THE SEATTLE COMPROMISE: MULTICULTURAL SENSITIVITY AND AMERICANIZATION

DORIANE LAMBELET COLEMAN†

> Obstetrician to Pregnant Woman: "If it's a boy, do you want him circumcised?"
>
> Pregnant Woman: "Yes, and also if it's a girl."[1]
>
> An effective society—one that can accomplish its common goals, facilitate the private ends of its members, and nourish its system of values—requires that newcomers achieve at least a modest degree of assimilation into its culture.[2]

INTRODUCTION

As the United States seeks to accommodate a large number of non-European and thus culturally distinct immigrants for the first time in its history,[3] it is increasingly faced with significant cultural

† Lecturing Fellow, Duke University School of Law. B.A. 1982, Cornell University; J.D. 1988, Georgetown University Law Center. Many thanks to James E. Coleman, Jr., Katharine T. Bartlett, Jerome McCristal Culp, Anne Dellinger, Stanley Fish, John Payton and William W. Van Alstyne for reviewing and commenting on a draft of this Article. Thanks also to my research assistants, Robin Whitlock and A.C. Walters, and to the ABA Section on Individual Rights and Responsibilities for including me on the extraordinary female genital mutilation panel discussion that prompted my work on this issue. It was a particular honor to exchange views with Alison Dundes Renteln, Mimi Ramsey, and Karen Musalo, other panelists who have contributed so much to the continuing debate about female genital mutilation.

1. Tom Brune, *Refugees' Beliefs Don't Travel Well; Compromise Plan on Circumcision of Girls Gets Little Support*, CHI. TRIB., Oct. 28, 1996, §1, at 1.

2. Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, *in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA, 51, 60-65 (William Rogers Brubaker ed., 1989).

3. Before 1965, United States immigration laws severely restricted the ability of non-Europeans to immigrate to the U.S. The 1965 immigration reforms, *see* Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.), which followed closely behind the Civil Rights Act of 1964, *see* Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000(a)–(h)(6)), permitted, for the

collisions which challenge both its legal and civic tradition of tolerance and its ability to resolve these collisions in a manner that does not destroy what the majority believes are important aspects of American culture.[4] Reconciling these two predominant values is both a classic legal and philosophical dilemma for American democracy, and an urgent contemporary problem.

Historically, American law and its underlying political philosophy have resolved the tension between tolerance and a unified culture by applying the doctrine of ordered liberty. Ordered liberty provides for freedom *within* assumed societal goals and values as opposed to freedom *from* assumed goals and values.[5] Specifically,

first time, large numbers of non-Europeans to enter the United States. Since then, the majority of immigrants to the United States has come from these continents, rather than from Europe. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1120-21 & n.149 (1996) (summarizing the history of U.S. immigration laws and the cultural phenomenon caused by the relatively recent influx into the U.S. of non-Europeans).

4. As a "nation of immigrants," the United States has always been confronted by cultural collisions among various immigrant groups. For example, there has long been a debate about the propriety of having a "national language." *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 402-03 (1923) (holding unconstitutional a Nebraska law that prevented parents from schooling their children in German despite the state's view that schooling in English was necessary to assure integration into the national culture). The most recent collisions, however, are more difficult to resolve because our contemporary pluralism is much more adventurous than that which predated the immigration reforms of 1965. *See* Coleman, *supra* note 3, at 1120-21 & n.149 (describing the 1965 reforms). For example, because in the past immigrants to the United States usually shared a common European heritage, the divisive issue was primarily language; today, the typical immigrant is from Asia or Africa or Latin America, and the divisive issues are language *and* cultural practices such as marriage-by-capture, parent-child suicide, and female genital mutilation. *See id.* at 1105-06, 1109-10, 1111-13 (describing these various cultural traditions). These cultural traditions challenge our tolerance in unprecedented ways because, among other things, they are inconsistent with values like equal protection and the rule of law, which themselves generally are held to be among the better aspects of American culture. *See id.* at 1166-67; *see also infra* notes 242-67 and accompanying text (discussing "Americanization" and "American culture.")

5. *See* Poe v. Ullman, 367 U.S. 497, 518 (1961) (Douglas, J., dissenting) (describing the doctrine of ordered liberty). Justice Douglas's dissent in *Poe* described the doctrine as a mechanism to separate acceptable from unacceptable conduct:

> The due process clause is said to exact from the states all that is "implicit in the concept of ordered liberty." It is further said that the concept is a living one, that it guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right. It is to be applied, according to this view, to facts and circumstances as they arise, the cases falling on one side of the line or the other as a majority of nine justices appraise conduct as either implicit in the concept of ordered liberty or as lying without the confines of that vague concept.

Id. at 518 n.9 (Douglas, J., dissenting) (quoting OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 80 (1951)).

ordered liberty permits cultural pluralism within boundaries that the majority is willing to tolerate, so that the liberty we are afforded is not unfettered, but rather bounded by prevailing social dictates.[6] For example, although individuals are normally accorded great freedom in the way they choose to conduct their private lives and family relations,[7] legal and social tolerance cease where those relations transcend societal bounds or are found to be "subversive of good order."[8]

As a matter of constitutional due process, the freedoms that are deeply rooted in this nation's history and tradition are considered to be "implicit" in the concept of ordered liberty. *See* Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (concluding that a statute criminalizing sodomy was constitutional on the ground that sodomy fell outside the bounds of ordered liberty). Thus, conduct that is consistent with this history and tradition will generally fall within the concept of ordered liberty and be protected from governmental intrusion absent a very good reason, whereas conduct that is not will fall outside of its boundaries and be subject to relatively unfettered governmental regulation. *See id.* at 191-94, 196. Note, however, that while this analysis is focused on history and tradition, the breadth of the individual freedoms associated with that history and tradition assures that the doctrine of ordered liberty does not necessarily exclude minority cultural or religious practices. Justice Douglas's dissent in *Poe* makes this same point. *See Poe* at 518 (Douglas, J., dissenting). *See also infra* notes 6 and 12 (describing the nature of the analysis under the doctrine of ordered liberty as inclusive of contemporary cultural issues.)

6. Ultimately, whatever society gives up in the course of this balancing of individual freedom against the larger social good, the better aspects of American culture, or those traditions which the majority most values, should be left intact. *See, e.g.*, Coleman, *supra* note 3, at 1166-67 (arguing that multiculturalism must defer to the majority when that doctrine irreconcilably conflicts with values such as equal protection and the rule of law). Those traditions that are thought to be inside or outside the bounds of what this country will allow, however, are constantly evolving as the norms of society change. *See* BILL ONG HING, TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION 154 (1997) (suggesting that immigrants help to develop our constantly evolving culture).

7. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (delineating the standard for family privacy, which protects "a realm of family life which the state cannot enter"); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (concluding that the right to choose how to structure family relations is "deeply rooted in this Nation's history and tradition").

8. Reynolds v. United States, 98 U.S. 145, 164 (1878) (upholding a law punishing polygamy). *Compare Prince*, 321 U.S. at 165 (upholding a law punishing a guardian who allowed her child ward to proselytize on the street at night because that religious practice was inconsistent with children's "opportunities for growth into free and independent well-developed men and citizens"), *and Hardwick*, 478 U.S. at 196 (upholding a state statute criminalizing sodomy because the majority views that practice as "immoral and unacceptable"), *with* Wisconsin v. Yoder, 406 U.S. 205, 222 (1972) (holding unconstitutional the application of a state law punishing Amish parents for their practice of withdrawing their adolescent children from school, because that community "has been a highly successful social unit within our society"), *and* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding unconstitutional the application of a state law punishing German parents for teaching their primary school-aged children in that language, because "[m]ere knowledge of the German language cannot reasonably be regarded as harmful" to the ability of citizens to acquire American ideals), *and* Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding unconstitutional the application of a state law requiring parents to send their children to public school because the private schools at issue "effectively dis-

As Stanley Fish explains in the context of the First Amendment, where the question is "how far . . . the freedom of religion from state scrutiny [should] extend given that it is the function of the state to secure good order and stability," the answer our law and society give is

> "[t]olerate as much as you can so long as the basic shape of the enterprise, whether spiritual or civil, is not compromised; identify a base-line level of obligation that leaves believers free to live out their faiths within limits and provides the magistrate with a measure for determining when those limits are breached and a justification for enforcing them."[9]

This classic doctrine has been challenged recently by some modern multiculturalists who disagree with rulings the Supreme Court has made under its auspices, or who tout the merits of unbounded tolerance for individual and group difference.[10] Largely in response

charged their obligations to patrons" and employed "teachers . . . of good moral character and patriotic disposition").

The United States Commission on Immigration Reform recognized the continuing social vitality of the doctrine of ordered liberty when it noted in its Report to Congress that "American unity depends upon a widely-held belief in the principles and values embodied in the American Constitution and their fulfillment in practice" and that "[e]thnicity and religious diversity based on personal freedom is compatible with national unity." U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY, A REPORT TO CONGRESS, Executive Summary 5 (1997). This view is correct only so long as the doctrine of ordered liberty serves as the mechanism for resolving disputes that arise when the exercise of ethnic or religious diversity clash with the principles and values embodied in the American Constitution.

9. Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2261 (1997).

10. As Michael Lind notes:

> The multicultural left[ ]. . . believe[s] that the melting-pot conception of American identity has been, or should be, repudiated in favor of a new understanding of American society as a "mosaic" of five races or racelike communities—whites, blacks or African-Americans, Hispanics or Latinos, Asian and Pacific Islanders, and native Americans. These races are not mere ingredients to be blended in a future unity, but permanently distinct communities, like the Francophone and Anglophone populations in Canada, or the German, French, Italian, and Romansch nationalities in Switzerland. Each of the five American races has its own distinct culture, to which immigrants belonging to that race are expected to assimilate (Mexicans and Cubans join Hispanic America; Chinese, Indians and Filipinios join Asian-and-Pacific-Islander America, and so on). Moreover, each race, in addition to preserving its cultural unity and distinctness, should act as a monolithic political bloc (particularly since white Americans, according to the multicultural left, are guilty of racial bloc voting). Those who criticize the fivefold race-culture-political bloc scheme are, by definition, racists who wish to turn back the clock to the era of white supremacy.

MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION 98 (1995); *see also* HING, *supra* note 6, at 163-70 (describing this same perspective as "ideological separatism," and arguing that its existence is "undeniable" and is largely a reaction to majority racism). For an example of such a perspective in legal

to opponents of modern immigration, who seek to create or re-create a culturally-pure (i.e., white) America,[11] these multiculturalists argue that legal and social boundaries drawn by European-Americans are inherently racist or ethnocentric, and should therefore not apply in the new multicultural America.[12] While proponents of this view generally do not make their argument explicitly, it is a necessary result of the piecemeal argument that particular minority groups—whether indigenous or immigrant—should be permitted both as a legal and a cultural matter to engage in traditional or religious practices that fall outside of the larger society's assumed goals and values. Thus, for example, it has been argued that a "cultural defense" to immigrant crime, which affords the defendant a culturally subjective assessment of guilt and punishment, is necessary to assure that individuals are not improperly judged according to laws designed by white men.[13]

scholarship, see Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1600-11 (1996) (arguing that because any boundaries that might be established would be set by a majority that is racist and sexist, those boundaries would lack moral authority and should not govern immigrant communities). For different reasons, libertarians also argue that individual freedom should not be restrained by the mores of the majority. *See, e.g.*, William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 771 (1997) (describing the libertarian philosophy as "protecting the individual against state invasion of a socially defined private realm of freedom").

11. *See, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 264 (1995) (arguing that when the government reformed the immigration laws in 1965, it reneged on an "explicit[ ] promise[ ]" to keep the racial balance of the U.S. primarily white, and that Americans have a right to insist that "their government stop shifting it . . . [and] to insist that it be shifted back").

12. *See, e.g.*, Volpp, *supra* note 10, at 1609 & n.173 (describing Brimelow and others as "right-wing demagogues" whose "neoconservative version of multiculturalism" must be rejected). This argument has at least superficial appeal, since a person must show that a cultural or personal freedom or practice is "deeply rooted in this Nation's history and tradition" to receive the utmost protection from governmental intrusion under the doctrine of ordered liberty. *See Hardwick*, 478 U.S. at 192 (quoting *Moore*, 431 U.S. at 503). The appeal is only superficial, however, since among those matters which are accepted as "deeply rooted," and thus protected, are very broad categories of freedoms (including religious freedom and the freedom to conduct family relations) that subsume many of the controversial traditional practices of contemporary immigrants.

13. *See* Volpp, *supra* note 10, at 1595-600 (calling for "color consciousness" in the law as a way to combat "subordination" of people of color and women); *id.* at 1616-17 (arguing that to "refus[e] an explicit consideration of 'race' or 'culture' within our legal system will . . . result . . . in a replication of dominant patterns of dispersal of power"). As I described elsewhere, "[t]he affirmative presentation of foreign customs as exonerating evidence in criminal cases where both the defendant and his victim are from the same culture, known in the legal literature as the immigrant 'cultural defense,' is perhaps the clearest example of how multiculturalism has influenced the law . . . . The defense assumes that 'someone raised in a foreign culture should not be held fully accountable for conduct that violates United States law . . . [if that conduct]

The logical effect of such a doctrine would be to create a balkanized legal system and a country without fixed legal boundaries, where the rules of social conduct depended upon the ethnicity of the actor.[14] In any event the doctrine certainly does not allow for the boundaries currently fixed by white men.

Despite the energy with which this argument is made and one's individual views concerning the propriety of particular decisions of the Supreme Court, the doctrine of ordered liberty is alive and well as the paradigm that governs and, more importantly, should govern the way we resolve cultural collisions and other conflicts between individual freedom and the necessary social order. Without such balancing—which, again, assures that both of these constitutional values are given consideration in each collision between the two—American society would effectively be forced to choose between one of two deplorable states: the anarchy of complete freedom or a social order defined exclusively by the current ethnic majority.[15]

This Article demonstrates the continued relevance of the doctrine of ordered liberty in the context of our contemporary plural-

would be acceptable in his or her native culture.'" Coleman, *supra* note 3, at 1100-01 (quoting Melissa Spatz, Note, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597, 620 (1991) (citations omitted)).

14. *See supra* note 13 (defining the cultural defense). As I have argued elsewhere, allowing a cultural defense to immigrant-on-immigrant crime would have the effect of renewed apartheid in the law. *See* Coleman, *supra* note 3, at 1144. Rather than having only two legal systems—one black and one white—however, the new apartheid would be multiplied by all of the immigrant or minority groups that could show they had legal or cultural traditions that were different from those of the majority. When people argue on behalf of the cultural defense because the law otherwise is ethnocentric, patronizing, and/or racist, they are wittingly or unwittingly setting at least the theoretical stage for such apartheid, and for a balkanization of American society generally. *But cf.* Volpp, *supra* note 12, at 1594-600, 1609-16 (criticizing my view in this regard and arguing that the cultural defense is appropriately used in a context where American culture and its legal tradition, because of its history of racism, cannot otherwise be fair to immigrants).

15. As Professor Fish has explained, this is merely a political reality: "[I]n the absence of common ground there can be no state and no laws . . . common ground will be what emerges (temporarily) when one party wins the right (through war, elections, dynastic succession, etc.) to determine the decorums of proper behavior." Fish, *supra* note 9, at 2264.

To argue that the doctrine of ordered liberty is necessary in a pluralistic society to assure both that individual and group differences are respected and that the society does not become fragmented, is not to say that every decision the courts reach under its auspices is correct. For example, there is a substantial argument that the Supreme Court was wrong to allow states to classify sodomy as an illegal practice that is subversive of good order or otherwise inconsistent with prevailing social dictates. *See Hardwick*, 478 U.S. at 196 (finding that a majority of Georgia voters viewed "homosexual sodomy [as] immoral and unacceptable"). The fact that the Court may sometimes be wrong, however, does not diminish the value of the doctrine as a necessary tool to resolve conflicts between the majority and minority groups or individuals.

ism.[16] It is about an effort by a group of Somali immigrants in Seattle that tested to the maximum the boundaries and integrity of the American tradition of tolerance: These immigrants sought to have their daughters *symbolically* circumcised by a state hospital; the procedure would have involved no tissue removal or subsequent scarring, and, according to those concerned, would have prevented the immigrants from seeking to have their daughters cut in the traditional way. The Article is also about the extraordinary sensitivity some members of the Seattle community displayed in addressing the immigrants' cultural and religious concerns, the sometimes predictable and sometimes surprising ways others inside and outside of the community reacted, and the lessons, both large and small, that can be derived from the episode. Ultimately, the Article demonstrates the value of ordered liberty as a pragmatic tool to achieve solutions to cultural collisions which otherwise are embedded in the quagmire of theory and rhetoric created by cultural relativists, anti-immigrant assimilationists, and, as this Article will show, sometimes even by well-meaning liberals.

Part I describes the background of the domestic and international discussions concerning the issue of female genital mutilation (FGM). It focuses particularly on the practical and theoretical obstacles, largely ignored and even in some instances created by Western opponents, to the eradication of the practice throughout the world. In this context, Part I discusses the sincere belief of many practitioners, including immigrants, that female circumcision is mandated by their religion. It also addresses the argument among Western feminists and cultural relativists concerning both the substance of the cultural critique of FGM and the manner in which that critique is made. Highlighted in this context is the particularly thorny theoretical impasse created by charges of barbarism and patriarchy from one side, and imperialism and ethnocentrism from the other.

Part II sets out the facts of the Seattle dispute and compromise. It describes the immigrant community's overtures to the hospital; the cultural and religious bases for the immigrants' belief that the circumcisions are required; the hospital's initial rejection of the immigrants' requests, as well as its efforts to resolve the matter through compromise with the immigrant community; the proposal to perform ritual or symbolic circumcisions that was suggested by the hospital's

16. *See supra* notes 3-4 and accompanying text (describing this contemporary pluralism).

review committee; and the resulting public outcry that ultimately destroyed the proposal.

Part III addresses the legal issues implicated by the hospital's proposal, including the impact of the federal statute banning FGM, of state child abuse laws, and of equal protection doctrine. It concludes that the proposal did not contravene federal law, and that where the circumcisions are only symbolic, the Equal Protection Clause requires that child abuse laws be read to treat boys and girls similarly: either no parent is accommodated, and no child is cut (absent a successful exception on religious grounds for either), or all parents are accommodated, and both boys and girls are cut.

Part IV explores more particularly the merits of symbolic circumcision. It discusses the principal argument of its opponents—that even in its limited form, the procedure would have been abusive and would have lent legitimacy to the more severe forms of the traditional practice. It also discusses the argument that the compromise procedure would have defeated the process of Americanizing the immigrants at issue. It weighs these arguments against those of the procedure's proponents: that the procedure was necessary to assure the eradication of the more severe forms of FGM in that community; that it assured both the moral and medical sensitivity sought by cultural relativists; and that rather than detracting from the Americanization process, it was entirely consistent with its underlying requirement of a transition period. This Part concludes that the proposal should have been implemented for the reasons suggested by its proponents. In doing so, it argues that the hospital's proposal fits within the paradigm of ordered liberty by assuring both multicultural sensitivity *and* the successful Americanization of immigrants.

The Article concludes that despite its premature demise, the Seattle compromise provided a provocative and useful model for other Western communities that seek to address the very important issue of FGM. It also suggests that the process the hospital undertook to address the immigrants' concerns can be useful to address other cultural collisions which, at first glance, may appear to pose irreconcilable differences, but which, upon more careful examination, are ripe for compromise.

I. THE POLITICAL AND THEORETICAL CONTEXT OF THE FEMALE GENITAL MUTILATION DISCUSSION

The traditional practice that some feminists and human rights activists have dubbed "female genital mutilation" (FGM)[17] has received much public attention over the past ten years. Outrage over reports that many cultures and some Muslims require the excision of portions or all of a young girl's external genitalia has captivated the

17. The debate over the propriety of this term has raged since the inception of Western efforts to eradicate the traditional practice it describes. Indeed, footnotes such as this, recognizing and describing the controversy over nomenclature, have become almost *de rigeur* in recent articles discussing the subject. *See, e.g.*, Isabelle R. Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 193-94 n.15 (1992); Hope Lewis, *Between* Irua *and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 1-2 n.4 (1995); Barrett A. Breitung, Comment, *Interpretation and Eradication: National and International Responses to Female Circumcision*, 10 EMORY INT'L L. REV. 657, 662 n.17 (1996).

It is the position of most Western opponents of the traditional practice that its various forms and the manner in which it is performed justify the term "mutilation," particularly given that in its "mildest form, clitoridectomy . . . is anatomically equivalent to amputation of the penis." Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 NEW ENG. J. MED. 712, 718 (1994).

On the other hand, some members of the cultures that practice FGM, as well as many cultural relativists, insist that the term is judgmental, patronizing, and imperialistic, and that these perceptions ultimately hamper any real communication between the Western opponents of FGM and their counterparts in the cultures that engage in the practice, who traditionally have preferred the term "female circumcision." *See, e.g.*, Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155, 170 (1985) (describing the view of some African women that the term "mutilation" is offensive and thus impedes positive dialogue); L. Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 289-90 (1997) (describing the debate over phraseology, noting the flaws in both popular terms "circumcision" and "mutilation," and arguing that she uses the term "circumcision" because "[t]he 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").

