Chapter 1
"Three-Fourths Were Abnormal"—Misha's Case, Sick Societies, and the Law

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Abstract Law, human rights, medical ethics, and social mandates reflect, transmit, and reinforce social norms. Well over a century ago, normality was redefined, and suddenly, "three-fourths of all male babies [had] abnormal prepuces." Genital cutting presents a cluster of interwoven discriminations that violate law, human rights, and ethics. Differential terminology—MGC and FGC—facilitates differential treatment and unequal protection. Oregon's Boldt v. Boldt case ended in the boy's wishes being honored, but perhaps only due to the inexcusable 5-year delay in resolving the case and the conflation of custody and circumcision issues. This case eloquently demonstrates the law's inability to effectively address male circumcision. Numerous authors from a variety of disciplines have forcefully contested the reigning paradigm whereby FGC is outlawed and MGC is legally tolerated. Some observers also note the further irony that cosmetic FGC by wealthy westerners is permitted while traditional FGC by developing world peoples is vilified. Activists against FGC are acknowledging their support of the movement for male intact rights. HIV/AIDS is the latest attempted justification for male genital amputation but utterly fails scrutiny, as even the Centers for Disease Control and Prevention (CDC) is finding itself compelled to concede in the face of growing protests in favor of children's rights. Not only do most of the reasons for FGC parallel the rationales for MGC, but a surprising number of similarities link cultures around the world that practice MGC. Parents (as in Boldt v. Boldt), doctors, and society seek treatment, not the infant. Thus, the problem cannot be solved by a medical procedure, which circumcision never was anyway. Only human compassion can end the nightmare.

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Law, human rights, and medical ethics reflect, transmit, and reinforce social norms. These official mandates are ultimately enforced by a country's police power. Social mandates including culture, mythology, and religion enforce social norms through

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less official channels but can operate at least as potently, often complementing and enabling (and indeed, often helping give rise to) official mandates. Such social mandates have powerfully supported infant male circumcision. Sarah Waldeck points out that "when circumcision rates in the United States were more than 70%, nearly 10% of parents thought the procedure was required by law, much like . . . the installation of silver nitrate drops into a newborn's eyes shortly after birth."[1] Mythology such as scientific misinformation and misplaced desire that a son "look like" his father has further facilitated the continued persistence of this Victorian holdover.[2]

Genital cutting persists because it is perceived to provide real or imagined benefits and to connect the cut individual to society along a variety of dimensions—cultural, economic, class-related, medical, mythological, psychological, sexual, religious, "scientific," etc. Desired societal values that may help justify and institutionalize mutilations encompass courage, pride, fulfillment of the assigned sexual role, religious devotion, willingness to sacrifice oneself for society's greater good, and many others.[3] Regarding MGC in primitive cultures, Paige and Paige comment that "the boy who is circumcised is not himself the object of the ceremony, which is, in fact, conducted to impress others. . ."[4] This observation calls to mind Ford's apt observation regarding intersex surgeries on infants, which is every bit as applicable to male circumcision: "It is the parents and doctors of intersexed infants who are experiencing a medical emergency, not the intersexed infant."[5] Circumcision, therefore, "solves" a non-existent problem, utterly failing to address the infant's needs while treating the child as a means to society's ends rather than an end in himself, thereby violating Kantian ethics.

Male circumcision, like female circumcision, as Prescott notes, never has been primarily a medical issue. Rather, its roots go deep into powerful religious beliefs and social customs that defy rational analysis.[6] As Voskuil shows, menstrual blood and male genital bleeding are closely connected. As one of many examples, "in ancient Egypt boys going to be circumcised wore girls' clothes and were followed by a woman sprinkling salt, a common substitute for menstrual blood."[7] Romberg notes, "One possible, intriguing motivation for male genital mutilation (both foreskin amputation and subincision—the ritual slashing of the underside of the penis) is menstrual envy."[8] As Bettelheim discusses, penile subincision is called "men's menstruation." Thus, men mimicked women's power in the very ritual that affirmed their maleness, their entitlement to exclude women from positions of importance in the tribe and in religious leadership.[9]

