm and locate women as passive pawns who are eternally reacting to men rather than acting for themselves within a specific cultural context perpetuate masculinist tendencies? If what is sexual about a woman is what the male view requires for excitement, has the male requirement so usurped its terms as to have become them?<sup>186</sup> How would the trivialization of women's sexual experiences in the anti-circumcision feminist campaign differ from sexist denigrations or from the social construction of the "worst" as being whatever women claim?<sup>187</sup> What aspects of the anti-circumcision campaign are at odds with feminist epistemology and praxis?

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184. See Hanny Lightfoot-Klein, *The Sexual Experience and Marital Adjustment of Genitally Circumcised and Infibulated Females in The Sudan*, 26 J. SEX RESEARCH 375 (1989). Cognizance of the monumental problem that such reticence generally poses for data collection enabled Lightfoot-Klein to penetrate through her interviewees' facade of ideal "institutional answers" or professions of absolute absence of sexual desire and enjoyment to reveal the real behavioural responses. Other researchers document similar reticence in other localities. Aida Seif El-Dawla, an Egyptian psychiatrist, explains that it took her team about two years of extensive grass-roots involvement before they could broach the subject. See MONEYCLIPS, *supra* note 117.

185. See HUDSON, *supra* note 105; FRAN P. HOSKEN, THE HOSKEN REPORT 48 (1982).

186. See Catherine MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 534-36 (1982); see also Catherine Mackinnon, *Toward a Feminist Theory of the State*, 14 SIGNS 520 (1989).

187. See Lucinda Finley, *Reflections on Feminism Unmodified*, 82 NW. U. L. REV. 352 (1988).

### E. An Itinerary of Contradiction

#### 1. Situating the Anti-Circumcision Campaign in Feminist Critique

*[F]eminism's present renaissance has come about precisely because many women have rejected other people's (men's) interpretations of our lives. Feminism insists that women should define and interpret our own experiences, and that we need to re-define and re-name what other people (men, experts) have previously defined and named for us. . . .*

Stanley & Wise

*When the axe came into the forest, the trees said the handle is one of us.*

Bumper sticker

*We are making our voices heard. May the world stop to listen.*

Nahid Toubia

Despite the scathing feminist criticism of androcentrism and false universals, delineating female sexuality solipsistically and discounting the affirmative testimonies of circumcised women as mere consolations on the basis of dominant male claims is borrowing from the tools of patriarchy.<sup>188</sup> The *raison d'être* of feminism is compromised when, in its name, the ground-level realities of women are betrayed or a process that pawns the actual interests of women under the guise of protecting them is resurrected. Feminism emerged in opposition to patronizing and paternalistic politics predicated on phallogocentric misconceptions of women's "nature" and "best interests."<sup>189</sup> The feminist critique seeks to redeem women's voices and realities from the eclipsing of male controlled social discourses and institutions.<sup>190</sup> Insisting that no one community of

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188. See Obiora, *supra* note 95. The importance of an actor's viewpoint could not be more highly underscored than in considerations of orgasmic intensity. The fact remains that while the orgasm of a woman may be detected by her partner, the purity of the experience itself is subjective, and its intensity can be perceived only by the woman herself. Women are prone to shy away from disconcerting repudiations of the intrinsic worth of their perspectives, concerns, and experiences with relationships and intimacy, even if disguised as feminism.

189. See Mary E. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 *SIGNS* 533 (1989).

190. See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 *CAL. L. REV.* 1279

norms is astute enough to trump the variegated values and standards of human experience, feminists argue that the white male ideal marginalizes, disempowers, and renders the "other" invisible.<sup>191</sup> Instead of predisposing women to uncritically adopt male standards, feminism validates the significance, strengths, values, and positive functions of women's experiences and perceptions. Because it grows out of direct experience and consciousness, feminism emphasizes context and the importance of identifying experience and claiming it for one's own.<sup>192</sup> As a mode of analysis, feminism rejects elitism and vanguardism, on the basis that people are imbued with transformative capacities and are best suited to champion their own revolution.<sup>193</sup>

Nevertheless, whether out of arrogance or fear of fracturing the base for mobilization, feminism manifests a tendency that betrays the partiality of its makers and entertains a party line that muzzles the merits of voices that do not simply echo the mainstream sentiments. Assuming that women are a determinate group with identical interests and desires risks deteriorating feminist inquiries into the suppression of differences.<sup>194</sup> Even if sincere, the assumption highlights the hypocrisy inherent in professing high-sounding principles of global sisterhood and the politics of experience, while meting out a double standard that reinstates the very silencing and stigmatization of women that feminism challenges. Owing to their attraction to essentializing categories, their unconscious attachment to stereotypes, and their participation in a culture in which power is enforced by dominance over definitions and truth claims, some feminists renege on the principal insights that animate their initia-

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(1987); Sallyanne Payton, *Releasing Excellence: Erasing Gender Zoning From the Legal Mind*, 18 IND. L. REV. 629, 641 (1985).

191. See L. Amede Obiora, *Neither Here Nor There: Of the Female in American Legal Education*, 1996 L. & SOC. INQUIRY 355 (1996); see also JANE ROWLAND MARTIN, *RECLAIMING A CONVERSATION: THE IDEAL OF THE EDUCATED WOMAN* (1985); Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829-35 (1990); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1178 (1986).

192. See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 624 (1990).

193. See Nancy Hartsock, *Fundamental Feminism: Process and Perspective*, 2 QUEST: A FEMINIST QUARTERLY 67-80 (Fall 1975).

194. See Susan Griffin, *The Way of All Ideology*, in *FEMINIST THEORY: A CRITIQUE OF IDEOLOGY* (Nannerl O. Koehane et al. eds., 1982); ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* ix, 102 (1988).

tives—insights about the problems of unstated reference points and about how privileging a particular experience mystifies difference.<sup>195</sup>

## 2. The Charge of False Consciousness

*The furor in the US over female circumcision, where it has taken on the prominence of a cause célèbre, is hardly surprising. There is always something or the other which American women . . . feel bound to take up on behalf of the women world-wide, in much the same way as their government sees itself as the world's police. . . .*

Marilynne Charles

*"Among the natives," including those turned anthropologist like myself, the emotion is one of indignation at the paternalism which oozes from proposals of "Western political agitation against female genital operations . . . . [Our response] may be considered an attempt to take a turn at gatekeeping—an academic exercise which is too familiar to those of us who relate to the other in ways which transcend profiting from their lives as sources of data and making use of their sufferings as stepping stones in the path of career building, at a distance from their struggle."*

Soheir Morsy

The whole point of challenging the traditional view of women was to prevent society from forcing women into uncongenial positions based on incorrect assumptions. Mindful of the fact that freedom lies in the ability to choose and fulfill one's desires, feminists unambiguously reject paternalism. Yet, it would seem that in convenient circumstances, some feminists are quick to impose certain choices on other women under the pretext that patriarchal hegemony and conditioning insidiously constitute and constrain these women's choices.

Research has shown that moral values are but one narrow band of causes in the total spectrum of forces impinging on people, and that ordinary people, without any particular hostility on their part, can become agents in a destructive process.<sup>196</sup> Even when the de-

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195. See MAREN LOCKWOOD CARDEN, *THE NEW FEMINIST MOVEMENT* 46, 75 (1974); see also JANET RADCLIFFE RICHARDS, *THE SKEPTICAL FEMINIST* 1 (1987); Minow, *supra* note 192, at 47; Bartlett, *supra* note 191, at 848.

196. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 6



structive effects of their work become patently clear, and they are asked to execute actions incompatible with fundamental standards of conscience and morality, their moral sense acquires a radically different focus. A variety of other forces then converge to undermine their resolve to resist authority and to realize their values in action. Consequently, the actors tend to become absorbed in technical aspects of the task, as if they are devoid of human origin and control. The result is that their imperatives become part of the schema which exerts on the subjects' mind a force that transcends the personal.<sup>197</sup>

Evidently, culture is a set of interpretive understandings and aggregate consciousnesses under active construction.<sup>198</sup> Just as it is always practiced, it is never neutral. It integrates and incorporates inequalities.<sup>199</sup> The process of hegemony occurs when the system of domination and inequality in a society becomes so culturally encoded that it comes to appear natural and inviolate.<sup>200</sup> To this extent, it is myopic to minimize the profound layers of influences, traditions, structures, and processes in individual life. Nonetheless, overlooking the diversity in world-views and values systems in defining a counter-politics is not only myopic; on some level it is inexcusably afeminist.

In its pristine formulation, the notion of determinism aims at inducing self-reflective transformation. This notion, however, has become associated with a paternalistic discounting of the experiences and capacities of subjects by those who claim the authority to work on their behalf and to know what is in their best interest. It is covertly employed to discredit influences that its theorists disfavor or cannot explain. The concept of determinism presupposes some culturally transcendent or manipulative agent.<sup>201</sup> If cultural hegemony is an inescapable reality, it is hard to see how any social actor could exist immuned from it. Determinism refutes itself, insofar as it implies that "I'm not free, and if I'm not free, I can't engage in real investigation or inquiry, and so I can't have confidence in either opposition to the free will philosophy of mind and

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(1974).

197. *See id.* at 8-9.

198. *See* Richard G. Fox, *Introduction*, in *NATIONALIST IDEOLOGIES AND THE PRODUCTION OF NATIONAL CULTURES* 6, 10 (Richard G. Fox ed., 1990).

199. *See id.* at 12.

200. *See* F.E. WILLIAMS, *CREED OF A GOVERNMENT ANTHROPOLOGIST* 110 (1977).

201. *See* Fox, *supra* note 199, at 11-12.

action or in my support of determination."<sup>202</sup> Elucidating this limitation, Larry Spence notes that social investigators, who contend that human beings cannot be trusted to learn the truth about themselves and the world, must implement some exotic maneuvers to free themselves from this universal defect.<sup>203</sup>

Inasmuch as feminist discourses derive from the experiential analyses of women's oppression, a theory which casts aspersions on experiential knowledge is an affront to feminist enterprises. If women's wishes are to be ignored on grounds of false consciousness and social conditioning, it is necessary to know the exact meaning and parameters of the phenomena and what constitutes both social conditioning and the genuine consciousness that is the yard-stick for determining false-consciousness, in addition to knowing how conditioned or falsely-conscious women are distinguishable from the ones who are not.<sup>204</sup> It is important to avoid the romanticization of, or uncritical flirtation with, an ideal of autonomy as the exercise of choice completely unconditioned by any factor external to a subject's practical reasoning faculty.<sup>205</sup> The fact that an individual is conditioned to conform to social dictates, in and of itself, does not suffice to vitiate the authenticity and volition of her desires and decisions.

The only restrictions on a woman who makes a rational and self-interested choice within her limited field of options are external, not internal. The basic discovery of feminist studies is that women, insofar as they are oppressed by a culture, are rarely oblivious of their grievances. Instead of existing as acquiescent pawns of historical forces and cultural transactions, women engage and interact with their material conditions as agents; they negotiate gender constructs and asymmetries in studied resistance and acquiescence to claim a significance that is at least complementary to men's. In this vein, Janice Boddy argues that even circumcision and its social implications are counter-hegemonic efforts by women to negotiate ascribed subaltern statuses.<sup>206</sup>

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202. See TED HONDERICH, *HOW FREE ARE YOU? THE DETERMINISM PROBLEM* 103 (1993).

203. See LARRY SPENCE, *THE POLITICS OF SOCIAL KNOWLEDGE* 4 (1978).

204. See LOMASKY, *supra* note 165, at 185; JOHN ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983); WALKER, *supra* note 134.

205. LOMASKY, *supra* note 165, at 182.

206. See BODDY, *supra* note 114, at 35; see also Janice Boddy, *Womb as Oasis: The Symbolic Context of Pharonic Circumcision in Rural Northern Sudan*, 9 AM. ETHNOLOGIST 682, 696 (1982).

Female genital scarring or reconstruction epitomizes the tenuousness and artificiality of the boundaries of agency and critical thought. Depending on the angle of vision, it has ramifications that both oppress and empower women to manipulate oppressive structures. On one level, it is plausible to suggest that mature participants in genital surgery exhibit a considerable degree of awareness and instrumentality. At the very least, they are deploying cultural constructs within the confines of their realities to reach compelling self-affirming ends. On another level, it is conceivable that their ratification of, and complicity in, a potentially coercive transaction to validate culturally-imputed values bespeak the gravity of their oppression. From this perspective, the exaltation of agency over submission is circular, insofar as a gender-based culture dictates the utilitarian and aesthetic values celebrated in circumcision. This dilemma underscores the inherent risk of polarizing the issue of agency and submission as if they are mutually exclusive absolutes. Women, like men, are culturally situated beings of inevitably relative autonomy; their responses are, to some extent, necessarily determined. As such, a more pressing consideration is the question of the circumstance and degree of determinism.

Female circumcision, as it is conducted both in Africa and by African immigrants under foreign jurisdictions, has complicated several commonplace assumptions about social structure and agency. There is some indication that communitarian African social structures may not have the causal determinacy that gender relations and sexual stratification studies may suggest. Instead of being subject to a monolithic regime of patriarchs, it may well be that African women resort to female circumcision to recreate notions of womanhood adept for their peculiar conditions of existence. The world they know—with its intricate networks of kin relations, the accentuation of the dead and the unborn in their world views, the nature of production under dispersed and low technological infrastructure, the frailty of their ecological circumstances, the burdens of their structural incorporation into the global order—is not readily amenable to the conceptualization of polemic gender identity and politics.

The regrettable focus on determinism explains the inclination of some radical feminists to discount or marginalize the perspectives of African women who they perceive as merely condoning female circumcision.<sup>207</sup> The failure to acknowledge and engage these

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207. See Karen Engle, *Female Subjects of Public International Law: Human Rights and*

women in dialogue does not extinguish their force or constituencies, constituencies that are equipped to foment subversive challenges to radical reform proposals.<sup>208</sup> Interestingly enough, most studies on female circumcision seldom articulate personal discontent by its "victims." Instead, they tacitly or expressly convey a recalcitrance uncanny for victims of dismal abuse. Although attitudes regarding the practice appear to be gradually changing, some suggest that there has been no *significant* decline in the practice.<sup>209</sup> It is certain that while academics and activists continue to wax eloquent at national and international forums about containment strategies, those directly affected by the issue remain faithful to their traditional obligation to circumcise.<sup>210</sup>

Commentators report active resistance against intervention not just from the elders or the so-called "token torturers;" some younger women seem to cling to the custom with equally fierce tenacity.<sup>211</sup> Although several theories are tenable, satisfactory explanation as to why the women themselves are often the most resistant to liberationist interventions remains unascertained. An argument that this resistance may be deliberately conceived is liable to cavalier dismissal by determinists; they posit that attitudes of accommodation to a subordinate status reflect adaptive complicity or internalization of dominant values to survive systematic socio-cultural inequality.<sup>212</sup> From this perspective, the dangers of fatalism, socialized conformity, and false consciousness are real. Thus, affirming whatever version of experience a particular woman asserts may falsely assume that women are altogether free and self-constituting beings.<sup>213</sup>

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*the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1518 (1992).

208. See *id.* at 1525.

209. See BADRI, *supra* note 62, at 5. In Egypt, for example, there is evidence that some mothers who were not circumcised themselves have circumcised their daughters. Some research shows, however, patterns of disinclination to circumcise their daughters among several circumcised mothers in Togo. See Celia W. Dugger, *Rite of Anguish: Genital Ritual is Unyielding in Africa*, N.Y. TIMES, Oct. 5, 1996, at 1.

210. See LIGHTFOOT-KLEIN, *supra* note 64, at 168-69.

211. See Jocelyn Murray, *The Church Missionary Society and "Female Circumcision" Issue in Kenya*, 8 J. RELIGION IN AFRICA 92 (1976); *Female Circumcision: Because It's Always Done*, 284 ECONOMIST 14, Sept. 18, 1982 [hereinafter *Female Circumcision: Because It's Always Done*]; Hayes, *supra* note 106, at 617; FRAN HOSKEN, THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES 376 (1982); Smith, *supra* note 65, at 2452; Edward Ameyibor, *Ghana-Women: Beginning to the End for Female Circumcision?*, INT'L. PRESS SERVICE, May 20, 1994 available in LEXIS, News library; A' Haleem, *supra* note 48; Assaad, *supra* note 48.

212. See CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 39 (1987).

213. See KATHY FERGUSON, THE FEMINIST CASE AGAINST BUREAUCRACY 179 (1984);

Hayter argues that the cloistered lifestyle and acute state of economic dependence of women in circumcising cultures make them unable to form balanced judgments in their best interests.<sup>214</sup> Hayter's conclusion, like many feminist lay opinions, is that paternalistic overtures assist in freeing and empowering women to deviate from social pressures to conform.<sup>215</sup> This argument proceeds on a tenuous, if not erroneous, premise. To begin with, there is no determinate link between circumcision and economic dependence. The allegation that uncircumcised women are not eligible for marriage is not supported by precise documentation. Secondly, it is not established that marriage is a passport to material comfort for circumcised women. Thirdly, claims of acute economic dependence are not borne out in reality; since economic marginalization in the African context is a social reality for both men and women, economic activity is a compelling necessity, and a tradition, for women. Finally, the nebulous and relative notion of "cloistered lifestyle" is no more a justification for intervening in the affairs of African women than it is in other forums.

### 3. Parallels with Elective Surgical Procedures in the West

The mediatory influence of social mores and conditions is also frequently operative for men and women in the West. Mackay ethnocentrically asserts that while routine male circumcision may be upheld on the grounds of religious toleration, vasectomy and sterilization as acceptable methods of contraception, and cosmetic surgery and sex-change operations as psychologically beneficial, there is no justification for female circumcision.<sup>216</sup> At least one commentator, on the other hand, considers male circumcision no less cruel, cosmetic surgery a barbarity in the pursuit of an aesthetic ideal, and sex-change a psychotic eccentricity.<sup>217</sup> Although the propriety of these procedures is fiercely challenged by some segments of Western society, they are, for the most part, legal.<sup>218</sup> Konner indicates that male circumcision is even recommended by

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Joan C. Williams, *Deconstructing Gender*, 86 MICH. L. REV. 797 (1989).