Largely in an effort to avoid this debate, some commentators have developed other terms to describe the practice. *See, e.g.*, Gunning, *supra passim* (using the expression "female genital surgery"); Obiora, *supra*, at 288 (using, on at least one occasion, the term "[g]enital scarification and reconstruction"). These terms have yet to catch on, perhaps because they are problematic in their own way. (For example, both appear to imply that the practice is somehow medical in nature; given its traditional forms, however, these terms are euphemistic at best.) This Article will use both FGM and female circumcision, depending on the perspective being discussed.

popular press,[18] the legal academy,[19] and the political arena.[20] Although largely initiated by women from the mostly African and Asian cultures that practice FGM,[21] the public *international* discus-

18. While there has been much in the American press in the last few years on the topic of FGM, A.M. Rosenthal in particular has written consistently on the subject. *See, e.g.*, A.M. Rosenthal, Editorial, *Making the World a Better Place*, SUN-SENTINEL (Ft. Lauderdale), June 2, 1996, at 5G (urging President and Hillary Clinton and Bob and Elizabeth Dole to use their political influence to achieve a ban on FGM); A.M. Rosenthal, Editorial, *Female Mutilation No Longer Tolerated*, LEXINGTON HERALD-LEADER, Sept. 12, 1994, at A13 (noting significance of international agreement at U.N. Conference in Cairo to include the following statement in the Cairo declaration: "[g]overnments are urged to prohibit female genital mutilation wherever it exists and to give vigorous support to efforts . . . to eliminate such practices"); A.M. Rosenthal, Editorial, *And the Torture Continues*, BALTIMORE EVENING SUN, July 28, 1993, at 15A (expressing "hope that [the practice of FGM in the U.S.] might arouse some interest among Americans"); A.M. Rosenthal, Editorial, *Torture Too Long Ignored: Female Genital Mutilation Has Scores of Millions of Living Victims Around the World*, DAYTON DAILY NEWS, Jan. 4, 1993, at 7A (noting, in his first column on FGM, that it was "the most widespread abuse of human rights and the human body in the world"); *see also, e.g.*, Brune, *supra* note 1 (describing the practical problem that is stopping FGM in the U.S. in the context of Harborview's proposed alternative to FGM); Celia W. Dugger, *Clash of Cultures, Customs: Rite of Female Genital Cutting Collides with U.S. Views, New Law*, CHARLOTTE OBSERVER, Dec. 26, 1996, at 2A (describing a Somali refugee's insistence that his daughters be circumcised in the U.S. despite the federal ban).

19. *See, e.g.*, Gunning, *supra* note 17, at 197 (noting criticism that FGM is a practice which imposes male authority upon women through control of their bodies and sexuality); Lewis, *supra* note 17, at 3 (noting the tension concerning Western feminist discourse regarding their human rights-based, cross-cultural approach to stopping FGM); Obiora, *supra* note 17, at 377 (arguing that current attempts to eradicate FGM may fail because they do not take into account the cultural primacy of the practice).

20. FGM has been banned in France, England, Canada, and the United States, among other countries. *See* Breitung, *supra* note 17, at 664-77 (discussing current Western legal sanctions against FGM). In the United States, the practice has been the subject of both federal and state legislation. *See, e.g.*, Federal Prohibition of Female Genital Mutilation Act, 18 U.S.C.A. § 116(a) (West Supp. 1997); CAL. PENAL CODE § 273.4 (West Supp. 1998); DEL. CODE ANN. tit. 11, § 780 (Supp. 1996); MINN. STAT. ANN. § 609.2245 (West 1998); N.D. CENT. CODE § 12.1-36-10 (Supp. 1997); TENN. CODE ANN. § 39-13-110 (1997); WIS. STAT. ANN. § 146.35 (West 1997). FGM has also been the subject of intense international political scrutiny, principally in the course of international human rights discussions of "traditional practices" and women's rights. *See, e.g.*, Boulware-Miller, *supra* note 17 *passim* (describing the international human rights efforts to eradicate female circumcision); Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 LAW & INEQ. J. 367 (1989) (describing these same efforts); Breitung, *supra* note 17, at 677-84 (discussing efforts to treat FGM as a violation of the international human rights to health, freedom from torture and degrading treatment, and generally the rights of women).

21. *See* Boulware-Miller, *supra* note 17, at 159-60 (describing efforts by African women to eradicate female circumcision). Most prominent in the discussion in the United States are Meserak "Mimi" Ramsey, who is originally from Ethiopia and who founded the anti-FGM organizations Forward USA and Forward International, and Fauziya Kasinga, who is from Togo and whose case set the precedent for FGM being a considered a legitimate basis for asylum. *See*

sion (at least that heard in the United States) often appears to be dominated by Western feminists and rights advocates who view FGM as a women's rights issue, and who seek recognition of a universal human right not to be genitally mutilated.[22] To support their position, they have introduced an international audience to the details of the various forms of the practice, which range from simple "*sunna*" circumcisions requiring "only" the partial or complete removal of the clitoris to complete "Pharaonic infibulations" requiring removal of all of a girl's external genitalia followed by the stitching together of the resulting wound.[23] The drastic medical ramifications of these pro-

infra notes 114-15 (describing contributions of Mimi Ramsey); FAUZIYA KASSINDJA & LAYLI MILLER BASHIR, DO THEY HEAR YOU WHEN YOU CRY (1998).

22. Alice Walker's 1992 novel *Possessing the Secret of Joy* is largely credited with exposing FGM to the American audience. *See generally* ALICE WALKER, POSSESSING THE SECRET OF JOY (1992) (portraying a fictionalized account of an African immigrant who went mad and died after being forced to submit to FGM). *See also* ALICE WALKER & PRATHIBA PARMAR, WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN 253 (1993) (recounting the journeys and experiences of Walker and Parmar while making a documentary film on female genital mutilation in Africa); Paul Giddings, *Alice Walker's Appeal*, ESSENCE, July 1992, at 59 (book review and interview); *Nightline: The Disturbing Issue of Female Genital Mutilation* (ABC television broadcast, Sept. 20, 1993). In the United States, "interest in FG[M] is attributable in part to recent fictional and documentary work done by Alice Walker and to several high-profile FG[M]-related refugee and asylum cases." Lewis, *supra* note 17, at 4. FGM also has "received much attention in the Western press and among Western feminists since about 1979, largely as a result of the work of Fran Hosken." Rhoda Howard, *Women's Rights in English-speaking Sub-Saharan Africa*, *in* HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 46, 66 (Claude E. Welch, Jr. & Ronald I. Meltzer eds., 1984); *see also* Brennan, *supra* note 20, at 376 n.47 (noting Hosken's contribution to the FGM debate).

Interestingly, this "discovery" by Westerners of FGM in Africa ignores the practice in our own history, which, according to Professor Obiora, persisted in the United States until the 1950s, and also was based on a desire to impose "patriarchal control on female sexuality." Obiora, *supra* note 17, at 298-99. Although the practice was never commonplace in American culture, Obiora is correct that

> [f]emale 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. . . . [Circumcision] was also foisted as a "remedy" for female masturbation . . . .

Id. at 298; *see also infra* note 224 (discussing the history of FGM in the U.S.).

23. *See* Coleman, *supra* note 3, at 1111 n.91 (describing the practice of FGM). A "*sunna*" circumcision, also known as a clitoridectomy, "involves the removal of a part of the clitoris or the whole organ." *Id.* (quoting Toubia, *supra* note 17, at 712). Infibulation

> involves the removal of the clitoris and the labia minora, plus incision of the labia majora to create raw surfaces . . . that are stitched together to cover the urethra and the entrance to the vagina with a hood of skin, leaving a very small posterior opening for the passage of urine and menstrual blood.

cedures—including bleeding, infection, and sometimes death—have featured prominently in this discussion.[24] In general, however, the focus of Western condemnation of FGM lies in its patriarchal underpinnings[25] and in the fact that it deprives the girls and women in those societies of what Western opponents call the "right to sexual and corporal integrity."[26] Specifically, opponents of FGM have noted that girls are subjected to this practice, *inter alia*, to prevent promiscuity and to assure that they will remain chaste for their future husbands.[27]

Id. (quoting Toubia, *supra* note 17, at 712) (alteration in original). Whatever the case, "the procedure . . . generally is performed without anesthetic by a layperson." *Id.* at 1111. "Bleeding from the raw surfaces and from the clitoral artery may be halted with a few stitches of catgut or thorn or by the application of homemade poultices." *Id.* at 1111 n.91 (quoting Toubia, *supra* note 17, at 712).

24. *See, e.g.*, Coleman, *supra* note 3, at 1112 (discussing the common medical implications of FGM).

25. *See* Gunning, *supra* note 17, at 197.

26. Boulware-Miller, *supra* note 17, at 169-72 (characterizing the sexual/corporal integrity argument as one frequently raised by Western feminists).

27. *See, e.g.*, Coleman, *supra* note 3, at 1112. It also has been said that the procedure is necessary based on the belief that if not cut off, "the clitoris . . . would continue growing, eventually reaching the knees." Jacquie Miller, *Canadian Aid Helps Stop Ritual Genital Mutilation of Girls in Rural Mali*, OTTAWA CITIZEN, Jan. 22, 1997, at A5. Professor Obiora condemns this patriarchal focus, which she characterizes as an example of the Western emphasis on the negative aspects of the traditional practice. *See* Obiora, *supra* note 17, at 300-07. Specifically, she notes that in addition to this patriarchal rationale for FGM, the rite also "serves the multiple purpose of expressing, inculcating, and ensuring the maintenance of cultural values and identity." *Id.* at 295; *see also* Boulware-Miller, *supra* note 17, at 157-58 (describing the complex social, economic, and cultural rationales for the traditional practice, including the belief that circumcision is required to ensure suitability for marriage and thus to "avoid becoming social and economic outcasts").

Professor Obiora is correct that Western critics generally have focused on the patriarchal and sexual issues surrounding FGM to the virtual exclusion of other issues, thus avoiding the complexities inherent in the situation of African women and girls. On the other hand, it is apparent that the other, more positive rationales for the traditional practice are themselves tied to or even stem from the patriarchal structure of the society, and the fact that this structure relies at least in part on the physical and cultural domination of women. Thus, the fact that female circumcision is in some cultures a rite of passage and a prerequisite to marriage may simply be a manifestation of the core principle that women are to be submissive and that rituals designed to assure the perpetuation of that principle are to be encouraged. This is not so foreign a notion even for Western women, since, as Professor Obiora herself notes, we do not have to look back so far in time within our own cultures to see very similar patterns, practices, and motivations. *See* Obiora, *supra* note 17, at 298-99 (describing Western history of FGM); *see also infra* note 224.

Whatever the case, it appears that this Western perspective is not particularly helpful, because even, and perhaps especially, the African women who seek to eliminate the practice of FGM resent it. This point is made most persuasively by Kay Boulware-Miller. *See* Boulware-Miller, *supra* note 17, at 169-72 (noting how the Western feminists' right-to-corporal-integrity argument alienates African opponents of FGM because it ignores the socio-political context in which the practice is performed). Her informative and concise work describing, among other

In the course of their challenge, opponents of FGM often have sought to reject or marginalize the view that the practice is dictated by religion,[28] apparently believing that this makes their argument more acceptable.

However, despite their obvious successes, opponents of FGM have not offered viable solutions for two of the most important problems inherent in the discussion. First, they have failed to provide a blueprint that would eventually lead to the eradication of the practice. Second, opponents of FGM have failed adequately to meet the more theoretical but equally thorny challenge from willing FGM participants and cultural relativists who reject what they view as the "imperialism" inherent in the perspectives of their Western critics.[29]

The first problem exists because FGM is ingrained in the cultures of the people who engage in its practice and, despite the hearty denials of its opponents, sometimes in their religions as well. As a result, the promulgation or administration of criminal sanctions against the practice by both Western countries that harbor immigrants from

things, the problems with the Western emphasis on sexuality and bodily integrity, should be required reading for anyone in the West who is interested in the issue, or who works with affected immigrant communities.

28. *See, e.g.*, 140 CONG. REC. S14,242, S14,244-45 (daily ed. Oct. 5, 1994) (statement of Sen. Moseley-Braun) (contrasting religious right to male circumcision with lack of religious foundation for FGM). Consistent with the approach of Senator Moseley-Braun, Patricia Schroeder is said to have sought purposefully to minimize the significance of the religious issue in the course of her successful effort to convince the House of Representatives to pass its federal proscription of FGM. *See* Donna Abu-Nasr, *Woman's Efforts to Ban Genital Mutilation of Girls Pays* [sic] *Off Today*, SEATTLE TIMES, Mar. 29, 1997, at A3 *see also infra* notes 33-34 and accompanying text (discussing the argument that FGM is not a religious requirement).

29. "Cultural relativism is a 'doctrine that holds that (at least some) . . . variations [in moral rules and social institutions] are exempt from legitimate criticism by outsiders.'" Breitung, *supra* note 17, at 684 (omissions and alterations in original) (quoting Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 400 (1984)). "[T]he relativist cannot disapprove of specific cultural practices . . . because the practices regarded as reprehensible are judged according to an ethnocentric standard." Alison Dundes Renteln, *The Unanswered Challenge of Relativism and the Consequences for Human Rights*, 7 HUM. RTS. Q. 514, 514 (1985); *see also* Gunning, *supra* note 17, at 190-91 (defining "cultural relativist" as one who believes that "all cultures are fine on their own terms," and that "universalism [is] barely disguised ethnocentrism, a cultural imperialism"). Gunning also describes the imperialism inherent in the "arrogant perception" of some Western critics of FGM. *See id.* at 198-99. I have been charged with such imperialism (sometimes "neoimperialism") for the views I expressed in my article, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, *supra* note 3, which opposes use of a "cultural defense" to prosecutions of FGM as child abuse. *See* Volpp, *supra* note 10, at 1577, 1599, 1609.

these cultures[30] and countries like Egypt[31] that seek to encourage their own cultures to evolve away from the practice, have done little to prevent its performance.[32]

The categorical view that FGM is not required by Islam has been particularly pernicious.[33] The fact is that despite the views of some Islamic clerics who have stated that the traditional practice is culturally- rather than religiously-based,[34] many Muslims continue fiercely

30. *See supra* note 20 (describing Western political efforts to eradicate FGM).

31. See BBC News, Egyptian Court Holds Up Ban On Female Genital Mutilation (visited Dec. 28, 1997) <http://news.bbc.oo.uk./hi/english/world/middle%5Feast/newsid%5F42000/42986.stn> (reporting that the highest administrative court in Egypt, the Council of State, upheld an official ban on FGM). The Council of State's ruling overturned a lower court's ruling that the ban placed undue restrictions on physicians. See Douglas Jehl, *Egyptian Court Overturns Ban on Cutting of Girls' Genitals*, N.Y. TIMES, June 26, 1997, at A12. The ban, instituted by the government of President Hosni Mubarak in the wake of pressure from human rights advocates, prohibits "female genital cutting" by both non-medical and medical personnel. *See id.* The ban is aggressively opposed by some Islamic leaders who assert that the practice is required by Islam. *See id.* Hisham Mubarak, a human rights activist, described the conflict: "There is a real crisis in Egyptian society; it is half-secular, half-religious . . . . The Government has not decided what it wants to be. Egyptian civil society is stuck between a rock and a hard place, between the Government and the Islamists." *Id.* Polls conducted in Egypt "have shown that 70 to 90 percent of Egyptian women have been subjected to some form of genital cutting, although for younger urban women the percentage is far less." *Id.*

32. Some have noted this failure in the U.S. federal proscription, saying that it is

> more a political statement—that Americans disapprove of this procedure—than an answer to the problem. "If someone is performing (the operation) in this country[,] they're probably not terribly concerned about U.S. laws . . . . The community is going to close off and protect the people who are performing it. This is not something that people are forced to do. This is something that people want to do."

Abu-Nasr, *supra* note 28 (quoting Dr. Michael Rich of Boston's Children's Hospital); *see also* Boulware-Miller, *supra* note 17, at 158 (noting that "[w]hile legislation should not be disregarded as a possible means to eradicate the practice, successful efforts to reduce the incidence of female circumcision will likely come from community-based health and educational programs rather than from penal sanctions").

33. *See, e.g.*, TiaJuana Jones-Bibbs, Note, *United States Follows Canadian Lead and Takes an Unequivocal Position Against Female Genital Mutilation:* In Re Fauziya Kasinga, 4 TULSA J. COMP. & INT'L L. 275, 278-79 (1997) ("Pro-FGM scholars attempt to justify their position by noting the alleged [religious] history of FGM . . . [however] FGM is a matter of tradition and not religion."); Kris Ann Balser Moussette, Note, *Female Genital Mutilation and Refugee Status in the United States—A Step in the Right Direction*, 19 B.C. INT'L & COMP. L. REV. 353, 362 (1996) ("Adherence to religion is also a popular justification for FGM, but neither Christian nor Islamic dogma requires such mutilation"); Mary M. Sheridan, Comment, In Re Fauziya Kasinga: *The United States Has Opened Its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433, 439 (1997) ("The rationale that FGM is based on religious beliefs is misguided.").

34. *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, 424-25 (1996):

> The religious reasons cited for perpetuating FGM are unpersuasive because the practice is not explicitly mandated by either Islam or Christianity, the two pre-

to debate whether FGM is required by Islam.[35] A thorough examination of this debate is beyond the scope of this Article. However, to appreciate the commitment certain immigrants have to female circumcision, and also to determine the constitutional weight to be accorded that practice, it is important to understand at least in a general way the basis for the traditional view of some Muslims that it is religiously-based.

There are two sources of Islamic law, the Koran and the *Sunna*. The Koran is the principal source of authority in Islam because it contains God's own proclamations to the Prophet Mohammed.[36] For the definitive interpretation of the Koran, Muslims turn to the *Sunna*, a compendium of the Prophet's sayings and customs.[37] Individual sayings or customs of the Prophet are called *hadith*.[38]

The Koran does not mention female (or male) circumcision.[39] However, this omission is not unusual in and of itself, as that text does not address many specific subjects of importance to the religion.[40] On the other hand, the subject of female circumcision does appear in the *Sunna*, where, according to Professor Annemarie Schimmel, a "barely known" *hadith* addresses the practice directly.[41] It is apparently from the *Sunna* that many Muslims derive their view that female circumcision is mandated by Islam:[42] If a practice was done in

> dominant religions of the countries where FGM is practiced . . . Islam is the religion most associated with the regions where FGM is performed and its leadership has, on multiple occasions, refuted the notion that FGM is mandated by Muslim precepts.

35. *See supra* note 31 (describing this debate in Egypt); *see also* Sami A. Aldeeb Abu-Sahlieh, *To Mutilate in the Name of Jehovah or Allah: Legitimization of Male and Female Circumcision* (visited Nov. 7, 1996) <http://www.hollyfeld.org/~xastur/mutilate.html> (setting out disagreement among Muslim scholars concerning religious basis for female circumcision, and arguing that it is not a requirement of Islam).

36. *See* ANNEMARIE SCHIMMEL, ISLAM 29 (1992).

37. *See id.* at 51-52.

38. *See id*. There are approximately three thousand recognized *hadith*. *See id.*

39. *See* SCHIMMEL, *supra* note 36, at 54-55; Abu-Sahlieh, *supra* note 35, at n.13 and accompanying text.

40. *See* SCHIMMEL, *supra* note 36, at 51.

41. *Id.* at 55; Abu-Sahlieh, *supra* note 35, at nn.41-42. For example, the *Sunna* describes Mohammed explaining to a female circumcisor that excision "is allowed" and as instructing the circumcisor "if you do cut, do not overdo it . . . because it brings more radiance to the face . . . and is . . . better for the husband." Abu-Sahlieh, *supra* note 35, at n.41 (parenthetical omitted). Mohammed also is said to have stated that "[c]ircumcision is a sunnah for the men [i.e., conforms to the tradition of Mohammad] and makrumah [an honorable deed] for the women." *Id.*

42. *See* SCHIMMEL, *supra* note 36, at 55 (noting that a number of Muslim communities engage in the practice); *see also infra* notes 92-95 and accompanying text (describing view of some Somali immigrants that the practice is required by Islam because it is mentioned in a *hadith*,

the time of Mohammed, and especially if Mohammed sanctioned it, it is considered a requirement of the religion. The religious status of female circumcision is contested despite its existence in a confirming *hadith* because the relevant authority is obscure, and also because not all *hadith* are considered reliable.[43]

In any event, many Muslims who believe that female circumcision is required by Islam are not personally familiar with the religious texts or the substance of the *hadith* in question.[44] These Muslims particularly appear to derive their belief that the practice is religiously-mandated from the overriding principle of Islam—which itself means "complete surrender to the Divine will"[45]—that the religion governs all of their lives' activities, and from the specific statements of their clerics.[46]

Although this view of religion as encompassing all facets of life may be foreign to some who are not Muslim, it is perfectly consistent with Islam.[47] Islamic law, for example, "is a way of life that governs morals, religious practice, and the resolution of civil, criminal and family matters."[48] The Koran itself "contain[s] solutions for all problems that arise in the world"[49] including "quite a number of regulations for worldly affairs, daily life, and political order."[50] While

and noting that consistent with this *hadith*, the traditional form of female circumcision practiced in Somalia is called *sunna*, or "in the tradition of Mohammed").