The transformational power of genital modification must be appreciated to understand these practices' persistence. A Nineteenth century physician's medical journal article by S.G.A. Brown states in all seriousness that, "Fully three-fourths of all male babies have abnormal prepuces."[10] Such a redefinition of normality is inherent in the process of genital modification, and can be one of its goals. MGC purges the male body of the "female" foreskin, while FGC purges the female body of the "male" clitoris. Genital modification can promise to redefine normality by turning a boy into a man, a girl into a woman, or a non-virgin back into a virgin. Our S.G.A. Brown for the modern era may be the notorious Brian J. Morris, writing on "Why circumcision is a biomedical imperative for the twenty-first century."[11]

The exoticization of "African" FGC contrasts with the normalization of "American" MGC. An almost missionary evangelism characterizes anti-FGC activists' opposition to these practices, while a culturally inert prurience regarding male circumcision reinforces the status quo. Law helps both processes by reifying and reinforcing social norms. Circumcision is tied up with three of the most powerful discourses in modern society—science, medicine, and religion, and a variety of other uncomfortable, controversial and deeply emotional issues including psychological denial and parental authority. No wonder there is so much argument.[12]

Genital cutting presents a cluster of interwoven discriminations—racial, gender-based, age-based, and class-based—that violate law, human rights, and ethics. We know that human rights treaties—the supreme law of the land and applicable either through ratification or through customary law—forbid circumcision based on such important principles as the rights of the child, the right to freedom of religion, and the right to the highest attainable standard of health. Human rights treaties are binding in the US either through ratification (as with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Political Rights) or through customary law (as with the Convention on the Rights of the Child, of which we remain the only non-ratifying country in the world with a functioning government). The United Nations has already endorsed in official documents the principle that male genital cutting (MGC) qualifies as a human rights violation, at least under certain circumstances.[13,14] A presentation by Attorneys for the Rights of the Child and the National Organization of Circumcision Information Resource Centers centrally addresses male circumcision as a human rights violation and is part of the official UN record.[15]

The legal status quo, whereby female genital cutting (FGC) is severely punished while MGC is not punished either criminally or civilly as long as it is done "competently" and with "consent" of the parents, must be unstable. Differential terminology—MGC and FGC—facilitates differential treatment. We do not speak of male rape and female rape. We do not speak of female incest and male incest. A priori, there is no reason (and no justification) for this gender-stratified taxonomy. Of course, it does help to obscure the clear violation of equal protection that otherwise might become evident whenever a legal action relating to MGC makes it into court.

One recent lawsuit has already become the most famous circumcision-related legal case ever. In Boldt v. Boldt, the Oregon custody case filed in 2004 in which a recently converted Jewish father had been seeking the circumcision of his son Misha against the wishes of the boy's mother, the Oregon Supreme Court (OSC) reversed the trial court's and the court of appeals' previous decisions in favor of the father. The OSC remanded (returned) the case to the trial court for further proceedings, including a determination of the boy's wishes in the matter. The final paragraph of the OSC's ruling held:

> If the trial court finds that M agrees to be circumcised, the court shall enter an order denying mother's motions. If, however, the trial court finds that M opposes the circumcision, it must

> then determine whether M's opposition to circumcision will affect father's ability to properly care for M. And, if necessary, the trial court then can determine whether it is in M's best interest to retain the existing custody arrangement, whether other conditions should be imposed on father's continued custody of M, or change custody from father to mother.[16]

At the remand hearing, held in April 2009, the then 14-year-old boy testified privately to the judge with neither parent present. Misha told the judge he did not want to be circumcised, nor did he want to be Jewish, and the judge accepted that testimony on the record in the courtroom. In June 2009, she issued an order finding significant cause to warrant testimony as to whether custody should be returned to the mother. The great irony, as attorney John Geisheker points out, is that the unconscionable delay may be the very factor that saved him, giving him time to grow and develop self-confidence to the point where no one could fail to be swayed by his desires.[17] Thus the most obvious solution, to let the boy grow old enough to make his own decision, was reached not deliberately but more or less by default and through the passage of time.

