Law, Ethics, and Gender

Male Versus Female Genital Alteration: Differences in Legal, Medical, and Socioethical Responses

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ABSTRACT

The different legal, social, and medical approaches to ritually based male and female genital circumcision in the United States are highlighted in this article. The religious and historical origins of these practices are briefly examined, as well as the effect of changing policy statements by American medical associations on the number of circumcisions performed. Currently, no state or federal laws single out male circumcision for regulation. The tolerant attitudes toward male circumcision in law, medicine, and societal opinion stand in striking contrast to the attitudes of those disciplines toward even the least invasive form of female genital alteration. US law tacitly condones male circumcision by providing exemptions that are not available for other medical procedures, while criminalizing any similar or even less extensive procedure on females. The increase in immigration, over the past few decades, of people from countries in which female genital alteration is a cultural tradition has brought the issue to the United States. The medical profession's changing approach over time toward male circumcision is primarily responsible for such different legal and societal reactions toward female genital alteration.

This article examines the origins of male circumcision and its history in the United States, and contrasts these with the dramatically different treatment that female circumcision has received in this country. The type of genital alteration under discussion is limited to alteration of the prepuce (ie, the male foreskin and its equivalent in females). Those forms of female circumcision that remove functional biological tissue are not considered except by contrast.

Approaches to Male Circumcision

In the United States, male circumcision is a commonly performed procedure in which a doctor, typically an obstetrician or pediatrician, or a specifically trained individual surgically removes a newborn's foreskin shortly after birth. The procedure involves cleaning the newborn's penis and foreskin, attaching a special clamp to the penis, and surgically removing the foreskin.[1] There is no analogous procedure performed on newborn girls in this country, even though the equivalent of the foreskin, ie, the clitoral hood, can fairly be said to exist in girls. Both the male foreskin and the female clitoral hood are known as the prepuce, an integral structure of the male and female external genitalia found in all humans and nonhuman primates.[2]

Accepted for publication May 1, 2007.
Gend Med. 2007;4:89–96. 1550-8579/$32.00

Male circumcision is thought to predate recorded human history, with depictions found in stone-age cave drawings and ancient Egyptian tombs.[3] Today, circumcision is practiced primarily by 2 major religions, Judaism and Islam. In the Jewish faith, the basis for circumcision is provided by the Old Testament, or Torah. According to the book of Genesis, God commanded Abraham to circumcise himself and his male offspring as part of an eternal covenant:

> "Every male among you shall be circumcised in the flesh of your foreskin, and it shall be a token of a covenant betwixt Me and you. And he that is eight days old shall be circumcised among you, every male throughout the generations."[4]

In Islam, on the other hand, circumcision has no specific mention in the Koran but is instead addressed by the Sunnah (a secondary source of Islamic law recounting the customary practice of the Prophet Muhammad).[5] According to the Sunnah, Muhammad stated that circumcision was a "law for men and a preservation of honor for women."[6] In contrast to Judaism, where circumcision is invariably performed on the eighth day of a male baby's life (unless postponed for medical reasons), there is no fixed age for circumcision in Islam, although it is typically performed by the time a boy reaches 7 years of age.* Nor is circumcision regarded as strictly compulsory in Islam; rather, it is considered an important ritual and a tradition that carries great symbolic value in the Muslim faith.[7]

Circumcision does not have a tradition in Christianity. The first Church Council in Jerusalem decided that circumcision was not a requirement,[8] and the Apostle Paul warned against adopting the practice.[9] Because circumcision is not a customary practice in Christianity, most western societies other than the United States regard circumcision as a mark of religious identification, that is, as belonging to the Muslim or Jewish faith. This is not so in the United States, where circumcision rates do not appear to vary much between the different religions. Indeed, circumcision in this country seems to have lost its association with religion and instead has become something approaching a universal American practice.[10] Because Christian religious organizations in the United States have never strongly objected to the circumcision of their members, deferring instead to medical authority, most circumcisions in this country have traditionally been performed not for religious but for medical reasons.