43. *See* SCHIMMEL, *supra* note 36, at 52-53 (discussing "sound" and "less 'sound'" *hadith* generally); Abu-Sahlieh, *supra* note 35, at nn.43-45 (arguing that the *hadith* on which female circumcision is based is suspect). It is important to understand that the scholarly study of the *sunna* is in fact primarily a study of the reliability of individual *hadith*, and involves in each instance a search for the genealogy or provenance of the *hadith* to determine to the extent possible whether or not it actually comes from Mohammed himself. *See* Schimmel, *supra* note 36, at 52-53. As a result of these searches, "each *hadith* consists of the text . . . and the . . . chain of those who have heard the text in question." *Id.* at 52. To be considered authoritative, "[t]his chain has to continue without interruption to Muhammad or one of his companions." *Id.*

44. In part this is because the texts are in Arabic, and thus they are both translated and interpreted for most Muslims by their own clerics.

45. *Id.* at 14.

46. *See, e.g.*, *supra* note 31 (describing clerical source of some Egyptian Muslims' belief that female circumcision is a requirement of Islam); *see also infra* note 98 and accompanying text (quoting Somali immigrant as saying that "[e]verything we do comes from religion—how we eat, how we dress, how we talk to people").

47. *See* SCHIMMEL, *supra* note 36, at 17 (describing Islam as teaching that "[a]ll of life was and is permeated by religion").

48. Jill Schachner Chanen, *Beheading and Blood Money*, A.B.A. J., Jan. 1998, at 34.

49. SCHIMMEL, *supra* note 36, at 30.

50. *Id.* at 33; *see also infra* notes 92-99 (describing this broad basis for the view of some Somali immigrants that female circumcision is required by Islam). Of course, it is also this gen-

this premise is less specific than that which is based directly in the relevant *hadith*, because it is the bedrock of Islam it nevertheless constitutes a basis for believing, as many Muslims clearly do, that their religion requires them to circumcise their daughters.[51]

Ultimately, belief is the critical ingredient for constitutional purposes: First Amendment doctrine requires that those seeking its protection demonstrate a sincere personal belief that a traditional practice is religiously-mandated.[52] Significantly, this First Amendment test does *not* require that the belief comply with standard religious "dogma."[53] Thus, even if mainstream Islamic scholars ultimately determine that female circumcision is not a requirement of Islam, the right of sincere dissenters to the protections of the First Amendment would not be affected.[54]

The failure of mostly Western opponents of FGM to recognize the almost-impermeable impasse that is created by the religious beliefs of some Muslims is not the only stumbling block these opponents face in their efforts to eradicate FGM. The second, more theoretical problem, concerns the criticism raised by cultural relativists that Western interference is inappropriate because it is based in "imperialistic" tendencies. Professor Isabelle Gunning makes this point eloquently. She agrees that what she calls "female genital surgeries" ought to be eradicated, but notes that the lack of respect inherent in the West's incredulous and categorical condemnation of the practice has contributed to a backlash within the cultural and religious communities that embrace it.[55] A particular sore point has been

eral foundation that creates the potential for the argument that the practice of female circumcision is culturally- rather than religiously-based.

51. *See infra* notes 92-99 and accompanying text.

52. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (holding that the Free Exercise Clause protects individuals with sincerely held religious beliefs even when those beliefs do not arise out of the commands of an established religious sect); Thomas v. Review Bd., 450 U.S. 707, 713-14 (1981) (stating that individual religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

53. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 970 (1997).

54. As a result, Muslims who believe that female circumcision is required by their religion—even if they are in the minority—could argue that they should be protected under this doctrine. This argument likely would be overcome in cases where parents proposed to perform traditional circumcisions because the government has a compelling interest in protecting children from physical abuse. On the other hand, it is likely that no such compelling interest would exist if parents proposed to perform the sort of symbolic circumcision described in this Article.

55. *See* Gunning, *supra* note 17, at 198-200 (describing her own aversion to the practice, and noting that the "arrogant perception" of outsiders had alienated those within the affected

the emphasis Western feminists have placed on the argument that FGM deprives girls and women of "sexual and corporal integrity" because that focus ignores the "complex sociopolitical context" in

cultures who would be natural allies) (citing Marilyn Frye, *In and Out of Harm's Way*, *in* THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 52, 69 (1983)). Professor Gunning's article negotiates the divide between ethnocentrism ("arrogant perception") and cultural relativism ("independence"), noting the problems inherent in both perspectives, and suggesting that the solution to cultural collisions like "female genital surgery" lies in a recognition by multicultural feminists of their "interconnectedness." *See id.* at 202-47. Her work is exceptional in this regard, as it is one of only a few contributions to the growing literature on the subject of FGM that offers a paradigm to reconcile the two traditional opponents of FGM—cultural relativists who would eradicate female circumcision and Western critics of the traditional practice.

The only apparent difficulty with this attack on the imperialism of Western critics is that it appears to equate in all instances ethnocentrism with arrogant perception. Although Professor Gunning herself does not make this equation explicit—and thus she may not intend it—the implication is certainly inherent in the concept of arrogant perception and in related literature generally. The arrogant perceiver is described in Gunning's article as seeing the "other" as having "no independent perceptions and interest but only those that [the arrogant perceiver] impose[s]." *Id.* at 199. Gunning also describes the Western critic as viewing "[a]ny evidence that the 'other' is organized around her own interests [as] evidence of defectiveness in the 'other.'" *Id.* (citing Frye, *supra*, at 69). She argues that in international matters, and perhaps also when confronted with domestic cultural collisions, the ethnocentrist sees the West as "good and enlightened," and the rest of the world as "ignorant and barbaric." *Id.* While it is beyond dispute that there are and always have been racist ethnocentrists who are on a mission to save "the ignorant savage," there also are ethnocentrists who are not racist.

Ethnocentrists who are not racist seek change because they believe their view is "better" or "the best" for reasons that have nothing to do with race or ethnicity. These ethnocentrists do not believe that "others" are "barbarians." For example, one can take the position of this Article, that FGM is wrong, without also believing that those who engage in the traditional practice lack "independent perceptions and interest," are somehow "defective," "ignorant," or are otherwise "victims" in need of rescue by so-called "enlightened" Western white women. Indeed, what has appropriately been described as the "complex socio-economic environment" in which women in Africa live and make decisions makes this characterization wholly illegitimate. *See infra* note 56 and accompanying text. Similarly, given that cultural context, the decision whether or not to circumcise cannot easily be reduced to a "sexual integrity" or "child abuse" issue. *See infra* note 56 and accompanying text. At the same time, however, recognizing or being sensitive to these facts does not mean that FGM is "the right thing to do." And it certainly does not signify that it is morally inappropriate to argue for its eradication *in the domestic (American) context*, where the practice can easily be characterized as child abuse and gender discrimination, based on the dispositive fact that women's socio-economic opportunities are entirely different in this country. To the contrary, given these different conditions, it is entirely appropriate to say that the anti-FGM perspective is the "better" one—not more enlightened, just better.

Relatedly, this position—particularly as applied to the practice of FGM in the West—and the role of Western feminists at least in the domestic discourse is entirely appropriate because these feminists are not and cannot be "imperialists" in their own country. The United States has a culture, just as do those countries where FGM is practiced indigenously. It is simply inaccurate to describe those who subscribe to American cultural tenets as "imperialists" or even as ethnocentrists when they seek to adhere to or to apply those tenets within the domestic context.

which the practice occurs.[56] What is ultimately significant for purposes of this Article, however, is that this relativist backlash has been based at least in part on the argument that Western concern is hypocritical because its cultures engage in what practitioners of FGM and cultural relativists see as the largely equivalent practice of male circumcision.[57] If you so willingly circumcise your boys, ask practitio-

56. *See* Boulware-Miller, *supra* note 17, at 171 (describing the argument of and the backlash against Western feminists even by women in the affected cultures who otherwise oppose female circumcision).

This emphasis on sexual deprivation is seen as particularly myopic by African women, for example, who view the issue of female circumcision in a larger "socio-political context" that includes sex as well as social and economic success. *See id*. at 170-71; *see also id*. at 165-69 (describing how the characterization of female circumcision as child abuse also ignores this wider context). Commentators setting out the African perspective have described African women as undertaking a balancing process where sexual integrity ultimately is judged to be less valuable than other social and economic benefits. *See id*. at 165-71 (making this point in the context of child abuse perspective on female circumcision). The fact that this consideration of the larger social context and resultant balancing takes place is said to highlight the "imperialism" and "arrogance" (some might even say ignorance) of the Western perception that "almost every woman on the planet [would be] horrified by [female circumcision] if they ha[d] time to think about it." Abu-Nasr, *supra* note 28 (attributing the quote to Patricia Schroeder). As a result, African opponents of FGM prefer an African solution to the problem, one which does not focus on "women's sexual integrity." Boulware-Miller, *supra* note 17, at 175.

Interestingly, a contextual approach was adopted by the Special Working Group on Traditional Practices, a section of the United Nations' Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, which itself was established, *inter alia*, to study how best to deal with the issue of female circumcision in the context of these relativist critiques. *See* Breitung, *supra* note 17, at 689-90. Its first report, issued in 1986, emphasized cultural context but chose to "appl[y] a balancing process weighing the procedure's health consequences against its cultural functions. The Working Group found that female circumcision, judged in its own context, had become increasingly obsolete due to social and economic changes in the practicing societies." *Id.* This fact of "social and economic change" is particularly pronounced in the case of immigrants to Western countries. *See supra* note 55 (discussing difference between African and Western contexts in which choice to circumcise is made).

57. *See, e.g.*, Obiora, *supra* note 17, at 319-20 (describing this alleged hypocrisy). Professor Obiora argues that while infibulation and clitoridectomy are not analogous to male circumcision anatomically, the traditional *sunna*, where only the hood or prepuce (foreskin) of the clitoris is removed, is directly analogous. *See id*. at 289. Since the *sunna* may serve the purpose of cleanliness and hygiene, an accepted rationale for male circumcision, Obiora concludes that "medicalization" of the female procedure should satisfy those who honestly address its demerits, and ensure equal protection guarantees for parents of girls who wish them circumcised under these constraints. *See id*. *passim*. Although this position goes a long way toward recognizing the valid arguments and concerns of both sides of the dispute, it is quite unlikely that this particular physical equation, even with the protections afforded by medicalization of the female procedure, makes male and female circumcision the same thing, particularly for equal protection purposes. For example, this argument ignores the very real potential for vastly different emotional damage to boys and girls, and for vastly different physical ramifications. In any event, Professor Obiora's very provocative argument, and responses to it, are thoroughly set forth in Colloquium, *Bridging Society, Culture, and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. 263 (1997).

ners of female circumcision, how can you condemn us for doing the same to our girls?

This analogy can and has been rejected as specious and disingenuous, as the traditional forms of FGM are as different from male circumcision in terms of procedure, physical ramifications, and motivation as ear piercing is to a penilectomy.[58] Nevertheless, the attempt to analogize the two has been provocative, and has succeeded to some extent in causing opponents of FGM to question the propriety of Western action against the practice.[59]

It is against this backdrop that the ultimately inconsequent but nevertheless laudatory efforts of one hospital in Seattle must be viewed. That hospital, Harborview Medical Center, confronted perhaps for the first time in the United States[60] not only the practical problem of how to stop FGM in its community, but also the usually disingenuous, but in this case ultimately legitimate, comparison between FGM and male circumcision.[61] Harborview did not categorically reject the repeated requests of the immigrant mothers who asked to have both their girls and boys circumcised.[62] Instead, it lis-

58. *See infra* notes 184-204 and accompanying text (discussing the differences, both physical or medical and motivational, between FGM and male circumcision).

59. For example, "[o]fficials at three private Atlanta [immigrant and refugee] resettlement agencies said they avoid the controversial topic in their refugee orientation programs" because they were reluctant to condemn the immigrants' traditional practices. *See* Jane Hansen & Deborah Scroggins, *Female Circumcision: U.S., Georgia Forced to Face Medical, Legal Issues*, ATLANTA J. & CONST., Nov. 15, 1992, at A1; *see also* Gunning, *supra* note 17, at 190-91 (wrestling with the dilemma caused by multicultural feminism).

60. *See* Brune, *supra* note 1 (arguing that "[t]hough this is an issue physicians and hospitals across the country likely are facing, Harborview is the only one to discuss the problem openly as a public health issue"); Tina Kelley, *Token "Circumcision" is Too Painful; Ritual: Seattle Doctors Hoped Their Procedure Would Spare Young Women from Returning to Africa for Female Circumcision. But Even Their Symbolic Alternative Provoked a Public Outcry*, BALTIMORE MORNING SUN, Jan. 6, 1997, at 2A (reporting that "Harborview is the only medical center in the United States to address the issue"); *see also* Obiora, *supra* note 17, at 284-85 (describing efforts by Dutch government to implement a similar proposal).

61. *See* Obiora, *supra* note 17, at 284-85 (describing this same effort).

62. While FGM is said to be intended in large part to control the sexuality of girls for the present and future benefit or pleasure of men, it is generally performed by the women in the community, with the mothers and grandmothers of the female children orchestrating the procedure. *See infra* Part II (describing involvement of women in procedure and decision making). Indeed, in the traditional Somali culture and religion at issue in the Harborview context, men apparently are excluded from participating in the traditional practice. *See id*. The irony in this arrangement is extraordinary, for not only is the ritual patriarchal in nature, but the culture has evolved the added bonus for men that they do not even have to think about the pain and suffering that is being inflicted on their girls. *But see supra* note 27 (discussing whether the characterization of FGM as a patriarchal practice is valid). The fact that in some communities the

tened to the women, heard them say that the circumcisions would take place with or without the doctors' participation, and worked out a compromise with the immigrants: the hospital would perform a "simple, symbolic cut"[63] amounting to a mere "nick"—enough to draw blood,[64] with no tissue removal or subsequent scarring.[65] Although this procedure was clearly not the sort of procedure typically thought of as FGM, it would have satisfied at least some of the members of the immigrant community who required a form of female circumcision for their girls. Moreover, in technical or clinical terms, the suggested procedure was not even a circumcision,[66] which itself ensured that what would have been done to girls was much less drastic than what routinely is done to boys in that hospital, and in hospitals across the country. Ultimately, despite this unprecedented effort at compromise, the procedure was never performed because some prominent opponents of FGM, who generally take a categorical position against any form of the traditional practice, launched a successful campaign against the hospital's efforts.[67]

In their Pyrrhic victory, however, Harborview's opponents probably denied some Somali girls in Seattle the possibility of living a life free of the physical and emotional devastation caused by the traditional circumcision practiced in their community; in the name of ideological purity, they probably sacrificed some of the very girls they

procedure also is said to provide a bonding experience for the girls and women merely increases this irony:

> The mothers do it to their daughters. Like footbinding, like suttee or widow burning, like mothers in America telling daughters to be a certain thing, to be like this, and not like that. The mothers always do it to their daughters—the men's culture relies on this complicity for this is the role of the vanquished to be intimately involved in their own oppression and to perpetuate it, . . . leaving the culture intact, the culture of men.

Boulware-Miller, *supra* note 17, at 158 n.21 (quoting Conklin, *Women's Culture: Whose Culture?*, *in* FRAN HOSKEN, FEMALE SEXUAL MUTILATIONS: THE FACTS AND PROPOSALS FOR ACTION 20 (1980)).

63. Brune, *supra* note 1.

64. Telephone Interview with Dr. Leslie Miller, obstetrician/gynecologist at Harborview Medical Center (June 6, 1997).

65. *See infra* notes 108-12 (discussing facts surrounding the Harborview proposal).

66. By definition, both formal and popular, a "circumcision" involves the removal or excision of tissue. For example, male circumcision involves the removal of a boy's prepuce or foreskin. *See* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 268 (1989). Traditional forms of female circumcision at the very least involve the removal of part of the clitoris. *See supra* note 17 (comparing the mildest form of FGM to a penilectomy).

67. *See infra* notes 113-35 and accompanying text (discussing opposition to Harborview proposal).

claim are the beneficiaries of their efforts. As I will demonstrate, this likelihood exists because the practice is thoroughly engrained in the religion and culture of the Somalis seeking the compromise; the fact that the parents were willing to accept a compromise as part of the process of assimilation was not an indication that they were willing to forego their tradition entirely.[68]

Additionally, Harborview's opponents also squelched what was perhaps the most successful compromise of a cultural collision that has been publicly contemplated in this country. In that process, they inadvertently began a public debate about the legitimacy of the comparison between some forms of female circumcision and traditional male circumcision, and relatedly, about the legitimacy of the position of cultural relativists and Harborview that the comparison is at least sometimes a valid one.[69] Although the substantial arguments that both female and male circumcision should be considered child abuse suggest that this debate is not one we should continue to avoid,[70] it is certainly not one which opponents of FGM willingly encounter.[71]

II. THE HARBORVIEW PROPOSAL

The Harborview Medical Center in Seattle, Washington serves a largely immigrant community, including a substantial number of Somali immigrants and refugees.[72] In this capacity, it has had extensive experience addressing the many differences between the cultural

68. *See infra* notes 85-99 and accompanying text (describing the immigrants' cultural and religious commitment to the practice).

69. *See, e.g.*, Rachel Chauvin, Letter to the Editor, *Female Circumcision—Isn't It Equally Inappropriate to Subject Boys to Procedure?*, SEATTLE TIMES, Dec. 23, 1996, at B5 (arguing that "I seem to be among the few who see the hypocrisy in our community's outrage at the thought of circumcising girls while allowing the same practice to occur with boys without even mention of religious, cultural, or even medical justification"); Paul Ketteridge, Letter to the Editor, *Cultural Beliefs—Harborview Decision Demands Editorial Page Challenge*, SEATTLE TIMES, Dec. 16, 1996, at B5 (reporting that "Harborview has decided it will refuse to . . . perform female circumcisions . . . . One can only hope that our enlightened insurance commissioner will end this discriminatory practice and mandate that all health-insurance carriers [that cover male circumcision] cover this ancient practice immediately").

70. *See infra* note 185 (describing the argument that male circumcision should be considered child abuse).

71. *See supra* note 28 (discussing how careful opponents of FGM have been to distinguish that practice from male circumcision); *infra* note 272 (describing Schroeder's efforts in this regard).

72. There are approximately 3,500 Somali immigrants in the Seattle area. Some are established immigrants, and others are refugees of the recent war in that country. *See* Brune, *supra* note 1.

practices of immigrants and American health care standards, which incorporate, to a large extent, American culture. The hospital's policy is to be sensitive to these cultural differences and to assure that the community it serves will trust in the good intentions of its doctors.[73] In the case of FGM, the hospital's policy was challenged by a Somali tradition that requires the circumcision of both boys *and* girls, a tradition which clearly collided with the American custom and health care practice of circumcising *only* boys.

While female circumcision is generally treated discreetly by Somali immigrants living in Western countries,[74] in this instance, the practice was squarely faced when pregnant Somali women, a majority of whom apparently were recent refugees,[75] answered this routine hospital inquiry: "If it's a boy, do you want him circumcised?" "Yes," replied some of the women, "and also if it's a girl."[76] According to one reporter, the women "repeatedly asked that their daughters be cut."[77] Moreover, perhaps aware of the hospital's reluctance to perform the procedure, the women also requested that instead of the traditional cut, the doctors perform a symbolic *sunna* that would have involved only a small incision or "nick" on the foreskin or prepuce (also called the hood) of the clitoris, just enough to draw blood.[78]

73. *See* Carol M. Ostrom, *Is Form of Circumcision Outlawed? Procedure at Harborview Under Review*, SEATTLE TIMES, Oct. 14, 1996, at B3 (quoting Dr. Abraham Bergman, Chief of Pediatrics at Harborview Medical Center).

74. *See* EFUA DORKENOO, CUTTING THE ROSE: FEMALE GENITAL MUTILATION 127 (1994) (noting that an aura of secrecy has surrounded the practice of FGM by immigrants in Western countries).

75. *See* Brune, *supra* note 1.

76. *Id*.

77. Dugger, *supra* note 18.

78. Telephone Interview with Dr. Leslie Miller, *supra* note 64. That the suggestion for the compromise circumcision came from the immigrant community is not as surprising as it may seem to some. For example, Professor Obiora notes that symbolic circumcision has been part of the anti-circumcision campaign in Africa, where the practice, "[i]n moderate forms, [now involves] only a drop of blood or the [removal of the] prepuce . . . from the clitoris." Obiora, *supra* note 17, at 284. She notes in particular that in Somalia, where the practice has been to a large extent "sanitized"—the procedure is performed in hospitals or by trained medical personnel—"the sunna countenanced consists of a mere prick of the clitoris to shed a drop of blood." *Id*. at 370.

This history and experience may explain why the Somali parents in Seattle were apparently willing to consider the symbolic compromise despite their clear cultural and religious beliefs concerning the necessity of the practice to assure control over their girls. *See infra* notes 85-99 and accompanying text (describing cultural and religious commitment Somali parents in this case had to some version of the procedure). It also may be that the parents, having moved to the United States and gained an awareness of this country's social and legal condemnation of the traditional practice, were personally inclined not to circumcise their girls, but felt that they

The hospital initially declined the request, telling the women that in this country only boys are circumcised.[79] In response, the women told the hospital that if it did not perform the procedure, they would have to send their daughters home to Somalia, or to one of three Somali midwives in the Seattle area, each of whom had her own idea of what a *sunna* requires.[80]

Although the hospital will not reveal the details of its discussions with the Somali refugees, Somali men and women interviewed by the *Seattle Times* confirmed "that if they could not get it done in the U.S., they would pay the $1,500 fare to fly their daughters to their homeland, where [their daughters would] face the extreme version of the cutting ritual."[81] The refugee mothers explained that if this were to happen, it was possible that their daughters would suffer the same drastic procedure to which they had been subjected.[82] Specifically, as one woman is reported to have said, "if mothers take their daughters back to Africa, there is more chance that a grandmother who believes

had to engage in some symbolic practice to appease their more traditional relatives. Whether such motivation would satisfy a court examining a request under the First Amendment for a religious exception to the ban on FGM is an open question. If male circumcision is ever considered child abuse with a religious exception, the ability of non-practicing Jews who wished to circumcise their boys also to appease their more traditional relatives would similarly be an open question.