Despite the happy end result, Geisheker was troubled

> by the gratuitous linkage of circumcision with custody. Ironically, this procedural point may be precisely what got the case onto the Oregon Supreme Court docket in the first place, as family law matters are rarely reviewed by courts of general jurisdiction [and in fact are exempt from such review]. It is appalling to put the child in the position of choosing surgery to stay with dad, or freedom from surgery with his mom.

Geisheker notes that the Court mentioned only the child's right to be heard, but did not recognize its paramount duty to protect him.[18] Misha's case is a sad commentary upon American life and constitutional principles. Boldt v. Boldt eloquently demonstrates that in the US, at least, the law to date has not been able to effectively grapple with such a heavily contextual and cultural practice as male circumcision.

To date, with one known exception, all awards and settlements have occurred in cases involving either a "botched" procedure or a lack of informed consent. At least three times, courts have avoided squarely addressing the legality of male circumcision by diverting the discussion into such peripheral, procedural issues as standing. Judicial views of standing are politically and culturally shaped in response to social mandates. Although MGC is currently illegal under existing laws and human rights treaties, if properly and objectively interpreted free of cultural bias, American cultural blindness has prevented recognition of this.[19] Elsewhere in the world, Tasmania's Law Review Commission recently released a lengthy issues paper questioning the legality of male circumcision.[20] Sweden has regulated circumcision and the practice was recently made illegal in South Africa, with religious and medical exceptions included that threaten to swallow the rule. While the practice is not otherwise explicitly prohibited anywhere in the world, it is of course illegal worldwide under a broad range of prohibitions imposed by statute, common or civil law, human rights treaties, and customary law."

By contrast, world opinion has determined that girls' bodies are more important than tradition, and that any cutting of the female genitals is female genital mutilation, now banned by law in many countries. Under the reigning paradigm,

discrimination against men is regarded far less seriously than discrimination against women. Despite a blatant violation of the equal protection principles enshrined in the United States Constitution and human rights treaties, courts are reluctant to affirm claims of equal treatment not yet socially approved. A movement brought primarily or exclusively on behalf of males seems to cause discomfort to individuals, institutions, and society.[21]

However, signs are appearing on the horizon that such balancing acts are becoming more difficult to sustain. Numerous authors from a variety of disciplines are concluding that, due to basic issues of justice as well as equal protection principles, genital cutting is genital cutting, whether done on a male or female body.[22] Two commentators have forcefully argued that given the American laws against FGC, MGC must also be illegal under the US constitutional principle of equal protection.[23,24] After an exhaustive review of legal and human rights implications of circumcision, European human rights scholar Jacqueline Smith concludes that the differential treatment is simply indefensible. "By condemning one practice and not the other, another basic human right, namely the right to freedom from discrimination, is at stake. Regardless of whether a child is a boy or a girl, neither should be subject to a harmful traditional practice."[25] Dena Davis finds "troubling implications for the constitutional requirement of equal protection, because the law appears to protect little girls, but not little boys, from religious and culturally motivated surgery."[26] Sirkuu Hellsten concludes that "from a human rights perspective, both male and female genital mutilation, particularly when performed on infants or defenseless small children . . . can be clearly condemned as a violation of children's rights."[27]

Anthropologist Kirsten Bell notes the contradictory policies of international health organizations, "which seek to medicalize male circumcision on the one hand, oppose the medicalization of female circumcision on the other, while simultaneously basing their opposition to female operations on grounds that could legitimately be used to condemn the male operations."[28] R. Charli Carpenter criticizes the United Nations' double standard with regard to "harmful traditional practices," a term the UN defines to exclusively address women and girls while ignoring "the most obvious one of all—the genital mutilation of infant boys, euphemistically known as . . . circumcision."[29]

In addressing male circumcision within an article primarily devoted to female circumcision of Egyptian Nubians, Fadwa El Guindi calls feminists to task for their "arrogant and ethnocentric" focus on saving ostensibly helpless African women while ignoring "the cruelty of American male infant circumcision.[30] One of the anthropologists who has been working on FGC the longest, Janice Boddy, forthrightly asks, "Why is there no outrage remotely parallel to that which leads some writers to insist that circumcised women are entirely alienated from the essence of the female personality [citations omitted]? Is it because these excisions are performed on boys, and only girls and women figure as victims in our cultural lexicon?" A bit later in her article, Boddy proffers a possible explanation for the widely disparate views: "intuitively, men and boys are not 'natural' victims."[31] Fox and Thomson suggest a possible reason for this collective failure of our intuition.