214. See K. Hayter, *Female Circumcision: Is There a Legal Solution?*, J. SOC. WELFARE L. 323, 326 (1984).

215. See *id.*

216. R.D. Mackay, *Is Female Circumcision Unlawful?*, 1983 CRIM. L. REV. 717, 719.

217. See Maynard Merwine, *How Africa Understands Female Circumcision*, N.Y. TIMES, Nov. 24, 1993, at A24.

218. See E. Wallerstein, *Circumcision: Ritual Surgery or Surgical Ritual?*, 2 MED. & L. 85 (1983); Kevin Starbuck, *Rights of Infants*, CHI. TRIB., July 8, 1993, at N18.

the American Academy of Pediatrics.<sup>219</sup> The inherent paradox and double-standard of acquiescing to the legality of male procedures while being scandalized and morally outraged by female circumcision raises an interesting question regarding why the West has failed to abide by its own criticism.<sup>220</sup>

Most Americans persistently circumcise their sons on account of social pressures or claims that “[e]verybody does it,” and/or “[i]t looks better.”<sup>221</sup> The affected males tend to view the procedure as something that was done *for* them, and not something that was done *to* them.<sup>222</sup> Other commentators, who increasingly refer to male circumcision as genital mutilation, however, question its health value, and maintain that it involves the risks of infection, hemorrhage, and injury inherent to any surgery.<sup>223</sup> A unique study of neonatal male circumcision found that out of one hundred cases, twenty-four of the circumcised developed problems.<sup>224</sup> Money maintains that even when the operative procedure is performed in a hospital, morbidity is prevalent to a degree that would not be legally tolerated in test trials of any new clinical procedure.<sup>225</sup>

After several decades of tenacious feminist agitation, it is not as if women in the West can boast of originating choices that are “free” or unencumbered by causal necessity. Many of their decisions that are more reflective of the absence of meaningful options belie the ostensibility of the notion of choice.<sup>226</sup> Given their constrained and contingent repertoire of choices, women go to great lengths to align with popular dictates of identity and sexuality. Some resort to abortion “because it is the only possible solution in an economic and cultural context that might force them to choose between a career and motherhood, or to gain acceptance within their own social or professional communities as women who are truly in charge of their own lives and reproductive capacities.”<sup>227</sup>

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219. See Konner, *supra* note 65, § 7, 5; Melvin Konner, *Body and Mind*, N.Y. TIMES, May 8, 1988, at 58.

220. See Ralph Ginzburg, *Is Circumcision Indispensable*, N.Y. TIMES, May 13, 1990, at 40.

221. See LIGHTFOOT-KLEIN, *supra* note 64, at 189.

222. See *id.* at 193.

223. See generally WALLERSTEIN, *supra* note 218.

224. See LIGHTFOOT-KLEIN, *supra* note 64, at 190.

225. See J. Money et al., *Hermaphroditism: Recommendations*, in *SEXOLOGY, SEXUAL BIOLOGY, BEHAVIOR AND THERAPY* 251 (Z. Hoch & H.I. Lief eds., 1982).

226. See Dorchen Liedholdt, *Prostitution: A Violation of Women's Human Rights*, 1 CARDOZO WOMEN'S L.J. 133, 137 (1993).

227. Lionnet, *supra* note 13, at 105.

Another case in point relates to beauty dysfunctions which are largely medically unnecessary and arguably mutilating. In the pervasive tradition of prescriptive femininity, a popular magazine recently espoused the merits of "elective genital surgery," such as vaginal tightening and liposuction of the pubic mound.<sup>228</sup> Similarly, the media and other instruments of socialization orient women to submit to other sorts of harrowing experiences to conform to distorted standards of femininity.<sup>229</sup>

In the United States alone, thousands of women die each year from anorexia and bulimia, and more than one million American women have had breast implants.<sup>230</sup> According to the FDA, the common effect of the implant is the potentially painful and disfiguring hardening of the scar tissue around the implant.<sup>231</sup> This agency concedes that some of the possible effects are not yet ascertained, but it warns that it has not completely ruled out the possibility that implanted silicone gel leaks may cause connective tissue diseases, increase the risk of cancer, or pose a health risk to unborn babies.<sup>232</sup> A series of rebuttals sponsored by the Association of Plastic and Reconstructive Surgeons refutes any correlation between breast implants and an increase in the incidence of breast cancer or connective tissue diseases such as Lupus and rheumatoid arthritis.<sup>233</sup> Meanwhile, the manufacturer-defendants in the breast implant litigation funded a global settlement, although this response is not necessarily tantamount to admission.<sup>234</sup>

Arguably, for a woman living in a sexist and narcissistic society, the psychic disturbances she risks enduring if she does not perceive her body as aesthetically appealing may tilt the scale and override the public policy considerations in favor of paternalistic interference.<sup>235</sup> In comparison with cosmetic surgery, female cir-

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228. See Helen Rogan, *Women's Mag Masks Sleaze as Service*, Ms. 92 (Sept.-Oct., 1994).

229. See NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 9-19 (1991); see also EFRAT TSEELON, *THE MASQUE OF FEMININITY* 79-91 (1995).

230. See *id.*

231. See FDA, *IMPORTANT INFORMATION ON BREAST IMPLANTS*, ¶ 2 (Sept. 1991) <<http://www.fda.gov/opacom/backgrounders/breast.html>>.

232. See *id.*

233. See Dale C. Birdsell et al., *Breast Cancer Diagnosis and Survival in Women with and without Breast Implants*, 92 *PLASTIC AND RECONSTRUCTIVE SURGERY* 795 (1993).

234. See generally DAVID B. BAUM ET AL., *THE BREAST IMPLANT LITIGATION GLOBAL SETTLEMENT* (1994).

235. See Hayter, *supra* note 215, at 324.

cumcision is of more compelling significance since it purportedly pervades the totality of the women's being. It may reach beyond the questions of social stigma and self-definition to constitute a criterion for determining the status of the women within the group.<sup>236</sup> Assuming that there is a genuine relationship between circumcision and the achievement of status, the down-side of change must not be underestimated. One may appreciate, without following it to a logical extreme, the value of the functionalist argument that equates culture to a tapestry, or a working whole, that disintegrates with rash interference.<sup>237</sup> Thus, interfering with the practice, independent of the exigencies that sustain it, and without establishing viable alternatives for the women, is to leave them high and dry. Radical feminist strategies for change ignore the fact that such change may be too costly for women, and that it is conceivable that the women may want some of the alternatives that feminists want to abolish. If censorship is the weapon of patriarchy,<sup>238</sup> there is hardly a feminist justification for unceremoniously abrogating cultural traditions that women prefer to preserve, unless it is demonstrable that their overridden choice will be substituted by more meaningful options.

This analysis is not intended to suggest that there are no precedents for legal paternalism. There is legal authority that where there exists clear evidence that a custom occasions abuse, exploitation and suffering, the issue ceases to revolve around the legitimacy of reform.<sup>239</sup> According to Lord Devlin, legal intervention is justified where, in the collective moral judgment of a society, a practice is repugnant.<sup>240</sup> Paternalistic intervention is also permissible to prevent self-destruction and to interrogate socio-cultural practices which appear destructive. In all cases of paternalistic reform, however, there is some obligation to demonstrate the exact nature of the harmful effects to be averted and the probability of their occurrence. The issue thus hinges on what constitutes destructiveness. For example, is a symbolic prick on par with infibulation

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236. See *id.*; Judith Lorber, *Female Genital Mutilation Celebrates Only Male Social Power*, N.Y. TIMES, Dec. 6, 1993, at A16.

237. See WILLIAMS, *supra* note 200, at 110; Margaret Mead, *Cultural Factors in Community Education Programs*, in EDUCATION AND CULTURE: ANTHROPOLOGICAL APPROACHES (George D. Spindler ed., 1963).

238. See generally GERMAINE GREER, SEX AND DESTINY: THE POLITICS OF HUMAN FERTILITY (1994).

239. See MARTHA V. NUSSBAUM, THE FRAGILITY OF GOODNESS 30-31 (1986).

240. See PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 7-11 (1965).



and is self-alienation more destructive than reasonable conformity to community norms? The same standard of legal paternalism cannot be applied to minors and mature adults. Even if the decisions of the women circumcised as adults are predicated on what some will no doubt continue to see as a skewed set of reasons, the principle of self-determination supports this decision as one adult women make for themselves.<sup>241</sup> Additionally, the validity of paternalism does not defeat all arguments against vanguardistic top down and other defined reforms.

Aversion to hazardous health practices is neither original nor peculiar to Western liberals and feminists. It is noteworthy that feminist agitation for the abolition of female circumcision, not the failure to eradicate the formidable tradition, is novel. Previous premature attempts to pick apart the labyrinth of female circumcision have proven disastrously unsuccessful. The fact that circumcision is medically unnecessary is by no means dispositive. The medical argument addresses just one aspect of a practice that is sustained for a host of reasons. It is foreseeable that the positive connotations of the operation compete with and mediate the health implications. While the facts of physical pain and health hazard may speak volumes, such catalogues tend to be tentative, conflicting, and inapplicable to mild circumcision. Furthermore, the bare outline of horrendous details fails to indicate the agency of the women and the rationality of their choice. It is not unreasonable for a woman who is an avid pronatalist, and who inhabits a locality that is notoriously vulnerable to morbid and mortal ravages, to go to lengths to maximize her chances of procreation as well as the chances for survival of her progeny. In this respect, female circumcision is comparable to the many perplexing idiosyncracies, as discussed above, that prevail in the West.

#### 4. Co-opting Imperialist Discourses

*Remember Saartje, the so-called "Hottentot Venus"? Now Tashi! Whether well-endowed or excised, it appears that the African woman is discursively predetermined as*

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241. See Marvin E. Newman, *Active Euthanasia in the Netherlands*, in *TO DIE OR NOT TO DIE? CROSS-DISCIPLINARY, CROSS-CULTURAL AND LEGAL PERSPECTIVES ON THE RIGHT TO CHOOSE DEATH* 117, 125 (Arthur S. Berger & Joyce Berger eds., 1990) (discussing the concept of self-determination in the area of euthanasia).

*damned. Cha-a-a, even the hard of hearing can tell a commotion; the circus continues!*

Odiso Ntianu

*Given the indignity, impudence and dehumanizing objectification of Western criticism, its canvassed notion of integrity is a farce.*

Ntianu Amede

*O ji mu n'ala ji onwe ya: We share a mutual fate insofar as pinning me also immobilizes you.*

Amede Okwunobi

In a "relentless depiction" of the practice of female circumcision in Africa, Mary Daly alleges that among the Nandi, a girl is mutilated and converted to the property of her husband when "stinging nettles are applied to the clitoris, so that it swells and becomes unimaginably large" before it is charred off with glowing coal.<sup>242</sup> In the overwhelming majority of practicing communities, however, Daly reports that the ritual operation is effected by scraping the vulva raw with the broken neck of a bottle and tying the legs of the patient; she is immobilized for weeks, during which time excrement remains in the bandage. Daly further claims that persons who survive this unspeakable atrocity are condemned to a life of repeated encounters with "the little knife."<sup>243</sup> In blind attempts to penetrate quasi-occluded vaginas, frustrated partners typically stretch and lacerate it with sharp instruments; alternatively, excisors specially tailor clay or wooden phalluses to the measurement of a "master's member," which they insert in circumcised orifices to facilitate intercourse.<sup>244</sup> Continuing, Daly notes that further incisions have to be made in order for the woman to be delivered of a child. She must then be re-sewn to renew her virginity after each birth. Thus, she relives this painful experience with each delivery.

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242. See DALY, *supra* note 66, at 166.

243. *Id.* at 157.

244. See *id.* at 156, 164. (relying on JACQUES LA LANTIER, *LA CITE MAGIQUE ET MAGIE EN AFRIQUE NOIRE* 279 (1972)). Konner claims that the vagina is sealed to leave only a "pinhole" opening large enough to pass urine drop by drop, making penetration essentially a repeated process of tearing. According to Konner, the honeymoon hotel in the Sudanese city of Port Sudan is next to a hospital. See Konner, *supra* note 65, at 5.

More than a decade after Daly's work was published, Alice Walker's critically acclaimed "factual-fiction" chronicled the particular ordeals of generations of women from a misogynistic Olinka tribe at the hands of the *tsunga*, or circumcisor. The *tsunga* mutilates the Olinka women in mass ceremonies with unwashed and unsterilized sharp stones, tin tops, bits of glass, and rusty razors or dirty knives.<sup>245</sup> During pre-pubescence, the novel's protagonist, Tashi, voluntarily submits to the *tsunga*, who scrapes her clitoris clean, inserts a straw to prevent the adhesion of the traumatized flesh, and fastens the raw edges together with thorns.<sup>246</sup> Tashi's determination to be "bathed" is portrayed as a manifestation of her dire need to assert her African identity.<sup>247</sup> She eventually realizes that succumbing to nationalist sentiments eradicated her sense of self and crippled her hopes for a good life.<sup>248</sup> The excruciation of circumcision reduces her to a psychotic state and corrupts her gait into what Walker describes as a "classic Olinkan shuffle."<sup>249</sup> Her urination and menstruation are inordinately prolonged. She reeks incessantly and is incapacitated by cramps caused by the near impossibility of discharging through the pinhole-like aperture that remains from the operation; to crown it all, the aperture is so tiny that the obstetrician breaks several instruments in a bid to enlarge it for her son's birth.<sup>250</sup> Consequently, the son ends up deformed and developmentally disabled. In search of her vindication, Tashi travels out of Africa to the pristine shores of the West where she receives intense psycho-therapy; she eventually returns to Africa and murders the *tsunga*.<sup>251</sup>

Daly's and Walker's accounts are profoundly sobering, and are exemplary of the genre of works that have engendered chills and provoked Western indignation about female circumcision in Africa. Female circumcision has been so highly touted that it has become the prime point of reference in the West *vis-à-vis* African women. Angela Davis attests to the astounding number of women she encounters who know nothing else about the conditions of life for

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245. See WALKER, *supra* note 134.

246. See *id.*

247. See *id.*

248. See *id.*

249. See *id.*

250. See WALKER, *supra* note 134.

251. See *id.*

women in Africa but for their so-called mutilation.<sup>252</sup> Yet, some of the most critically acclaimed research on the subject are little more than the imaginings of "arm-chair" theoreticians.<sup>253</sup> Some of the more rigorous ones rely on selective samples that, even if painstakingly accomplished, are not validly generalizable to transcend the complex heterogeneity of Africans.<sup>254</sup> Inadequate sampling is often compounded by the fact that some of the studies involve minimal control-group representation. Incomparable results of misconceived criteria are further skewed by ideologically loaded research instruments and procedures. What is typically reflected is expected behavior born of the particular circumstances of the survey that largely serves to reinforce the investigators' preconceptions rather than to communicate observed realities.

Conveniently, critics of circumcision tend to extract the practice from its overwhelmingly developmental and cultural contexts in a manner analogous to "refusing to see the sun in the middle of the day."<sup>255</sup> It is sterile to evaluate the issue without considering the constraints posed by psycho-social factors. Worn polemics, value-laden rhetoric, and emotive statements about the heinous and barbaric nature of the procedure in no way suffice as substitutes for substantiated delineations of the basis for intervention. Most studies on circumcision are unanimous regarding the paucity of data on the distribution and incidence of the practice. Nevertheless, to orchestrate a "sensation-value" and convey an outrageous impression of daily mutilation of millions of women, some studies indulge in oppressive academic practices that range from crudity of methods, premature generalizations, and deductions of grand conclusions from scant and haphazard evidence, to manipulative neglect of the distinctions between severe and negligible circumcision. Speculations are propagated as credible findings, and other findings fall short of vigorous analyses of the nuances and complexities.

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252. See ANGELA Y. DAVIS, *WOMEN, CULTURE, AND POLITICS* 116-54 (1989).

253. See Filomina C. Steady, *Research Methodology and Investigative Framework for Social Change: The Case for African Women*, in ASSOCIATION OF AFRICAN WOMEN FOR RESEARCH AND DEVELOPMENT, *WHAT TYPE OF METHODOLOGY* 12 (1983).

254. See Arthur Phillips, *Introduction*, in LUCY MAIR, *AFRICAN MARRIAGE AND SOCIAL CHANGE* viii (1969); A.R. RADCLIFFE BROWN & D. FORDE, *AFRICAN SYSTEMS OF KINSHIP AND MARRIAGE* (10th ed. 1970); ISAAC SCHAPER, *A HANDBOOK OF TSWANA LAW AND CUSTOM* (2d ed. 1955).

255. See Association of African Women for Research and Development (AAWORD), *A Statement on Genital Mutilation*, in *THIRD WORLD: SECOND SEX* 217, 219 (Miranda Davies ed., 1983) [hereinafter AAWORD].

The conceptual and methodological flaws of the anti-circumcision campaign are especially evident in the respective works of Mary Daly and Alice Walker. It does not require a rigorous exercise of what Mary Daly considers the "mind's imaginative and critical powers"<sup>256</sup> to reckon that the grievous and rampant circumstances she and her cohorts vividly capture should result in phenomenal catastrophe, even the extinction of generations or races. Curiously enough, Daly concludes that infections, but not death, are a characteristic aftermath of the operation.<sup>257</sup> It is a paradox that, contrary to reasonable inferences from Daly's work and to suggestions that population control is the most crucial latent function of female circumcision,<sup>258</sup> contemporary African populations are reputedly exploding and international agencies are on record for their desperate efforts to curb the procreative proclivities of Africans. The United Nations found that of the sample of persons who oppose female circumcision within the cultures where it is practiced, only 12.72% cite "illness and accidents" as a reason for such opposition.<sup>259</sup> Some people construe this as reflective of a cult of ignorance that enshrouds the practice. It is somewhat counter-intuitive to claim that the affected groups are unaware of the medical consequences of their actions. If they are as pervasively diabolical and devastating as claimed, the affected societies would not be able to survive with it at their base. The practice must be sustained for some over-bearing reasons other than ignorance of the seemingly obvious health hazards.<sup>260</sup>

At various points, Daly denounces other researchers' "negation of the complexity of female experience, the poverty of imagination about the feelings of other women, fixation on sensational materials, maze of deceptive expressions, lack of social perspective, crass indifference, arrogance and ignorance."<sup>261</sup> Yet, although she may be unconscious of her complicity in what she criticizes in others, she is not exempt from her own reproach. Daly relies on and rein-

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256. DALY, *supra* note 66, at 155.

257. *See id.* at 156.

258. *See* Hayes, *supra* note 106, at 617, 628.

259. *See* KOSO-THOMAS, *supra* note 78, at 49-50.

260. *See* Carolyn Sargent, *Confronting Patriarchy: The Potential for Advocacy in Medical Anthropology*, 5 MED. ANTHR. Q. 24 (1995). In the emphatic words of Ellen Gruenbaum, "[P]eople do know the health risk. They have seen people get sick. On rare occasions, a girl might die . . . . They undertake the risks for reasons important to them." Dugger, *infra* note 359 (quoting Gruenbaum).