Professor Obiora also notes that "efforts[, like those of the Somalis here, previously] have been made in Egypt and Sudan to officially recognize these attenuated forms of the practice" and that "[i]n the Netherlands, a Welfare, Health and Culture Ministry report recommended a comparable accommodation." Obiora, *supra* note 17, at 284-85. Interestingly, this recommendation came in the wake of a series of harmful circumcisions in that country by Somali refugees who "could not afford the cultural alienation of not being circumcised" and were "denied . . . assistance" by the Dutch medical community. *Id.* at 285. Ultimately, as in the case of Harborview's proposal, the Dutch proposal "drew a storm of protests and was eventually superseded." *Id.*

79. Telephone Interview with Dr. Leslie Miller, *supra* note 64.

80. *See id.* The Somali women told Dr. Miller that the *sunna* likely to be performed by the midwives can range from the symbolic cut proposed by the immigrant women to the Hospital, to the complete removal of the clitoris. *See id.* This description is consistent with what is generally known about *sunna* circumcisions, namely that they can range from a limited cutting of the skin to removal of the clitoris and the labia minora. Abu-Sahlieh, *supra* note 35.

81. Brune, *supra* note 1; *see also* Carol M. Ostrom, *Harborview Debates Issue of Circumcision of Muslim Girls*, SEATTLE TIMES, Sept. 13, 1996, at A1 (quoting Somali refugee woman as saying that "[i]t's important enough to take your three kids and get a ticket [to Somalia], $1,500 for each person"). This is apparently a typical response given by Somali immigrants to the American proscription of FGM. For example, a Somali refugee living in Houston told Celia Dugger of the *New York Times* that "he would, if necessary, take his 17-month-old daughter Ikram out of the country when the time comes in six or seven years. His elder daughter, 11-year-old Faduma, was initiated before the family fled Somalia." Dugger, *supra* note 18.

82. *See* Ostrom, *supra* note 81.

in the old way, the Pharaonic circumcision, will call the shots."[83] A Pharaonic circumcision—also called an infibulation—involves the complete removal of the clitoris and labia, and sometimes the sewing together of the remaining flesh, with only a small opening through which urine and menstrual blood can pass.[84]

The immigrants also were candid about their commitment to practice some version of the procedure despite the law.[85] In their view, the procedure is necessary, both as a cultural matter to assure that the girls remained chaste, and as a religious matter because the oral teachings of their clerics require it.

The cultural rationale was most easily and frequently articulated. For example, one writer reported that "Somali men and women told the *Seattle Times* their daughters would be shamed, dishonored and unmarriageable if they were not cut, an act they believe shows their purity."[86] And a Somali refugee couple living in Houston who already have had one daughter circumcised and who intend to do the same with their other daughter explained, "We were taught that this was a way of ensuring a girl's good behavior . . . . It prevents them from running wild. Women should be meek, simple and quiet, not aggressive and outgoing. This is something we just accept."[87] In what

83. *Id*. While it is possible that the immigrants questioned and quoted were posturing, and would not so easily have paid such vast sums to send their daughters back to Somalia for the procedure, there is also substantial evidence that immigrants are so committed to the practice that they will take these drastic measures. *See* Hansen & Scroggins, *supra* note 66 (describing this commitment and the continued practice of FGM in the United States). Articles documenting the special concern that immigrants engage in the practice in the United States and other similar evidence of this fact largely prompted the federal action that resulted in the Federal Prohibition of Female Genital Mutilation Act of 1997. *See infra* note 150 and accompanying text (describing the statutory ban). For example,

> [i]t is estimated that at least 7,000 women and girls immigrate to the United States each year from countries where at least a majority of females, if not all of them, are circumcised. Most of these new immigrants live in California, New York, and the Washington, D.C., area. . . . Even if only a small percentage of newly arrived families from . . . countries [where girls are circumcised] maintain the tradition . . . [available] figures suggest that hundreds of young girls either brought here or born here are in danger each year.

Linda Burstyn, *Female Circumcision Comes to America*, ATLANTIC MONTHLY, Oct. 1995, at 28, 33. Burstyn's article also describes the work (sometimes unsuccessful) of refugee counselors who seek, in individual cases here in the United States, to convince parents not to have their daughters circumcised. *See id. passim*.

84. *See supra* note 23 and accompanying text (describing infibulations).

85. It was generally understood by the immigrant community that their traditional practice is considered illegal in the United States. *See supra* note 79 and *infra* notes 100-02 and accompanying text.

86. Brune, *supra* note 1.

87. Dugger, *supra* note 18.

is perhaps the ultimate irony, this immigrant couple and other practitioners of female circumcision see American culture as particularly problematic for their families, as, in their view, "American women jump from man to man because their sexual organs are driving them to have sex."[88] A Somali woman in Seattle explained this perception further, saying that the cutting was necessary to "help her daughters avoid what she sees as the American disease: 'Girls 13, 14, 15 get pregnant, go wild, get welfare.'"[89]

As previously discussed in Part I, the religious rationale appears to be somewhat more complicated because the question whether Islam requires female circumcision is the subject of debate within the Muslim community itself.[90] This debate occurred even within Seattle's relatively small Islamic community. For example, one community activist noted that female circumcision "'is not something advocated in the Islamic religion. . . . Most Somalis now recognize it is as physically destructive to women.'"[91] Nevertheless, as one reporter covering the story noted, "[a]lthough some Islamic scholars say the procedure is not a religious requirement, some Muslim families from Somalia insist that their faith requires it, much as the Jewish faith does male circumcision."[92] As is the case with many Muslims, the Somalis at issue believe that because the practice "is mentioned in the *Hadith*,"[93] it was required by Mohammed.[94] That *sunna*—"in the tradition of Mohammed"—is the name given to the most common

88. Abu-Nasr, *supra* note 28 (quoting Mimi Ramsey, President and Founder of Forward, an organization combating FGM domestically and internationally).

89. Ostrom, *supra* note 81.

90. *Compare* Tom Paulson, *Doctors Weigh Female Circumcision*, PITTSBURGH POST-GAZETTE, Sept. 15, 1996, at A13 (reporting the view of Executive Director of Afri-Relief and Development that female circumcision is not a requirement of Islam, but rather a cultural tradition), *with* Ostrom, *supra* note 73 (reporting that some Somalis clearly believe it is required by their religion). *See also supra* notes 33-51 and accompanying text (discussing this general debate).

91. Paulson, *supra* note 90.

92. Ostrom, *supra* note 73; *see also* Obiora, *supra* note 17, at 350 (describing legitimacy of religious rationale, reinforced by the United States Supreme Court in *United States v. Seeger*, 380 U.S. 163, 176 (1965), which defined "religion" as "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God"). Despite rhetoric to the contrary, it seems evident that the Somali refugees in this case could have articulated a constitutionally valid religious rationale for their belief that female circumcision was required by their iteration of Islam.

93. Ostrom, *supra* note 81.

94. Telephone Interview with Dr. Leslie Miller, *supra* note 64; *see also supra* notes 39-46 and accompanying text (discussing the general view of some Muslims that because female circumcision is mentioned in a *hadith* it is a religious requirement).

form of female circumcision in Somalia, appears to them to reinforce its divine origins.[95]

Consistent with this view, one Somali woman who is a Sunni Muslim "insist[ed] that each of her three young daughters must be cut."[96] She claimed that "It's important for [their] health; it's important for religion. We have to keep the religion."[97] Another woman noted that "[e]verything we do comes from religion—how we eat, how we dress, how we talk to people."[98] The hospital is reported to have been "convinced . . . that as strongly as a Jewish mother believes her son must be circumcised to be a member of the faith, so do some Somali Muslim refugees in Seattle believe that their daughters' genitals must be cut to comply with their religion and demands of their culture."[99]

Finally, although the larger established Somali community in Seattle is said to believe that Somali girls who live and are raised in the United States should not be circumcised,[100] its members also apparently believe that the tradition cannot be eradicated simply by telling the newer immigrants and refugees that it is illegal or contrary to American culture. "I think the prevailing concept about it is that it should be diminished as much as possible, and possibly eradicated as far as girls are concerned," said the Executive Director of the Somali group Afrirelief and Development.[101] "However," he added, "the fact that we came as refugees doesn't mean we are going to leave our culture overnight. The bad parts of our culture we will try to shake off, gradually. Now we are at a point as leaders and elders of the community negotiating with mothers."[102]

Faced with these facts, Harborview convened a committee of doctors to attempt to resolve the seemingly irreconcilable demands

95. *Id*.; *see also supra* note 37 (describing interpretive significance of the *sunna*).

96. Ostrom, *supra* note 81.

97. *Id*.

98. *Id*.

99. *Id*.

100. *See, e.g.*, Brune, *supra* note 1 (reporting that the larger Somali community "has essentially agreed that the practice should be ended"). That certain members of this larger community may be deterred by American law and societal disapproval from engaging in the practice does not mean that everyone will be so deterred.

101. *Id*.

102. *Id*.; *see also supra* note 62 (discussing the irony of women being the most vocal proponents of female circumcision); and *infra* notes 245-50 and accompanying text (discussing recognition that immigrants' process of Americanization generally has taken at least two generations).

of American culture and the beliefs of the immigrants. The committee included a urologist, medical ethicists, pediatricians, an obstetrician-gynecologist, hospital administrators, pediatricians, and a plastic surgeon.[103] Dr. James LoGerfo, Harborview's Medical Director, stated that "'[n]o one is contemplating doing those rituals most people associate with female circumcision' . . . . But out of respect for these women's beliefs . . . the physicians and others who treat the Somali families have been meeting to see if the hospital can offer a compromise solution."[104] Specifically, the committee's mission was to work with the affected community to develop an alternative to the traditional circumcision that would meet both the cultural and religious needs of that community, and the legal and ethical obligations of the hospital.[105] In the course of its review, the committee asked if performing a symbolic blood-letting on Somali girls would discourage their parents from sending their daughters back to Africa for a damaging and far more dangerous procedure.[106] In asking this question, the committee was obviously intrigued by the immigrants' request for a symbolic *sunna* that would be at most the medical equivalent of male circumcision and that would assure that no Somali girls suffered a more extreme version of that rite.[107]

The proposal that the hospital begin performing the cut originally suggested by the immigrant women emerged from the committee. The hospital viewed this severely modified *sunna* as "a largely symbolic compromise."[108] Hospital spokeswoman Tina Mankowski described the proposal in medical terms, as "a small cut to the prepuce, the hood above the clitoris, with no tissue excised, and this would be conducted under local anesthetic for children old enough to

103. Telephone Interview with Dr. Leslie Miller, *supra* note 64. Interestingly, the plastic surgeon was involved because, among other reasons, adolescent and teenage girls in the United States sometimes elect to have surgery performed on their genitals. For example, some girls have enlarged or protruding clitorises or labia that make it embarrassing or uncomfortable for them to appear in public in swimwear and choose to have these parts of their genitalia surgically reduced. *Id.*; *see also* Ostrom, *supra* note 81 (reporting that "[m]edical doctors in this country also do cosmetic surgery on genitals").

104. Paulson, *supra* note 90.

105. The hospital was concerned with the possibility that the procedure might violate state or federal law. Telephone Interview with Dr. Leslie Miller, *supra* note 64.

106. *See* Kelley, *supra* note 60.

107. Dr. Leslie Miller, in particular, was outspoken on this issue. *See infra* notes 141-44 and accompanying text.

108. Ostrom, *supra* note 73.

understand the procedure and give consent in combination with informed consent of the parents."[109]

Mankowski further noted that the intent of the hospital was "to provide a relatively safe procedure to a population of young women who traditionally have had some horrendous things done to them."[110] One report confirmed that "[m]any of the women requesting circumcision for their daughters said the procedure would prevent them from seeking a more radical procedure."[111] The hospital expressed the hope and the expectation that the procedure would be a transitional measure that would ultimately lead to the complete abolition of the practice in the second generation of immigrants.[112]

News of the hospital's efforts broke on September 13, 1996, at the time that the committee made its recommendations, and spread rapidly across the country, especially within the anti-FGM community. According to one report, the hospital was immediately "besieged by outraged opponents of female circumcision,"[113] a group which included mostly feminists opposed to FGM. Among them was then-United States Representative Patricia Schroeder, who worked for several years to enact federal legislation prohibiting FGM, and Meserak "Mimi" Ramsey of the anti-FGM group Forward USA and International. Ramsey, a former *Ms. Magazine* "Woman of the Year,"[114] is a self-described survivor of FGM who is well-known for her tireless public campaign against the traditional forms of the practice.[115]

Schroeder sent Harborview a letter which was quickly made public, in which she stated that the proposal would contravene fed-

109. Brune, *supra* note 1.

110. *Id*.

111. Abu-Nasr, *supra* note 28; *see also* Ostrom, *supra* note 81 (reporting that "[t]he Somali women [interviewed by Ostrom] say [the symbolic procedure] would fulfill their religious and cultural needs").

112. Telephone Interview with Dr. Leslie Miller, *supra* note 64; *see also infra* notes 245-50 and accompanying text (discussing view that Americanization of immigrants takes at least two generations).

113. *Hospital Won't Circumcise Girls*, SEATTLE TIMES, Dec. 5, 1996, at B2.

114. *See generally Mimi Ramsey: For Selflessly Striving, Despite Her Own Pain, to End the Mutilation of Young Girls*, MS., Jan.-Feb. 1996, at 51 (profiling Ramsey as one of its "Women of the Year").

115. Forward USA is a group which, among other things, "seeks to eliminate the ritual [of FGM] completely." Brune, *supra* note 1. Ramsey, an Ethiopian immigrant who calls herself a survivor of FGM, is described as "wag[ing] a one-woman campaign [against FGM], wandering from one African or Middle Eastern store to another, beseeching immigrants to spare little girls the painful price their cultures require . . . ." Abu-Nasr, *supra* note 28.

eral law.[116] She noted specifically that the law "criminalize[s] the performance of any form of female genital mutilation on minors," and wondered, in that context, why "Harborview further has pursued this issue . . . as to the legality of performing a ritual slicing of young girls' clitorises."[117] She concluded that "this apparent push for such a barbaric procedure by a respected, mainstream medical establishment both baffles and horrifies me."[118] The hospital has said that it also received other letters from Schroeder's office.[119] Dr. Abraham Bergman, chief of pediatrics at Harborview and the chair of the committee reviewing the proposal, described the group of letters from Schroeder and her office as having largely contributed to the hospital's ultimate abandonment of the compromise procedure.[120]

Ramsey responded to Harborview's proposal in a way that was equally categorical: "How dare it even cross their mind[?] . . . What the Somalis, what the immigrants like me need is an education, not sensitivity to culture."[121] While Ramsey is clear that African culture has many positive aspects, the practice of, as she calls it, "mutilating little girls" is not one of them.[122] FGM, says Ramsey, "is the most horrible, horrible thing that is happening to children. This is the sort of pain they want to create for the helpless little girls that are Ameri-

116. *See* Letter from Representative Patricia Schroeder to Dr. James LoGerfo, Medical Director of the Harborview Medical Center 1 (Oct. 15, 1996) (on file with author) [hereinafter Schroeder Letter to LoGerfo]. Passages from Schroeder's letter were quoted by several newspapers. *See, e.g.*, Peggy Andersen, *Harborview Rejects Female Circumcisions*, SEATTLE POST-INTELLIGENCER, Dec. 5, 1996, at B1; *Hospital Won't Perform Disputed Procedure*, AKRON BEACON J., Dec. 6, 1996, at A7. Although the FGM statute had been signed when Schroeder wrote this letter, it did not become law until March 1997. *See infra* note 150 and accompanying text.

117. Schroeder Letter to LoGerfo, *supra* note 116, at 1.

118. *Id.*

119. Telephone Interview with Dr. Abraham Bergman, Chief of Pediatrics, Harborview Medical Center (June 6, 1997).

120. *Id.*

121. Brune, *supra* note 1. This theme of education, not sensitivity, was echoed by Dr. Asha Mohamud, a Somali immigrant who works to eradicate FGM and who opposed the Harborview proposal. Dr. Mohamud, who is familiar with and generally laudatory of Harborview's commitment to its immigrant patients, noted that

> [c]ultures are good and to be respected . . . [b]ut they are not to be respected when they are harmful to the health of individuals. . . . Doctors have a role to play in educating women when they're pregnant, asking them to consider their own bodies, the problems female genital mutilation has caused them—and asking them not to subject their daughters to the same thing.

Kelley, *supra* note 60 (quoting Dr. Mohamud).

122. Remarks by Mimi Ramsey, ABA Annual Convention, San Francisco, Panel on Female Genital Mutilation (Aug. 3, 1997) [hereinafter Ramsey Remarks].

cans. They are born in this country. They have a right to protect their bodies."[123] Ramsey insists that education (including the educational value of legal proscriptions and criminal convictions for child abuse) is the proper vehicle to ensure the rapid eradication of the practice.[124] In the Harborview context, Ramsey and others were concerned that "*even talking about cutting female genitals* legitimizes a barbaric practice, one that disempowers women and serves to keep them out of the American mainstream."[125]

Ramsey's perspective was shared by others in the immigrant community,[126] at least one of whom publicly questioned the methodology of Harborview's factfinding:

> They probably talked to very few people, who probably came from the [Somalian] countryside . . . . In an urban environment, that has been eradicated many, many years ago. There are 20-year-old [women] who were not circumcised any way. Those women are doing great. Harborview was just talking to a few that haven't even been educated.[127]

Schroeder and Ramsey's view was also shared by others in the larger American anti-FGM community who "inundated [the hospital] with hundreds of letters and calls protesting [the proposal]."[128] According to one report, "doctors [at Harborview] received letters of complaint, in some cases with copies sent to their supervisors and state officials."[129] The letters, described by the doctors as "hate mail,"[130] "condemned what the writers perceived as the doctors' advocacy of female circumcision."[131] Dr. Abraham Bergman was most frequently targeted.[132] Dr. Bergman, who is an orthodox Jew, publicly stated his "wish that people who have strong feelings about this

123. *Id*.

124. *Id*.

125. Ostrom, *supra* note 81 (emphasis added) (describing the position of several who oppose FGM).

126. *See* Obiora, *supra* note 17, at 366 (describing African opposition to the "clinicalization" even of the milder forms of the practice on the ground that "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" (internal quotation marks omitted)).

127. Kelley, *supra* note 60.

128. Dugger, *supra* note 18.

129. Kelley, *supra* note 60.

130. Telephone Interview with Dr. Abraham Bergman, *supra* note 119; Telephone Interview with Dr. Leslie Miller, *supra* note 64.

131. Kelley, *supra* note 60.

132. Telephone Interview with Dr. Abraham Bergman, *supra* note 119.

issue would calm down and gain some possession of the facts first before launching their fusillades."[133] He also said that it was "imperative that we try to understand the cultural practices of other people and that we respect privacy of families and their physicians."[134] According to Dr. Bergman, these last two remarks in particular prompted "hate mail and death threats for weeks."[135]

Most disturbing, and perhaps ultimately dispositive, was the fact that many of the people who opposed Harborview misunderstood the nature of the proposed procedure, wrongly believing that it involved a true circumcision rather than a symbolic cut on the clitoral hood.[136] This misunderstanding was, in many instances, shared or perhaps instigated by members of the press, who constantly referred to Harborview's proposal as "female circumcision" even as they were reporting the details of the procedure.[137] It is entirely likely that Schroeder herself shared this misunderstanding.[138]

As a result of this extraordinary onslaught, Harborview abandoned its effort, issuing a final news release stating that its "role in considering the need for a culturally sensitive, safe alternative to the practices of female circumcision or female genital mutilation has now been concluded."[139] In the end, the hospital is said to have found the effort "too controversial."[140]

Dr. Leslie Miller, an obstetrician/gynecologist at Harborview, continues to treat the same Somali women who initiated this discus-

133. Ostrom, *supra* note 73. The fact that Dr. Bergman was identified specifically as "an orthodox Jew" may have been intended to signal his personal sensitivity to the legitimacy of circumcisions generally, and to the particular merits in this context of the comparison between male circumcision and the symbolic cut sought by the immigrants.

134. *Id*.

135. Telephone Interview with Dr. Abraham Bergman, *supra* note 119.

136. *See, e.g.*, Chauvin, *supra* note 69 (stating that "I am among the many people in the area who were relieved by Harborview's decision against performing female circumcision"); Ketteridge, *supra* note 69 (lamenting Harborview's decision not to perform "female circumcisions" and implying that if insurers pay for male circumcisions, they should also be forced to pay for the female equivalent).

137. Indeed, many of the articles simultaneously called the proposed procedure a "circumcision" and quoted language from Schroeder's letter condemning Harborview for its consideration of a symbolic version of the practice. *See, e.g.*, *Hospital Won't Perform Disputed Procedure*, *supra* note 116. The fact that the newspaper previously had published the hospital's description of the proposal, making it clear that it did not involve circumcision, seemed not to matter. *See, e.g.*, *Hospital Won't Circumcise Girls*, *supra* note 113. This contradiction frustrated Harborview officials immensely. *See supra* text accompanying note 133.