They write that a "harm/benefit assessment [footnote omitted] lies at the heart of the male circumcision debate," contending that legal and ethical tolerance of male circumcision can be attributed to traditional constructions of male bodies as resistant to harm or even in need of being tested by painful ordeals, and of female bodies, by contrast, as highly vulnerable and thus in need of greater protection.[32]

Oddly enough—and demonstrating the pervasive power of the "tough male" stereotype—although Fox and Thomson emphasize that MGC is always risky surgery, mentioning adverse outcomes, they neglect the most obvious harm of all: the harm of being deprived of an integral and erotically significant part of the penis. Sami A. Aldeeb Abu-Sahlieh argues forcefully and simply. "The right to physical integrity is a principle. We must accept or reject genital cutting in totality. If we accept this principle, we must refrain from cutting of children's genitals regardless of their sex, their religion, or their culture."[33] Audrey Macklin[34] and Christine Mason[35] reach similar conclusions.

From an ethical perspective, the procedures look even more analogous, for, as Bell comments, "each operation involves an unnecessary bodily violation that entails the removal of healthy tissue without the informed consent of the person involved."[36] Moreover, as ritual forms of MGC are medicalized under the influence of western health agencies and educational institutions, defenders of male circumcision justify the procedure with medical rationales that are strikingly similar to those used to support excision of female genitalia.

Ylva Hernlund and Bettina Shell-Duncan note another disturbing form of unequal protection, an exception from the harsh treatment of FGC practices by foreigners that is carved out, as it were, for the benefit of usually wealthy women practicing cosmetic versions of FGC that are becoming popular in the US:

> If contradictory responses to nonconsensual genital surgeries on female and male minors respectively reveal inconsistencies, the same can be said when comparing FGC and an increasingly common type of plastic surgery, popularly referred to as female genital cosmetic surgeries or 'designer vaginas.' Such procedures include labia minora reduction, labia majora remodelling, pubic liposuction and lifts, and clitoral reduction (see www.altermd.com), some of which resemble quite closely—in results, if not in the context of the surgeries—genital cutting procedures done 'traditionally' in African societies.[37]

Fuambai Ahmadu finds physical parallels that belie the attempted distinction of the practices:

> Ironically, in the name of sexual liberation, these wealthy or middle-class Western women spend thousands of dollars to become as 'closed' as virgins, while ordinary Somali immigrants in Norway line up at hospitals to be 'opened' at public expense, under the same banner. Unlike these 'mutilated' African women, no one seems to question the credibility of Western women with surgical 'designer vaginas' who report increased psychological and physical sexual satisfaction after drastic genital operations."[38]

Such clashes in interpretation cannot be reduced to theoretical conundrums but impact lives in concrete ways. In a fascinating turn of events, Somali women in Sweden who wished to perform a minor form of sunna circumcision that removes essentially no tissue from the girls were bewildered to be told that this was illegal. They found this hard to understand because pricking

> the clitoris to induce minor bleeding does not, generally speaking, lead to permanent changes. Besides that, such a procedure is far less invasive than what is done to male infants at Swedish hospitals during male circumcision and what is permitted on young women who have their genitals pierced, as well as on women who go through genital plastic surgery. In a strictly medical sense, then, there is no reasonable motive to forbid pricking girls' genitalia while permitting male circumcision, genital plastic surgery, and genital piercing for aesthetic or erotic reasons.[39]

Thus, the equal protection puzzle has gotten one step more bizarre. To paraphrase Orwell, it is no longer simply "cut male genitalia good, cut female genitalia bad," but rather now, "cut male genitalia good, cut Western female genitalia also good, cut African female genitalia bad."