The American public's acceptance of infant male circumcision as a preventive medical procedure may be traced to the late 19th century. In 1870, a prominent Milwaukee surgeon believed that he had cured a young boy's debilitating bowleggedness by circumcising him.[11] Hypothesizing that the root cause of many orthopedic conditions was irritation in the genital area caused by the presence of the foreskin, the surgeon promoted the perceived usefulness and versatility of circumcision as a medical procedure. Within a short period of time, medical professionals began to expand the use of male circumcision to treat a number of orthopedic as well as nonorthopedic ailments, including alcoholism, epilepsy, asthma, gout, rheumatism, curvature of the spine, headache, hysteria and other nervous disorders, paralysis, malnutrition, night terrors, clubfoot, eczema, convulsions, mental retardation, promiscuity, syphilis, and cancer,[12] as well as the "vile" habit of masturbation.[13] Perceived as effective in curing such a range of unrelated ills, circumcision soon gained widespread acceptance by the medical community as a preventive measure to ward off a variety of diseases in newborn boys. These rather illustrious origins may have helped the procedure attain the unique cultural status it enjoys in the United States today—we currently have one of the highest nonreligious circumcision rates of any country in the world.[14]

Prevailing medical belief regarding the benefits of circumcision has changed repeatedly since the days of nonreligious circumcision as a virtual cure-all in the 19th century. With the

*The Old Testament also records that Abraham circumcised himself and his first-born son, Ishmael, when the latter was 13 (Genesis 17:25).

advent of evidence-based medicine, claims that circumcision cures mental, orthopedic, and other medical disorders have been discredited; however, empirically reliable evidence regarding precisely which, if any, medical benefits can be obtained by circumcision is still scarce if not nonexistent. Ascertaining the health benefits of circumcision requires statistically valid and scientifically rigorous studies, of which there have been few. Not surprisingly, public recommendations by medical associations, such as the American Academy of Pediatrics (AAP), on the advisability of circumcision have changed over the years as newer research emerged, contradicting and superseding older data. For example, in 1971 the AAP stated that there were "no valid medical indications for circumcision in the neonatal period."[15] By 1989, the AAP had softened its position, acknowledging that "newborn circumcision has potential medical benefits and advantages as well as disadvantages and risks."[16] This partial reversal in position was based on the latest scientific evidence available at the time, which indicated that circumcision might offer certain medical benefits, including lower risks of urinary tract infections,[17] penile cancer,[18] and certain sexually transmitted diseases.[19]

The effect of the changing policy statements by American medical associations has been reflected in the fluctuating number of overall circumcisions performed in the United States. For example, one study examining the reported frequency of circumcision during a 10-year period from 1975 to 1985 noted a sharp drop in circumcision rates (from ~85% to 70.5% of all male infants in the tested population, US Army hospitals worldwide)[20] after the 1975 report of the AAP Ad Hoc Task Force on Circumcision found no medical indications for routine circumcision.[21] Then, after a continued decline, rates of male circumcisions performed in the United States began to rise sharply (from 48.3% in 1988–1991 to 61.1% in 1997–2000),[22] after the AAP in 1989 announced that circumcision may indeed provide some potential medical benefits.[16]

Recognizing that statistically valid data on the medical benefits of routine male circumcision are as sparse as they are inconclusive, medical associations have more recently taken the stance that circumcision is a matter of personal choice, "an elective procedure to be performed at the request of the parents,"[23] and is no longer indicated for any potential medical benefits.

> "Most parents base their decision whether or not to have their newborn son circumcised on nonmedical preferences (ie, religious, ethnic, cultural, cosmetic). The American Academy of Family Physicians recommends physicians discuss the potential harms and benefits of circumcision with all parents or legal guardians considering this procedure for their newborn son."[24]

The permissive attitude of the medical profession toward routine nonmedical neonatal circumcision in the United States is mirrored in the American legal system. Currently, there do not appear to be any laws, state or federal, that regulate male circumcision (other than those expressly exempting religious circumcisions from medical accreditation requirements).[25] In addition, several states specifically exclude circumcision from the scope of laws prohibiting ritual abuse.[26] Male circumcision, whether religious, ritual, or medical, is clearly favored under American law, and courts have flatly refused to hear parental disputes regarding circumcision.[27]* In one case, a court held that a hospital was not liable to the parents for circumcising their child when the parents had specifically informed the hospital that they wished to perform a ritual circumcision away from the hospital setting. As one author has observed, "The thrust of those and other cases is that circumcision is a harmless and, in fact, a generally helpful operation that should not be placed under excessive legal regulation."[28]

*Svoboda et al describe a 1987 California law suit challenging the legal validity of parental permission for neonatal circumcision and an 8th Circuit Court of Appeals dismissal for lack of standing of a mother's claim on behalf of her son who was circumcised with his father's consent, but without her consent.