138. *See infra* Part III (discussing implications of the federal statute prohibiting FGM).

139. Dugger, *supra* note 18.

140. Kelley, *supra* note 60.

sion. All have assured her that the hospital's decision not to perform the compromise procedure has had and will continue to have no effect on their commitment to have their daughters circumcised. They have told Dr. Miller that if they can afford it, they will send their daughters back to Somalia. If they cannot, they will send their daughters to one of the local midwives.

At the same time, Dr. Miller's patients have told her that they are confused that Americans encourage the circumcision of their sons, but refuse a less invasive symbolic *sunna* for their daughters.[141] "We will cut the whole foreskin off a penis," said Dr. Miller, relaying their frustration, "but we won't even consider a cut, a *sunna*, cutting the prepuce, a little bloodletting (on a girl)."[142] To this day, Dr. Miller claims, the immigrants have not been given a satisfactory explanation for the distinction, or for the hospital's and the larger American community's rejection of the symbolic circumcision that would have saved their daughters from what they (and, normally, we) understand to be an inevitable and significantly worse fate.[143] Ironically, Dr. Miller foresees the day when the hospital and the community will have to confront the medical and emotional repercussions of the midwives' work.[144]

III. THE LEGAL IMPLICATIONS OF HARBORVIEW'S PROPOSAL

According to published reports, "[i]t was never clear whether the [symbolic cut proposed by Harborview] would have violated the law."[145] The matter was never formally litigated, and the only legal

141. Telephone Interview with Dr. Leslie Miller, *supra* note 64.

142. Ostrom, *supra* note 81.

143. Telephone Interview with Dr. Leslie Miller, *supra* note 64.

144. *Id.* Although the federal ban on FGM would clearly apply to midwives, there is significant doubt in the immigrant community that this ban will have any effect on their work because there is no one to complain to the authorities about particular mutilations: the children who are being cut are generally too young or too attached to their parents to complain, and the parents, who would normally be the ones to lodge such a complaint, are the very persons requesting the procedure. Family members or friends who oppose the procedure and who know the identities of the midwives do not complain because they fear that the parents also would be prosecuted and do not wish to break up the family. The only such prosecution that has ever been attempted in this country failed because the prosecutor, armed with ample evidence that a two-year-old girl was severely mutilated, was unable to prove who had actually cut the girl because no one would testify against the defendant. *See* Coleman, *supra* note 3, at 1113 (describing this Georgia case).

145. Abu-Nasr, *supra* note 28; *see also* Ostrom, *supra* note 73 ("A new federal law has outlawed female genital circumcision, but it's not clear whether the language of the law applies to a proposal by doctors at Harborview Medical Center."); *Hospital Won't Circumcise Girls*, *supra*

analysis undertaken—by the Washington State Attorney General representing Harborview—has never been made public.[146] In addition, those who spoke out publicly on behalf of or against the proposal, including Schroeder, lent the impression that the issue would certainly be hotly contested.

In fact, however, the legal implications of the hospital's proposal were relatively straightforward. As Schroeder insisted, an important question was whether the proposal violated the new federal statute banning FGM.[147] Even more important was the issue whether the suggested procedure would have violated state child abuse laws. In the event that it was found to contravene those laws, the proposal also would have raised substantial equal protection questions.

The threshold issue Schroeder posed, whether the symbolic circumcision would have violated the federal ban on FGM, is the easiest to address. Schroeder took the position that "[w]hat Harborview appears to be considering would violate [the] clear intent [of the law]," which she described as "to criminalize any medically unnecessary procedure involving female genitalia."[148] Schroeder admitted, however, that at the time she took this position, she had not seen a copy of Harborview's proposal, nor had she been informed about the symbolic nature of the procedure at issue.[149]

note 113 ("While the procedure under consideration at Harborview . . . may not even be addressed by the [federal] law, 'we're not going to do it', [a] Harborview spokesman . . . said.").

146. The author requested information concerning the state's legal analysis from Lisa Vincler, Assistant Attorney General charged with representing Harborview Medical Center, but was told that the state's analysis was protected by both attorney-client confidentiality and the work product doctrine.

147. *See* Schroeder Letter to LoGerfo, *supra* note 116, at 1.

148. *Id*. This was not the first time Schroeder actively opposed an effort to "medicalize" FGM. In 1995, she convinced the U.S. House of Representatives to pass a resolution "urging the President to help end the practice of female genital mutilation worldwide." *House Passes Schroeder Resolution on Female Genital Mutilation*, Government Press Release, June 7, 1995, *available in* 1995 WL 14249480. According to the government press release announcing the resolution, Schroeder's effort "was prompted in part by the Egyptian government's effort to medicalize FGM." *Id*. Schroeder was concerned that Egypt no longer intended to seek a total ban on FGM in that country, or to punish those who engaged in the practice. *See id*. She noted that, unlike the Egyptian government's act to medicalize the procedure, the House of Representatives "resolution [was] in the true spirit of the [U.N. International Conference on Population and Development in] Cairo." *Id*. (quoting Schroeder). Schroeder's work in connection with this resolution may also help to explain her quick condemnation of Harborview's proposal, which may have seemed to her to be an effort in the United States to do what Egypt had done, i.e., to medicalize FGM.

149. *See id*. In her letter to Dr. LoGerfo, Schroeder specifically notes that the hospital had not yet "answer[ed] an August 19 inquiry from [her] office asking for a copy of the committee's recommendation." *Id*. She also indicates that she wishes "to hear directly from [the hospital]

The Federal Prohibition of Female Genital Mutilation Act, the statute to which Schroeder refers, became law in March of 1997. It proscribes the practice of "female genital mutilation" in the United States, and defines FGM as "the removal or infibulation (or both) of the whole or part of the clitoris, the labia minora, or labia majora;" it also provides for the punishment of anyone who "knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of [a child]."[150]

Because the symbolic cut or "mere bloodletting" contemplated by the hospital was not a circumcision,[151] and did not involve the excision or infibulation of any tissue, it is difficult to comprehend the basis for Schroeder's conclusion that the proposal would have violated federal law.[152] As a textual matter, the procedure did not fit within the statutory definition of FGM and thus would not have violated the statute. The statute's sparse legislative history—apart from Schroeder's own expanded rendition of that history in her letter to Harborview—provides little additional support for her interpretation; instead, that legislative history appears to underscore the fact that Schroeder and her colleagues were concerned exclusively about the practice of the traditional forms of FGM on United States soil.[153] For example, all of the reported congressional statements about the legislation described only those traditional practices.[154] Nothing in those reports or in related documents indicates that either Schroeder or others in Congress or in the administration even contemplated the possibility of a symbolic version of the mutilations that were prohibited textually. Nor is there any indication in that history that, as she

exactly what [it] is considering." *Id*. at 2. Among her questions in this regard are "how deep the cut would be, how the procedure would . . . be done, what the possible complications would be," etc. *Id*.

150. Federal Prohibition of Female Genital Mutilation Act, 8 U.S.C.A. § 1374(c) (West Supp. 1997) (defining FGM and providing for information to be given to immigrants from cultures that engage in the practice); 18 U.S.C.A. § 116(a) (West Supp. 1997) (prohibiting the practice of FGM and setting punishments for its practice in the United States).

151. *See supra* notes 108-09 and accompanying text (describing the true nature of the procedure).

152. *See supra* notes 116-18 and accompanying text (describing and quoting from Schroeder's letter).

153. *See* Christine Anasmith, *Seattle Doctors Consider Modified Female Circumcision* (National Public Radio broadcast, Oct. 17, 1996). While Schroeder clearly believes that so-called "lesser" forms of FGM, such as the Harborview proposal, would be illegal under the federal statute, her colleagues admit "it's unclear whether the procedure Harbor View [sic] proposes would violate the law since it removes no tissue." *Id*.

154. *See, e.g.*, *supra* note 28 (statement of Sen. Moseley-Braun).

suggests in her letter, "[t]he clear intent of the legislation . . . was to criminalize *any medically unnecessary procedure* involving female genitalia."[155] Indeed, it is rather unlikely that Congress would have enacted such a broad prohibition since it made substantial efforts to steer the discussion away from any implication that the new prohibition could jeopardize the country's own traditional practice of male circumcision, a practice which itself is of questionable medical value.[156] Because a symbolic cut, or even the removal only of the prepuce of the clitoris, would be directly analogous to that practice, it is likely that such relatively minor forms of female circumcision were not contemplated at all, or that they were discussed and rejected, or expressly left out of the statute. As a result, there is little merit to Schroeder's claim the Harborview proposal would have violated even the "spirit" of the statute.

It is possible, of course, that Schroeder stated her position prematurely, before she received all of the information necessary for her analysis. Indeed, the fact that she expressed concern about not receiving the details of the procedure and pointed to the "dangerous, deadly and psychologically scarring" nature of "female genital mutilation" lends some credence to this possibility.[157] That she was "baffle[d] and horrifie[d]" by the hospital's "apparent push for such a barbaric procedure" also suggests she was not fully informed.[158] After all, how could she be "baffled and horrified" by a procedure that was less "barbaric" than male circumcision, which she did also not seek to proscribe?

On the other hand, given that Harborview's explanation of its proposal was publicly disseminated and that Schroeder's office certainly had access to this information, it is also possible that she was trying to ensure that despite the language and history of the federal statute, no form of female circumcision, symbolic or otherwise, was practiced in the United States. In fact, Harborview publicly disseminated details of the proposal a few weeks after Schroeder's principal

155. Schroeder Letter to LoGerfo, *supra* note 116, at 1 (emphasis added); *see also Schroeder Calls on HHS to Education* [sic] *Harborview Medical Center About Female Genital Mutilation*, Press Release, Oct. 18, 1996 (on file with the *Duke Law Journal*) (quoting Schroeder as saying "[t]he clear intent of my legislation was to ban FGM in *all* forms because of its serious health and psychological consequences").

156. *See supra* note 28 and *infra* note 272 (describing this effort) and *infra* note 185 (describing the current view that male circumcision is not medically indicated).

157. Schroeder Letter to LoGerfo, *supra* note 116, at 2 (quoting the American Medical Association).

158. *Id*. at 1.

letter to the hospital, *but she never retracted her position*. As a result, it was this misleading letter—coupled with Schroeder's incendiary language about FGM—which became the principal fodder for the public opposition to the procedure.[159] Schroeder certainly had the right to argue that parents should not be permitted even to perform a symbolic cut on their daughters.[160] What is unfortunate is that she chose to clothe that view in inappropriate legal garb.[161]

159. *See supra* note 120 and accompanying text (indicating Dr. Abraham Bergman's view of Schroeder's influence on Harborview's ultimate decision to abandon the proposal). Indeed, a November 19, 1996, response to Schroeder from the hospital's Medical Director, Dr. James LoGerfo, appears to confirm this influence. Specifically, the letter reportedly informed Schroeder that "the hospital had decided against offering the procedure [and] . . . commended Schroeder for her 'leadership on this topic which has been important to all of us involved in the care of African women.'" Andersen, *supra* note 116 (quoting letter from Harborview to Schroeder).

160. *See infra* notes 222-25 and 233-34 and accompanying text (discussing policy argument that even the symbolic procedure should not be performed).

161. Even if Harborview's proposal could somehow be interpreted to fall within the ambit of the federal statute, there is a substantial question whether the law, enacted pursuant to Congress' Commerce and Treaty powers, is itself constitutional in light of *United States v. Lopez*, 514 U.S. 549 (1995). Congress may have recognized the *Lopez* issue, emphasizing in its legislative findings that FGM "infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional," and that "the unique circumstances surrounding the practice of female genital mutilation place it beyond the ability of any single State or local jurisdiction to control." Federal Prohibition of Female Genital Mutilation Act of 1995, Pub. L. No. 104-208, § 645(a)(3)-(4), 110 Stat. 3009-70 (1996). The question of the statute's constitutionality has yet formally to be resolved; however, given that Congress has *not* expressly found that immigrants will travel across state lines to obtain the services of a circumcisor, and that state hospitals like Harborview are not likely to be viewed as instrumentalities of interstate commerce in this context, it is quite possible that the Commerce Clause basis for the statute would fail. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., No. 96-1814, 1997 WL 785529, at *16 (4th Cir. Dec. 23, 1997) (dismissing summarily the argument that the analogous federal Violence Against Women Act was a regulation of an "instrumentality" or "channel" of commerce). The court in *Brzonkala* did find that statute constitutional under *Lopez*'s alternative "substantially affects interstate commerce" criterion. *See id.* But as the court stated, this criterion was met only because Congress had voluminous evidence to support this finding. *See id.* at *17. To my knowledge, no such support exists for the federal Prohibition of Female Genital Mutilation Act.

In addition, as I will show later, *see infra* notes 164-79 and accompanying text, FGM in its traditional forms can constitute child abuse, which itself is an area of the law traditionally reserved to the states.

The federal statute has also been attacked because, rather than proscribing child abuse and specifically defining abuse to include mutilation, it proscribes only a specific traditional practice in which only certain ethnic (primarily African) minorities engage. This narrow proscription may expose the statute to the challenge that it discriminates on the basis of race or ethnicity. This concern often prompts comparison between the federal statute in the United States and other bans against FGM by Western countries, principally France, which have enacted more general, non-discriminatory laws. Ironically, because these foreign statutes would

While federal statutory law was inapplicable to Harborview's proposal, there is no question that state child abuse laws and the Equal Protection Clause were directly implicated.[162] As a result, whether the proposal was lawful rests upon an analysis of those two doctrines.[163]

The State of Washington defines child "abuse or neglect" as "the injury . . . or maltreatment of a child . . . by any person under circum-

likely be seen in the United States as an usurpation of state child abuse laws, it is unlikely that the approach they take was ever seriously contemplated in this country.

Finally, the statute may be challenged on the ground that it discriminates against boys. While this challenge has less merit because of the significant differences between traditional male circumcision and female genital mutilation, there has already been some litigation over the question. *See* Andersen, *supra* note 116 (describing federal lawsuit challenging North Dakota statute outlawing female genital mutilation on grounds that it unconstitutionally discriminates against men and boys).

162. From the Western perspective, the view that FGM constitutes child abuse is not novel. In fact, this argument is one of the original and principal international (again, Western) weapons in the fight against FGM. *See* Boulware-Miller, *supra* note 17, at 165-69 (describing the argument against female circumcision as a violation of the rights of the child). For example, Boulware-Miller argues that FGM violates the U.N. Declaration of the Rights of the Child, which provides that "children must be guaranteed the opportunity to develop physically in a healthy and normal way." *Id*. at 165-66. "In the process of being circumcised," Boulware-Miller explains, "girls are routinely tied down, forced to display their sexual organs, and subjected to an intensely painful operation when they are too young to understand why the operation is performed or to give meaningful consent." *Id*. at 166. She also argues that this violation is compounded by the "betrayal" at least some children feel when they learn their mothers condoned their pain. *See id*. at 167-68.

Although they are not formally relevant to analysis under United States law, there are substantial policy and personal implications to characterizing FGM as child abuse. Boulware-Miller finds that challenging

> female circumcision as a violation of the rights of the child suggests that women who permit the operation are incompetent and abusive mothers who, in some ways, do not love their children. . . . [This approach also] conflicts with parents' desires to rear children independently and their notions of what is in their children's best interests. While women may not wish to see their daughters harmed, they may also feel strongly that they should be able to rear their children according to their own cultural norms and traditions. Besides, if mothers value the economic, social, and cultural benefits of the operation, they are unlikely to be persuaded that it should not be performed on their daughters. . . . [Another] problem with this approach is that it almost exclusively focuses on the physical harm done to a child when she is circumcised and does not address the positive feelings she may have as a circumcised woman. . . . [Finally], many young girls believe that they want to be circumcised. The stigma associated with not being circumcised attaches early, virtually compelling a choice to undergo the operation.

Id. at 166-67. At the very least, these problems with the child abuse approach should operate as a caveat for those working with the affected immigrant communities. They also emphasize the tremendous cultural impasse surrounding the practice of FGM, and the importance of resolving the impasse without engaging its two sides in this legal and philosophical debate.

163. While the Washington state legislature has contemplated making FGM a specific offense, it has yet to do so.

stances which indicate that the child's . . . health, welfare, and safety is harmed."[164] Acts which constitute prima facie abuse include "[i]nflicting physical injury on a child by other than accidental means, causing . . . disfigurement, skin bruising, impairment of physical or emotional health, or loss or impairment of any bodily function."[165]

The state's purpose in enacting its child abuse and neglect scheme is to "safeguard the general welfare of . . . children."[166] This purpose encompasses ensuring the child's "right to conditions of minimal nurture, health, and safety."[167] Thus, while the state expressly views the bond between parent or guardian and child as being "of paramount importance,"[168] it intervenes when children are subjected to "instances of nonaccidental injury, neglect, death, sexual abuse and cruelty"[169] committed by "their parents, custodians or guardians."[170]

The State of Washington notes, however, that its child abuse statute "shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety."[171] A related administrative provision attempts to explain the difference between child abuse and child-raising practices or reasonable parental discipline:[172] "the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent,

164. WASH. REV. CODE ANN. § 26.44.020(12) (West 1997).

165. *Id.* § 388-15-130(3)(a) (setting forth authority of child protective services to investigate child abuse, neglect, or exploitation and defining these terms).

166. *Id*.

167. *Id.* § 26.44.010.

168. *Id*.

169. *Id*.

170. *Id*. Washington's child abuse statute is typical with respect to its definition of abuse and neglect, as well as to its underlying purpose and justification. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3623 (West 1997) (defining child abuse as injury to a child producing physical or emotional harm); CAL. PENAL CODE § 273a (West Supp. 1998) (criminalizing willful harm or injury to a child and endangering a child's person or health); DEL. CODE ANN. tit. 11, § 1103 (1996) (defining abuse as physical injury to a child by torture, exploitation, maltreatment, mistreatment, or means other than accidental); MICH. COMP. LAWS ANN. § 750.136b (West 1997) (defining abuse as causing physical or mental harm to a child).

171. WASH. REV. CODE ANN. § 26.44.010. The definition of "child abuse and neglect" given in 1993 legislation also contained this caveat, as well as the separate condition that "nothing in this section shall be used to prohibit the reasonable use of corporal punishment as a means of discipline." *See id.* § 26.44.020 historical and statutory notes. The right to use reasonable corporal punishment as a means of discipline still exists, although in a separate provision. *See id*. § 26.44.015(2).

172. *Id.* § 9A.16.100 (defining use of force on children and actions presumed unreasonable).

teacher, or guardian for purpose of restraining or correcting a child."[173] Acts which are expressly "presumed unreasonable," and therefore illegal, include "cutting of a child" or "doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks."[174]

No reported cases in the State of Washington involve this last, most clearly applicable provision. However, given the broad language of the child abuse laws generally, and the flexibility and discretion that are built into these laws,[175] Harborview's proposed procedure could easily have been interpreted to fall within the proscription: Because it required a doctor to "nick" the hood of the clitoris sufficient to draw blood, the procedure would have involved "nonaccidental" (albeit minimal) "cutting,"[176] and would likely have caused some (albeit minimal) "disfigurement [and] skin bruising."[177] Thus, even if the parents believed the procedure was necessary to ensure that their daughters are disciplined and otherwise sexually restrained,[178] according to the statute and its related administrative provisions, the procedure could have been considered *per se* unreasonable and thus illegal.[179]

It is equally possible that the child welfare authorities in Washington could have concluded that the procedure did not violate the law. This possibility exists because the statute and administrative regulations both appear to take into account the *degree* of harm inflicted on a child in determining whether there is child abuse. For example, the principal statutory provision makes clear that one purpose of the legislative scheme is to prevent endangerment of a child's "health, welfare, and safety."[180] One can certainly argue that Harbor-

173. *Id*.

174. *Id*.

175. Washington's child abuse law is purposefully broad, since it is designed to cover all conduct (whether or not it has occurred or been contemplated previously) which actually threatens the health and well-being of a child. Interview with Jeff Norman, Washington State Child Protective Services (on file with author).

176. Under Washington law, cutting a child is presumed unreasonable. *See* WASH. REV. CODE ANN. § 9A.16.100.

177. *See* Wash. Rev. Code Ann. § 388-15-130(3)(a).

178. *See supra* note 87 and accompanying text (describing Somali parents' belief that if their daughters are not circumcised, they will "run[ ] wild," and that circumcision is necessary to "ensur[e] a girl's good behavior").

179. *See* WASH. REV. CODE ANN. § 9A.16.100 (stating that parental discipline is only permissible if it is also reasonable). The state hospital would also have been subject to the prohibition as the parents' agent.