Ahmadu, born in Sierra Leone and educated in the US, who returned to her homeland for a circumcision as an adult, is perhaps the person best positioned to comment on such disjunctions: "[T]he greatest irony of all is the increasing number of clinical female genital surgeries performed on women in the West for cultural reasons when the same are condemned for African women because 'culture is no excuse for mutilation.'"[40] Sally Sheldon and Stephen Wilkinson cogently ask if this differential treatment of FGC and cosmetic genital surgery can be justified. The authors propose several possible theories for distinguishing the two—consent, oppressiveness, injury, and offensiveness of the practices—and, one by one, demolish each of them. They conclude that each reduces to cultural privileging of certain practices over others.[41] Lois Bibbings argues, reasonably enough, that: . . .any legal regulation of body-altering practices should be consistent. In addition if restrictions are to be imposed they should be constructed according to valid health concerns and should treat the practices according to the risks involved, rather than merely enforcing dominant notions of the acceptable body."[42]

The parameters of the issues discussed often predetermine the conclusions reached. As Fox and Thomson note, pain is often entirely omitted from the discussion of MGC's effects. Astoundingly, even Fox and Thomson neglect any discussion of loss of tissue, inadvertently following in the path of countless prior authors, who limit themselves to toting up "risks" v. "benefits." If, as Fox and Thomson argue, the male body in general is regarded as less susceptible to injury than the female, the penis seems to be the most invulnerable part of all, nearly any injury to which (short of amputation) is construed as harmless. As Juliet Richters points out, dulling ourselves to the harm caused by loss of the foreskin is facilitated by conceiving of the penis as a battering ram (rock-hard and actively "masculine"), not an organ expected to receive pleasurable sensation (potentially implying softness and passive "femininity").[43] Margaret Somerville astutely observes that, while we would be shocked by the notion of amputating girls' breasts to protect against later breast cancer, as a society we accept the idea of removing the foreskin as a prophylactic against cancer of the penis or HIV. The reason is simple.

> [W]e value breasts—we see it as a serious harm to women to lose them—and we do not value foreskins, in fact they are often devalued—spoken of as ugly, unaesthetic and unclean. Yet both are part of the intact human body, and both have sexual and other functions.[44]

The evidence thought to show a "potential health benefit" for MGC may in fact be an artifact of its cultural acceptability and long history in American society. As Miller[45] and Waldeck[46] have eloquently argued, MGC in the United States, despite the hospital setting, is more of a cultural ritual than a health measure, as most parents agree to the operation out of habit [and based on social mandates], because other parents agree to it, because they are accustomed to the appearance of the cut penis, and because they do not want their boys to look different.

Regardless of one's views about adults, one tends to see male babies and female babies as both equally innocent and equally vulnerable. It is now evident that activists against FGC agree on this point. In July 2008, I was in the audience at a London press conference as Efua Dorkenoo frankly told us that she wholeheartedly supported the genital integrity movement, and that the anti-FGC movement had simply made a strategic decision not to openly support intactivism as doing so would make protection of females harder. Two months later, on the eve of the symposium at which this talk was presented, two prominent UK organizations that hitherto have labored on opposite gender sides of the genital integrity battlefront, FORWARD and NOHARM-UK, launched a new joint campaign promoting the right of all men and women to say no to unnecessary genital surgery. This is a landmark development. At the press conference announcing this collaboration, FORWARD echoed Dorkenoo in noting that in the 1980s, the anti-FGC movement made a strategic decision not to support intactivism. FORWARD affirmed that male genital integrity is equal in importance to female genital integrity.

Today the most striking asymmetries between male and female genital cutting lie in the fact that powerful international agencies are promoting the first as a "scientifically proven" health precaution while campaigning against the latter as a significant threat to health. The UNAIDS and WHO have failed to acknowledge the well-established fact that rates of new HIV infection have been declining for over a decade as the disease comes under increased control. AIDS is not, and never will be, a critical public health problem in developed countries, where the disease remains largely confined to the traditional sub-cultures: gay men and intravenous drug users.[47] Even if the African studies are valid, their results are totally inapplicable to the developed world because the virus is a different strain, and because of radical differences in methods of transmission and in access to education, hygiene, and healthcare. Moreover, Lawrence Green et al., showed in *Future HIV Therapy* that, relative to circumcision, condoms are 95 times more cost-effective at preventing HIV. Posing circumcision as a vaccine may make it easier to compel its adoption, though as we move closer and closer to a genuine vaccine against HIV, they also may highlight the utter failure of this fanciful metaphor.[48]

And compelling its adoption is exactly the goal the US Centers for Disease Control (CDC) has, until recently, been vigorously pursuing. However, due to the worldwide pro-intact trends in media statements and popular opinion regarding intact rights, in September 2009 the CDC found itself forced to issue a statement on its website affirming its commitment to hearing both sides of the issue.[49] To date, this promise remains unfulfilled. Only one token representative of intact rights

has had any participation in the CDC's process, while it has consulted a panoply of "experts" with anti-foreskin views.