261. DALY, *supra* note 66, at 170.

forces overt and subliminal racist sentiments by paying homage to the work of Felix Bryk, who invalidated the very basis of his own findings when he surmised that Africans "like to lie—particularly to whites—just as children do, because, like children, they cannot comprehend the moral necessity for truthfulness."<sup>262</sup> Also drawing extensively from Allan Worseley, who characterized the procedure as a sadistic venture "thoroughly enjoyed by the privileged spectator," Daly perpetuates the myth of Africa as the dark continent of unbridled savagery, violence, and moral bankruptcy.<sup>263</sup> Thereby, she legitimizes discourses that provide moral justifications for the recurring Western savior and rescue complexes.<sup>264</sup>

Similarly, Alice Walker, oblivious to the elusiveness and inherent ambiguity of behavioral transcripts, bemoans what she perceives as the pathetic demeanor of the women she encountered on the streets of Africa. She assumed that these women, without exception, were reeling from "genital mutilation." It is not a surprise that her protagonist, Tashi, whom she first described as having hands like that of a monkey, was the one to epitomize the classic "Olinka shuffle" by preferring a Western identity over an African one. Nonetheless, the woes of this maladjusted character are depicted as representative of the objective realities of African women.

Much like Mary Daly's and Alice Walker's exposés, the debates that have ensued on their heels tend, regrettably, to be dogmatic, insulting, and ethnocentric. As Savanne observes, "Talk of 'barbarians' and 'uncivilized' practices is sensationalist and alienating to those who are named in that way."<sup>265</sup> At a conference in Copenhagen in 1980, Fran Hosken, along with Renee Saurel, a French woman with little, if any, first-hand experience with Africa, spear-headed a discussion on female circumcision. The African

262. See FELIX BRYK, *DARK RAPTURE: THE SEX-LIFE OF THE AFRICAN NEGRO* 28 (Dr. Arthur J. Norton trans., 1939).

263. See Worseley, *supra* note 115, at 686.

264. See JOSEPH CONRAD, *HEART OF DARKNESS* (Ross C. Muffin ed., 1986); V.Y. MUDIMBE, *THE INVENTION OF AFRICA* (1988); PHILLIP D. CURTIN, *THE IMAGE OF AFRICA: BRITISH IDEAS AND ACTION, 1780-1850* (1964); DOROTHY JABLOW & ALTA HAMMOND, *THE AFRICA THAT NEVER WAS: FOUR CENTURIES OF BRITISH WRITING ABOUT AFRICA* 72 (1970); SARAH L. MILBURY-STEEN, *EUROPEAN AND AFRICAN STEREOTYPES IN TWENTIETH-CENTURY FICTION* (1981); CHRISTOPHER L. MILLER, *THEORIES OF AFRICANS* (1990).

265. Savanne, *supra* note 69, at 37. In the succinct appeal of Lane and Rubinstein, if we care about the genitals of these women, we need also to care about their feelings. See Sandra D. Lane & Robert A. Rubinstein, *Judging the Other: Responding to Traditional Female Genital Surgeries*, 26 HASTINGS CTR. REP. 31, 36 (1996).

women who were present at the meeting registered their protest by walking out after incisively criticizing the graphic presentation that violated, exploited, and sought to "forcibly strip them in company."<sup>266</sup> Apparently, Western feminist interventions are motivated by the concept of "sisterhood" that Daly equates to the mandate for "naming the crimes against [these African] women without paying mindless respect to the social fabric."<sup>267</sup> At the very least, "sisterhood" equally counsels sensitivity to the dignity and intricate realities of the women.<sup>268</sup> The Association of African Women for Research and Development ("AAWORD"). echoes a similar sentiment in its stern condemnation of uninformed propagandists who, in desperate appeal to Western audiences, are "insensitive to the dignity of the very women they want to 'save.'"<sup>269</sup>

Effective critics straddle the fine line of condemning the extremities of the practice but not the culture that spawned it.<sup>270</sup> In spite of the media-grandstanding appeal of the emerging rallying retort, "torture is not culture," seasoned feminist activists who are more adept at grassroots politics quarrel with that statement's implicit cultural condescension.<sup>271</sup> Supporters of female circumcision argue that those who seek to ban the practice are typical Western imperialists who are quick to pontificate without the benefit of a cultural reference.

##### 5. "Once Bitten, Twice Shy:" Outside Interventions in Time Perspective

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266. See SANDERSEN, *supra* note 65, at 12.

267. DALY, *supra* note 66, at 172.

268. See Rose Posel, "Alien Researcher?" White Feminist Writing About the Past of African Women (unpublished manuscript on file with author); THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 56-57 (Chandra Talapade Mohanty et al. eds., 1991); Hazel V. Carby, *White Women Listen! Black Feminism and the Boundaries of Sisterhood*, in THE EMPIRE STRIKES BACK: RACE AND RACISM IN 70S BRITAIN 212 (University of Birmingham Ctr. for Contemporary Cultural Studies, 1994).

269. See AAWORD, *supra* note 255, at 218.

270. See Mary Ann French, *The Open Wound*, WASH. POST, Nov. 22, 1992, at F1.

271. See Seble Dawit & Salem Mekuria, *The West Just Doesn't Get It*, N.Y. TIMES, Dec. 7, 1993, at A27; David A. Kaplan et al., *Is It Torture or Tradition*, NEWSWEEK, Dec. 20, 1993, at 124. Interestingly, Kenyan-born Prithiba Parmar, whose embarrassing ignorance about Africa, as illustrated by her identification of eminent Kenyan novelist, Ngugi, as Nigerian, drives home the need for some cultural reference, scoffs at this observation. See Rosalind Bentley, *Films View Elegance, Horror; Nightmarish Tale Aims at Eliminating Mutilation of Women*, STAR TRIBUNE, Jan. 7, 1994, at 1E.

*Everything has been said before, but since nobody listens we have to keep going back and beginning all over again.*

Andre Gide

*Our rebuttal proceeds from a recognition of the need for dialogue, not diatribe, and has no other goal in tying together the legal and cultural debates than to re-introduce the contradictory. . . .*

Raymond Verdier

*[I]f it is deemed necessary to introduce laws to combat a sensitive custom as female circumcision, a genuine attempt must be made to grasp the full socio-psychological implications of these laws in order to avoid their undesirable results or unintended consequences.*

Babiker Badri

Through the years in Africa, outside interventionists, whether colonialist or missionary (and now feminist), continue to presume that it is their duty as the "advanced" to elevate and enlighten the "backward." It is characteristic of these interventionists to pay scant attention to crucial issues including the wishes and opinions of the supposed beneficiaries of their benevolence, the overall implications of intervention, and the possibility of more "benign" intervention. Not surprisingly, their campaigns, often couched in terms of virtual monopoly on good judgment, are perceived as unduly ethnocentric and presumptuous. Such campaigns conform to patterns and habits that have historically provoked righteous indignation and engendered cultural resistance to Western "missionary" exploits.<sup>272</sup> Moreover, they tend to pre-judge and alienate the only forces—women, the "victims" and perpetrators—capable of facilitating or subverting meaningful change.

It is probably as an instrumental measure which lends itself to the expression of social values that female circumcision has come to gain a resilient foothold. But it remains uncertain that the conflict between the interest of the group to preserve its cultural heritage and the autonomy of women lies at the heart of the controversy over prohibition.<sup>273</sup> A review of the indigenous justifications

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272. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 167-205 (1963); see also ADN BOAHEN, *AFRICAN PERSPECTIVES IN COLONIALISM* 107-08 (1985).

273. See Juith Lorber, *Female Genital Mutilation Celebrates Only Male Social Power*,



for circumcision reveals that the women may consider it a form of self-assertion, or even the ultimate expression of their personhood. Due to the lack of emphasis on extreme individualism, many circumcised women perceive their universe as a web of organically interrelated processes. Some of the Western cultural and ideological assumptions that underlie the anti-circumcision campaign may well be antithetical to the values and goals of these women. Even if the argument for sexual and corporal integrity of circumcised women cannot be faulted, popular Western critiques reify a specific norm of sexuality when some of the relevant African communities are yet to witness the kind of decline in public reticence about sex that occurred in the West, or to fully embrace the cult of individuality which ratifies atomistic impulses.

Interventionist missions by outsiders are notorious for mystifying powerful organic links between entities and representing them as dichotomies.<sup>274</sup> The considerable contrasts between various non-Western systems and Western systems in sexual instances may preclude the possibility of dealing with non-Western people on the basis of vaguely defined Western criteria and standards. For example, traditional African communities are inclined to encompass the individual within a cocoon of fine-spun relationships. In return, they exact certain obligations and disciplines for the common good of their posterity. This is in contradistinction to the emergent Western emphasis on the individual who is free to insulate herself from the demands of the wider society—but “free also to fail, and to find little but the impersonal support of State charity, if any.”<sup>275</sup>

During colonial domination in some parts of Africa, the practice of female circumcision was a passionately contested terrain. In Kenya, for example, efforts to abolish the practice may date as far back as the beginning of British colonialism.<sup>276</sup> A blind effort to eliminate the practice which was engendered by the British contempt for the indigenous values it expressed, simultaneously condemned it to secrecy and redefined its significance; as a clandestine custom, attachment to it became a symbol of nationalistic resis-

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N.Y. TIMES, Dec. 6, 1993, at A16.

274. See Steady, *supra* note 253, at 13.

275. See C.K. MEEK, LAW AND AUTHORITY IN A NIGERIAN TRIBE 325 (1950); see also Maynard Merwine, *How Africa Understands Female Circumcision*, N.Y. TIMES, Nov. 24, 1993, at A24.

276. See Baasher et al., *supra* note 58, at 176 (tracing the anti-circumcision movement to pioneering efforts of the Roman Catholic mission in Ethiopia in the Sixteenth Century).

tance.<sup>277</sup> It was disconcerting enough that people were dealing with the crisis of confidence caused by the aftermaths of colonialism which destroyed ancestral ways without necessarily providing comparable security.<sup>278</sup> The interference with their esteemed cultural practice merely intensified their disillusionment, distrust, and resentment for the alien power.

According to Sequeria, Africans were only beginning to cultivate ample knowledge of the potential hazards of circumcision but their favorable disposition to change was thwarted by the antagonistic intervention of the missions.<sup>279</sup> Murray narrates the blunder that ensued when missionaries who could not come to terms with what they perceived as the sexually celebrated female circumcision, latched onto it as the perfect emotional peg for extraneous bones of contention.<sup>280</sup> Reporting on how the issue came to a head in 1929-30, Jomo Kenyatta explains that families who interpreted the measures imposed by the colonists as a flagrant interference with their freedom, social customs, and cultural beliefs were prompted to circumcise their daughters even at the hands of unskilled persons, with inevitable tragic consequences.<sup>281</sup> The advantage of hindsight favors a gradual evolution in lieu of drastic change.<sup>282</sup> Kenyatta clarifies that the critical lesson of the resistance was the need to understand that the operation is still regarded as the very essence of an institution which has enormous educational, social, moral, and religious implications quite separate from the operation itself.<sup>283</sup> Although the Kenyan President reaffirmed its government's opposition to the practice in 1990, it is still widely performed.<sup>284</sup> If the Kenyan experience provides meaningful guid-

277. See JOMO KENYATTA, *FACING MOUNT KENYA* (1938).

278. See L. Amede Obiora, *New Wine, Old Skin: (En)Gaging Nationalism, Traditionalism, and Gender Relations*, 28 *IND. L. REV.* 575 (1995).

279. J.A. Sequeria, *Female Circumcision and Infibulation*, III *LANCET* 1054 (1931).

280. See Murray, *supra* note 211, at 92.

281. See KENYATTA, *supra* note 277; see also Shandall, *supra* note 63, at 189 (recording a similar incident in the Sudan).

282. See Janice Boddy, *Body Politics: Continuing the Anti-Circumcision Crusade*, 5 *MED. ANTHRO. Q.* 15, 16 (1991) (noting that since the operation remains a lively symbol of ethnic identity, direct outside interference may prolong it); see also Nancy Scheper-Hughes, *Virgin Territory: The Male Discovery of the Clitoris*, 5 *MED. ANTHRO. Q.* 25, 27 (1991) ("I don't 'like' the idea of clitoridectomy any better than any other woman I know. But I like even less the Western 'voices of reason.' . . . Even the most balanced and well intentioned [attention given to the practice by outsiders] may do more harm than good.").

283. See *id.*

284. See TOUBIA, *supra* note 64, at 46.

ance, it should serve as a corrective to popular misconceptions about the role and ability of law in developing countries.

#### IV. QUEST FOR CHANGE

##### A. *Strategies of Containment: Ethical, Legal, and Moral Considerations*

###### 1. International Restraints: Conventions, Declarations, and Immigration Practices

It is a foundational principle of jurisprudence and peaceful co-existence that every people, in exercise of the right to self-determination, has the right to determine the regime that will optimize the enjoyment and enrichment of their cultural heritage, values, and identity.<sup>285</sup> Support for cultural autonomy, however, is not equivalent to condoning violence. Because "human rights" rest on a view of the individual person as separate from, and endowed with, inalienable rights *vis-à-vis* the state or society, respect for the integrity and basic rights of individuals dictates that coercive cultural measures be constrained by rigorous standards. The current regime of human rights gained global ascendancy after World War II.<sup>286</sup> Before then, individuals were more like mere appendices or simple pawns of the State to which they belonged, to be used, protected, or sacrificed according to the imperatives of State interest.

In spite of the emergent focus on the individual, the false dichotomy between the public and the private, which necessitates state action as a *sine qua non* for violations, effectively interferes with the protection of the rights of women.<sup>287</sup> Gender-based inequality is discernably the most systematic, unreported, and unremedied human rights violation. Placing violations of women's basic rights and freedoms on the human rights agenda defines them in terms of entitlements and correlative governmental obligations.<sup>288</sup> Such acknowledgment holds radical implications for the

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285. See HECTOR GROS ESPIELL, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 28* (1980).

286. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 287-93 (1986).

287. See Funder, *supra* note 46, at 424-25. See generally ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1993).

288. See KATARINA TOMASEVSKI, *WOMEN AND HUMAN RIGHTS* 84 (1993); Engle, *supra* note 207, at 1513.

dominant framework and necessitates official invasion of areas that have been traditionally cordoned off as sacrosanct.<sup>289</sup>

The gender-biased selectivity that regards the bulk of concerns that impinge on the lives of women as either private, culturally related, or beyond the competence of traditional human rights and political discourses is very apparent in the realm of immigration regulation.<sup>290</sup> A 1951 United Nations Convention defines a refugee as someone who cannot return to their country because of "a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion."<sup>291</sup> Until recently, the gender-based plight of women has been excluded from the parameters of this definition. Presently, however, the Commissioner for Refugees is favorably disposed to the recognition of sexual violence, including "female genital mutilation," as persecution.<sup>292</sup>

In 1991, France became the first country to establish that the threat of "genital mutilation" is sufficient grounds to grant a woman refugee status; no one has yet been granted such status in France for this reason.<sup>293</sup> In the foremost French case, a twenty-two year old Malian woman named Aminata Diop was denied political asylum and was only allowed to remain as a humanitarian exception.<sup>294</sup> The most significant development in this area occurred in March 1993, when Canada pioneered guidelines expanding the basis of refugee claims to include gender-related persecution.<sup>295</sup> The Canadian novation does not enumerate gender as an

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289. See Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 1994 AM. J. INT'L L. 183 (1994).

290. See L. Amede Obiora, *An Ode to Candor: Reflections on U.S. Immigration Policies*, 2 U.C. DAVIS J. INT'L L. & POL'Y 1 (1996).

291. See FRANK D. BEAN ET AL., *OPENING AND CLOSING THE DOORS: EVALUATING IMMIGRATION REFORM AND CONTROL* 92 (1989); DEBORAH E. ANKER ET AL., *THE LAW OF ASYLUM IN THE UNITED STATES: A MANUAL FOR PRACTITIONERS AND ADJUDICATORS* 5 (1989).

292. See United Nations High Commissioner for Refugees, *Memorandum: Female Genital Mutilation* (May 10, 1994); see also *Report of the Forty-Fifth Session of the Executive Committee of the High Commissioner's Programme*, 44th Sess., Agenda Item 21, at 15, U.N. Doc. A/AC/96/821 (1993); *Declaration on the Elimination of Violence Against Women*, U.N. GAOR 3d Comm., 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/104 (1994).

293. See Bronwyn Winter, *Women, the Law, and Cultural Relativism in France: The Case of Excision*, 19 SIGNS 939 (1994); Lionnet, *supra* note 13.

294. See *id.*

295. See IMMIGRATION AND REFUGEE BOARD, *GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION* 2 (1993).

independent ground; it states instead that gender-related claims should be evaluated under one or more of the pre-existing five categories.<sup>296</sup> Consequently, the Canadian Immigration and Refugee Board granted refugee status to Khadra Hassan Farah, a Somali who contended that her repatriation would cause the coerced circumcision of her minor daughter.<sup>297</sup>

In the United States, lawyers and other advocates for women refugees have developed a set of guidelines similar to Canada's.<sup>298</sup> Recently, a federal court in Philadelphia recognized the validity of a claim for asylum based on gender, but nonetheless turned down the request of an Iranian woman who anticipated persecution if she disobeyed her government's gender-biased strictures.<sup>299</sup> In a widely publicized case in Seattle, a federal immigration court ruling suspended, on humanitarian grounds, the deportation of a thirty-two-year old Nigerian woman, Lydia Oluloro, and her two daughters, whom the mother wanted to shield from genital mutilation.<sup>300</sup> According to the presiding judge, "although [genital mutilation] attempts to respect the traditions and cultures of other societies, as to this practice the court concludes that it is cruel and serves no known medical purposes."<sup>301</sup> In 1996, the Board of Immigration Appeals granted asylum to Fanziya Kasinga, a woman from Togo who claimed that she was in danger of circumcision.<sup>302</sup>

A series of human rights instruments and provisions can be read as prohibiting female circumcision. These regulations range from those regarding equal protection and non-discrimination to those pertaining to the rights of children, the right of sexual and corporal integrity, the right against torture, the right to life, and the right to health. Several international forums have also recently issued a spate of pertinent declarations. These attempts are a far cry from the situation in 1959 when the World Health Organization ("WHO") declined the invitation of the Economic and Social Coun-

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296. *See id.*

297. *See* Clyde H. Farnsworth, *Canada Gives a Somali Mother Refugee Status*, N.Y. TIMES, July 21, 1994, at A14.

298. *See* Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415, 437 (1995).

299. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

300. *See In re Olulora*, No. A72 147 491 (Exec. Off. Immig. Rev., Mar. 23, 1994).