180. WASH. REV. CODE ANN. § 26.44.020(12).

view intended nothing of such great magnitude and, more importantly, that nothing of such great magnitude would have resulted from the symbolic circumcision. This interpretation of the statutory language is also consistent with the language of the applicable administrative regulation, which "presume[s] unreasonable" *only* those injuries "that [are] likely to cause and which do[ ] cause bodily harm *greater than transient pain or minor temporary marks*."[181] Under this regulation, it is possible that the symbolic circumcision proposed by Harborview—a small "nick" on the hood above the clitoris, just enough to draw blood[182]—could have been considered a "child-raising practice[ ]" involving "reasonable parental discipline,"[183] because the harm that would have resulted, including both the pain attendant to the procedure and any subsequent scarring, would have been minimal.[184]

If the State of Washington took the position that the symbolic circumcision was not child abuse, the matter would remain a question of state law. On the other hand, if the state decided that the procedure constituted child abuse, its interference with the symbolic act would implicate equal protection principles because the state does not similarly bar the more severe cutting of male children.[185] The

181. WASH. ADMIN. CODE § 9A.16.100 (emphasis added). Child welfare authorities in at least some other jurisdictions have taken such an interpretation of child abuse statutes and related administrative provisions. *See* V.I. CODE ANN. tit. 14, § 507 (1997) (incorporating language almost identical to that of Washington); *see also* ARK. CODE ANN. § 12-12-503 (Michie 1995); CAL. PENAL CODE § 273a (West 1998); COLO. REV. STAT. § 19-1-103 (1997); GA. CODE ANN. § 19-13-1 (1997); IND. CODE ANN. § 31-34-1-15 (Michie 1997); MO. ANN. STAT. § 210.110 (West 1996).

182. Telephone Interview with Dr. Leslie Miller, *supra* note 64 (setting out Dr. Miller's description of the symbolic *sunna* at issue in the immigrants', and ultimately the hospital's, proposal).

183. WASH. REV. CODE ANN. § 26.44.010.

184. WASH. REV. CODE ANN. § 9A.16.100.

185. This argument assumes that male circumcision is not medically indicated. I believe that this assumption is warranted because it represents the current trend in medical thinking. First, the American Academy of Pediatrics (AAP) does not suggest that the procedure is medically indicated. Rather, it outlines the purported medical benefits and risks of the operation, and leaves the decision whether to circumcise to the individual contemplating the procedure. *See generally Report of the Task Force on Circumcision*, 84 PEDIATRICS 388 (1989). Despite the AAP's listing of six "good reasons" for choosing circumcision, current medical thinking acknowledges only one—the potential for lowering an infant's "chances of getting a urinary tract infection in the first year of life"—as having an independent medical basis. Interview with Dr. Deborah L. Squire, Associate Professor, Duke University Pediatrics Department, in Durham, N.C. (Nov. 19, 1997) (on file with author). And even that basis is in question because the relative incidence of such infections in circumcised and uncircumcised infants is "statistically insignificant." *Id.* Moreover, the single study upon which the infection argument is based did

Equal Protection Clause requires that "similarly-situated" persons be treated alike under the law, and conversely, does not permit gender-based classifications absent "an exceedingly persuasive justification."[186]

not take into consideration that pediatricians and parents may have contributed to the increase in infection rates in uncircumcised infants in their attempts prematurely to retract and clean under the infant foreskin. *Id.* The other five medical arguments in favor of circumcision—reduction in rates of penile cancer, sexually transmitted disease, foreskin infection, swelling of the urethral opening, and general genital hygiene—listed by the American Academy of Pediatrics are in fact all related to hygiene; if the parent and later the child is taught and maintains good hygiene practices, all of these conditions are similarly eliminated. *Id.* Thus, there is no need to have a child circumcised for these reasons, particularly when "it is easier to clean under the foreskin than behind the ears." *Id.*

The notion that male circumcision should be treated as child abuse is not a new one. This suggestion was made in the legal literature as early as 1984. *See* William E. Brigman, *Circumcision as Child Abuse: The Legal and Constitutional Issues*, 23 J. FAM. L. 337, 337-38 (1984). More recently, men's groups have formed specifically to urge legislative action on the issue. *See* Cecelia Goodnow, *Time Doesn't Heal Division Over This Issue*[—]*Research Revives Age-Old Debate: To Cut or Not?*, SEATTLE POST-INTELLIGENCER, Aug. 18, 1992, at C1 (describing advocacy groups decrying male circumcision as child abuse). Most recently, these groups have argued, *inter alia*, that statutes banning FGM discriminate on the basis of gender, and that the legislation must to be redrawn to include both male and female circumcision. *See* Andersen, *supra* note 125 (discussing federal suit filed by a men's group in North Dakota challenging an anti-FGM statute in that state as a violation of equal protection. The suit was dismissed on standing grounds and appealed to the United States Court of Appeals for the Eighth Circuit).

186. The Supreme Court articulated and further explained this standard most recently in *United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996). Specifically, the Court noted that gender-based classifications are subject to heightened equal protection scrutiny, and required that a state provide an "exceedingly persuasive justification" for distinctions in this category. *Id.* The Court further noted that this standard can be met by a showing that the gender-based classification "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 2275 (internal quotation marks omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Finally, the Court stated that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*; *see also* Hogan, 458 U.S. at 724 (articulating "exceedingly persuasive justification" test for gender-based classifications). This Fourteenth Amendment doctrine applies exclusively to the government and to private institutions that otherwise satisfy state action requirements. *See In re* Civil Rights Cases, 109 U.S. 3, 11 (1883) (articulating the Amendment's state action requirement and noting that "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment"); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 1301 (3d ed. 1992) ("Almost without exception . . . the provisions of the Constitution are addressed to governmental entities and officials."). Because the Harborview Medical Center is a state owned and operated facility, there is no question that the doctrine, with its attendant proscription of gender discrimination, applies to the hospital's activities. There is also no question that it would apply equally to private hospitals that for funding or other reasons could be considered state actors.

Harborview's refusal to accommodate the parents of Somali girls, and the state's eventual treatment of symbolic circumcisions as child abuse, may also create an impermissible eth-

As I noted in Part I, the comparison between FGM and male circumcision is usually a flawed one, because the two practices differ substantially both as to their medical or physical aspects and as to their underlying motivations.[187]

First, male circumcision typically involves only the removal of the foreskin of the penis.[188] In the United States, this procedure is generally performed in a hospital, often with local anesthetic.[189] A small percentage of circumcisions are performed in ritual Jewish ceremonies without these safeguards.[190] The infant experiences pain along with the surgery, and the resulting wound takes approximately one week to ten days to heal.[191] After that time, there are no generally acknowledged ramifications from a properly performed procedure.[192] Despite suspicions and theories to the contrary, where the procedure is properly performed, there is no known future pain and suffering, and there is no known sexual dysfunction.[193]

There are three stated motivations for male circumcision: religion, hygiene, and custom. Religion provides the principal rationale for Muslim and Jewish parents, who believe that Islam and Judaism require the practice. Other parents may choose to circumcise their infant boys for health reasons, believing that the surgery will diminish the likelihood that their children will suffer infections or other ailments in the future. This rationale has been the subject of much debate in the medical community; however current medical thinking

nicity or national origin-based distinction because the hospital sometimes performs surgery to reduce the size of the external genitalia of American teenaged girls. *See supra* note 103. While this procedure is not well-known, it apparently is understood to be an appropriate way to reduce the size of allegedly abnormal genitalia. Depending upon the medical necessity for that procedure in individual cases, the state may not be able adequately to distinguish between allowing genital tissue removal in cases where American girls or their parents request it for non-medical reasons, and denying a symbolic prick of the clitoris when Somali girls or their parents request it for cultural and especially for religious reasons.

187. *See supra* note 58 and accompanying text (introducing this argument).

188. *See* Abbie J. Chessler, Comment, *Justifying the Unjustifiable: Rite and Wrong*, 45 BUFF. L. REV. 555, 564 (1997).

189. AMERICAN ACADEMY OF PEDIATRICS, CIRCUMCISION: PROS AND CONS, GUIDELINES FOR PARENTS (1995) [hereinafter AAP CIRCUMCISION PAMPHLET].

190. *See* Chessler, *supra* note 188, at 564.

191. *See* AAP CIRCUMCISION PAMPHLET, *supra* note 189.

192. *See id.* ("Problems after a circumcision are very rare."), *id.* ("It takes about 1 week to 10 days for the penis to fully heal. . . .").

193. *Cf.* Chessler, *supra* note 188, at 570-73 (discussing theory that male circumcision can cause physical and psychological problems).

suggests that the surgery is not indicated.[194] The most popular reason for male circumcision is custom. As the American Academy of Pediatrics has noted, "[m]any parents choose to have their sons circumcised because 'all the other men in the family were circumcised' or because they don't want their son to feel 'different'."[195]

On the other hand, FGM traditionally has involved the removal at least of part of the clitoris.[196] In more severe forms, it involves the removal of all of the clitoris, all of the clitoris and the labia, or all of the clitoris, the labia, and a procedure called "infibulation," in which the resulting wound is stitched closed leaving only a small opening through which urine and, later, menstrual fluid can pass.[197] In these forms, as Pat Schroeder correctly noted, "There is no similarity [between FGM and male circumcision] unless one considers circumcision amputation."[198] Although medicalized in some places, FGM is generally performed by a traditional circumcisor or midwife who uses rough tools and no anesthesia.[199] Mimi Ramsey has described cases where battery acid was used after the procedure to seal the wound and to stop the bleeding.[200] The ramifications of the traditional forms of FGM include excessive bleeding (sometimes causing the death of the child) and pain; both can last a lifetime.[201] When the girl reaches adolescence and adulthood, she will not experience sexual pleasure as we know it since she has, for all practical purposes, lost her sexual organs. Depending upon the type of FGM she has suffered, she may have to be cut open to have intercourse and to give birth.[202]

194. *See, e.g.*, Brigman, *supra* note 185, at 337-38 (arguing male circumcision is not medically warranted, has no significant psychological benefits, and poses major health risks); Goodnow, *supra* note 185 (describing controversy over medical necessity for male circumcision); *see also supra* note 185 (explaining the "health" rationale and questioning its validity).

195. AAP CIRCUMCISION PAMPHLET, *supra* note 189.

196. *But cf.* Obiora, *supra* note 17, at 288 (noting that in its modern, "sanitized" forms, it may include merely the removal of the prepuce or hood of the clitoris, or the symbolic prick on the hood that was at issue in the Harborview proposal).

197. *See id.* at 289.

198. 139 CONG. REC. H7546-04 (daily ed. Oct. 7, 1993) (statement of Rep. Schroeder); *see also* Abu-Nasr, *supra* note 28 (reporting that Schroeder said that FGM "'[is] not like circumcision for men. It's much like Lorena Bobbitt'"). Schroeder's view is consistent with the medical facts. *See* Toubia, *supra* note 17, at 712 ("The mildest form [of FGM], clitoridectomy, is anatomically equivalent to amputation of the penis.").

199. *See* Boulware-Miller, *supra* note 17, at 174 (describing medicalization in urban Somalia).

200. *See* Ramsey Remarks, *supra* note 122.

201. *See* Coleman, *supra* note 3, at 1112.

202. *See* Gunning, *supra* note 17, at 196-97 (describing complications with procedure); Ostrom, *supra* note 81 (noting complications typical of FGM).

The stated motivation for this practice varies. Sometimes it is seen as a rite of passage into adulthood, although it generally appears to be performed on younger children, including infants.[203] Whatever its status as a rite of passage, its proponents almost always say it is necessary to prevent the girl from engaging in sexual activity, to keep her chaste and pure for her husband, so that she does not become a "harlot."[204]

Because of these profound differences between the traditional forms of FGM and male circumcision, equal protection challenges to state statutes outlawing FGM brought by circumcised males will likely fail on the ground that boys and girls are not "similarly situated" for the purposes of those statutes. For the same reasons, the analogous argument made by practitioners of the traditional forms of FGM—that equal protection doctrine requires that they be treated the same as practitioners of male circumcision—likely would not succeed.

The Harborview proposal was clearly different, however, because unlike the traditional forms of FGM, it would have been *less* injurious to the health, welfare and safety of girls than male circumcision is to the health, welfare and safety of boys. Specifically, while the symbolic female circumcision would have involved only a small incision on the hood of the clitoris, an incision that was accurately characterized as a "mere bloodletting," male circumcision always involves the cutting as well as the removal of tissue (the foreskin of the penis). Skin bruising and disfigurement always accompany the accepted procedure, and these injuries typically take some time to heal. The emotional consequences of the two procedures could be characterized as equivalent; although again, the fact that the Harborview proposal contemplated obtaining the actual consent of the girls, where boys are rarely in a position to give their consent to circumci-

203. *See* Chessler, *supra* note 188, at 556-59.

204. *See* Coleman, *supra* note 3, at 1112. It is largely this issue of intent that has been central to the ability of FGM opponents to steer any conversation away from male circumcision and to turn FGM into a women's rights issue. This approach is entirely legitimate, at least from the Western perspective. However, one unfortunate result is that it also has caused the conversation to steer away from the evident child abuse implications of the practice, implications which, again from the Western perspective, are equally legitimate. Mimi Ramsey has successfully steered the conversation in both directions. She emphasizes the child abuse implications, noting, for example, that FGM "is the most horrible, horrible thing that is happening to children" and that American-born children, whatever their parents' country of origin, deserve the right assured to all other American children not to be mutilated. *See* Ostrom, *supra* note 81.

sion, makes it arguable that the symbolic female circumcision actually would be less injurious in this respect as well.[205]

Thus, given the nature of the procedure proposed by Harborview, there is for the first time a form of FGM that is comparable to male circumcision,[206] so that girls and boys are "similarly situated" for equal protection purposes. Under these circumstances, the question becomes whether the hospital can provide a legitimate "exceedingly persuasive justification" for its final decision to discriminate against the wishes of the parents of the Somali girls, and more generally, whether the State of Washington could provide such a justification if it continued to condone male circumcision and at the same time chose to bring charges against the parents of girls who are symbolically circumcised.[207]

Given the close similarity of Harborview's proposed cutting of girls and male circumcision, the sole justification for prohibiting the cutting of girls while allowing the cutting of boys would be if symbolic female circumcision harms girls (and eventually women) in a way that male circumcision does not harm boys.[208] For example, one

205. The consent issue could go either way. It is unclear whether any eleven-year-old child, still very much under the influence of her parents, can give independent consent. If independent consent at this age is impossible, or unlikely, then it is a fiction to say that any consent that is eventually obtained is valid. Indeed, consent obtained under these circumstances might enhance the emotional injury because it might cause the child later to believe she had actively contributed to her own circumcision. On the other hand, making the child part of the decision making process even at this early age may well give her the feeling of responsibility and identity she needed to accept her parents'—and perhaps now her—tradition.

206. Professor Obiora appears to suggest that "clinicalization" of the traditional *sunna* circumcision—the form that involves "only" the removal of the hood or prepuce of the clitoris and thus, according to Obiora, is "most comparable to male circumcision"—may be an appropriate solution to the international conflict over female circumcision. *See* Obiora, *supra* note 17, at 289 (making comparison between *sunna* form of female circumcision and traditional male circumcision); *id.* at 365-76 (making the clinicalization argument). Implicit in this is the notion that for equal protection purposes, one does not need to do what I am suggesting, i.e., to "reduce" the circumcision to its symbolic form. Although Obiora's approach goes far in recognizing the need to address the child abuse argument and the legal implications of equal protection doctrine, I believe that the doctrine demands more comprehensive equivalence. The long-term ramifications of removing male and female foreskin are likely to be quite different. We know, for example, that circumcised males can and do live perfectly normal lives—including sexual lives. We do not have this same information in the case of circumcised women. Indeed, the clitoris is such a sensitive part of the female anatomy that it is likely that if its protective hood or prepuce was removed, the opposite would be true. Clinicalization at the time the procedure is done simply cannot cure this deficiency.

207. This is, of course, a hypothetical question, since the symbolic procedure was never performed, at least at Harborview.

208. This argument is hotly contested by men's groups who argue that male circumcision should also be classified as child abuse, because it both causes emotional harm and is of dubi-

might argue, as did Mimi Ramsey, that the symbolic circumcision of girls is an enactment and reinforcement of female subordination, and thus emotional child abuse,[209] and rather than participating in gender-based discrimination, the state, through its child abuse laws, is attempting to control it.

There are several flaws in this argument which make it unlikely that it could provide the requisite "exceedingly persuasive justification" for the state's discriminatory treatment of otherwise similarly-situated boys and girls.[210]

First, it would be pure speculation to say that the symbolic circumcision likely would cause the sort of emotional suffering that amounts to child abuse, particularly in this case where the procedure was never performed. We simply do not know how a girl who was subject to this procedure would react, and what other factors, including other cultural forces in her life, would contribute to her emotional state. And while it is certainly possible that there might be some emotional repercussions, it is equally possible that if the girl believed that her parents had saved her from a worse fate, she would be relieved that the procedure was performed. Ultimately, there is simply no way to know what the emotional impact of the symbolic circumcision would be, and thus it would be illegitimate to base a decision to discriminate against the potential beneficiaries of the procedure on such pure speculation.

More importantly, even if Somali (and other) girls did suffer emotionally as a result of their parents' beliefs, the Supreme Court under the First and Fourteenth Amendments has given wide latitude

ous medical benefit. *See, e.g.*, Edward Wallerstein, *Circumcision: Ritual Surgery or Surgical Ritual?*, 2 MED. & L. 85, 90-92, 95-96 (1983) (noting the dispute among scholars regarding the necessity and wisdom of practicing male circumcision); Kevin Starbuck, Perspective, *Rights of Infants*, CHI. TRIB., July 8, 1993, at H18 (asserting that male circumcision is medically necessary in less than one percent of cases in which it is performed).

209. Many states define child abuse to include acts causing emotional harm. *See, e.g.*, FLA. STAT. ANN. § 39.01(2) (West 1988) ("'Abuse' means any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's . . . emotional health to be significantly impaired."); LA. CHILDREN'S CODE ANN. § 1003 (West 1995) ("'Abuse' means any of the [enumerated] acts which seriously endanger the physical, mental, or emotional health of the child . . . .").

210. The argument I imagine the state making here—that the motivational difference between male and female circumcision, and the emotional suffering that female circumcision might engender, provides an "exceedingly persuasive justification" for discriminatory treatment—could also support the position that boys and girls were not in fact similarly-situated.

to parents to raise their children as they see fit,[211] and there is no exception to this doctrine for the purely private decision some parents make to subordinate girls. For example, parents are allowed to send only their boys to college, to teach their girls that their place is in the home, and to instruct their boys that they will be the "lords and mas-

211. The broad freedom that parents have to raise their children, even if their views lie outside the mainstream, is a well-ensconced feature of constitutional law. The First Amendment protects the exercise of religious traditions by parents in the upbringing of their children; invasions of this right by the state must be justified by interests "of the highest order." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The Fourteenth Amendment protects the fundamental right of "parental autonomy," the interest of parents in retaining substantial control over how they raise their children. Limitation of this interest by the state must be justified by equally compelling state interests. *See* Parham v. J.R., 442 U.S. 584, 600 (1979) (balancing, in the context of a dispute over voluntary commitment of children to mental hospitals, the interests of parents and children against those of the state). Thus, courts asked to rule on the role of parents in particular circumstances usually, if not always, begin their analysis with a passage much like this one:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."

Id. at 602 (alteration in original) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).

It is under the auspices of this doctrine that dissenting parents are permitted despite compulsory school attendance laws to take their children out of school or to home school them, *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972) (allowing such removal where the parents, members of the Amish religion, had otherwise demonstrated their commitment to an orderly society). For an exceptional argument that parental freedom not to adhere to compulsory school attendance laws and to conventional medical practices violates children's right to the equal protection of the laws, see James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321 (1996).

The philosophical origins of this doctrine lie in liberalism's respect for the individual *adult* and his (or her) right to be free from governmental intrusions:

> Every family is a little state, or empire within itself . . . .
>
> Every father is the constituted head and ruler of his household. God has made him the supreme earthly legislator over his children . . . amenable to no other power, except in the most extreme cases of neglect, or abuse. The will of the parent is the law to which the child is bound in all cases to submit, unless it plainly contravenes the law of God. . . .
>
> Nor has *civil government* any right to interfere with the head of a family, unless it be where he is guilty of extreme neglect, or abuse.

HEMAN HUMPHREY, DOMESTIC EDUCATION (1840), *reprinted in* 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 351-52 (Robert Bremner ed., 1970); *see also* Lacher v. Venus, 188 N.W. 613, 617 (Wis. 1922) ("A natural affection between the parent and offspring . . . has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty and pursuit of happiness, our government is formed.").

ters" of those homes.[212] Such private discrimination and the emotional suffering that it may bring to girls have always fallen within the realm of appropriate parental autonomy. State action designed to infringe on that autonomy—for example, as a result of a judgment that the practice constituted child abuse—generally is found to be unconstitutional.[213] If discriminatory parenting practices are protected constitutionally, it is difficult to see how eliminating these practices would constitute an "exceedingly persuasive" reason to sanction or to discriminate against certain (immigrant) parents and their similarly patriarchal views on child-rearing. Stated another way, the state's hypothesized justification would be inconsistent with parents' religious and cultural autonomy rights under the First and Fourteenth Amendments.[214]

Finally, the state may argue that even if it cannot prosecute purely *private* cutting as child abuse—for example if the Somali parents decided to perform the symbolic circumcision at home—it should not be required to perform the procedure in *public* facilities. While this position may have force in other contexts, it is critically flawed here, again because the state has chosen to provide circumcision services to parents of male children, and has done so without also reaffirming the non-medical parental motivations underlying that practice. Specifically, when the state performs a circumcision at a state facility at the request of Jews or Muslims, it has not chosen to practice Judaism or Islam, nor has it adopted the religious and cultural rationales that motivate these groups. Rather, it merely recognizes the procedure as a child-raising practice that does not transcend the bounds of law. What this somewhat vague conclusion means is simply that our law permits quite a lot of individual freedom, including the freedom of parents to raise their children in a patriarchal tradition.[215] In allowing this freedom, the state does not thereby adopt patriarchy; rather, it merely affirms the country's historical and philosophical commitment to individual liberty.[216]

212. *See generally supra* note 211 (describing broad parental autonomy rights under the First and Fourteenth Amendments).

