

# Female Circumcision/ Female Genital Mutilation in the United States: Legislation and Its Implications for Health Providers

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**Criminal laws prohibiting female circumcision/female genital mutilation (FC/FGM) have recently been passed in the US Congress and in several state legislatures. The full effect of criminalization on prevention and on the overall well-being of immigrant groups from FC/FGM-practicing countries is currently unknown and will ultimately depend on, among other things, the precise interpretation of the laws by courts and local authorities. Meanwhile, the content of these laws prompt questions about their intended and inadvertent effects on FC/FGM, including: What acts are criminalized under these laws? Will criminalization prevent them? Do the laws have the potential to do more harm than good? The appropriateness of prosecuting FC/FGM under existing child protection statutes is also raised.**

In the last several years, female circumcision/female genital mutilation (FC/FGM) has been the subject of a host of legislative changes passed in the US Congress and in state legislatures. The legislative measures include programmatic mandates for demographic and epidemiologic surveillance and a range of prevention initiatives domestically, as well as broader policy objectives aimed at averting FC/FGM on a global scale.<sup>1</sup> Some of the most debated new laws criminalize FC/FGM and mandate education of specific immigrant groups on its health effects and legal consequences in the United States. Farther reaching condemnation of the practice has been voiced through restrictions on foreign aid to

countries that, despite high rates of FC/FGM, still lack national prevention strategies.

## The Criminal Legislation in Brief

Circumcising a female minor was made a federal crime throughout the United States on March 30, 1997, with only two narrow exceptions.<sup>2</sup> The law, which amends Chapter 7 ("Assault") of Title 18 ("Crimes and Criminal Procedure") of the US Code, specifically stipulates that "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both." Genital surgery on a minor female is permissible *only* if it is "necessary to the health of the person on whom it is performed," or if it is "performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth." The latter exemption specifically addresses "de-infibulation" (surgical separation of the joined labia) for safe childbirth in previously infibulated women.

The federal criminal law also plainly prohibits exemptions based on personal conviction, such as religious belief: "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."<sup>2</sup> This provision is similar to clauses found in some child abuse legislation in which religion, such as Christian Science, is explicitly rejected as a defense.<sup>3</sup>

A few states have enacted similar legislation, prohibiting the practice of FC/FGM on minors, while others extend legal protection to adult women as well. Currently, seven state laws make it a

crime to perform FC/FGM on a female minor.<sup>4-10</sup> Three states also make it a crime to perform FC/FGM on adult women.<sup>5,7,8</sup> Within these statutes, the definition of FC/FGM is either identical to that found in the federal legislation, or broadened to stipulate the sweeping illegality of any procedure that "separates or surgically alters normal, healthy, functioning genital tissue."<sup>7</sup> While criminal liability under the federal law is restricted to individuals who actually perform the procedure, some state laws explicitly ascribe guilt to those who "allow"<sup>5</sup> or "permit"<sup>4</sup> the procedure to be performed on a child in their care. In this case, it is clear that a parent or guardian known to have procured the surgery for his or her child would be considered as guilty as one who performs the operation; what remains unspecified is who else might be considered guilty. Is a woman who opposes her husband's wish to have their daughter circumcised, but who feels powerless to protest due to her economic or social reliance on him, liable for the crime? These laws also lack any gradation of punishment based on level of involvement.

Again, echoing provisions contained in the federal law, most state statutes clearly provide an exception if the surgery is performed by a licensed physician for necessary reasons,<sup>5-10</sup> because of an "anatomical abnormality,"<sup>9</sup> or during childbirth.<sup>5</sup> The consent of the person undergoing the procedure or her guardian,<sup>9</sup> as well as justification based on beliefs held,<sup>5</sup> are expressly ruled out as defenses in some states. Similar criminal legislation is pending in several other states, including Illinois, New Jersey, New York, and Oregon.<sup>1</sup>

## The Implications of Criminalization

Considering that the body of FC/FGM legislation was only passed very recently (the earliest state law passed in 1994)<sup>6</sup>, it

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is too early to know the full effect of criminalization on either prevention or, perhaps more importantly, on the overall well-being of immigrant groups from FC/FGM-practicing countries. The actual impact of these laws will ultimately depend on prosecutorial discretion at the federal and state levels and on the precise interpretation of the laws given by the courts and local authorities.

As written, the US laws criminalizing FC/FGM prompt several questions about their intended and inadvertent immediate and residual effects on FC/FGM, the political climate surrounding it, in particular, and on immigrant status in the United States more generally. For each of the laws, there are three apparently simple but relevant questions: What act(s) does the law criminalize? Will criminalization prevent these act(s)? Does the law have the potential to do more harm than good? The issues raised by these questions will vary most radically according to the type of law, the two main types being those that criminalize FC/FGM and those that also criminalize *permitting* or *allowing* FC/FGM to be performed.