301. *See id.*

302. *See* Keith Donoghue, *A Right of Passage*, THE RECORDER, Jan. 18, 1996, at 1; *see also* James Walsh, *Misuse of Asylum Law*, WASH. POST, June 22, 1996, at A16.

cil of the United Nations to undertake a study of the persistence of female circumcision, on the grounds that investigating operations based on social and cultural backgrounds was outside its competence.<sup>303</sup> It was only within the last two decades that the WHO meaningfully started addressing the practice.<sup>304</sup> Echoing the WHO, the World Medical Association and the International Federation of Gynaecology and Obstetrics maintain that excision and infibulation only create opportunities for medical complications. They therefore oppose the participation of health professionals in these procedures.<sup>305</sup> The Population Fund likewise identifies "genital mutilation" as a risk to women's reproductive health and a violation of their rights.<sup>306</sup> In 1990, the Committee responsible for the implementation of the Convention for the Elimination of Discrimination Against Women ("CEDAW") issued a comprehensive recommendation for the eradication of female genital mutilation.<sup>307</sup> More generally, the Vienna Declaration emphasizes the duty of states to promote and protect all human rights and fundamental freedoms regardless of economic and cultural impediments.<sup>308</sup>

Conferring rights on a person necessarily imposes a duty on another to effectuate those rights. As individual rights are hollow without corresponding remedies, human rights are of legal importance only if corresponding legal obligations are established and adequately enforced. The arguably exaggerated metaphor of the United Nations and its mechanisms as a "toothless bull-dog" underscores an appalling implementation record. The difficulty of enforcement is compounded by the lack of consensus on the substance and scope of human rights.<sup>309</sup> Given that they are rather

303. See UN, *THE UNITED NATIONS AND THE ADVANCEMENT OF WOMEN 1945-95* (1995).

304. See Halima Warzazi, *Study on Traditional Practices Affecting the Health of Women and Children*, U.N. ESCOR, Commission on Human Rights, 43d Sess., Prov. Agenda Item 4 at 1, U.N. Doc. E/CN.4/Sub.2/1991/6 (1991).

305. See Eike-Henner Kluge, *Female Circumcision: When Medical Ethics Confront Cultural Values*, 148 CAN. MED. ASSOC. J. 288 (1993).

306. See United Nations Population Fund, *Report of the Round Table on Women's Perspectives on Family Planning, Reproductive Health and Reproductive Rights, Ottawa, Canada, 26-27 August 1993*, at 4.

307. See *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 45th Sess., Supp. No. 38 at 80, 81, U.N. Doc. A/45/38 (1990).

308. See *Declaration on the Elimination of Violence Against Women*, U.N. GAOR 3d Comm., 48th Sess., 85th plen. mtg. at 3, U.N. Doc. A/RES/48/104 (1994); United Nations General Assembly, *Vienna Declaration and Programme of Action, Note by the Secretariate*, A/CONF.157/23 5 (12 July, 1993).

309. See *supra* notes 8-13 and accompanying text.

jealous of their sovereignty, state-parties to international instruments resort to reservations for immunity when they suspect that scrutiny is a facade for Western cultural imperialism. CEDAW, which condemns practices that violate, impair, or nullify women's enjoyment of human rights and fundamental freedoms, is the subject of the most substantive reservations of any human rights treaties.<sup>310</sup> A case in point is Malawi's reservation: "[O]wing to the deep rooted nature of some traditional customs and practices of Malawians, the Govt. of the Republic of Malawi shall not, for the time being consider itself bound by the provisions of the convention as require immediate eradication of such traditional customs and practices."<sup>311</sup>

## 2. African Reformatory Endeavors

The course of state intervention in the matter of female circumcision in Africa has been somewhat tortuous and tentative. While it is clear that many African governments recognize the need to address drastic forms of the practice, they equivocate regarding the plan of action to be adopted. Apparently they realize the dangers of flirting with false options in matters that resist rash and facile responses. Although a few African countries have legislation relating to circumcision, it appears that the force of cultural traditions trumps the force of legislative enactments.<sup>312</sup> In 1946, the British colonial administration in Sudan amended Section 284(A) of its Penal Code, illegalizing all forms of genital surgeries, except *sunna*.<sup>313</sup> One of the several impediments to the implementation of this provision was posed by the 1974 Code of Criminal Procedure, which conditioned prosecution on the approval of the provincial commissioner. The commissioner's office was often far removed from the locus of the offense so that the cost and inconvenience of obtaining the requisite approval proved to be an effective

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310. See Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 317 (1991).

311. See Multilateral treaty series, deposited with the Secretary General, Status as of Dec. 31, 1989, at 171 U.N. Doc. ST/LEG/SER. E/8 (1989).

312. See REGIONAL CONFERENCE REPORT, *supra* note 53; HOSKEN, *supra* note 211, at 266-96.

313. See A' Haleem, *supra* note 48, at 152. The original legislation called was changed from absolute prohibition to exempt *sunna* because of resounding public outcry. See Abdullahi An-Na'im, *A Legal and Religious Response to the Egyptian Female Genital Mutilation Problem*, in ELIZABETH KIRBERGER ET AL., INTERSECTIONS BETWEEN HEALTH AND HUMAN RIGHTS: THE CASE OF FEMALE GENITAL MUTILATION 8 (1995).

disincentive for prosecution.<sup>314</sup> Section 284(A) was eventually superseded in 1983 by an ambiguous provision enjoining the infliction of bodily injury through cuts, wounds, or organ amputation.<sup>315</sup>

In 1958, President Nassar of Egypt passed a decree prohibiting clitoridectomy.<sup>316</sup> The decree never materialized into legislation because of concern for reactionary backlash. According to Azia Hussein, Director of Egypt's Family Planning Center, it should be theoretically possible to charge participants with the deliberate infliction of bodily harm under Sections 241 and 242 of the Penal Code.<sup>317</sup> Ghana's cabinet recently approved a draft legislation designating genital *mutilation* as a second degree felony, punishable by imprisonment.<sup>318</sup> Official declarations against female circumcision have been made in Benin, Nigeria, Ghana, Burkina Faso, and Senegal.<sup>319</sup> In 1982, President Arap Moi of Kenya banned the practice; medical and social workers contend that the ban merely precipitated a conspiracy to conceal casualties.<sup>320</sup> Kenya's parliament has yet to ratify the presidential decree.<sup>321</sup>

Most African governments and women's organizations prefer information and education to blaming women, whose actions indicate that they are products of their cultures. Some governments have attempted to remedy the situation by clinicalizing circumcision. This was the case in urban parts of Sudan and in Egypt. In 1959, though, the Egyptian Minister of Public Health resolved to forbid all but partial clitoridectomy performed by a doctor, and a

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314. *See id.* at 153.

315. *See id.* (citing Penal Code § 138).

316. *See* MONEYCLIPS, *supra* note 117; *see also* Assaad, *supra* note 48, at 5. In fact, Amal Abd El Hadi, the coordinator for the Egyptian Task Force Against Female Genital Mutilation, asserts that the anti-circumcision movement has been in existence in Egypt since the 1930s: "Every twenty years or so the issue seems to renew itself with new or heightened debate." Hadi, *Female Genital Mutilation in Egypt: Historical Overview*, in KIRBERGER ET AL., *supra* note 313, at 17.

317. *See id.*

318. *See* Ameyibor, *supra* note 212. The Criminal Code, 1960 (Act 29) has also been amended to specifically prohibit the practice. *See* Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, *Ghana-Legislation Against Female Genital Mutilation*, 17 NEWSLETTER 9 (Apr. 1995).

319. *See* DORKENOO & ELWORTHY, *supra* note 58, at 11. There have been reports of arrests in Ghana and Burkina Faso. *See* Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, *Ghana-Legislation Against Female Genital Mutilation*, 18 NEWSLETTER 12 (Dec. 1995).

320. *See Female Circumcision: Because It's Always Done*, *supra* note 212, at 42.

321. *See id.*



1978 official resolution sought to foreclose the availability of public health facilities for the operation.<sup>322</sup> The resolution absolutely enjoined circumcision by traditional midwives, leaving a loophole for trained health professionals to undertake the operation in private settings.<sup>323</sup> The Egyptian government recently resurrected this resolution, utilizing it to arrest a barber and his accomplices who had circumcised a girl for a Cable News Network documentary broadcast.<sup>324</sup> This incident triggered an interesting chain of events, including fundamentalist reactions that prompted the Minister of Health to rescind the resolution.<sup>325</sup> Under further pressure from anti-circumcision constituencies, the government reversed the implicit medicalization of the practice.<sup>326</sup> The ban on circumcision by health professionals engendered strong opposition by some in the medical community, including a law suit by a British-trained professor of gynecology who facilitates mild circumcisions.<sup>327</sup>

### 3. European Measures

With the world increasingly becoming a global village, and as Africans seek refuge from pathological socio-economic vestiges of imperialism, European nations are confronted with an influx of foreigners. The concomitant fusion of cultural horizons occasionally culminates in conflict, as has been the case for women from cultures that practice circumcision. Torn between allegiance to their culture's power to invest their body with meaning and the European states' power to construct that body's biological integrity according to modern notions of individual rights, some of these women opt for circumcision, even if much of the surrounding ritual is absent.<sup>328</sup> In turn, certain European countries have fashioned relevant laws and policies, ranging from the prohibitive, which address the practice as a crime, to the preventive, which subordinates judicial intervention to information campaigns.

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322. See Assaad, *supra* note 48.

323. See Inter-African Committee on Traditional Practices Affecting the Health of Women and Children, *Ghana-Legislation Against Female Genital Mutilation*, 17 NEWSLETTER 9 (Apr. 1995).

324. See *A Daughter: 4 Men Arrested in Circumcision of 10-Year-Old Girl*, WASH. POST, Sept. 13, 1994, at A12.

325. See Inter-Africa Committee on Traditional Practices Affecting the Health of Women and Children, *News from Africa*, 18 NEWSLETTER 1, 4 (Dec. 1995).

326. See *id.* at 5.

327. See Al Dabiya, *Egyptians Stand by Female Circumcision*, WASH. POST, Nov. 24, 1996, at A33.

328. See Lionnet, *supra* note 13, at 107.

## a. France

In principle, France pays homage to multiculturalism and vows to respect some foreign cultures that are at odds with its legal and social norms.<sup>329</sup> Nonetheless, the notions of universality and indivisibility of law are deeply ingrained in the French collective consciousness. As Benoite Groult forcefully put it, "The immigration of different ethnic groups, the juxtaposition of cultures, should not lead to the breaking up or the renouncement of French law."<sup>330</sup> This remark bespeaks the reaction of the majority of the French to female circumcision though France does not explicitly prohibit the practice. Article 312-3 of its Penal Code stipulates that "[w]hoever beats or otherwise voluntarily inflicts violence upon or assaults a child of under fifteen years of age, excluding minor violence, will be punished . . . [b]y imprisonment of between ten and twenty years."<sup>331</sup> It is important to note that the right to bodily integrity is by no means an absolute norm in France, given the cultural acceptability of tissue-modifying surgeries such as male circumcision, tonsillectomy, and appendectomy.<sup>332</sup> Also, the corporal punishment of children is exempt as invasive of integrity because it is sanctioned by "custom" as defined by Article 327 of the Penal Code.<sup>333</sup>

Article 312-3 is at the heart of France's distinctively aggressive circumcision prosecutions. As of the summer of 1994, France was the only country in which the practice of circumcision has resulted in criminal trials.<sup>334</sup> Expounding on the history of such trials, Winter, who documents an interesting case of judicial ambivalence, notes that the first case was instituted before a police court magistrate in November 1979; the defendant received a symbolic one-year suspended sentence. It was not until 1988 that the criminal court exercised jurisdiction over the matter. Even then, the parents of the deceased circumcised girl were given a three-year suspended sentence.<sup>335</sup>

The most notorious cases came in 1991, with the same circumcisor, Keita, being charged in both; it turns out that owing

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329. See Lionnet, *supra* note 13; Winter, *supra* note 293, at 939.

330. Winter, *supra* note 293, at 963 (quoting Benoite Groult).

331. C. PÉN. Art. 312-3.

332. See Lionnet, *supra* note 13, at 103.

333. C. PÉN. Art. 327.

334. See Winter, *supra* note 293, at 943.

335. See *id.* at 945.

to the difficulty of proof and detection, Keita remains the only circumcisor to stand trial.<sup>336</sup> At one of her trials, the proceedings were translated and she received a clement sentence; three of the impleaded parents of circumcised children were acquitted, and the others received one year suspended sentences.<sup>337</sup> At her other trial, Keita denied performing the operations; except for the charges and the questions asked directly of her, she did not have the benefit of interpretation of the furious court debate allegedly precipitated by her conduct. The courtroom scenario, which occasionally took the air of a symposium, was vividly captured by the media who reported that the presence of the accused in the dock seemed but a pretext, were it not for the imminent prospect of imprisonment. For the most part, it appeared as if the court tried the practice rather than the persons involved.<sup>338</sup> Keita was eventually sentenced to five years' imprisonment, while her co-defendants, the parents of the circumcised, received five years' suspended sentence.<sup>339</sup>

Although there is a growing movement against the suspension of custodial terms, the personality and personal opinions of the presiding judge, coupled with the circumstances of the trial, are outcome-determinative.<sup>340</sup> Hence, in 1993 Teneng Fofana-Jahate was sentenced to five years (four suspended, one to be served) for the *excision* of her two daughters, whereas a few days later, Coumba Greou's sentence was completely suspended, despite the fact that it was the first case involving the more severe *infibulation*, and that it was performed on a one-month-old baby.<sup>341</sup> In adjudicating the cases, the court was persuaded by the ingenious defense that the infibulation was "spontaneous" and that the labia bond together in the process of healing.<sup>342</sup> The refutation of this claim was frustrated due to the tender age of the child in question, as there was no trace of needle marks to suggest deliberate stitching.<sup>343</sup>

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336. *See id.* at 945-46.

337. *See id.* at 947.

338. *See* Lionnet, *supra* note 13, at 100.

339. *See* Winter, *supra* note 293, at 947.

340. *See id.*

341. *See id.*

342. *See id.*

343. *See id.*

A conviction under Article 312-3 requires proof of intention to commit harm as well as proof, per Article 64, that the perpetrator acted freely.<sup>344</sup> Article 64 of the French Penal Code stipulates that "[t]here is no crime or offence when the accused has been . . . compelled by a force that he has been unable to resist."<sup>345</sup> A common strategy of the defense in the circumcision trials has been to submit that circumcision is both a custom of social initiation and a moral obligation with the force of law, not a "mutilative" wound.<sup>346</sup> Along these lines, the defense strives to vitiate individual responsibility by emphasizing the perpetrators' precarious existence as "strangers in a strange land" who lack basic social assets such as knowledge of the *lingua franca* and economic viability, and as people who are merely acting in accordance with deeply-held and imperative socio-cultural and religious beliefs.

#### b. Great Britain

In 1982, the Royal College of Obstetricians and Gynecologists found that "female genital mutilation" was a "very infrequent occurrence" in Britain.<sup>347</sup> By 1985, a "scare of waves of occurrences" prompted the promulgation of the British Prohibition of Circumcision Act.<sup>348</sup> Section 1 of the Act makes it an "offense for any person (a) to excise, infibulate or otherwise mutilate the whole or any part of the labia majora or labia minora or clitoris of another person; or (b) to aid, abet, counsel or procure the performance by another person of any of those acts on that other person's own body."<sup>349</sup> Ironically, contrary to the connotation of the British Act's title, "female circumcision proper" and innocuous or symbolic prickings may not come within the purview of the Act. Self-mutilation of the genitalia is also tacitly exempt.<sup>350</sup>

Section 2 of the Act indicates that genital surgeries are not absolutely prohibited; its precise wording seems to accommodate exceptions and to defer to an individual's right of self-determination where prescribed redeeming circumstances exist.<sup>351</sup> This sec-

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344. C. PÉN. Art. 64, 312-3.

345. C. PÉN. Art. 64.

346. See Winter, *supra* note 293, at 954.

347. Judith S. Seddon, *Possible or Impossible? A Tale of Two Worlds in One Country*, 5 YALE J.L. & FEMINISM 265, 270 (1992-1993).

348. See *id.* After 10 years of existence, not even one prosecution has taken place under this Act. See *id.* at 272.

349. See *id.* at 269.

350. See *id.*

351. See SEBASTIAN POULTER, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS 159

tion provides that "Subsection 1(a) of Section 1 shall not render unlawful the performance of a surgical operation if that operation (a) is necessary for the physical or mental health of the person on whom it is performed and is performed by a registered medical practitioner."<sup>352</sup> This exception allows the continuation of "trimming" surgeries that are typically performed on Western women who, although endowed with functionally normal genitalia, are dissatisfied and psychologically disturbed by the shape or size of their external genitalia.<sup>353</sup> Section 2(2) of the Act states that "[In] determining for the purposes of this section whether an operation is necessary for the mental health of a person, *no account shall be taken of the effect on that person of any belief on the part of that or any other person that the operation is required as a matter of custom or ritual.*"<sup>354</sup> The courts have yet to decide the meaning to be attributed to the vague phrase "required as a matter of custom or ritual," but it appears to foreclose the manipulation of the exemption under the pretext that the social sanction for deviating from the traditional norm of circumcision is inimical to health.

The Section 2(2) qualification of the mental health exception is problematic. Instead of operationalizing mental health in holistic terms, its subtext is the legitimation of the overwhelmingly narcissistic cosmetic needs of Western women.<sup>355</sup> Emotional distress and anxiety are health conditions that occur in virtually all human societies, even if their causes and manifestations are culturally particular. Women's self-perception typically reflects the demands of the social group to which they belong. In the case of circumcision, the motivation for conformity extends beyond mere aesthetic appeal and stigma-avoidance. As earlier indicated, being circumcised is determinative of social status, roles, and rights. Thus, in the apt estimation of Lord Kennet, the sponsor of the Act, an arbitrary distinction between two essentially culturally-induced claims that is blatantly skewed in favor of one and loaded with negative value judgment against the other is tantamount to "naked racism."<sup>356</sup> A similar conclusion was reached by the Commission

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(1986).

352. Prohibition of Female Circumcision Act, 1985, ch. 38 (Eng.).

353. See *id.*; Elise Sochart, *Legislating Against Female Circumcision: Social Reform or Placebo Politics*, STRATHCLYDE GOVERNMENT AND POLITICS 37 (1987) (emphasis added).