213. *See id.*

214. As I described in Part II, the Somali parents at issue sincerely believe that their religion requires female circumcision "much as the Jewish faith does male circumcision." *See supra* note 99 and accompanying text.

215. *See supra* notes 211-12 and accompanying text.

216. Of course, the individual liberty at issue in this context is that of the adult parents, as this is all that the constitutional doctrine contemplates. *See supra* note 211 (discussing philosophical underpinnings of broad parental role).

Ultimately, the state has no "exceedingly persuasive" reason for any gender-based distinctions in the Harborview proposal. And as a consequence, because the proposal would not have violated federal law, there is little doubt that the symbolic female circumcision would have been lawful.[217] Indeed, even if the proposal had violated federal law, the foregoing equal protection analysis shows that its application in this case likely would have been unconstitutional. There is little doubt, therefore, that Somali (or other similarly-situated) parents who are refused the symbolic circumcision of their girls can claim that the state is acting illegally. In addition, to the extent that the equal protection argument can be based on national origin or ethnicity rather than gender,[218] and that the hospital or medical facility at issue receives federal funds, the parents also might have a federal civil rights cause of action under Title VI of the Civil Rights Act of 1964.[219]

Given this conclusion, a state such as Washington has two options. It can begin performing symbolic female circumcisions, or it can stop circumcising or condoning the circumcision of boys. While the latter option would immediately raise substantial and very legitimate First Amendment concerns for parents whose religion requires circumcision—concerns that could be articulated just as easily by parents of boys and girls—it is clear that the choice must be made one way or the other. The bottom line is that the state cannot treat parents differently on the basis of their child's gender.

IV. THE MERITS OF THE COMPROMISE

Assuming the legality of the Harborview proposal, the policy question remains: Should the proposal have been carried out? Answering this question requires serious consideration of the views of its opponents, as well as those of its proponents. It also requires some

217. It bears repeating that this legal conclusion is only viable if the symbolic circumcision at issue is less invasive than or at most a relative equivalent to male circumcision. Thus, I am not arguing (and do not believe) that any traditional form of FGM could be viewed as an equivalent to male circumcision.

218. *See supra* note 186 (describing both the equal protection test and this ethnicity argument).

219. *See* 42 U.S.C. § 2000d (1994) (prohibiting exclusion from participation in, denial of benefits of, and discrimination under, federally-assisted programs on grounds of race, color, or national origin); *cf.* cases cited *supra* note 186 (noting that an equal protection challenge on the grounds of ethnicity or national origin also may be viable in the context of symbolic FGM restrictions).

further exploration of the merits of pragmatism in the consideration of cultural collisions, particularly those that implicate religious beliefs, and of the importance to American society of achieving the proper balance between multicultural sensitivity and the need for social order.

Opponents identified three problems with Harborview's proposal to perform symbolic female circumcisions. The first and, in my view, most weighty, is that performing this procedure would have sanctioned medically-unnecessary physical injury to children.[220] The second, often voiced by opponents of FGM, is that "even talking about cutting female genitals legitimizes a barbaric practice, one that disempowers women and serves to keep them out of the American mainstream."[221] The third, related criticism of Harborview's proposal is that it seems to defeat the process of Americanization. I will address the merits of each of these quite legitimate concerns in turn.

Typically, medically unnecessary injury to a child is considered child abuse in jurisdictions across the United States.[222] These laws accurately reflect society's view that children should purposefully be injured only in those circumstances where it is necessary to preserve their health, and then only by a trained medical provider. So strongly held is this view, in fact, that its traditional exceptions, including "reasonable" corporal punishment and male circumcision, are today being reexamined as more and more modern experts in child development and medicine question the appropriateness of even these long accepted forms of injury.[223]

In this evolving cultural context, the notion that we would voluntarily add to the list of socially accepted but medically unnecessary

220. *See* Boulware-Miller, *supra* note 17, at 165-69 (discussing policy and personal implications of characterizing FGM as child abuse); *see also supra* text accompanying note 118.

221. Ostrom, *supra* note 81.

222. *See supra* note 170 (describing typical child abuse statutes).

223. The propriety of routine male circumcision is very much at issue in the medical community today. *See* Goodnow, *supra* note 185 (discussing the current context of the debate). The same is true of corporal punishment, although contemporary child specialists appear to be more unified in the view that physical punishment is not appropriate. *See* T. BERRY BRAZELTON, M.D., TOUCHPOINTS 260 (1992) (stating that physical punishment has disadvantages such as telling the child "you believe in power and physical aggression" and suggesting other forms of discipline, such as "time out"). The movement against corporal punishment is especially strong internationally. *See* Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 450-51 (1996) (noting that Article 19 of the U.N. Convention has been interpreted both by the treaty's managing committee and by some of its proponents and opponents as prohibiting corporal punishment).

injuries makes little sense.[224] Indeed, it is anachronistic at best that we would consciously add female genital "cutting" to the list of condoned injuries at the same time we are busy whittling down that list. Pat Schroeder seemed especially perturbed by this contradiction when she wrote to Harborview that she was "baffle[d] and horrifie[d]" when she heard of the proposal to perform symbolic circumcisions, since, in her mind, "[t]he clear intent of the [federal] legislation . . . was to criminalize any medically unnecessary procedure involving female genitalia."[225]

This view would be quite persuasive, except for two important considerations. First, it necessarily assumes that if the symbolic circumcision is not performed, the girls at issue will not be physically injured. In fact, we know that the opposite is probably true. The immigrants and refugees told Harborview that both their culture and their religion mandate a form of the traditional practice. They also insisted that if the hospital did not perform the procedure, they would send their daughters to one of three local midwives, each of whom has a different idea of what a *sunna* circumcision is.[226] If the midwives were unable to cut the girls, the parents were clear that "they would pay the $1,500 fare to fly their daughters to their homeland, where they would face the extreme version of the cutting ritual."[227] Assuming these claims are true, the question Harborview faced was not whether to injure a child. Either way, the girls would be injured. And thus, the issue presented was a most practical one: Do we allow for the reality that the child will likely be cut by a midwife in the traditional fashion, or do we afford her the possibility of a

224. It makes even less sense when one considers that this same society has only recently abandoned all but one form of female genital "surgery." *See* Telephone Interview with Dr. Leslie Miller, *supra* note 64 (discussing role of a plastic surgeon on Harborview's review committee, and the fact that that specialization currently performs surgery on the genitalia of female adolescents in the United States); *see also* Ben Barker-Benfield, *Sexual Surgery in Late Nineteenth Century America*, 5 INT'L J. HEALTH SERVICES 279 (1975) (discussing historical practice of FGM in the U.S.)

225. Schroeder Letter to LoGerfo, *supra* note 116, at 1. It is unclear either from her letter or from the legislative history of the federal statute whether Schroeder was aware of the cosmetic procedure. Either she was aware of its existence, and she believed it could be classified as medically necessary, or she was not aware of the procedure, and risked criminalizing it.

226. Telephone Interview with Dr. Leslie Miller, *supra* note 64; *see also supra* text accompanying note 80.

227. Brune, *supra* note 1; *see also* Burstyn, *supra* note 83, at 30 (discussing basis for believing the immigrants were and are committed to this enormous expense).

symbolic incision made by a trained medical professional at an age where she could presumably have some voice?[228]

This question, I believe, can have only one answer in the discussion about child abuse. Let me be clear: No abuse is better than even a little abuse. And if this were the real choice, then the answer would be equally clear. We could not condone the procedure. But here, the real choice is between the evil of FGM and the lesser evil of a symbolic cut.[229] In graphic terms, it is a choice between having your mother hold you down while your clitoris is cut off by an untrained midwife with rough tools and no anesthesia, and consenting (or not) when you are eleven to having a doctor at a hospital make a small, symbolic incision on the hood of your clitoris under some form of anesthesia.[230] Assuming there was nothing else at stake, all of us would subject ourselves and our children to the lesser of these two scenar-

228. In response to comments that the hospital's proposal would take away the girls' right to be free from any form of physical abuse, Dr. James LoGerfo, Harborview's Medical Director, commented that this view was naive: "the compromise [procedure]," he stated, "may be the only available ethical, legal and humane alternative 'short of throwing the kids and the mother in jail for 20 years to make sure nothing happens to them.'" Ostrom, *supra* note 81.

229. As I have already discussed, the concept of FGM as "evil" is certainly not universally shared. *See supra* note 27; *see also* Boulware-Miller, *supra* note 17, at 157-58 (relating the social and economic benefits that accompany FGM); Obiora, *supra* note 17, at 295-98 (noting positive aspects of the practice in the cultural contexts in which it is performed); c*f. id.* at 367 (characterizing "sanitization," or medicalization of FGM, as "the lesser of two evils" for practitioners of FGM, the greater evil in her view being an uninformed push for abolition). Indeed, it appears to be the case that most African women confronted with the choice whether or not to circumcise their daughters balance the physical harm to the child against the social and economic benefits that come from the procedure, and generally (and in their cultural context logically) decide that the latter outweigh the former. *See* Boulware-Miller, *supra* note 17, at 165-69. Thus, this judgment that I have made that FGM is "evil" is a particularly Western (and some would say "arrogant" or "imperialist") one. *See supra* notes 29, 55. This perspective in some respects also might be considered unhelpful. *See supra* note 27 (noting how the Western perspective of FGM is resented by even the African women who are trying to halt its practice). Nevertheless, I make the judgment and dare to be an imperialist in the context of a discussion of the cultural rights *immigrants* have in a *Western* country. Despite the views of some cultural relativists and multiculturalists, such imperialism in the domestic context is not inappropriate; indeed, as I stated earlier, to call it imperialism in this context is entirely inapposite. *See supra* note 55. As a practical matter, the situation of girls facing FGM in the United States is not the same as it would have been in their own countries; for example, if they are not circumcised here, they are not necessarily unmarriageable and certainly not categorically deprived of economic opportunities. Thus, the more positive rationales for the traditional practice as it takes place in Africa or Asia no longer have measurable force, and what we are left with is primarily physical harm to a child.

230. As I have already noted above, the question whether the girl's consent would be truly informed and voluntary can be debated. *See supra* note 205. Suffice it to say that even if it were impossible to obtain informed and voluntary consent from an eleven-year-old, this scenario would be better than the alternative.

ios. The Harborview proposal was not equivalent to *Sophie's Choice*, where the proposed options were equivalently evil, and thus the ethical selection was to make no selection at all.[231] As a result, to talk at this juncture of theory or the message the practice would send to society, is both inapposite and inappropriate to the very stark circumstances some little girls are facing.

Indeed, the fact that Somalis might be more likely to circumcise their girls in the United States than in their home country, because American culture is seen as allowing the very promiscuity the practice is intended to eradicate, highlights that the West cannot simply assume that the refugees and immigrants will agree to stop the practice because they are now "in Rome." Short of changing what these immigrants view as our culture of promiscuity, the United States must appreciate and address the legitimacy of this traditional concern—a concern shared, ironically, by many indigenous conservatives in our society—and develop, in addition to legal proscriptions, practical ways to protect the little girls in jeopardy.[232]

The second consideration that makes the child abuse attack on Harborview's proposal less persuasive is that it is being applied unequally to girls and boys. As I discussed in Part III, permitting male circumcision while disallowing this symbolic form of female circumcision likely would violate the Equal Protection Clause. But even if this constitutional prohibition were not implicated, there still would be the moral question of how to justify abusing boys but not girls. Either our society wants to eradicate all forms of non-accidental injuries to children, or it wants to continue to allow for such injuries under certain circumstances. But if the latter is the predominant view—and it may well be—it is anathema to other societal values to define the permissible injuries on the basis of gender. Religion or health-based motivations are condoned in general, but gender-based motivations are not. Thus, as I concluded earlier, if the child abuse argument is used against Harborview's proposal, it works only so long as society also is willing to address the issue of male circumcision.

231. *See* WILLIAM STYRON, SOPHIE'S CHOICE 483-84 (1979) (relating how a Nazi concentration camp guard gave Sophie, an inmate, the "choice" of selecting which one of her children lived and which one died).

232. *Cf.* Boulware-Miller, *supra* note 17, at 169-72 (noting that the traditional Western argument against FGM—that it denies women the "right to sexual and corporal integrity"—is not one which is persuasive to affected women who often prefer the social and economic benefits attendant to the procedure).

Because that day is not yet at hand, and because the proposal would have prevented severe physical and psychological injuries rather than perpetrated them, there is little doubt that the child abuse argument against Harborview's proposal fails. To the contrary, this very analysis reveals the wisdom of the proposal: It would have solved the practical problem opponents of FGM have failed to solve, namely, how to stop that traditional practice and actually prevent mutilations. And it would have addressed the theoretical critique of cultural relativists and practitioners of FGM that Western opponents of the practice are hypocritical given their acceptance of male circumcision. In this latter regard, not only does the symbolic circumcision proposed by Harborview reflect a lack of hypocrisy, but it also demonstrates that to make female circumcision relatively equivalent to male circumcision, the former has to be altered to the extent suggested by the Harborview compromise.

As I suggested in the introduction to this Part, however, there are other problems with Harborview's proposal that must be considered. The second problem, most strongly supported by feminist opponents of FGM, is that the proposal would have sent the wrong message to society and to immigrants about the willingness of American culture to accept FGM and its underlying patriarchal philosophy.[233] As Ramsey noted when she heard of Harborview's plans, "[w]hat the Somalis, what the immigrants like me need is an education, not sensitivity to culture."[234] This view certainly has merit. A willingness openly to discuss discrimination against cultural minorities (including women) in *positive* tones can lend vitality to those forces that would engage in or perpetuate the discrimination. And to the extent that FGM itself has the potential to cause real harm to its victims, such discussions may be harmful. Indeed, I agree with Ramsey that we should not encourage practitioners of FGM to believe that the United States is open to their underlying views about women's sexuality and the role of girls and women in the society.

233. *See* Ostrom, *supra* note 81 (noting that the mere discussion of symbolically cutting female genitalia serves to subjugate women). Although Schroeder joined in the opposition, *see* Dugger, *supra* note 18, Mimi Ramsey was the principal voice for this argument in the context of the Harborview proposal. *See* Brune, *supra* note 1; Ostrom, *supra* note 81. A Dutch proposal to perform a similar symbolic circumcision drew a nearly identical reaction from Berhane Ras-Work, the Ethiopian Chair of the Inter-African Committee. *See* Obiora, *supra* note 17, at 285. Ras-Work's view was that the official approval of symbolic incisions would "set a dangerous precedent, reconfirming the subjugation of women." *Id*. Obiora believes that this response "is somewhat misconceived and over-broad." *Id*. at 285-86.

234. Brune, *supra* note 1 (internal quotation marks omitted).

The flaw in this opposition to Harborview's proposal does not lie in a recognition of the dangers of talking openly and positively about FGM, but in the fact that it also would censor and eventually kill potentially effective discussion about how to limit and ultimately to stop the practice of FGM. This unfortunate outcome, in fact, is precisely what happened in the Harborview case. Schroeder, Ramsey, and others who were "horrified," "baffled" and otherwise outraged that the hospital was "even talking about" a compromise on the circumcision question[235] cloaked their outrage in the language of a purported higher morality, and managed, as a result, quickly and cleanly to stop the Harborview proposal. Empirical evidence demonstrates, however, that *their* message—ensconced in the federal and state statutes prohibiting FGM—is not broadly effective in the relevant communities.

Immigrants who believe, either for religious or cultural reasons, that their daughters must be circumcised apparently are not deterred by the law or the majority culture's dictates. The report in the *Seattle Times* that Harborview's patients "would pay the $1,500 fare to fly their daughters to their homeland"[236] if necessary is but one of many examples where immigrants have insisted that Western legal and cultural opposition to a traditional practice would not affect their behavior.[237] As I have stated elsewhere, both the law and the punishment it imposes serve an important educational function.[238] Nonetheless, in the case of FGM, it is in spite of the law that, as I write this Article and as we debate the power of messages, it is said that little girls are being "operated" upon on United States soil.[239] If the goal is to protect those little girls, it is both imprudent and unrealistic to rely *exclusively* on messages, however important they otherwise may be.

235. Ostrom, *supra* note 81.

236. Brune, *supra* note 1.

237. *See* Dugger, *supra* note 18 (describing a Somali refugee couple living in Houston who already have had one daughter circumcised and who intend to do the same with their other daughter); Ostrom, *supra* note 81 (describing a Somali woman living in Seattle who said the procedure was necessary to "help her daughters avoid what she sees as the American disease").

238. For example, both the guilt and sentencing aspects of criminal law are designed to serve the purposes of general deterrence, specific deterrence, and education. *See* Coleman, *supra* note 3, at 1128. As such, the law is specifically intended "to assure that the individual criminal, and sometimes those with the potential for criminal behavior, are discouraged from engaging in such conduct in the future." *Id*.

239. *See* Burstyn, *supra* note 83, at 33.

The other point that needs to be made about messages is that even if the Harborview compromise sends a negative message about American society's willingness to tolerate the patriarchal notions that underlie FGM, it is certainly an attenuated one. The hospital categorically refused to consider any form of traditional female circumcision.[240] It proposed the symbolic circumcision because it reasonably believed this procedure was the only way to protect the little girls who otherwise would be mutilated. As Harborview's spokesperson said, the hospital's intent was "to provide a relatively safe procedure to a population of young women who traditionally have had some horrendous things done to them."[241] Given this quite public rejection of FGM, it is difficult to view the hospital's message—accurately presented—as terribly threatening. The fact that many apparently did not hear it accurately, because influential individuals created and perpetuated the false impression that Harborview actually was planning to circumcise girls, only goes to show how tricky reliance on messages can be.

On the other hand, Harborview's compromise with its patients might have sent positive messages about the need for immigrant communities to understand the limits of our society's tolerance for certain practices (in this context, the traditional forms of FGM), and at the same time its ability to engage in pragmatic discussions to resolve cultural collisions that implicate issues of great significance for immigrant communities as well as the larger community as a whole. The hospital's insistence that it would not even consider performing any of the traditional forms of FGM should have sent the clear message that neither it nor the society was willing to tolerate any traditional form of this practice. This message was received at least by those Somalis who agreed to the modest compromise. In addition, the hospital's recognition of the need to develop a practical solution to the problem also should have sent a positive message about the ability and willingness of the majority culture to be sensitive to and understanding of the power of cultural and religious difference. That the viability of these messages was severely damaged by misleading newspaper articles and commentary from opponents of the compromise does not, of course, mean that the messages were not there, just that they were embedded in negative rhetoric that should have been discarded.

240. *See supra* notes 79, 104, 109-10, 139 and accompanying text.

241. Brune, *supra* note 1.

The third, related attack on Harborview's proposal, which does not appear to have been articulated explicitly, is that it interfered with the process of "Americanization."[242] "Americanization" was recently defined by the United States Commission on Immigration Reform as "the process of integration by which immigrants become part of our communities . . . [including] the civic incorporation of immigrants, that is the cultivation of a shared commitment to the American values of liberty, democracy, and equal opportunity."[243] The Americanization argument against the Harborview proposal is that in allowing for even a symbolic form of female circumcision, the hospi-

242. "Americanization" may be defined as the process of becoming American or "Americanized." *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY 60 (3d ed. 1992) (defining "Americanize" as "to assimilate into American culture. . . . To become American, as in spirit"); WEBSTER'S NEW WORLD DICTIONARY 44 (3d C. ed. 1988) (listing among the definitions of "Americanize" "to make or become American in character, manners, methods, ideals, etc.; assimilate to U.S. customs").

In the legal literature, the words "Americanize" and "Americanization" are most often used in connection with immigrants; specifically, this term usually refers to the process of learning the English language and American cultural behaviors. *See, e.g.*, Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 328 (1997) (stating that "the compulsory public education law in *Pierce* [*v. Society of Sisters*, 268 U.S. 510 (1925)] was part of a strategy designed to 'Americanize' the schools by requiring teacher loyalty oaths and by banning the teaching of evolution and foreign languages, among other things"); Frank Sullivan, Jr., *Indiana as a Forerunner in the Juvenile Court Movement*, 30 IND. L. REV. 279, 302 (1997) ("There was an effort [in the mid-nineteenth century] to Americanize ethnic children by separating them from their families and giving them a segregated education" (quoting Roger Rosenblatt, Essay on *The News Hour with Jim Lehrer* (PBS television broadcast, Feb. 12, 1996))); Michael DiChiara, Note, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 103 (1997) ("In the early 1900's, English literacy requirements were imposed as conditions for naturalization and suffrage in order to Americanize immigrants.").

The term "Americanization" itself is controversial. Some believe that it accurately, poignantly, and with utmost good will describes the process of acculturating immigrants. Like Barbara Jordan, they believe that although the "'word earned a bad reputation when it was stolen by racists and xenophobes in the 1920s. . . . [I]t is our word, and we are taking it back.'" U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 8, at 6 (quoting a public speech given by Barbara Jordan in 1995). Others believe that conservative anti-immigration forces stole the word forever, and thus that it cannot be resuscitated in any useful—i.e., non-racist—sense. Even when viewed in the best light as defining "the process of integration by which immigrants become part of our communities and by which . . . the nation learn[s] from and adapt[s] to their presence," U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 8, at 6, the term necessarily begs loaded questions including, acculturation into what and just how much acculturation do we require?