Every FC/FGM law criminalizes the cutting of a female child's genitalia; interpretation of this language is straightforward, the crime circumscribed. Whether this type of criminalization will prevent FC/FGM is unknown and could only be determined through controlled prospective study. If the laws are limited in their capacity to directly curtail FC/FGM incidence in the United States, they nonetheless provide strong rhetorical support for the protection of female minors from the imminent physical and mental health effects of FC/FGM.

Laws that criminalize permitting or allowing FC/FGM to be performed elicit a broader set of answers to these questions, with farther-reaching implications. Even the basic question of what act(s) these laws criminalize is not easily answered. Because the laws lack any definition of the terms "permit" and "allow," exactly what conduct rises to meet these terms remains vague and problematic. For example, does silent opposition constitute permission? Meanwhile, procuring FC/FGM for a child is noticeably absent from these laws.

The question of who bears ultimate responsibility for FC/FGM and, by extension, who is most appropriately considered guilty under the law, is hardly clear cut, and leaves room for debate over the efficacy of these legal measures in ensuring the best interests of the child. Ironically, it is the very girls these laws attempt to protect who may suffer the gravest consequences of the laws' enforcement. As with any child protection measure that results in the incarceration of a parent, a necessary and therefore acceptable consequence of standard child abuse prosecutions, the inadequacies of the foster care system make it difficult to draft FC/FGM laws that protect and benefit children in an unambiguous way. A girl whose caregiver is incarcerated for a lengthy period might be temporarily orphaned. What was intended as an affirmative act by the parent—ensuring a daughter's marriageability and general acceptance by her community—could eventually result in foster care for a child.

These laws may have even more serious repercussions for immigrant families whose resident status may be affected by criminal conviction. Legislation aimed at halting the naturalization of immigrants convicted of felonious acts in the United States might also be applied to parents deemed to have "permitted" the circumcision of their daughters, and could lead to deportation of the entire family. Interestingly, the federal law was passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>11</sup>

Application of these laws might also make circumcised women less likely to seek health care and deter health providers from providing care. Circumcised women might fear the exposure and possible criminal prosecution resulting from a health consultation. Health providers, on the other hand, might also avoid treating circumcised women and girls based on fear of prosecution. While the laws are currently devoid of reporting requirements for health providers, there is a government mandate to produce medical curricula on the treatment of complications from FC/FGM. Concern about such discrimination is evidenced by New Jersey's FC/FGM bill, which explicitly prohibits discrimination in health service provision based on having been circum-

cised or requesting it.<sup>1</sup>

Finally, a more generalized concern has been voiced that if FC/FGM is being practiced in a particular ethnic community, enforcing these laws could drive it underground. The lack of specificity in the scope of liability mandated could leave immigrants from countries in which FC/FGM is prevalent open to biased and unsound investigation.<sup>12</sup>

### **FC/FGM as Child Abuse**

While new laws have specifically criminalized FC/FGM, theoretically it could be prosecuted under existing child abuse and neglect statutes. These statutes both incriminate anyone caught abusing a child and require professionals to report child abuse on "reasonable suspicion" that it has occurred or will in the future. The laws that specifically criminalize FC/FGM, however, are notably silent on reporting.

Reporting requirements for child abuse may be inappropriate for dealing with known FC/FGM for several reasons. One problem immediately raised by mandatory physician reporting involves its "reasonable suspicion" basis. A physician must have "reasonable suspicion" that abuse has occurred or will occur in order to be legally bound to report it. Suspicion that is commonly triggered by such physical signs as hematomas or burns, for example, would not be triggered for FC/FGM. In fact, a request for circumcision or expression of intent to circumcise may be all the evidence the physician has; though such a request approaches the severity of the act of circumcision, the two nevertheless remain qualitatively distinct. Would a request, then, be sufficient to establish "reasonable suspicion"? The combination of the vagueness with which the threshold for reporting has been established and the lack of discretionary authority on the part of the mandated reporter could invoke prejudicial assumptions regarding intent and guilt under the law.

With these concerns and others in mind, activist groups such as Research, Action and Information Network for Bodily Integrity of Women have suggested that "Laws against FC/FGM...be carefully reviewed, and, if necessary, revised, to clarify criminal liability and reporting

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requirements.”<sup>12</sup> The problems introduced here are meant to be illustrative rather than definitive. Because the development and interpretation of US FC/FGM legislation is ongoing, health providers need to find out what the laws are in their state and how they function. ■

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#### References

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