354. Prohibition of Female Circumcision Act, 1985, ch. 38 (Eng.).

355. See Seddon, *supra* note 347, at 271.

356. See Lord Kennet, Telephone Interview Feb. 10, 1993, *quoted in* Seddon, *supra* note 347, at 271 n.39.

for Racial Equality: "To suggest that some reason for [the patient's] state of mind may be acceptable and others, broadly confined to those which might affect persons of African origin or descent, are not, is, in our view, discriminatory. . . ."<sup>357</sup>

#### 4. The American Proposal

In the United States, female circumcision has featured in diverse contexts ranging from academic forums to child custody disputes.<sup>358</sup> Recently, however, Congress has stepped in, and, for the first time criminalized the practice.<sup>359</sup> A new law makes it a felony, imprisonable for up to five years, for anyone who "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."<sup>360</sup> This statute, however, exempts a surgical procedure performed by a licensed medical practitioner, which is either necessary for the health of the woman on whom it is performed, or is performed pre-natally or post-natally on a woman.<sup>361</sup> Congress also authorized economic sanctions to be levied against any countries that have a "cultural custom" of female circumcision, and have not implemented "educational programs designed to prevent [its] practice."<sup>362</sup>

#### *B. The Limits of Coercive State Intervention in*

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357. 447 *HL Official Report*, 6th series col 78 (cited in Poulter, *supra* note 351, at 157).

358. See Elsa Walsh, *Three-Way Inter-Continental Custody Battle Rages over 7-year-old Girl*, *WASH. POST*, Jan. 18, 1987, at D1.

359. See Celia W. Dugger, *New Law Bans Genital Cutting in United States*, *N.Y. TIMES*, Oct. 12, 1996, at 1. In describing the necessity for this statute, Representative Pat Schroeder, Democrat from Colorado and the principal proponent of this bill, stated, "You keep trying to explain that this is not circumcision. This is more like Lorena Bobbit. Once [people] find out it goes on and is not some victim fantasy we're having, they're horrified." *Id.* California, Minnesota, North Dakota, Rhode Island, and Tennessee are among the states that have similarly outlawed female circumcision. See *id.* at 6.

360. 142 *CONG. REC.* H11644-01 (daily ed. Sept. 30, 1996) (§ 645(b)(1)(A), Criminalization of Female Genital Mutilation). Insofar as the bill expressly prohibits circumcision, it is arguably more inclusive than its British counterpart, although some forms of ritual pricks or superficial nicks that fall short of sunna-circumcision appear implicitly exempt. On the other hand, the U.S. bill is less restrictive than the British Act to the extent that it defines an age limitation.

361. See 142 *CONG. REC.* H11644-01 (§ 645(b)(1)(B)).

362. *Id.* (§ 579(a)(1)-(2)).

*Matters of Conscience and Private Morality*

State intervention in the matter of female circumcision raises a host of issues. In this section of the article, I will articulate, primarily within the framework of American liberal legal traditions and cultural practices—jurisprudential and judicial discourses that illuminate the pitfalls of misconceived and premature strategies of containment. The American focus derives from the common law influence that the American legal system shares with Britain and its former African colonies, the particularly pendant rabidity of the circumcision debate in America, and the new American law.<sup>363</sup>

Western legal norms and political values, which constitute the primary reference for the anti-circumcision campaign, are fundamentally based on restrictive interpretations of the individual that trump mediating psycho-material and collective variables. The principle of personal autonomy that informs the notion of bodily integrity, for example, connotes that an individual belongs to herself above others and society as a whole. The case of circumcision reveals that an over-extension of this principle threatens its transcultural validity. In a curious sense, however, the principle offers a bulwark for the affirmation of the body as a site for the cultural transactions of meaning and identity.

Anglo-American law is predicated on a thorough-going right of self-determination.<sup>364</sup> Justice Cardozo, articulating the classic formulation of this right, stated, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>365</sup> The fundamental right of individual free choice and self-determination finds expression in the constitutional penumbra of privacy protection.<sup>366</sup> This right has been explicitly recognized in abortion decisions.<sup>367</sup> Similarly, a long line of cases upholds familial autonomy and religious freedom.<sup>368</sup>

The resolution of conflicts between legitimate competing objectives is an inevitable function of the legal system. With the circumcision controversy, there are two moral conundrums that feature prominently. The first exists between the desire of a parent to

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363. See *supra* Part IV.A.4.

364. See *Natanson v. Kline*, 350 P.2d 1093, 1099 (1960).

365. *Schloendorff v. Soc’y New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914), *overruled*, *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957).

366. See *infra* Part IV.B.3.

367. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

368. See *infra* Parts IV.B.2, 4.

mold a child in a preferred pattern and the ideal of the child's best interest. Secondly, there is the tension between competing rights and interests, such as respect for cultural self-determination and the protection of an individual right of self-determination.<sup>369</sup> Beginning with a discussion of the issue of the right to bodily integrity, the ensuing section examines judicial efforts to establish the essence of choice that inheres in the rights of religious autonomy and privacy. It also examines judicial reconciliations of the tension between public policy and the objective of protecting the dignity of these rights.

### 1. The Integrity of the Body

The basic right to bodily integrity, inherent in the notion of self-determination, considers unlawful interference an assault or battery.<sup>370</sup> By implication, therefore, an act undertaken with appropriate consent, such as an authorized surgical procedure, does not constitute an offense. Consent is ineffective for malicious wounding or serious injuries.<sup>371</sup> Consent is not a defense in a criminal prosecution because a criminal offense is theoretically a wrong affecting the general public and cannot be licensed by the individual directly harmed.<sup>372</sup> Also, consent may be vitiated where it is given without a sincere appreciation of the relevant procedure's entire ramifications for the right of self-determination. In *Burrell v. Harmer*, the court rejected the defense of consent on the ground that minors who had willingly submitted to a tattooist did not have a reasonable understanding of the nature of the act.<sup>373</sup>

Cases involving children present a different issue because of the legal limitations on their capacity to give consent. In general, the values of individuality and self-determination are less readily extended to minors.<sup>374</sup> Their guardians or parents are their designated proxies; as such, the consent of the parent ordinarily pre-

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369. See *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5 (D.N.M. 1975), *rev'd and remanded*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

370. See POULTER, *supra* note 351, at 155; *Mohr v. Williams* 104 N.W. 12, 14 (Minn. 1905).

371. See MODEL PENAL CODE § 211.1; Leigh, *Sado-masochism, Consent, and the Reform of the Criminal Law*, 39 MOD. L. REV. 130, 141 (1976).

372. *State v. West*, 57 S.W. 1071, 1074 (Mo. 1900).

373. Case Comment, *Burrell v. Harmer*, 1967 CRIM. L. REV. 169 (1967).

374. Lawrence P. Wilkins, *Children's Rights: Removing the Parental Consent Barrier to Medical Treatment of Minors*, 1975 ARIZ. ST. L.J. 31, 38 (1975).



cludes a claim of unlawful interference. The rationale for this rule was suggested by Chief Justice Burger: "The law's concept of the family . . . rests on a presumption that parents possess what a child lacks in maturity, experience and judgment . . . [and that] the natural bonds of affection lead parents to act in the best interests of their children."<sup>375</sup>

## 2. The Sanctity of the Family

The recognition of the role of the family as the natural and fundamental unit of society and its entitlement to protection and assistance from the State has been recognized in a wide range of international human rights instruments.<sup>376</sup> Article 16 of the United Nations Convention on the Rights of the Child provides, *inter-alia*, that no child shall be subjected to arbitrary and unlawful interference with his or her privacy and family.<sup>377</sup> This provision, whose initial proposal was sponsored by the United States, guarantees the individual rights of children without jeopardizing parental authority; in fact, it affirmatively addresses the rights of parents and the need to protect and preserve the family.<sup>378</sup>

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375. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). In lieu of parental consent, statutory and common law regimes accord competent and capable minors some degree of autonomy or democratic space in the health care decision-making process. This "mature minor" exception is granted when there is no public consensus against the relevant procedure and when it is relatively low-risk, or when denying access may cause the minor to suffer permanent harm. See Michelle Oberman & Heather Fields, *The Mature Minor: Sex, Drugs and the Right to Die?*, HEALTHNEWS, Summer 1994, at 1.

376. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 10 ¶ 1; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 23 ¶ 1, Universal Declaration of Human Rights, *supra* note 11, at art. 16 ¶ 3.

377. See United Nations Convention on the Rights of the Child, art. 34, Nov. 20, 1989, G.A. Res 44/25, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/736 (1989).

378. See Malfrid G. Flekkoy, *Children as Holders of Rights and Obligations*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOUR OF ASBJORN EIDE 97, 102, 110 (Donna Gomien ed., 1993); Philip Alston, *Interpreting a Child's Right to Privacy in the UN Context: The Influence of Regional Standards*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOUR OF ASBJORN EIDE 125, 129 (Donna Gomien ed., 1993).

*Pierce v. Society of Sisters*<sup>379</sup> is identified as the classic American precedent for the traditional recognition of the fundamental rights of parents to inculcate their child with moral standards, religious beliefs, and elements of good citizenship. As the *Pierce* court observed, "The child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>380</sup>

Traditional notions of family autonomy and parental interests in the upbringing of their child are not invariable and absolute. As with many other legal presumptions, experience and reality may rebut the starting point that parents generally act in the child's best interest.<sup>381</sup> In the public interest, the state as *parens patriae* may move to circumscribe parental control where it interferes with the legitimate rights of the child.<sup>382</sup> A determination of the legitimacy of intrusion, when it impinges on parental authority, judgment, or veracity entails balancing the rights of parents and the state's interest in the welfare of children.<sup>383</sup> This principle is reflected in a catalogue of statutes and cases.

In *Prince v. Massachusetts*,<sup>384</sup> adjudicating a conflict between the exercise of religious convictions and state authority to protect the welfare of children, the court noted that:

Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.<sup>385</sup>

379. 268 U.S. 510 (1924).

380. *Id.* at 535.

381. See *Parham v. J.R.*, 442 U.S. 584, 631 (1979) (Brennan, J., concurring in part, dissenting in part).

382. See *id.*

383. See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1971); Laura M. Plastine, "In God We Trust": When Parents Refuse Medical Treatment for Their Children Based Upon Their Sincere Religious Beliefs, 3 SETON HALL CONST. L.J. 123 (1993); Patricia Schroeder, *Female Genital Mutilation: A Form of Child Abuse*, 331 (11) NEW ENG. J. MED. 739 (1994).

384. 321 U.S. 158 (1944).

385. *Id.* at 166, 170 (quoting *People v. Pierson*, 68 N.E. 243 (1903)). Even in the liberal decision of *Wisconsin v. Yoder*, Chief Justice Warren Burger noted that "no one can question the State's duty to protect children," and suggested that the relatively free rein afforded Amish parents stemmed from the fact that, whatever their idiosyncracies as

In *In re Green*,<sup>386</sup> the Pennsylvania Supreme Court held that in the event of conflict between a parent's constitutional freedoms and state power to safe-guard the welfare of the child, the state does not have an overriding interest when the child's life is not imperiled.<sup>387</sup> In *In re Cabrera*,<sup>388</sup> however, a subsequent decision from the same jurisdiction, established mental and physical harm as a threshold for compromising the private agenda of the family.<sup>389</sup> In *Sherbert v. Verner*,<sup>390</sup> the Supreme Court applied the strict scrutiny standard of review for burdens on the free exercise of religion.<sup>391</sup> Thus, even if officials believe with some justification that their standard of value is preeminent, it will be impermissible to coerce those whose convictions lie elsewhere, unless it can be demonstrated that the relevant state regulation is the least restrictive means of achieving its compelling interest.

### 3. The Dignity of Choice: Privacy

The United States Constitution guarantees that certain private spheres of individual liberty are afforded a substantial degree of sanctuary from State interference.<sup>392</sup> In *Griswold v. Connecticut*,<sup>393</sup> for example, the Supreme Court elaborated on the American heritage and values that recognize the individual's "inviolable personality" and cognizable legal interest in private life.<sup>394</sup> More than fifty years ago, Justice Brandeis identified this "right to be let alone" as "the most comprehensive of rights."<sup>395</sup> The concept of privacy deals with the individual's right to freedom of choice on fundamental decisions implicating "basic values" that will affect her or her family's destiny.<sup>396</sup> Thus, the right to freedom of choice in

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judged by the conventional mainstream, their highly successful social unit posed no harm to the physical or mental health of the child. *Yoder*, 406 U.S. at 222.

386. 292 A.2d 387 (Pa. 1972).

387. *See id.* at 392.

388. 552 A.2d 1114 (Pa. Super. Ct. 1989).

389. *See id.* at 1118.

390. 374 U.S. 398 (1963).

391. *See id.* at 403.

392. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

393. 381 U.S. 479 (1965).

394. *See id.* at 482.

395. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

396. *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976).

marriage and family relationships lies at the heart of the right to privacy. Although it has not exhaustively delineated the exact parameters of this right, the Court has clearly indicated that the regulation of private activity must be justified by overriding State interest.<sup>397</sup> In *Roe v. Wade*,<sup>398</sup> a majority identified the protection of the health of a woman as a compelling interest, but found that a regulation could be invalidated if it is targeted at deterring personal choice such as abortion, instead of at protecting the health of the woman.<sup>399</sup>

#### 4. Religious Freedom

There is ample precedent for the accommodation of moral and cultural pluralism, in spite of contemporary society's "hydraulic insistence on conformity to majoritarian standards."<sup>400</sup> *Wisconsin v. Yoder*<sup>401</sup> represents the most expansive reading of the Free Exercise Clause of the First Amendment. It balanced fundamental constitutional claims and interests, exculpating an Amish religion-based mode of life that breached the official requirement for compulsory education.<sup>402</sup> The years since *Yoder* have witnessed a conservative decline in the scope of protection granted under the Free Exercise Clause.<sup>403</sup> In *Employment Division, Department of Human Resources v. Smith*,<sup>404</sup> the Court found no violation of religious freedom when Native American employees, who were dismissed for ingesting peyote (a controlled dangerous substance) in the course of a religious ceremony, were denied unemployment compensation.<sup>405</sup> The *Smith* decision echoes *Reynolds v. United States*,<sup>406</sup> which established that, despite constitutional protection of religious beliefs, action deemed antisocial, such as polygamy (even if grounded on deeply held and sincere religious convictions) could be punished.<sup>407</sup>

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397. See *Griswold*, 381 U.S. at 482.

398. 410 U.S. 113 (1973).

399. See *id.* at 154.

400. *Yoder*, 406 U.S. at 217.

401. 406 U.S. 205 (1972).

402. See *id.* at 217.

403. See *Plastine*, *supra* note 383, at 133.

404. 494 U.S. 872 (1990).

405. See *id.* at 890.

406. 98 U.S. 145 (1878).

407. See *id.* at 164, 166-67; see also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sustaining prosecution for homosexual sodomy).

One of the parallels between the First Amendment and female circumcision cases is that the cause of action in both kinds of cases derives from practices that reflect a deep investment in collective convictions which pervade and determine lifestyle options. Some persons may, however, be inclined to distinguish the two issues on the ground that First Amendment cases involve expressions and beliefs, not cultural practices that have both signifying and concrete effects.<sup>408</sup> This may be a valid distinction, but as will be demonstrated, the problematic dimension of the practice is not inevitable; it can be eliminated while preserving the practice.

Much has also been made of the claim that female circumcision is not mandated by religion since it pre-dates the advent of orthodox Islam and Christianity in Africa.<sup>409</sup> Some people may extrapolate from this claim to distinguish the practice from religious freedom cases. The originating claim for the position holds only for persons favorably disposed to denigrating indigenous African religion as a farce.<sup>410</sup> *United States v. Seeger*<sup>411</sup> suggests that one does not even need to elaborate a case for the recognition of the parity of indigenous religion with Islam and Christianity.<sup>412</sup> In that case, the Supreme Court, interpreting "religion" as "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God," found that a conscientious objection against military service draft is entitled to exemption.<sup>413</sup>

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408. See CATHERINE A. MACKINNON, ONLY WORDS 11-16 (1993).

409. See Celia W. Dugger, *Genital Cutting in Africa: Slow to Challenge an Ancient Ritual*, N.Y. TIMES, Oct. 5, 1996, at 1, 4.

410. See PAULIN J. HOUNTONDI, AFRICAN PHILOSOPHY: MYTH AND REALITY 7, 33 (1983). Moreover, denying the religious connotations of circumcision does not capture the complexity and latent functions of religion. If honor and chastity, for example, are Islamic strictures, a relationship between female circumcision and Islam can be inferred among ardent Moslems who emphasize the moralizing effect of circumcision. Additionally, there is some indication that a series of prophet Mohammed's sayings favor *sunna*. Finally, it is not unusual for Africans who profess the practice of either of the orthodox foreign religions to have synchronized it with the substantive values of traditional religion which pervade their social milieu.

411. 380 U.S. 163 (1965).

412. See *id.* at 176.

413. See *id.*

*C. Women on Trial: On Blaming the "Victims"*

*Several feminist constituencies are opposed to criminal prosecution and advocate alternative strategies, "particularly as it is other women who are being judged and sentenced . . . both husbands and wives maintain that excision is 'women's business'"*

Bronwyn Winter

*Under the guise of protecting young girls from a "barbaric mutilation," the French legal system has victimized [certain] individuals who were not themselves treated as persons in their own right. . . .*

Guidicalli-Delage

Several courses of action have been prescribed to stem female circumcision. They range from economic sanctions and extradition to criminalization. These strategies are of considerable force, but they are not without grave limitations. When it comes to withholding or conditioning aid as a mechanism for controlling the practice,<sup>414</sup> humanitarian and political consideration dovetail and clash simultaneously.<sup>415</sup> On the one hand, there is the strong case that a carrot and stick approach serves the best interest of human rights. On the other hand, economic sanctions ultimately exacerbate the predicament that they purport to alleviate. This is because it is women who will bear the brunt of its burden, and it will perpetuate the conditions of (under)development that contribute to the prevalence of the practice in the first place.<sup>416</sup>

A more radical note admits the merits of Gosling's analysis, which imputes Western donors with an affirmative obligation to the

414. See Schroeder, *supra* note 383, at 739; Rosenthal, *supra* note 72, at A33. This measure has already been applied in the case of Burkina Faso. See Parker, *supra* note 74.

415. See SARAH J. TISCH & MICHAEL B. WALLACE, *DILEMMAS OF DEVELOPMENT ASSISTANCE: THE WHAT, WHY AND WHO OF FOREIGN AID* 66 (1994); JOAN M. NELSON & STEPHANIE J. EGLINTON, *ENCOURAGING DEMOCRACY: WHAT ROLE FOR CONDITIONED AID* (Overseas Development Council, Policy Essay No. 4 1992).

416. See, e.g., Sen, *supra* note 109, at 61; Dennis Goulet, *Development: Creator and Destroyer of Values*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 689 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); Pala, *supra* note 109, at 9-13. Does the recognition of rights merely require the foreclosure of harmful incursions, or does it additionally impose duties to render positive assistance? Are the avoidance of harm and the provision of aid distinguishable, especially given that the perceived harm may be the function of lack of developmental aid?