CDC edicts tend to be faithfully followed by US doctors and hospitals. If the CDC were to issue a pro-circumcision recommendation, circumcision could go the route of Hepatitis B vaccines in the US. After the CDC recommended that the first Hepatitis B shot be given to newborns while still in hospital (despite the fact that the virus is sexually transmitted and thus newborns are not at risk unless their mother is positive). Nurses and doctors then virally passed on the CDC recommendations to parents, to the point where today parents are informed at the hospital that a Hepatitis B shot is required, and all US newborns receive the shot more or less automatically right after birth. If this dire scenario came to pass with MGC, it would mean that circumcision would once again predominate among the vast majority of US newborns.

Commonalities between the very diverse cultures that practice genital cutting are astonishing. In a study by Reed Riner of 144 pre-industrial cultures, genital cutting was performed in 23. Of the 23, some cultures cut the genitals of both boys and girls, or boys but not girls, but not a single culture cut girls and not boys. "This suggests," Riner comments, "that female genital modification is somehow dependent on the cultural presence of male genital modification, and that if we explain the latter we have, for the most part, explained the former."[50] Clearly a powerful process of association is at work, contradicting current legal and popular conceptions of FGC and MGC as radically different phenomena.

All of these 23 cutting cultures, without exception, and none of the 121 non-practicing cultures, can be described, to quote another observer's formulation, as subsistence "societies with powerful and sometimes massive fraternal interest groups, chronic internal warfare and feuds, and tight contractual control over women and marriage."[51] Cutting cultures invariably provide special training in aggression, in the manly behaviors associated with warfare, and the male role, for the boys. MGC thus represents a permanent, dramatic, bloody, public ritual of submission of the individual to the group, of the father to his "fathers." Along similar lines, Hellsten observed that all forms of genital cutting are derived from ideas of the place of human sexuality in society, are intended to alter sexual function in some way, and are performed in the belief that the procedure—no matter how physically injurious—will in some way improve the subject's life.[52]

In our society, circumcision's popularity may have been facilitated by our tendency to solve problems by cutting things, often by cutting things out.[53] Episiotomy, circumcision, and Caesarian sections are the most common forms of cutting, and all involve the genital tract. As famed anti-FGC activist Hanny Lightfoot-Klein demonstrated, parallel justifications buttress alteration of male genitals and of female, including claimed enhancement of physical beauty, medical reasons, improving sex, asserted universality, as an initiation rite, cleanliness, religion, and looking like other modified humans. Similarly, Dr. Robert S. Van Howe observes that "the reasons cited by families for altering the genitalia of their children are nearly identical whether it is a girl in Africa or a boy in the United States," namely, "cleanliness,

preventing illness, religion, looking like other children or like their parents, fear of promiscuity, and acceptance of the altered genitalia as more attractive by the opposite sex."[54] As Henrietta Moore aptly summarizes matters, "The West, it turns out, has culture like everyone else."[55]

In a recent article summarizing these issues inadvertently, as it were, famed author and new mother Erica Jong lays out her numerous "misgivings about circumcision," but nevertheless in the end, offering no explanation, she allows her son's genital cutting to proceed against her own instincts. "Don't mark him! I wanted to shout, but instead I laughed hysterically at all the mohel's jokes."[56] We cannot help but note Jong's fascinating yet chilling mention of "hysteria," a word that is etymologically and subconsciously related to *hystera* (womb) and thus to hysterectomy, itself another excision of a sexual organ to solve a perceived social problem and a procedure that is often unnecessary.

The truth comes out. Regardless of the efforts of those who would keep it in, sooner or later, human compassion comes into full play, and the truth comes out.

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