Approaches to Female Genital Alteration

In the United States, the tolerant approaches to male circumcision in law, medicine, and societal opinion (not to be confused with ethics) stand in striking contrast to the treatment of female circumcision—even the least invasive form of female genital alteration, the (ceremonial) nicking of the clitoral prepuce. The World Health Organization defines the least invasive form of female genital alteration as "[e]xcision of prepuce (the fold of skin surrounding the clitoris)."[29] As noted, because the clitoral prepuce is analogous to the male foreskin, the nicking or removal of a small amount of this tissue can be considered the equivalent of male circumcision.[2]

Female circumcision is practiced in various forms in other countries, mainly in sub-Saharan Africa. As is true for male circumcision, the practice is believed to predate the major religions under consideration, but in contrast to male circumcision, it is not associated with any one religion.[29] Although the countries in which female circumcision is practiced are predominantly Islamic, there is no consensus that a clear religious basis exists for the practice in Islam. In fact, there appears to be considerable debate among the different schools of Islamic religious scholarship regarding the mandate or legitimacy of female circumcision.[30,31] Most Islamic countries, including Saudi Arabia, Iran, and Turkey, do not practice female circumcision.[32] However, the increase in immigration over the past few decades of people from countries in which female genital alteration is a cultural tradition (eg, Ethiopia, Nigeria, Somalia, Sudan, and others) has brought the issue to the United States, where it has been greeted with considerable public and legislative hostility.[33]

Since the mid-1990s, at least 15 states have adopted laws prohibiting "genital mutilation" of girls and impose criminal sanctions for violations: California, Colorado, Delaware, Illinois, Maryland, Minnesota, Nevada, New York, North Dakota, Oregon, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin, with Illinois, Minnesota, Rhode Island, and Tennessee prohibiting the practice on adult women as well as on minors.[34] At the federal level, female genital alteration is prohibited by the Federal Prohibition of Female Genital Mutilation Act, enacted in 1996.[35] Both state and federal laws that criminalize female genital alteration are worded broadly enough to cover even the most minimal ritual nicking of a girl's prepuce or clitoral hood.*

That American public opinion on female genital alteration is clearly negative is evident in the following episode. In Seattle, Washington, in 1996, a group of Somali immigrants requested to have their daughters circumcised in a hospital. The hospital agreed to a compromise and was willing to perform a ceremonial nick on the girls' clitoral prepuce to honor the Somali tradition of female genital alteration. This would have also prevented the immigrants from sending their daughters to Somalia to have a more extensive procedure performed. After the compromise became public, however, it stirred up such heated controversy that the hospital backed away from its decision. According to Congresswoman Patricia Schroeder, the compromise would have been in violation of the federal female genital alteration bill she had helped to author and that had been passed by the US Congress but had not yet taken effect. In a letter to the Seattle hospital, she stated that "the clear intent of the legislation was to criminalize any medically unnecessary procedure involving female genitalia."[36]

*18 USCA §116 provides: (a) Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labial majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both. (b) A surgical operation is not a violation of this section if the operation is (1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or (2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife. (c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.

DISCUSSION

US law tacitly condones male circumcision by providing exemptions that are not available for other medical procedures, while criminalizing any similar or even less extensive procedure on females. Indeed, the disparity in treatment between male and female circumcision becomes even more apparent when the public or its elected officials address the issue. For example, legislative drafters in North Dakota attempted to present a bill that would apply equally to male and female genital alteration. This bill was rejected by the legislature and ultimately passed only after it was redrafted to limit the prohibition to female genital alteration.[37]

What justifies the differences in medical approaches, legal treatment, social acceptability, and ethical reactions to male circumcision on the one hand and female genital nicking on the other? First, are there medically based differences? Although we have found many pseudomedical polemics condemning all manner of female genital alteration no matter how minimal, we have found little, or no careful, measured medical discussion specifically addressing minimally invasive female genital nicking. The American Medical Association refers to any genital alteration in the female as "genital mutilation," defining it broadly as "the medically unnecessary modification of female genitalia."[38] We also have not found any medical authority drawing significant distinctions from a medical point of view between removing the foreskin of a boy and nicking the clitoral prepuce of a girl. If anything, it would seem that the former is more invasive, more lasting than the latter.