Third World on account of past relationships stemming from colonialism.<sup>417</sup> This view would locate the persistence of female circumcision as a function of the historical marginalization of participating cultures by macro-structural forces. As Clarence Dias bluntly put it, many human rights violations can be traced to the causal relationship that exists between need in the lesser developed countries and greed in the industrialized world.<sup>418</sup> Even without subscribing to these views, experience teaches that the effectiveness of economic sanctions is questionable because they are viewed as an undue invasion of sovereignty or an implication that the donor best knows what is good for the recipient.<sup>419</sup> Also, sanctions may jeopardize the legitimacy of reform and erode domestic initiatives because the approach is often perceived as reflective of, and instrumental for, power inequalities. Commenting for the need for diplomacy in executing the U.S. conditionality of aid and loans on recipients' undertaking of educational campaigns against female circumcision, Senator Leahy of the Senate Appropriations Committee discussed the potentials of such conditionality to provoke an adverse reaction from the client state.<sup>420</sup> A World Bank Officer for Africa cautions that if the U.S. strategy "highlights the problem, it will be constructive. If it provides an instrument for finger-pointing, it will be counter-productive."<sup>421</sup>

Proposals for economic sanctions are ultimately elitist and counter-productive. A more compelling case can be made for financial assistance towards efforts such as educational programs that target the eradication of radical circumcision techniques. A review of the functions, sanctions, and costs of criminal prohibition reveals that its prescription arises out of a naively idealized confidence in the law. Solutions promoting criminalization with the penalty of extradition are perhaps tunnel-visioned, given the reality that the extradited may end up being celebrated and immortalized as a hero at home.<sup>422</sup> While extradition may circumvent the possibility of trial by a biased jury, its extra-territorial or "not in my backyard"

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417. See David Gosling, *Obligations of Affluent Nations to the Poor in the Situation of "Radical Inequality,"* in ISSUES OF SELF-DETERMINATION 57 (William Twining ed., 1991).

418. See Clarence Dias, *Rural Development, Grassroots Education and Human Rights: Some Asian Perspectives,* in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE 701, 703 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

419. See NELSON & EGLINGTON, *supra* note 415, at 1.

420. See Dugger, *supra* note 359.

421. *Id.*

422. See WALKER, *supra* note 134.

flair makes it self-serving and without regard for the fact that a circumcisor may thereby be afforded the leeway to thrive uninhibited. If circumcision is irredeemably repugnant and culpable, it would appear counter-intuitive and inimical, at least from the point of view of the perceived interest of women, to unleash a person into a domain more conducive to his or her handiwork.

The penalty of a fine is equally problematic. The practitioners' allegiance to the custom may far outweigh a pecuniary loss. One case in point is the notorious experience in several parts of Africa where escalating bride wealth payments prompted the promulgation of Limitation Acts.<sup>423</sup> The legislation was a colossal failure, because some practitioners consider the fine stipulated by the legislation a negligible opportunity cost or price for the prestige of paying inflated bride wealth.<sup>424</sup> Even those who cannot personally afford the fine may take solace in the community as a safety cushion. The travesty is that law enforcement agents are also disdainful of the legislation. A good number of them breach it personally; others find it so incongruous with predominant social predilections that they dismiss it as undeserving of serious attention or implementation.<sup>425</sup>

Over the years, scholars have proffered several theories of punishment. The restraint or disablement theory posits that an incarcerated or executed person is incapable of committing crimes.<sup>426</sup> The theory of retribution speaks of restoring the moral equilibrium. The enculturation rationale denotes that the unpleasant conditions imposed on an offender has educative values that enhance the propagation and inculcation of the knowledge and respect of norms.<sup>427</sup> The rehabilitation or reformation theory equates punishment with treatment for the alteration of criminal propensity;<sup>428</sup> in fact, the word "penitentiary" captures the penance and reform focus.<sup>429</sup> Conscientious observers note, however, that the terms of

423. See TASLIM O. ELIAS ET AL., *AFRICAN INDIGENOUS LAWS* 251 (1975).

424. See ALFRED B. KASUNMU & JESWALD W. SALACUSE, *NIGERIAN FAMILY LAW* 78-79 (1966).

425. See ELIAS, *supra* note 423.

426. See Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, in *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTION ON CRIME RATES 187-88* (Alfred Blumstein et al. eds., 1978).

427. *BLACK'S LAW DICTIONARY* 1317 (6th ed. 1990).

428. See Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 *J. CRIM. L. & P.S.* 226, 226 (1959).

429. See Gordon Tullock, *Does Punishment Deter Crime?* 36 *CRIMINOLOGY & POL. SCI.* 103 (1974).



the sentence tend to undermine this focus; harsh punishment may preclude penitence and short terms may not suffice for rehabilitation.<sup>430</sup>

In a similar vein, several authorities question the validity of the other theories. The extent to which punishment is one of several factors that restrain is uncertain.<sup>431</sup> Evidence of the high recidivism rate, the so-called revolving door syndrome, is brought to bear out the tenuousness of the deterrence argument. The problem of recidivism among culprits is illustrated by the case of Keita, the circumcisor who stood trial twice in France.<sup>432</sup> The point is not that punishment does not deter crime. Although aggressive enforcement of penal coercion is not a perfect deterrent, the propensity to violate the law is related to the likelihood that the offender believes she will be punished. Chances are that some percentage of the populace may be disinclined to participate in a practice such as circumcision if they perceive detection, arrest, and conviction as imminent.<sup>433</sup> But are these consequences always imminent and what makes for imminence? Even if deterrence is effected, to what extent is that attributable to punishment? The prospect of punishment is not the only factor that bears on the decision to commit a crime; and deterrence is hard to measure, hard to define, and inherently impossible to examine empirically.<sup>434</sup>

In the case of female circumcision, the argument for the rehabilitation of, and protection of society from, the circumcisor is understandable. But it is hardly tenable for the mother because her range of potential victims is usually limited to her children. Prohibition may prove impotent to deter persons who consider the prac-

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430. See *id.*; see also LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW & THE BEHAVIORAL SCIENCES* 295 (2d ed. 1977).

431. See L. HALL & S. GLUECK, *CRIMINAL LAW AND ITS ENFORCEMENT* 17 (1958).

432. See *supra* Part IV.A.3.i.

433. See Johannes Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV. 537, 538 (1971); HERBERT L. PACKER, *THE LIMITS OF CRIMINAL SANCTION* 45-48 (1968) (describing the deterrent effect of criminal laws and sanctions).

434. See JACK P. GIBBS, *CRIME, PUNISHMENT AND DETERRENCE* 13 (1975). Gibbs explains his conclusion as follows: suppose A is contemplating engaging in an illegal conduct that A realizes carries severe and imminent punishment; if A pursues the conduct, then the deterrent effect of the threat of punishment was null; if A refrains from the conduct, "the omission could be attributed to (1) the dictates of personal conscience, (2) the individual's recognition of and respect for the social (extralegal) condemnation of the act, and/or (3) the fear of some extralegal consequences (e.g., stigma). So we have a paradox—regardless of what the individual does (commits or omits the act), it is not evidence of deterrence." *Id.* at 12.

tice fundamental to their culture and who are fervently committed to it. Presumably, where the operation is deeply entrenched in the culture and religion, the fear of social and supernatural reprisals compete with, and probably diminish, the deterrent value of criminal penalty. Instead of being deterred, adherents may, in a bid to evade detection, go to lengths that only compound the very menace that salutary legislation means to curb. Even if circumcisors are significantly deterred, without an acceptable alternative, the prospects of inexperienced parents and women taking it upon themselves to perform circumcision are not inconsequential.

Conceivably, the primary parties to the offense are the circumcisor and the parent, usually the mother, of the circumcised who is under-age. If the "slap on the wrist" by the French judiciary has any precedential value, it is apparent that several mitigating factors will bear on the exercise of sentencing discretion for the mother. One of these derives from the hardship that will be occasioned on the child if, under the pretext of protecting her abstract individual rights, her parents are remanded to prison to expiate the guilt of circumcision. In a sense, this custodial measure is a double-victimization of both the child and the mother who, in keeping with the imperatives of their culture, espouses a specific concept of good mothering under which circumcision is an integral parental obligation. Secondly, it may not be immaterial that she did not intend the actual consequences of her action.

A crime consists of both a physical and a mental element.<sup>435</sup> Where there is a disparity between intended and actual result, a person is presumed to intend the necessary and legitimate consequences of her willful acts.<sup>436</sup> Under the objective standard, crimi-

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435. For example, for an assault to occur, one must intend to injure. See MODEL PENAL CODE § 211.1(a).

436. See *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (holding that knowledge of the nature of the act and its result, or recklessness and realization of the risk involved may suffice for culpability); *Fish v. Michigan*, 62 F.2d 659, 661 (6th Cir. 1933); see also *State v. Angina* 340 A.2d 207 (Me. 1975); *Commonwealth v. Hawkins*, 32 N.E. 862 (Mass. 1893). For criminal liability, there must be such wanton and reckless disregard of probable harmful consequences to others as to imply the infliction of intentional injury. See Model Penal Code § 2.02(2)(c). In *Commonwealth v. Pierce*, 138 Mass. 165, 176 (1884), the court was not persuaded by the defendant's argument for exculpation because he honestly believed his treatment would cure the deceased and he was subjectively unaware of the risk he created. See *id.* In that case, the defendant, who was not a doctor, wrapped a sick woman in kerosene soaked rags to cure her. See *id.* at 165. These rags caused burns from which she later died. Justice Holmes applied an objective standard in finding the defendant guilty. See *id.* at 176.

nal liability is predicated on the degree of negligence that diverges from the conduct of an ordinarily careful and prudent person; once the defendant acts recklessly, it is not necessary to prove that he or she foresaw the possible consequences of the act.<sup>437</sup> Obviously, the norm of the reasonable person is a crucial tool in adjudication. What ought to constitute the standard of reasonableness in the case of a conflict between differing cultural codifications—the formative culture for the conduct in question or the dominant culture of the proscriber?<sup>438</sup> What if in the defendant's codification, the remarkable person is the person who conforms reasonably to the customs and standards of his/her social position?<sup>439</sup> Notwithstanding whatever virtues may inhere in applying a uniform standard, it is problematic to apportion absolute blame to an agent whose action is in accord with an authentic but different socio-cultural script.<sup>440</sup> Punitive abstractions that uncompromisingly posit responsibility and scape-goat women, independent of the social conditions of individual agency, distract attention from potentially constructive means of control.

Even when it is immaterial that a defendant lacks knowledge of relevant law and customs, ignorance may mitigate punishment.<sup>441</sup> In fact, one court considered it a crime that “[a] man should be executed for [an act despite] his customs and his absence of knowledge of [governing] customs.”<sup>442</sup> The arguments concerning the lack of knowledge and intent can be extended to the circumcisor. Her culpability, however, is aggravated in the West by the popular perception that she or he is a “mentally castrated token torturer” who is motivated by the brute force of eco-

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437. *Fitzgerald v. State*, 20 So. 966, 967 (Ala. 1986); see also Hayter, *supra* note 214, at 329.

438. See MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 164 (1955).

439. See LEE, *supra* note 91, at 103 (noting that a peculiar codification which obfuscates other aspects of reality does not necessarily mean that the codification exhausts reality). Mere public intolerance cannot justify the deprivations of individual liberty or the abolition of a way of life that is “exotic” but interferes with no significant rights or interests; otherwise, the law would be giving effect to private biases. See *Wisconsin v. Yoder* 406 U.S. 205, 224 (1972); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

440. See *supra* notes 31-40 and accompanying text (discussing criminal cases involving a cultural defense).

441. See Rone Tempest, *Ancient Traditions vs. The Law*, L.A. TIMES, Feb. 18, 1993, at A1.

442. See Edwin R. Keedy, *A Remarkable Murder Trial: Rex v. Sinnisiak*, 100 U. PENN. L. REV. 48, 64 (1951).

conomic gain.<sup>443</sup> This perception may be erroneous. In the first place, it is not certain that circumcisors are primarily, let alone solely, mercenary. When situated in holistic African cosmologies, economic incentive pales against potential other-worldly reprisals for bad-faith. Besides which, the popular perception obscures the fact that circumcisors also may be subject to cultural hegemony. If they are products of the same culture as the parents of circumcised girls, perhaps their perceptual vision is just as inhibited and their sentence fit for mitigation.

The plethora of dysfunctional laws currently on the statute books attests to the fact that law is not self-executing. A law could be "unenforceable," that is, enforceable only with enormous expenditure of effort, time, and money, or simply not enforced.<sup>444</sup> In other words, compliance with a law is the function of diligent enforcement and/or conducive legal culture. Diligent enforcement presupposes the availability of material resources and cooperative enforcement agents. Even with the most conducive legal culture and structure, the prohibition of female circumcision presents peculiar monitoring problems because it deals with an intimate part of the body whose scrutiny is further frustrated by cultural reticence. It is common knowledge that behavioral customs in the subjective areas of life and practices that derive legitimation from tradition or religion are even harder to contest.<sup>445</sup> Without a change in underlying societal norm, absolute abolition will be yet another tragic repetition of putting the cart before the horse, especially in the African socio-legal context. Legislation has had some success in reducing or eradicating some cultural practices such as foot-binding and sati that, analogous to female circumcision, defied simplistic analysis.<sup>446</sup> The outcome has been born of a series of complex and interactive processes and events, as opposed to being solely determined by a prohibitive superimposition.

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443. See Daly, *supra* note 66, at 164.

444. See FRIEDMAN & MACAULAY, *supra* note 430, at 365-66.

445. In a sense, female circumcision constitutes the bodily inscription of cultural codes. It may well be that the ritualized marking of the genitalia is not so much about gendered identity and counter-politics as it is about natalist symbolism. The confluence of natalist ideology and the celebration of "lifecycle" in the practice is refracted by a variety of cosmological orientations that have largely proven impenetrable for Western critical consensus. See MBITI, *supra* note 107; Cobbah, *supra* note 9, at 310.

446. See LATA MANI, CONTENTIOUS TRADITIONS: THE DEBATE ON SATI IN COLONIAL INDIA 16 (1989) (detailing the evidence of the resurgence of ritual bride-burying in India); HOWARD LEVI, CHINESE FOOTBINDING: THE HISTORY OF A CURIOUS EROTIC CUSTOM (1966).

Law alone seldom changes behavior. Although it is certainly a key determinant of change, it is not a panacea nor is it a brooding omnipresence in the sky. It is instead a mechanism that is integral to, and contingent on, a broader societal scheme. Against this backdrop, it is reasonable to infer that law can wield considerable influence over actions and attitudes where it is accepted as legitimate authority. A corollary view is that legal control is affected by social influences; the greater the social consensus the higher the chances of observance and punishment for violations.<sup>447</sup> As exemplified by the aggressive posture of the French judiciary, there will be more interventions in jurisdictions where there is concerted public outrage against female circumcision than where it is considered normal. The courts' documented ambivalence in sentencing, in addition to its uniqueness of posture, demonstrates the legal dilemmas of circumcision.

These dilemmas are even more complicated if the law that "jumps the gun" to "legislate morality" is perceived as an outraged regimen with scant organic root or regard for local logic.<sup>448</sup> In such a case, the law lacks minimal prospect for meaningful enforcement and becomes a mere *rite de passage* to which governments acquiesce out of formal deference to powerful instigators. Not even the police are immune from the tentacles of social forces; to the contrary, they typically share the values and moral code of the community and may be inclined to conform to local patterns and preferences for social control, instead of to the ideals of law.<sup>449</sup> Thus, given budgetary constraints and the demands on their schedule, they may adjust their enforcement priorities to approximate not the ideal of law, but the community's sense of justice or its evaluation of propriety.<sup>450</sup>

In the case of circumcision, the lack of political will and an impotent enforcement structure, will be compounded by the cultural

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447. See Leonard Berkowitz & Nigel Walker, *Laws & Moral Judgments*, 30 SOCIOLOGY 410, 421 (1967).

448. See Alan W. Norrie, *Criminal Justice, The Rule of Law and Human Emancipation: An Historical and Comparative Survey*, in *LAW & CRISIS IN THE THIRD WORLD* 76 (Sammy Adelman & Abdul Paliwala eds., 1993); FRIEDMAN & MACAULAY, *supra* note 430, at 366 (citing John P. Roche & Milton M. Gordon, *Can Morality be Legislated*, N.Y. TIMES MAG., May 22, 1955, at 10).

449. See Albert J. Reiss, Jr., *Citizen Access to Criminal Justice*, 1 BRIT. J.L. & SOC'Y 50, 55 (1974).

450. See WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 102 (1965).

embeddedness of the practice and by the fact that it is deeply fossilized in women's psyches. Because the criminal justice process depends largely on the participation of victims, if the complainant is not willing to testify, there will often be no basis for prosecution and conviction.<sup>451</sup> A circumcised woman who is well-adjusted by the standards of her reference group may, notwithstanding the physical pain involved, not perceive circumcision as a wrong to be vindicated. Since the official classification of female circumcision as illegal may not immediately alter this view of morality, such a woman is unlikely to facilitate prosecution or to disclose the identity of the parties to be charged.<sup>452</sup> The high probability of grave repercussions, such as jeopardizing a close relationship, risking the incarceration of her care-giver, and being alienated from the community, are further disincentives for complaining.

A cost-benefit analysis may reveal positive exit options other than complaining, especially if the social sanctions of deviating from the cultural norm outweigh the penalty of breaching the law. This disposition is captured by the Igbo saying, *adaghi aso mgbagbu agha ugu*, which refers to the stoic resignation of people who make war in spite of the risk of casualties and fatalities. This disposition is also comparable to that of a chain smoker who is aware of the health hazards, but continues to indulge for other reasons.<sup>453</sup> Additionally, the circumcised may run the risk of personal incrimination as a principal or an accessory to the crime, although it appears that prosecuting an adult who consents to her circumcision would not be in sync with the principle that both liability and protection cannot simultaneously inure to the same person.<sup>454</sup>

There obviously are no simple or definitive solutions to this dilemma. Nevertheless, reformist efforts that flow from a careful analysis of the problem and consultation with the affected community would probably secure greater public acceptance. Consistent with the "no more expert" credo of feminist politics and practice,

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451. See FRIEDMAN & MACAULAY, *supra* note 430, at 105 (citing Reiss, *supra* note 449, at 50).

452. If she is under-age and the state acts as her proxy, her parents may frustrate the apprehension of the circumcisor, especially if they are sworn to secrecy. See EL DAREER, *supra* note 56, at 28, 85.