I use the word in this Article understanding the importance of this debate and the legitimacy of these questions. I use it because I agree with Barbara Jordan and her ideological colleagues that racists should not be permitted forever to co-opt the national name. And I use it expecting to give some answers to the questions begged by its definition. *See infra* notes 259-67 and accompanying text.

243. U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 8, at 6.

tal seemed to recognize the continued vitality of an immigrant traditional practice that was clearly contrary to progressive tenets of American culture.[244] If some immigrants took this message from the proposal, they may falsely believe that American culture is tolerant enough to include the practice and its patriarchal underpinnings. And since Americanization involves assimilation by immigrants into at least the core aspects of the majority culture, the proposal appeared to retard that process.

As the failure of the anti-FGM laws actually to curb the practice demonstrates, however, how best to Americanize immigrants is by no means a simple matter. On the contrary, these questions have long been a subject of national significance and national controversy.[245] Our extensive history with Americanization, however, provides some empirical lessons. For example, it is accepted that there will be a transition period from the first to the second generation, during which the immigrant family assimilates into American culture.[246] We

244. I recognize, of course, that this argument begs the ultimate questions what is "American culture" and what are its "tenets." While a full exploration of this question is beyond the scope of this Article, I do set out my views in general at the end of this section. *See infra* notes 259-67 and accompanying text. I also have stated elsewhere that at least in the context of immigrant cultural practices like FGM, the position of American culture is clear and its tenets are equally so. *See* Coleman, *supra* note 3, at 1166 (describing *progressive* American culture as including both an antidiscrimination principle and a respect for women and children, which together do not permit violence directed specifically at those groups, and expressly rejecting the view that multiculturalism as a progressive cultural tenet can overcome these principles). Finally, I believe that we arrive at least piecemeal at some conclusions about the content of American culture when we address *comprehensively* cultural collisions of the sort this Article describes.

245. *See generally* EDWARD GEORGE HARTMANN, THE MOVEMENT TO AMERICANIZE THE IMMIGRANT (1948) (describing this historic movement and controversy).

246. Margaret Talbot makes this point in her writing on immigrant cultural collisions for the *New Republic*. *See* Margaret Talbot, *Baghdad on the Plains*, NEW REPUBLIC, Aug. 11-18, 1997, at 18, 20. She writes that American history is replete with examples of instances in which immigrant groups have sought, explicitly or in practice, transition periods in the Americanization process. *See id.* Often, if not always, the immigrant community in which the particular individual finds himself or herself provides the vehicle for transition. *See id.* In addition, and perhaps surprisingly, allowance for this period of transition seems to *enhance* the immigrant's chances of successful assimilation and his or her ultimate loyalty to American culture:

> [I]nstitutions[, such as] Yiddish newspapers, the German schools, the Scandinavian churches[,] have always played a vital part in assimilating immigrants, softening and making sense of the transition to American life.
>
> . . . .
>
> Immigrant enclaves have been like comfort stations on the road to assimilation, the places where you learned from your own kind about the new kind you were bound to become. "Indeed," writes John Gjerde[,] . . . "a political environment that permitted immigrants to maintain their religious beliefs and converse in their home language worked to augment loyalties to the American nation. Newspapers and

also know that acculturation is often non-existent in older or more conservative members of the first generation, while the rate of assimilation among younger members or members who have more to gain from the process is more rapid.[247] In any event, there generally is little (and often no) doubt that the children of immigrants will Americanize.[248] And while experts have demonstrated differences in the acculturation rates and abilities of various immigrant groups depending upon their educational and professional backgrounds and where they settle,[249] the process of assimilation is also generally un-

printed tracts instructed non-English speakers in the precepts, responsibilities, and rights inherent in the Republic."

> . . . [S]elf-contained immigrant communities coexisted with a generalized faith in what Peter Salins has called the assimilation contract—the idea that in exchange for tacit permission to retain much of their own culture, especially in the short term, immigrants would sign on to a kind of long-term project of Americanization.

Id.

247. *See, e.g.*, THE KOREAN DIASPORA: HISTORICAL AND SOCIOLOGICAL STUDIES OF KOREAN IMMIGRATION AND ASSIMILATION IN NORTH AMERICA 171 (Hyung-Chan Kim ed., 1977) (noting that a "young age at the time of entering the United States was expected to contribute to greater assimilation, since the young are thought to adapt more quickly to a new culture"); Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 49, 61 (1993) ("The Vietnamese husband traditionally is regarded as the strongest person in the household, the master and religious head of the family. . . . [In these households, there are] 'differential rates of acculturation [to American society] in husbands and wives, with rapid change likely in the latter's case.'").

248. *See* HING, *supra* note 6, at 152-54 (describing generally immigrants' assimilation patterns through the third generation). Professor Hing notes that despite anti-immigrant rhetoric to the contrary, immigrants from all countries do assimilate or Americanize:

> Study after study demonstrates . . . that the vast majority of immigrants take on cultural traits of the host community. Some traits replace old ones, but most are simply added. For example, immigrants entering the United States today learn English *at the same rate* as other immigrant groups before them. First-generation immigrants tend to learn English and pass it along to their children, who become bilingual. Immigrants want and encourage their children to learn English. By the third generation, the original language is often lost.
>
> . . . Many young Asian and Latino immigrants, in particular, aggressively strive to become "American." They are eager to learn English, to get a job, to work hard; in short they seek to achieve a part of the American dream. . . . Due to school attendance, interaction with peers, and exposure to the media, the children of immigrants, even foreign-born children, generally become fully acculturated.

Id. at 153 (footnotes omitted).

Importantly, these generalizations are true for both non-European immigrants and European immigrants. *See id.*; ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA 217-19 (1990) (including a chart describing linguistic assimilation—a marker for cultural assimilation generally—in second generation of workers, entrepreneurs, and professionals).

249. *See* PORTES & RUMBAUT, *supra* note 248, at 217-19 (noting different acculturation rates depending upon whether the immigrant is a worker, entrepreneur, or professional, whether the immigrant initially settles in an ethnic neighborhood or is "dispersed" among the general population, and whether the immigrant is first or second generation).

derstood as just that, a process.[250] Immigrants do not become culturally American simply by virtue of their presence on United States soil.

This last fact makes the acculturation process, or transition period between arrival and Americanization, a very critical one. Specifically, it is important not only that the process be recognized as necessary and inevitable, but also as worthy of consideration.[251] Therefore, in addition to clarifying what is legal and what is illegal, we must also ask "What is the best way to Americanize immigrants?" This question is precisely the one which Harborview and its patients attempted to answer. Implicit in their effort was the pragmatic recognition that they were together facing the process of acculturation. Indeed, the hospital,[252] the Somali immigrant community,[253] and at least a few others[254] saw the symbolic circumcision as a way to protect

250. *See* U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 8, at 6 ("Americanization is the *process of integration* by which immigrants become part of our communities." (emphasis added)).

251. The U.S. Commission on Immigration Reform was designed, in part, to consider how best to assure the success of the Americanization process. Included in its recommendations are suggestions that Congress assure the orientation, education, and naturalization of immigrants. *See id*. at 8-16.

252. Telephone Interview with Dr. Leslie Miller, *supra* note 64 (noting that the hospital had the hope and expectation that the procedure would be a transitional measure that would ultimately lead to the complete abolition of the practice in the second generation); *see also* Ostrom, *supra* note 81 (describing Dr. Miller's view that symbolic circumcision "would help make the transition from the generation with radical circumcisions to one where no cutting at all would need to be done").

253. The immigrant community's perspective was explained by the Executive Director of the Somali group, Afrirelief and Development:

> I think the prevailing concept about it [female genital mutilation] is that it should be diminished as much as possible, and possibly eradicated as far as girls are concerned. . . . [However,] the fact that we came as refugees doesn't mean we are going to leave our culture overnight. The bad parts of our culture we will try to shake off, gradually. Now we are at a point as leaders and elders of the community negotiating with mothers.

Brune, *supra* note 1. Brune notes that the larger immigrant community feels "the practice should be ended." *Id*. Nevertheless, community leaders are sensitive to the concerns of the recent arrivals. For example, as the Executive Director of Afrirelief and Development noted,

> [y]ou cannot take away the rights of families and women . . . . As leaders and elders of the community we cannot force a mother to accept the general idea of the [larger Somali immigrant] community [that circumcision should be eradicated]. She can say, "I want my girl to have letting of blood."

Id.

254. For example, one woman from the general community is reported to have said that:

> While I share with those who are opposed to even this modified procedure the belief that no girl should have to be physically altered in order to make her acceptable, I also encourage them to support this compromise in a spirit of respect and possibly as being necessary during a generation of transition.

little girls of recent refugees and immigrants who had not yet Americanized, and as a transitional measure between first and second generation Somalis. As such, their vision was entirely consistent with everything we know about how immigrants actually acculturate.[255] Indeed, by combining contemporary American culture's convictions against FGM with an understanding of the need for multicultural sensitivity during the period of Americanization, the hospital and its immigrant patients managed to work out a very real (perhaps the first real) solution to the problem of FGM in the United States.

Such pragmatism is essential in a field inundated from all sides with rhetoric about ethnocentrism, universal values, the sanctity of American culture, multiculturalism, and cultural relativism.[256] Whatever the philosophical views of those involved in the discussion, the fact is that traditional practices like FGM will not be tolerated in the United States or in other Western countries that share this country's views on customs that do not conform to majority culture. Coming to terms with that (ethnocentric) reality *and* the equally powerful truism that some immigrant traditions cannot be eradicated simply by telling the immigrants that they are illegal or contrary to American culture[257] is a critical part of the effort to change those practices.[258]

I recognize, of course, that the theoretical and perhaps even practical merits of this discussion about Americanization necessarily rest upon society's acceptance of the concept itself. That is, we can agree on the need for the symbolic procedure as a vehicle eventually to eliminate FGM only if we first agree that immigrants should assimilate into an American culture (which does not allow the traditional practice). This, in turn, requires that we reject the merits of a pure multicultural society[259] that would allow for such non-

Elaine Ellinger Barrick, Letter to the Editor, *Cultural Issues in Health Care—Circumcision Compromise Good Transitional Response*, SEATTLE TIMES, Sept. 22, 1996, at B11.

255. *See supra* notes 246-50 and accompanying text (describing the acculturation process generally).

256. *See* Obiora, *supra* note 17, at 286 (arguing that pragmatism such as that demonstrated by the Dutch proposal to perform symbolic circumcision is essential "to transform the manner and health consequences of the surgeries").

257. Brune, *supra* note 1.

258. This is not to say that philosophy is not important, or that discussions along those lines are not helpful, at least to ensure that all of the parties involved understand their opponents' perspectives. For example, cultural relativists have certainly influenced many involved in this area to be more sensitive, and at the same time to be wary of irrational ethnocentrism. On the other hand, these debates do little on their own to resolve anything.

259. As I have stated previously, multiculturalism involves

conforming traditional practices, and that we share some common understanding of what is meant by "American culture." The latter requirement is the subject of a sometimes acrimonious national debate,[260] but I suggest that when we cast off extremist views from the left and the right,[261] the real discussion centers not on the question whether we need or should have "one nation" with a "national culture," but rather, what are the outlines and contents of that national culture.[262]

> aspiring toward "a plurality of cultures with [all] members [of society] seeking to live together in amity and mutual understanding with mutual cooperation, but maintaining separate cultures." In its purest incarnation, multiculturalism is premised upon the belief that all cultures are of equal value, that no one culture is better than another. Professor Stanley Fish describes adherents of this school as "strong multiculturalists" who "want to accord a *deep* respect to all cultures at their core." Professor Fish contrasts "strong multiculturalism" with "boutique multicultualism," whose adherents "'admire' or 'appreciate' or 'enjoy' or 'sympathize with' or (at the very most) 'recognize the legitimacy of' the traditions of cultures other than their own."

Coleman, *supra* note 3, at 1119 (citations omitted). Thus, a pure multicultural society would be one in which the different cultural traditions of its members were not subject to judgment from the majority (or even other minority cultures). Applied specifically to FGM, such a society would not condemn the practice; it certainly would not make it illegal; and it would not work to acculturate its adherents differently.

260. *Compare* GEORGIE ANNE GEYER, AMERICANS NO MORE: THE DEATH OF CITIZENSHIP 55 (1996) ("[T]here is a real possibility that the idea and practice of citizenship in America may for all intents and purposes die . . . ."), *and* J. HARVIE WILKINSON, III, ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA 171 (1997) (arguing that shared language "enables Americans to interact as one nation rather than as a collectivity of enclaves"), *with* HING, *supra* note 6, at 6-12 (arguing that immigrants contribute to an evolving American culture), *and* LIND, *supra* note 10, at 14-15 (arguing that American society is not threatened by real racial Balkanization, and we can still achieve a "color-blind society, in which cultural fusion is accompanied . . . by racial amalgamation").

261. That there are extremists on both sides of the debate—racists and separatists—is beyond dispute. *See* HING, *supra* note 6, at 161 (positing conservative commentator Pat Buchanan on one side of this divide and multicultural separatists on the other); *see also id.* at 180 (noting that these extremist positions cannot ultimately prevail because it is a fact that American society already is a pluralistic one, and that "even [such] a . . . society must share a core of values, or a culture, to provide a means to live together as a society").

262. For example, Professor Bill Ong Hing argues that there is an American culture, but that it is an evolving one, influenced *positively* over time by the respective waves of immigrants who have come since the eighteenth century, and by technology, social movements, and economic developments. *See id.* at 153-54. Hing also suggests that the existence of an American culture is essential, and that certain core values of that culture can be identified:

> Even a multicultural society must share a core of values, or a culture, to provide a means to live together as a society. Without a commitment to a common core, balkanization into assorted factions is likely. . . . The common core of values encompasses the essence of good citizenship. It includes respect for the nation's laws, for its democratic political and economic system, and for equal opportunity. . . . [The basic values] are to repudiate racism, sexism, heterosexism, and class distinctions in our daily activities; to be open, caring, and fair; and to be accepting of diversity and respectful of others.

Needless to say, these questions will not be resolved overnight, if they are ever resolved. Our legal history and political philosophy do, however, provide a useful paradigm for discussing these questions. Specifically, as I suggested in the introduction to this Article, our tradition of ordered liberty, which allows for individual (and minority group) liberty or freedom within certain culturally-defined bounds, establishes the framework within which particular questions about what is and is not "within the American culture" can and should be resolved. Over time, prevailing cultural winds have changed the elastic line between the acceptable and unacceptable and allowed for more or less liberty.[263] And it is certainly the case today that the broader American culture permits more deviation from the majority's core than was the case in the past.[264] In this respect, one can say that multiculturalism, perhaps not in its pure form but in its admonition that we "tread gently if at all upon that which is at the core of [minority or] immigrant culture,"[265] has itself become part of the larger culture.[266] Using the paradigm of ordered liberty and allowing for its inclusion of multicultural sensitivity into the sphere of the accepted national culture permits us to engage in useful discussion about both the outlines and the contents of that culture.

At a minimum, as the United States Commission on Immigration Reform has suggested, American culture includes constitutional "principles and values," including especially "equal protection and justice under the law; freedom of speech and religion; and representative government," as well as "[e]thnic and religious diversity based

Id. at 180.

263. *See id.* at 155-56 (noting that pluralism shares with liberal democracy a commitment to "religious freedom, freedom of speech and assembly, and privacy" and describing periods in Supreme Court history during which those freedoms have been curtailed in favor of "assimilationist thought").

264. The modern Supreme Court's First Amendment cases—both under the free speech and religion clauses—are the principal example of this contemporary liberalism. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 586-98 (1992) (holding impermissible under the First Amendment the inclusions by public schools of clergymen offering nonsectarian prayers in school ceremonies); R.A.V. v. City of St. Paul, 505 U.S. 377, 391-96 (1992) (holding statute outlawing bias-motivated disorderly conduct unconstitutional under the First Amendment).

265. Coleman, *supra* note 3, at 1166.

266. *See* NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW 19-21 (1997) (arguing that American society, for better or worse, has adopted multiculturalism into the national culture, and exploring what this new identity means for our social institutions and our sense of national unity).

on personal freedom."[267] While there may be some debate about what else to include in the mix, there is no question, given the constitutional limitations inherent in the doctrine of ordered liberty, that the government cannot be in the business of dictating or even facilitating the inclusion of much else.

In the end, what is most extraordinary about the compromise reached by Harborview and its immigrant patients is that it provided "a culturally sensitive, safe alternative to the practices of female circumcision or female genital mutilation"[268] within the paradigm of ordered liberty. Specifically, it involved both multicultural sensitivity (or a respect for ethnic and religious diversity) and a respect for existing domestic cultural boundaries.[269] These qualities make the compromise, and particularly the process that led to the compromise, a model for American society as it seeks to resolve the cultural collisions that have occurred and will continue to result from progressive immigration policies.

CONCLUSION

> "We will cut the whole foreskin off a penis, but we won't even consider a cut, a sunna, cutting the prepuce, a little bloodletting [on a girl]."[270]

> Respect for . . . newcomers requires that we view multiculturalism as a positive and even necessary factor in the debate about how to resolve [cultural] conflicts. Without the sensitivity that multicultural-

267. U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 8, at 5. This is, in my view, just another way to say that the contents of American culture are determined by the principle of ordered liberty. *See also supra* note 262 (discussing Professor Hing's perspective on the contents of American culture).

268. Dugger, *supra* note 18 (quoting from Harborview's final press release and indicating that the hospital's role in considering the need for such an alternative "has now been concluded").

269. That the hospital's process involved both multicultural sensitivity and a respect for the anti-FGM position of American culture is, I think, beyond dispute. *See* Ostrom, *supra* note 73 (quoting Dr. Abraham Bergman, Chief of Pediatrics at Harborview Medical Center, as stating that it is "imperative to understand" cultural differences). Indeed, Dr. Bergman's quite public view that, as one journalist described it, Americans "should be careful when making judgments about the cultures of others," Ostrom, *supra* note 81, drew strong criticism. *See, e.g.*, Barrick, *supra* note 254 (noting that "a sincere religious belief is not enough to demand respect if its product results in iniquity"). At the same time, the hospital was clear that it would not circumcise girls. This was not even an issue. Telephone Interview with Dr. Leslie Miller, *supra* note 64.

270. Ostrom, *supra* note 81 (quoting Dr. Leslie Miller).

> ism injects into the debate, we have little hope of understanding the social obstacles immigrants face, or of ensuring their successful integration into American society.[271]

While opponents of FGM are generally correct to reject categorically the merits of that practice, they were wrong to reject the Harborview proposal. They were wrong particularly because they continued to ignore the deficiencies of the comparison between that traditional practice and male circumcision, and as a result, failed to protect any children, female or male, from medically or religiously unnecessary genital cutting. Saying that they had to avoid the male circumcision issue to assure political support for their cause is no response.[272] If the law is implicated in any political position, as it is in this one, that position must have integrity. Avoiding the obvious applicability of the equal protection doctrine under the facts of the Harborview proposal is intellectually dishonest.

The fact is, Harborview's efforts to resolve what no one in the United States has yet managed to tackle should be lauded rather than condemned. Not only did the hospital join together with the immigrant community to create a workable and positive solution to one of the thorniest of modern cultural collisions, but it also showed that sometimes, we can reach compromises that accommodate *both* the traditional practices of non-European immigrants *and* the existing norms of this culturally Western society. Because the proposal joined directly the theoretical concerns of cultural relativists, it also emphasized the continuing relevance of the Equal Protection Clause and of the doctrine of ordered liberty as we seek the proper path to the accommodation of non-European immigrants.

Compromises of the sort reached in Seattle are not always possible in a country which attempts both to be non-discriminatory in its immigration policies and to remain unified as to certain aspects of the culture and legal system. There are times when we must make choices that result in the exclusion and condemnation of nonconforming traditional or religious practices; traditional forms of

271. Coleman, *supra* note 3, at 1166.

272. Schroeder is reported to have said, for example, that the process leading to the federal prohibition of FGM was difficult because "some legislators did not believe the procedure was being done in this country and because some Orthodox Jews feared it would lead to criticism of male circumcision." Abu-Nasr, *supra* note 28. Because of this fear, Schroeder sought expressly to make clear that there was no relationship between male and female circumcision. *See id.* ("[FGM is] not like circumcision for men. It's much like Lorena Bobbitt." (internal quotation marks omitted)).

FGM are but one example of such instances.[273] On the other hand, the facts of the Harborview case also indicate the need to exercise caution before concluding that every cultural collision implicates such an "either/or" solution. What Harborview did was to ask the related questions "Why is FGM antithetical to our own cultural tradition?" and "Is there a way to accommodate the practice without offending United States law?" Asking and answering these questions allowed them to eliminate the collision and to ensure the best possible treatment for the immigrants under the dominant cultural and legal circumstances. Replace the phrase "female genital mutilation" with other controversial traditional practices and there is a model solution to the problem of how to determine whether a compromise is possible.

273. I have suggested that in addition to FGM, other traditional immigrant practices pose irreconcilable conflicts with United States law and culture, including the Hmong custom of marriage-by-capture, the Asian custom of parent-child suicide, and other cultures' customs that permit violence against women and children. *See* Coleman, *supra* note 3, at 1093-94 (providing examples of other such traditional practices and discussing the response of the American legal system). It should be clear from my earlier discussion of the doctrine of ordered liberty that some Americans (either individually or in groups) also hold values or share customs that are inconsistent with American law and (majority) culture. My argument applies equally to those groups and their practices.