Second, could a medical distinction be based on the respective ages of the male or female child undergoing the alteration? For boys, circumcision typically occurs in the first month of life, whereas for girls the ritual typically occurs before reaching puberty. Certainly, a girl of that age has a more developed anatomy. These are surely distinctions, but are they ones that make a meaningful difference to the issue? One might argue that the parents of a girl approaching religious adulthood might fairly have a greater say in their daughter's participation in a genuine and sincerely embraced religious ceremony.

Third, does a distinction exist that, given anatomical differences, it may be harder with young girls to "get it right"? Arguably, it is easier to locate and remove the foreskin than it is to find and remove or nick the clitoral hood. Part of the problem is that Western discussion of the issue of female genital alteration does not make subtle distinctions between the various types of female alteration, lumping all procedures together and condemning the lot. The fact remains, however, that the issue of "getting it right" appears to be a poor justification for the extraordinary differences in medical, legal, social, and ethical reactions.

With a fourth set of differences, we stray from meaningful scientific or legal justifications and into the realm of simply describing reality. One might focus on the racial and political biases. The groups practicing male circumcision are largely white, and the groups practicing female genital alteration are largely black. Furthermore, although Jews who are religiously observant represent a minuscule percentage of the US population, the number of religionists claiming some meaningful connection to the Old Testament is substantially greater than those claiming a connection to the Koran or to other writings discussing the issue of female genital nicking. Male circumcision is known—and known to have been practiced for thousands of years. Female genital alteration is not well known to Americans. The effective "lobby" is simply stronger for males than for females. Our social and ethical reaction is informed, at least in part, by historical familiarity: one practice is known and ubiquitous, certainly in the United States, whereas the other is neither. These facts can be assumed to account for much of the actual difference in perception, yet it is hard to turn these differences into legitimating explanations.

A fifth possible explanation implicates the medical history previously summarized. Male circumcision existed for ages before medicine came to have a public view concerning it at the end of the 19th century. Male circumcision did not need medical justification or support to le-

gitimate it; religious observers or sympathizers had all the justification they needed in the Old Testament and in the long-standing and consistent practice of religion.

Once medicine weighed in on the subject in the late 19th century, many religionists or people who used religious-based reasons for prescribing conduct tried to ground religious justification for circumcision in the then-popular medical explanations of the day.[12] To many, this effort constituted a category mistake, confusing the hegemony of the different realms of medicine and religion. Nonetheless, having attempted to justify a religious ritual with then-prevailing medical opinions, the legitimacy of male circumcision was then believed to lie in medicine. It is true that the evolution in medical analysis and reaction brought with it changes in the prevalence of the practice. In the latter part of the 20th century, when medicine could no longer provide as clear or complete a justification for male circumcision, the religious practice seemed to be on shakier ground. (If the practice was no longer justifiable medically, the thinking went, it should not merely be not encouraged, it should be discouraged and perhaps even outlawed, even for the religiously observant.) Yet these newer medical views have not been strong or consistent or long-lived enough to overcome the original and longer-standing medically based views, and, as a result, male circumcision in the United States remains popular and without serious medical, legal, social, or ethical stigma.

The case for female genital alteration followed a completely different medical path, and it is that different path that would appear to explain some of the differences in legal, social, and ethical reactions. Female genital alteration never had a chance to be considered medically during the same period as male circumcision was. It was never supported by the medical community. Although it is true that, as a result, female genital alteration did not fall prey to the same category mistake as male circumcision did, it also never got the boost in public opinion from early medical support. From the start, the battleground of explanation was demanded to be medical rather than religious or socio-historical. And from the start, it has never appeared to have a medically based justification.

CONCLUSIONS

Male circumcision is an ancient religious practice. As long as the worlds of medicine on the one hand, and law/ethics/religion on the other, remain respectful of each other's legitimate and separate spheres of influence, there do not appear to be convincing objections to the practice. The medical literature, however, has been inconsistent in its approaches to male circumcision.

Minimally invasive female genital alteration also appears to be a long-standing but less well-publicized religious or cultural practice, yet female genital alteration has been accorded radically different medical, legal, social, and ethical treatment. These differences in treatment appear hard to justify as a matter of medicine; the various rationales for distinguishing between the male and female practices appear unconvincing. The most likely explanation may well be that once-held—and now discredited—medical attitudes have significantly influenced different legal, social, and ethical attitudes.

The boundary lines separating the medical, legal, and ethical realms are blurry and changing, and even if we are vigilant and intellectually honest, many of us tend to confuse these domains, not merely in the answers but in the questions themselves. The significant medical, legal, and ethical approaches to genital alteration seem to be a case in point.

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