453. See Jerome H. Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 558, 624 (1968).

454. See J.C. SMITH & BRIAN HOGAN, *CRIMINAL LAW* 110-12 (3d ed. 1973); Hayter, *supra* note 214, at 330.

several constituencies acknowledge that circumcision can only be eradicated once the women themselves perceive its implications and refuse to perpetrate and perpetuate it. According to Wilkista Onsando, the chair of a Kenyan women's group, the practice will die more quickly with the support of indigenous people "than if others tell us what to do."<sup>455</sup> While recognizing that the initiative for eliminating the practice must come from women in the societies, some international agencies have also been acting with awareness that such local initiatives can benefit greatly from outside technical and financial support.<sup>456</sup>

The understanding, cooperation, determination, and know-how of the principal participants in circumcision are imperative for a workable solution.<sup>457</sup> Programs tempered with an interest in, and respect for, grassroots initiatives and local knowledge of needs which are designed, delivered, and managed by community women have a better prospect for sustainability. They are more cost-efficient, and because they draw on local resources, they are not disproportionately dependent on external aid.<sup>458</sup> It behooves international campaigners to reconceptualize the affected population as subjects, not objects. All things being equal, they are best equipped to inspire critical attitudes and formulate efficient levels of change with more emphasis on grounding than upon attaining triumphs which are unsupported by the rest of the culture. Since circumcision cannot be understood in isolation from its complex socio-cultural, moral, ethical, and religious matrix, an effective eradication campaign must locate it in relation to patterns and values relevant to these contexts. The merit, or lack thereof, of the custom must be dispassionately analyzed, with due attention given to what is given up as well as to what is gained in eradicating it. Articulating an agenda for change may involve a very considered conciliation of the exigencies of contemporary times with ancestral traditions.

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455. Kaplan et al., *supra* note 271, at 124.

456. See WELCH, *supra* note 53.

457. See Ismail, *supra* note 62, at 121.

458. See Susan Brems & Marcia Griffiths, *Health Women's Way: Learning to Listen*, in *THE HEALTH OF WOMEN: A GLOBAL PERSPECTIVE* 255, 255 (Marge Koblinsky et al. eds., 1993).

## V. ORCHESTRATING CHANGE: EXTRA-LEGAL ALTERNATIVES

### A. Education

As noted earlier, effective legal engineering can hardly occur in a social vacuum or without public support. Meaningful change requires specific conditions. It is in this regard that education for critical consciousness becomes relevant both as a prerequisite and a complement to legislation. This process of education is a promising vehicle for facilitating outcome determinative cognitive adjustments. Critical consciousness is an outcome one must define, develop, and appropriate for oneself, as opposed to something done "to" or "for" someone.<sup>459</sup> Accordingly, education for critical consciousness eschews vanguard politics and seeks to nurture a self-conscious interaction between the subject, possessed of a fresh sense of ability, and her context.<sup>460</sup> Mindful that "the personal is political," this process celebrates the realities of women's experiences as the starting point for individual and social change. Its ultimate strength lies in its capacity to simultaneously afford the structure for substantive appreciation of the exact conditions of social relations, while fostering understandings of local predilections and theories of change.

By virtue of education for critical consciousness, women can articulate and assess the burdens and benefits of circumcision in order to determine how best to serve their interests. One way of maximizing critical consciousness may be to integrate circumcision into a mainstream discourse of health and to encourage women to explore the possibility that the notion of femininity encapsulated in circumcision may well be a metaphor, not just for internalized identity, but for externally-imposed stricture. In this respect, medical facts that are not readily discountable on the basis of subjective experience may be marshalled to explicate the adverse implications of the practice for the practitioners' over-arching values and objec-

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459. See Marcia C. Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism, and the Demand for the Woman's Voice*, 6 *WOMEN'S STUD. INT'L F.* 573 (1983).

460. See MACKINNON, *supra* note 24, at 53-62 (recommending an individually-centered approach to political positioning); Marcia Weskott, *Women's Studies as a Strategy for Change: Between Criticism and Vision*, in *THEORIES OF WOMEN'S STUDIES* 210, 210-17 (Gloria Bowles & Ronate Duelli Klein eds., 1983) (supporting the assertion that education for critical consciousness nurtures self-conscious interaction).



tives.<sup>461</sup> For example, it may be necessary to employ this avenue to demonstrate that circumcision is potentially inimical for pronatalistic aspirations. In the event that the women are successfully persuaded, they may decide to abandon the practice entirely or to salvage its redeeming features.

Women might endure exploitation within the confines of their traditional community and shun commitments that would provoke opprobrium, but not when they have an active sense of their existential dilemmas and alternative possibilities. Dr. H. Nakajima, the Director-General of the World Health Organization, articulated similar conviction when he remarked that people will change their behavior only when they themselves perceive the availability of meaningful, functional alternatives that are not a threat to essential aspects of their culture.<sup>462</sup> Even Fran Hosken, a confirmed critic of female circumcision, concedes that:

[The practice cannot be eradicated] by talking or publishing articles or making movies and videos or holding conferences and meetings in the rest of the world. . . . [What counts in the final analysis is] a coordinated long-term and continuing effort to educate the people involved and to teach them on their own terms about health, about their own bodies and how reproduction functions. . . .<sup>463</sup>

Several authorities hail education as the single most important factor in combatting the practice. The noble efforts of the Inter-African Committee ("IAC") merit special attention. The IAC is constituted primarily, if not exclusively, of men and women from many African countries. The initiatives of the IAC are on a continuum with the struggles of African activists and scholars against various manifestations of gender-based prejudice. By disseminating information to foster awareness, mass mobilization, and local outreach, the IAC enhances the attitudinal foundation for change.<sup>464</sup> The committee emerged, in part, as a reaction against efforts, mounted largely by Western feminists and WHO specialists, to abolish the practice. To the credit of the IAC and other initiatives,

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461. See Funder, *supra* note 46, at 437.

462. See Charles Henderson, *Elimination of Female Genital Mutilation*, AIDS WEEKLY, June 20, 1994, at 14.

463. See FRAN HOSKEN, THE HOSKENS REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES 376 (1993).

464. See WELCH, *supra* note 53.

issues that were considerably entombed in silence are being engaged at different forums and are gradually becoming recognized as deserving of national attention. Claude Welch describes the IAC's *modus operandi* as representing the quintessence of "promotion" of human rights, because it abides by what he identifies as the first "E" of the trinity of education, empowerment, and enforcement.<sup>465</sup> In its educational efforts, the committee adopts a global approach and its programs strive to blend old and new. Instead of focusing on female circumcision in isolation, the IAC programs situate it within the context of other health-endangering traditional practices, including early marriage, nutritional taboos, and scarification. Where births are facilitated by traditional attendants, the IAC has shown that improving the attendants' skills is an approach that translates into a dramatic decline in maternal deaths. This works to provide scientific knowledge about reproduction and about the harmful effects of traditional practices on fertility, maternity, and health.<sup>466</sup>

*B. The Medium is the Message: Towards  
Reform with a Human Face*

*Without bread, freedom may be existentially meaningless.*

Upendra Baxi

*I have visited villages where, at a time when the village women are asking for better health facilities and lower infant mortality rates, pipe borne water and access to agricultural credit, they are presented with questionnaires . . . on female circumcision. There is no denying that certain statistical relationships can be established between such variables, however that is not a priority from the point of view of those who make the research subjects.*

Achola Pala

Emphasis on education, however, can only go so far. Shifts in attitudes must be complemented by alleviating the scourge of poverty. It seems that the inertia of some African administrations in formally addressing the issue of circumcision derives from their prioritization of basic human needs over lecturing people on the dangers of circumcision. This analysis is consistent with Gunning's

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465. *See id.*

466. *See id.*

observation that for the African feminists who support the abolition of genital surgeries, the practice is not considered the ultimate or the most urgent of the indicators of the poverty of the material realities of women.<sup>467</sup>

In spite of the public policy rhetoric about gender equity, the "human development" index for Africa reveals a wide gender disparity.<sup>468</sup> The dissonance between existing formal legal norms and socio-cultural realities is evident in the health care arena. Sen, among others, contends that the subordination of the health care needs of women is one reason for their premature demise.<sup>469</sup> Gender disparity in Africa is partly attributable to Africa's macroeconomic deterioration and increasing marginalization in an interdependent global economy. In effect, the argument is that the preoccupation of African governments with the incidents of structural adjustment programs, weakened power bases, acts of God, corruption, and mismanagement eclipses concern for the basic needs of women and children.<sup>470</sup>

An unfortunate aspect of the anti-circumcision campaign is the tendency to isolate the practice from the gamut of auxiliary conditions that anchor and motivate it. When deep-rooted social attitudes interact with gross economic, social, and political inequalities, more is needed than the top-down approach implicit in legislation.<sup>471</sup> A simultaneous challenge to all the practices and conditions sustaining circumcision augurs better than attempts at abolition for sincere and enduring change. This view is buttressed by local women, who favor the domino theory of change. One study found that even with all their dire need for health services, for example, these women understand that health is an integral part of the political economy and socio-cultural milieu in which they live and are apt to give high priority to "non-health" programs that precipitate positive health consequences.<sup>472</sup>

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467. See Gunning, *supra* note 229, at 225-26.

468. See RUTH LEGER SIVARD, *WOMEN: A WORLD SURVEY* (1985).

469. See Sen, *supra* note 109.

470. See Kouba & Muasher, *supra* note 64, at 107.

471. See WELCH, *supra* note 53.

472. See Brems & Griffiths, *supra* note 458, at 257-58.

### C. Clinicalization

Just as education is contingent, it is organic. It is a process of incremental effect that presupposes a temporal dimension. An urgent question, therefore, concerns interim transformational strategies that will address the needs of the women who are at risk before education is fully implemented. On this point, it might be illuminating to consider whether a proposal to prohibit female circumcision would be readily entertained if circumcision were an innocuous surgery. What would be the competing arguments for and against State intervention? The case for immediate prohibition is viable for persons who are persuaded by the premise implicit in statements such as Pat Schroeder's that "the girl who suffers genital mutilation is subject to a permanent, irreversible choice made by her parents."<sup>473</sup> Closer scrutiny precludes uncritical acceptance of the premise as applicable to various forms of practices that come under the rubric of female circumcision. While existing data are deficient, there is sufficient evidence to suggest that health complications are more characteristic of the drastic forms of circumcision, especially infibulation.<sup>474</sup>

The recent proposal by a Seattle hospital, which sparked a mix of reactions, is worth reiteration. Harborview Medical Center took under advisement the possibility of accommodating the cultural needs of Somali families by conducting what Dr. Leslie Miller described as "a symbolic blood-letting" on the prepuce or hood of flesh above the clitoris.<sup>475</sup> Speaking for Harborview, Dr. Miller explained that the procedure would involve a small nick of the prepuce and that no tissue would be removed. She demonstrated that the procedure would be far less than what is currently done in male circumcision of newborn infants, and compared the procedure to ear-piercing or cosmetic, as opposed to medical surgery. According to James LaGerfo, the Medical Director of Harborview, the compromise might be the only ethical, legal, and humane alternative "short of throwing the kids and their mothers in jail for 20 years to make sure nothing happens to them."<sup>476</sup> As of October 17, 1996, the legal assistants to Congresswoman Pat Schroeder of Colorado, one of the architects of the American legislation banning

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473. Schroeder, *supra* note 383, at 740.

474. See DORKENOO & ELWORTHY, *supra* note 58, at 8-9.

475. *All Things Considered* (National Public Radio broadcast, Oct. 17, 1996).

476. Ostrom, *supra* note 49, at A14.

female circumcision, were unclear as to whether the Harborview proposal would violate the new legislation, since it removes no tissue.<sup>477</sup> They indicated, however, that the World Health Organization defines the cutting of the prepuce as a form of circumcision.<sup>478</sup> Harborview eventually abandoned its proposed compromise.<sup>479</sup>

Seble Dawit, the director of an African Women's Network based in New York City, rejects clinicalization because it implies the defense of a "culture" that "articulates a gendered universe, insists on a right to be static and fundamentally cruel to a neat half of the adherents."<sup>480</sup> She contends that many African women "live in abysmal circumstances squeezed between a state that bestowes only second class citizenship and the safety/sanction of 'community' whose identity is too often etched in our bodies."<sup>481</sup> Aziza Kamil, the leader of an Egyptian project on female circumcision is equally opposed to the promotion of milder forms of circumcision under medical supervision. In her opinion:

No action will entrench female genital mutilation more than legitimating it through the medical profession. If doctors and hospitals start to perform it, rather than condemn it, we will have no hope of eradicating the practice. All the respect and authority given to doctors will be transferred to the practice and we [activists] will lose our credibility.<sup>482</sup>

The condemnation of medicalization as regressive partly results from the fact that it presents a slippery slope. The term "mild circumcision" is ambiguous and can be interpreted as encompassing a wide range of operations. Medicalization has also not precluded the risk of death. Just last year, a fourteen year-old Egyptian girl died from the administration of anaesthesia in the process of circumci-

477. See *All Things Considered*, *supra* note 475.

478. See *id.*

479. See *id.*

480. See Letter from Seble Dawit, Director, Alliances: An African Women's Network, to Professor Leslye Amede Obiora (Nov. 4, 1996) (on file with the author).

481. *Id.*

482. TOUBIA, *supra* note 64, at 16; see also Catherine Annas, *Irreversible Error: The Power and Prejudice of Female Genital Mutilation*, 12 J. CONTEMP. HEALTH L. & POL'Y 325, 347 (1996) (citing GEORGE ANNAS ET AL., INFORMED CONSENT TO HUMAN EXPERIMENTATION: THE SUBJECT DILEMMA 21 (1994) (arguing that the involvement of physicians enhance credibility because they are believed to act in the best interests of their patients)).

sion.<sup>483</sup> It is arguable that death from anaesthetic complications is an inherent risk of many surgical procedures. It is not peculiar to circumcision and it is distinguishable from death on account of circumcision. Experiments with medicalization have also failed on some occasions to dissuade those committed to circumcision from pursuing more drastic procedures. A team of U.N. representatives visited a clinic in Djibouti where traditional circumcisers performed mild circumcision under local anaesthesia. The team found that grandmothers often quarreled with the fact that the procedure was not complete since it was short of infibulation. The implicit concern was that disgruntled patrons may go elsewhere to perfect an infibulation.<sup>484</sup>

“Clinicalization” seems uncritically accepting of medicine and education. In material respects, however, medical and educational reforms are not the optimal avenues to depoliticize the regulation of female circumcision. Modern medical science, for example, is supposedly more value-neutral, objective, and transcendental of boundaries and differences than law and custom. Yet, medicine has been analyzed as constitutive of hegemonic social practices. Michel Foucault has argued that health and educational practices are, in certain respects, technologies of surveillance and control for regulating and normalizing individuals and collectives.<sup>485</sup>

Sanitation may not be the ultimate solution, but neither is abolition. The former remains the lesser of two evils, an interim measure targeted at attenuating potentially dire consequences until such a time that adequate groundwork is laid for eradication. Where not being circumcised is perceived as a transgression of social mores, to attempt a full-fledged and undifferentiated assault is to jeopardize enduring reform. It is more likely that reform will be coherent and successful if it is based upon identifiable principles and concepts which command general acceptance, particularly as

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483. See INDEPENDENT, Aug. 25, 1996.

484. See Warzazi, *supra* note 53, at 19.

485. See MICHEL FOUCAULT, *THE BIRTH OF A CLINIC: AN ARCHEOLOGY OF MEDICAL PERCEPTION* 22-37 (A.M. Sheridan trans., 1973) (examining the politicalization of medicine in the 19th century); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 38-64 (Richard Howard trans., Vintage Books ed. 1988) (describing medical treatment of the insane in the 17th and 18th centuries as a process of normalizing unreason); see also MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* (Robert Hurley trans., Vintage Books ed. 1980) (exploring the theme of the deployment of power); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977) (exploring the theme of discipline).

legal sanctions compete and conflict with social sanctions and self-interest. Modification is not only the least restrictive means; it is the path of least resistance and the more efficient and humane strategy.

It cannot be overemphasized that a mild form of female circumcision, such as the one described as entailing symbolic pricking, is largely inconsequential from a health standpoint and is a less extensive procedure than the "trimming" accommodated by the British Parliament. Even with *sunna* or "circumcision proper," potential health hazards are attenuated if performed by a competent person under hygienic conditions. There are corollary and corroborative reports that attendant complications are less frequent where trained medical personnel perform female circumcisions.<sup>486</sup> Even under ideal conditions, female circumcision is a delicate procedure. Although the adverse effects from the less extensive forms of the operation are usually less severe, the requisite skill, surgical tools, and knowledge of anatomy necessary for the delicate operation may be lacking. After extensive clinical experience in Sudan and intimate acquaintance with relevant literature, Nahid Toubia observed, "I have not found a single case of female circumcision in which only the skin surrounding the clitoris is removed, without damage to the clitoris itself. . . . With local or no anesthesia, the girl may move, and the extent of cutting cannot be accurately controlled."<sup>487</sup> Observations such as Toubia's augment arguments for improving the conditions of operation. Medical science and technology have facilitated and reduced the risk of far more delicate and intricate surgeries than the circumferential excision of the clitoral prepuce. Also, if it is reasonable to conclude that only complicated cases make it to clinics, the lack of report on *sunna* may actually be attributable to its low risk nature.<sup>488</sup> Mindful of the gradation of, and aggravating circumstances for, harm, several authorities seek to sanitize the practice by instituting a change of form and forum. The case for sanitization is not a plea for the reverence of vacuous tradition. To the contrary, Justice Blackmun reasoned in his dissenting opinion in *Bowers v. Hardwick*<sup>489</sup> that upholding a practice on account of either the length of time it has

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486. See Boulware-Miller, *supra* note 69, at 174 (citing reports of circumcisions in Somalia's urban areas).

487. See Toubia, *supra* note 61, at 712.

488. See Ismail, *supra* note 62.

489. 478 U.S. 186 (1986).

endured or the passions with which it is defended would validate abominations such as slavery and racism.<sup>490</sup> A similar opinion was poignantly stated by Justice Holmes:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>491</sup>

Sworn opponents of female circumcision concede that medical authorities who condemn the practice are more perturbed by the unsanitary circumstances and complications than the operation per se.<sup>492</sup> The relative rampancy of complications in rural arenas, while factually clearer than their explanations, establishes a strong relationship between the casualties and the form of circumcision in question, the non-hygienic conditions of performance, and the limited skill of operators.<sup>493</sup> The dangers of damage and infection posed especially by aged traditional operators with dimming vision working under crude circumstances buttress the case for regulation of the conditions under which the operation is performed. Sanitization ameliorates mutilation, morbidity, and mortality. It is compatible with pre-existing community values and agenda for welfare. Some of the rationales for the practice are lost in the abyss of historical uncertainties, but it appears that sanitization would cater to various concerns implicit in different strands of discernable rationales.<sup>494</sup> It aligns the practice with official objectives for the protection of the integrity of women and children, while striking a balance with the competing interests that sustain the practice. Sanitization holds promise as a viable option for both Africa and the West. The point of extending the proposal for modification to the West is not to dictate how it should deal with matters within its jurisdiction. It is rather to explore how best to ensure the welfare of the affected population, who in the wake of the recent wave of inter-continental migrations, now reside in the West.

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490. 478 U.S. 186, 210, 210 n.5 (1986) (Blackmun, J., dissenting) (referring to the trial courts statements and briefs related to *Loving v. Virginia*, 388 U.S. 1 (1967)).

491. Oliver W. Holmes, *The Path of Laws*, 10 HARV. L. REV. 457, 469 (1897).

492. See MOEN, *supra* note 56, at 9.

493. See WHO Press Release, *supra* note 54, at 210.

494. See *supra* Part III.A.



Clinicalization of female circumcision is consistently opposed by WHO,<sup>495</sup> along with other African commentators and organizations. There is some suggestion that if the practice is devoid of negative health consequences, states may be obligated under international law to ensure that it is performed under better health conditions.<sup>496</sup> If sanitized circumcision entails no documented or probable risk of harm, and if the liberty to act in conformity with the reasonable strictures of their culture is a chief component of good for women, absolute prohibition may impinge on their rights, welfare, and prospects for social adjustment. The opportunity that clinicalization affords competent health personnel to establish close rapport with clients bodes well for the goals of education and eradication. Assuming that the change of forum proceeds *pari passu* with symbolic pricking, it may reduce the practice to a bare minimum if doctors are able to persuade their patients of the lack of necessity for blood drop. Perhaps, given paradigms of practices that remain relevant in spite of profound transformations in form and content,<sup>497</sup> a mere visit to the hospital will, with time, become vested with the symbolism that presently attaches to the surgical aspect of the ritual practice.

Somalia is one of several countries that have sanitized female circumcision. Its National Committee on Female Circumcision recommended that *sunna* circumcision be encouraged and performed in hospitals.<sup>498</sup> When confronted with this development, the Somalian chief delegate to the 1976 United Nations Human Settlement Conference stated that it is a realistic step, because everybody, including his own daughters, participate in the practice.<sup>499</sup> According to a Somalian midwife, the *sunna* countenanced consists of a mere prick of the clitoris to shed a drop of blood. This mild form eliminates casualties, and the circumcised may have no recollection of it when it is performed at birth. Critics who emphasize the ritual poverty of circumcision in the contemporary period harp on the superficiality of the incision and the apparent circumcision of children. Assitan Diallo, for example, dubs modern

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495. Seble Dewitt points out that it was African women activists who in 1979 persuaded the World Health Organization to discourage medicalization of the practice in state medical facilities. See Letter from Seble Dewitt to Leslye Obiora, *supra* note 480.

496. See, e.g., Engle, *supra* note 207, at 1515.

497. See Obiora, *supra* note 86, at 222-25.

498. See HOSKEN 1982, *supra* note 211, at 32.

499. See HOSKEN 1993, *supra* note 463, at 32.

day circumcision "a caricature of the traditional rite."<sup>500</sup> The argument that the performance of the operation at pre-pubescence by competent medical practitioners under sterile and anesthetic conditions reduces the practice to an empty ceremony devoid of transitional role and ritual connotation is not without merit. The emphasis on physical puberty, however, may be misplaced if circumcision is not always associated with physical puberty, but, instead marks the beginning of either childhood or other phases of life.<sup>501</sup> It may also be true that moments of transition are demarcated more by social, not biological, factors and that the relationship of adolescent rites to physiological changes varies.<sup>502</sup>

In material respects, it is arguable that the opposition mistakes the forest for the trees. As Leslie Miller notes in her expression of dismay at the fury that greeted the Harborview proposal, "we will cut the whole foreskin off a penis, but we won't even consider a [less severe procedure for girls]. We are not discussing circumcision with [the Somalis] because we want to mutilate their daughters' genitals; it is because it is a reasonable request."<sup>503</sup> On account of its cultural embeddedness, female circumcision poses a real dilemma, engendering for women conflicts between their loyalties to their physical and social welfare. From most indications, the practice is not a meaningless cultural relic, but an integral part of the traditional system of values and social security, the disappearance of which would necessitate some alternative provision.<sup>504</sup> A woman from a circumcising culture may well reject circumcision at the risk of a loss of status, respect, and support within her own group.<sup>505</sup> The dilemma of such a woman can be deflated by minimizing the relatively avoidable health risks of adhering to the tradition. It is submitted in this context that modifying the form and forum of the practice, even if merely as a temporary transitional compromise, is less onerous than immediate and absolute abolition.

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500. Hosken, *Female Circumcision in the World Today*, in Baasher et al., *supra* note 58, at 208-09.

501. See VAN GENNEP, *supra* note 96, at 65-73 (discussing rituals and their relationship to physical or social puberty).

502. See *id.* at 65-69; VIZEDOM, *supra* note 96, at 31-32, 35.

503. Ostrom, *supra* note 49.

504. See Assaad, *supra* note 48, at 4-9 (analyzing circumcision in Egypt and prospects for its elimination).

505. See Boas, *supra* note 49.

Advocates of prohibition, who condemn sanitization as an undue stamp of approval on a practice that interferes with the right of women to sexual and bodily integrity, seem to ignore the ecological relativity of atomistic constructions of rights. The language of rights is the language of no compromise.<sup>506</sup> Problems become tractable if formulated in terms of competing interests or preferences become rigidified when staked out in an unqualified language of rights.<sup>507</sup> Concern for rights is a necessary cornerstone in the design of a strategy, but it should not be mistaken for the completed edifice.<sup>508</sup> The point is well-taken that sanitization may evade the fact that the surgical modification of the female genitalia is medically unnecessary. Adherents of the practice, as has already been discussed, entertain other viewpoints besides the medical. From their perspective, female circumcision is a rational option, and it is necessary to sustain a certain internally coherent pattern of order and structure of interpretation. It is a form of intellectual property which reflects rules derived from experience and experiment in specific environments and imputed with mandatory force by attribution to cultural and metaphysical forces. It is comparable to social genetics for group preservation. It evokes strong emotional commitment and cultural allegiance on the part of its practitioners.

Although rooted in the past, female circumcision has contemporary relevance that is believed to enhance personal fulfillment and social continuity.<sup>509</sup> In view of indigenous justifications for circumcision, many avid participants perceive outsiders' intervention as surreptitiously intent on corrupting and ultimately disintegrating the social fabric. In Sierra Leone, which boasts of some of the most enduring anti-circumcision campaigns, thousands of women reportedly demonstrated to launch an offensive in defense of female circumcision. Representatives of women's societies protested the infringement of the debate over circumcision on the secrecy of their societies. The president of the National Council of Moslem Women pleaded that life will be meaningless if women were forced to stop sacred rites of circumcision which instructs initiates

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506. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 8-16 (1991); ELIZABETH ADELL COOK ET AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 193-96 (1992).

507. See LOMASKY, *supra* note 165, at 5-7.

508. See *id.* at 228-54.

509. See Hayes, *supra* note 106, at 622-25 (describing the meaning of infibulation in the Sudan); Kouba & Muasher, *supra* note 64, at 102-04 (describing the meanings of female circumcision in Africa generally).

on useful codes of behavior and social values. According to one account, the authorities are extremely circumspect on the issue and a high-ranking representative of the ministry for the promotion of women's affairs, Bailah Leigh, could only call for collaborations "between those for and against the practice to get a better understanding of the advantages and disadvantages."<sup>510</sup> The protests of the women and the attitude of the female official establish the expedience of rethinking polemics and intransigence in the campaign against female circumcision.

The appeal of circumcision has already been elucidated in terms of the insistent tension between an avidly pronatalistic orientation and ecological circumstances that engender high mortality and morbidity. The transcendent values of procreating and preserving the life of one's progeny is intensified by material realities as well as by a cosmology in which eternity is a function of natalism. For many Africans, because of the care they provide to their ailing or aging parents, children are a form of social security or protective insurance. Additionally, in dominant traditional African worldviews, the family includes the dead, living, and unborn. After physical death, the spirit of every well-adjusted mature adult is expected to be ushered into the next stage of existence as an ancestor by funeral ceremonies in which the person's children play a significant role. Finally, in an atmosphere of corporate existence, a woman who abstains from circumcision may become the object of ridicule, and any misfortune befalling her or her family may "be on her failure to participate in ritual neutralization, ancestral propitiation, and strictures of consecration and sacrifice, or on the 'missing link' in her ritual growth."<sup>511</sup> Anyone who reneges on the rite may also be regarded as "killing the nation" because through the physical and psychological rite of maturation, the corporate life of the nation is revived, its rhythm revived, and its vitality renewed.<sup>512</sup> For these and other reasons, most African women and men do not make light of the imperatives of natalism.

It has been suggested that a mere change of the forum for circumcision will deprive traditional midwives of a source of income.<sup>513</sup> To protect the economic interest of traditional midwives,

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510. Rod MacJohnson, *Supporters of Female Excision Fight Back in Sierra Leone*, AGENCE FRANCE PRESSE, Aug. 30, 1996; see also *Sierra Leone Women March for Female Circumcision*, REUTERS WORLD SERVICE, Sept. 11, 1996.

511. MBITI, *supra* note 107, at 170.

512. See *id.* at 171.

513. See Gunning, *supra* note 229, at 242. Interestingly, this financial gain dimension

it may be worth exploring the possibility of training them as extension workers equipped to deal with the delicacy of the procedure. Any such possibility may be precluded and objectionable because the intricacy of the surgery calls not just for skilled hands but also for a certain minimum of scientific sophistication and paraphernalia that is more readily available in a hospital. The objection may, in turn, be misplaced in so far as it presupposes a degree of delicacy for the modified procedure, when the procedure envisaged is more like symbolic perforation. Except for a symbolic procedure, it is reasonable to argue that the token nature of the payments to midwives for performing circumcision is outweighed by the magnitude of the risk they pose to the circumcised. In the final analysis, the payments may well be too meager to make a consequential difference in the economic realities of these women. A more substantive economic program is necessary to address their needs. The ample evidence that wealth redistribution is a better prophylactic for crime than stringent punishment can be extended for the purposes of this argument.<sup>514</sup>

Perhaps the most troubling cost or consequence of a rash or premature attack on the practice relates to the waste of human resources that will occur if the practice is driven underground. The most probable effect of outlawing a popular course of action involves shifting its practice from legal to illegal dealers. Herbert Packer employs the term, "crime tariff," albeit in a different context, to describe the phenomenon.<sup>515</sup> A classic illustration of this phenomenon is the millions of women who have recourse to abortion at great risk to their lives and health despite restrictive laws. The historical experience with abortion offers a recess from which ample (re)vision can be gained vis-à-vis female circumcision. Where abortion is illegal, partly because of insufficient police activity and difficulty of apprehension, a negligible number of offenders are apprehended, much less convicted. Notwithstanding the discrepancy between offenses and convictions, the lives of

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has actually been utilized against circumcisors. In one of the French trials, the prosecutor demanded an exemplary sentence for Keita because she was compensated for her services by an ostensible offering of a *pagne*, some soap, and some unacknowledged money approximating the equivalent of \$20.00. These payments are symbols that represent some abstract notions (power, social or group unity, etc.) to which social or cultural value is attached.

514. See Sheldon Danziger & David Wheeler, *The Economics of Crime: Punishment or Income Redistribution*, 33 REV. SOC. ECON. 113, 126-28 (1975).

515. PACKER, *supra* note 433, at 277-82.

women who opt to circumvent the law are jeopardized and wasted. In their surreptitious bids to escape detection, they fall into the hands of quacks or resort to using dangerous contraptions such as lye, iodine douches, self-inserted catheters, and knitting needles.<sup>516</sup>

Since female circumcision is of cultural significance, uncategorical prohibition threatens to calcify an ordinary dynamic process and to banish it into clandestine operation, much like abortion. The impulse for the case for medicalization and decriminalization is reminiscent of the eloquent feminist arguments made in favor of the legalization of abortion. It is modestly estimated that complications from clandestine abortions account for approximately forty percent of maternal deaths worldwide.<sup>517</sup> Lack of access to safe abortion, and not any risk inherent in abortion itself, explains the unacceptably high levels of abortion mortality and morbidity. As in other health care settings, access to safe abortion services results in a disproportionate distribution of health risks among poor women.<sup>518</sup> Drawing upon the prevalence of abortion, advocates for the liberalization of law maintain that access to safe abortion represents for women the realization of the basic human right to health. Thus, they redefine the public issue in terms of safety and relative social control of a delicate procedure, rather than in terms of respect and tolerance.<sup>519</sup>

Unlike the case of women, the circumcision of boys is carried out in hospitals with sterile instruments. Nevertheless, radical anti-circumcision campaigns insist on outright eradication of the practice. Some claim that the financial cost of performing female circumcision in hospitals will be astronomical, and it is preposterous to deplete scarce resources just to perpetuate a cultural anomaly.<sup>520</sup> The recalcitrance of this stance clearly admits a double standard which assumes that the male sex is more deserving of

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516. FREDERICK S. JAFFE ET AL., *ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY* 2-3, 22 (1987). Censure and threat of punishment restrains many doctors from performing abortions, which, in turn, discourages women from seeking abortions. See Andenaes, *supra* note 433, at 545.

517. See Francine Coeyteaux et al., *Discussion*, in *METHODOLOGICAL ISSUES IN ABORTION RESEARCH* 43-44 (Francine Coeyteaux et al. eds., 1989) (giving 200,000 as the probable number of maternal deaths per year resulting from abortion).

518. Tomas Frejka, *A Conceptual Framework for the Study of Induced Abortion: Defining Methodological Approaches*, in *METHODOLOGICAL ISSUES*, *supra* note 517, at 3 (comparing laws and their consequences in countries with liberal and restrictive abortion laws).

519. See *id.* at 6-8 (comparing regional differences in abortion laws and evaluating them in terms of strategies for change); see also JAFFE ET AL., *supra* note 516, at 1-5.

520. See HOSKEN, *supra* note 185, at 210-11.

meager national health resources. Subordinating a crucial health need of women to that of men is not feminist. It is lame to oppose a forum change on economic grounds, especially since the expense of requisite educational and health care programs are justifiable in light of the menacing health hazards so far enumerated.

It is evident that there will be additional costs associated with clinicalization and the initiation of educational programs that expose the dangers and dysfunctions of female circumcision. In this respect, the argument that clinicalization burdens and diverts scarce resources is valid. The constraints of the alternatives have already been elaborated. Realizing any plan of attack involves costs, with or without harsh budgetary and economic realities. Many studies demonstrate that the ineffectiveness of prohibition is related to the prohibitive cost of stringent enforcement. Prosecution and punishment require a significant expenditure of time, energy, and other resources, and the expenditure may not translate into optimum effectiveness. Moreover, most jurisdictions adopt twin policies of prohibition and education, so that the case against the cost of education for critical consciousness is redundant. It is not obvious that clinicalization entails more expenses than prosecution and monitoring. More importantly, its short-term costs may well be long-term gains, especially in terms of protecting human life and relieving court schedules.

## VI. CONCLUSION

Beginning with a description of practices of female circumcision, which notes its variability across different cultures, this article systematically explores the theoretical and normative bases for trans-cultural critique and interrogates the circumstances under which "outsiders" can validly evaluate or condemn any cultural practice. Relying upon the literature on the "legislation of morality" and "every day forms of resistance and subversion," the article examines the efficacy, or lack thereof, of legal strategies for instituting socio-cultural transformations.

More precisely, the article discusses the campaign against female circumcision and the data upon which the campaign is based. In highlighting the medical, social, sexual, and psychological consequences of the practice, the article offers a critical analysis of the empirical and methodological flaws in the data upon which the anti-circumcision campaign rests. Further, the article considers conceptual assumptions regarding individual subjectivity and the

nature of the cultures within which female circumcision practices are embedded, with a view to enunciate the problems of decontextualized evaluations of the meanings and consequences of cultural practices.

To a considerable extent, the article elaborates on the political and normative ramifications of the campaign against circumcision. It demonstrates the complex relationship between contextualism, realism, liberal traditions of individualism, and narratives suffused with idioms of exoticism and "positional superiority." To propose a shift in the debate over female circumcision, the article establishes that, just as Western scholars have invented a monolithic "Africa" that denies the diversity and histories of the peoples of the continent, the champions of the anti-circumcision campaign have typically conflated the different practices known as female circumcision into one category. In an historical context, however, the article suggests that perhaps "female circumcision" as a monolithic category came into being not only through the campaigns for its eradication, but also, in part, through the actions of African nationalists who sought to challenge Western imperialism and rule of law with reference to customs that made them "unique" and different from Europeans.

Ultimately, the article investigates the conditions for reformist intervention and underscores the types of intervention that are likely to be effective. The analysis asserts the importance of indigenous hermeneutics and nuanced contextualism in response to an emerging consensus that overwhelmingly disregards the incommensurability of cultural motivations and meanings. As post-colonialist critiques of Western rights ideology demonstrate, the discourse of absolute rights offers little help for the resolution of the competing claims of cultural and individual autonomy. Accordingly, the article explores the possibility of a bottom-up transitional transformation, and its potential for bridging the rift between polarized views of relativism (read as custom) and universalism (read as law) with regards to female circumcision. In articulating the requisite dimensions for sustainable change, the article suggests that "clinicalization" or "medicalization" is an apparent (but only apparent) way of circumventing the tension between "custom" and "law" in the circumcision debate.

Through the years, patriarchal authorities have deployed culture as a rationale for exploiting the structures of power, enacting prejudice, entrenching sexist status quos, and masking the absence of political commitment to questions of gender equity. Whatever the



subversive uses of culture have been, they are not sufficient grounds to deny the validity of arguments for cultural sensitivity. In evaluating a practice such as female circumcision, it is expedient to take certain imperatives of culture seriously. Doing this will not necessarily abrogate or subordinate the legitimate rights of women, as individuals or as a group, to the interest of the society at large. Instead, it will acknowledge the objective constraints of socio-legal reform and enhance the prospects for implementation.

Regulating female circumcision, even as an interim response, reconciles the need to protect women with a respect for embodied socio-cultural identities. It also underscores the relevance of claims of cultural specificity to overriding questions of justice, liberty, and diversity. In conclusion, it is important to emphasize that the argument for a middle course that this article espouses is neither a case for nor a case against female circumcision. Essentially, the argument seeks to give voice to perspectives that have heretofore remained unarticulated or muted, and to enrich pertinent academic debates and policy strategies.