
The Culture Differential in Parental Autonomy

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When the laws of a community reflect a dominant culture and yet many of its members are from other minority cultures, there is often conflict. When this conflict occurs in the legal regulation of the parent-child relationship, the consequences are tremendous for the children, the parents, and the State. This Article focuses on the federal statute criminalizing female genital surgeries, and, in doing so, it makes two major claims. The first claim is that the decisions of minority parents are scrutinized and regulated to a greater degree than the decisions of parents from the dominant culture, even when their decisions are strikingly similar. For example, breast implant procedures, intersex surgeries, and the administration of growth hormones are arguably analogous to female genital surgeries, and yet they are severely under regulated. The result is a differential in the autonomy of parents that is explained more by cultural differences than by an objective interest in the protection of children. The second claim in the Article is a prescription for how the law can minimize this culture differential. Social psychologists have studied the interactions of human beings from different cultures and have developed principles and tools that seek to improve these interactions. This Article advocates for the adoption of procedural reforms to ensure cultural mindfulness or “hard second looks” at both the administrative and legislative levels in child welfare.

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INTRODUCTION

Every eight seconds a baby is born in the United States.¹ In that moment, a very special relationship between parent and child is born. Numerous sources of law govern this relationship,² including state and federal law, and even the U.S. Constitution.³ As a result, the relationship between parent and child is not simply between parent and child. Rather, the state, with all of its power and authority, is also involved.

The parent-child relationship also feels the heavy hand of another influence — the cultural background of the parents.⁴ Culture dictates what are optimal, appropriate, and acceptable parenting practices.⁵

¹ See Stephen Ohlemacher, *America's Population to Hit 300 Million This Fall*, AP WORLDSTREAM, June 25, 2006, at 1.

² Legal scholars have offered new perspectives through which the law should re-imagine the parent-child relationship. See, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988) (advocating that law should regard parents more as responsible parties rather than rights bearers); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 347-48 (1997) (observing tension between traditional and modern understandings of childhood and parenting); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (describing parents as stewards who fulfill their children's need-based rights). They have called for greater rights for children as autonomous beings and have even suggested a fiduciary model. See Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 19 (1994); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401-03 (1995). I do not enter this debate about the best legal paradigm for the parent-child relationship. Instead, I discuss a culture differential that would likely exist, regardless of the paradigm.

³ See *infra* Part I.B.

⁴ See also *infra* Part II.A. In the United States, it is quite common for children to have two parents of different cultural backgrounds. In such families, two or more cultures may be at work. However, for purposes of clarity and simplification, this archive assumes the influence of one culture in each family.

⁵ See Jill E. Korbin, *What Is Acceptable and Unacceptable Child-Rearing — A Cross-Cultural Consideration*, in CHILD ABUSE — A COMMUNITY CONCERN 257 (Kim Oates ed., 1984) (“There is not a unitary and cross-culturally valid standard for either optimal child-rearing or for child maltreatment. What is acceptable or unacceptable becomes inextricably linked to ecological constraints and to the cultural context in which behaviour occurs.”).

In a way, the diversity of viewpoints is remarkable given that parents around the world share the similar task of helping their children grow from helpless infants into responsible adults. “Child training the world over is in certain important respects identical . . . in that it is found always to be concerned with universal problems of behaviour. . . . In all societies the helpless infant . . . must be changed into a

What one group accepts may be considered unacceptable or even abusive and neglectful by another group.⁶ For example, many American parents warn against picking up a baby every time the baby cries for fear of spoiling the baby, while New Guinea parents believe allowing a baby to cry harms the child's immediate well-being and permits the spirit of the child to escape through their open fontanelle.⁷ While parents in both countries share the ultimate goal of avoiding harm to the baby, they differ on how to achieve it.

In our country, the variation in cultural views of parenting is palpable because of the growing diversity of the American population. In 1967, there were fewer than ten million people living in the United States who were born in other countries.⁸ Today, there are thirty-six million foreign-born people residing here.⁹ The percentage of the national population made up of white non-Hispanics dropped from 83% in 1967 to about 66% in the latest 2000 Census.¹⁰ By 2040, white non-Hispanics will be a slim majority while Hispanics will be almost 25% of the population.¹¹ Blacks will make up another 14% and Asians will be slightly over 7%.¹²

While we should celebrate our increasing diversity, it is also a challenge for our rule of law and our democratic ideals. The composition of the American populace is changing, but the laws governing the populace are not keeping pace. Thus, the laws are out of step with the population that they govern. Significant obstacles prevent the law from keeping pace with demographic changes. These include inequalities in political power and inefficiencies of the modern legislative process.¹³ This Article discusses a more deeply entrenched obstacle to legal change, and that, once again, is culture.

responsible adult obeying the rules of his society." *See id.* (citing J.W.M. WHITING & I. CHILD, *CHILD TRAINING AND PERSONALITY* (1953)).

⁶ *See* Jill E. Korbin, *The Cultural Context of Child Abuse and Neglect*, 4 *CHILD ABUSE & NEGLECT* 3, 4 (1980).

⁷ *See id.* at 5-6 (explaining how villagers in New Guinea were appalled at American anthropologists who allowed their newborn to cry and ultimately took it upon themselves to pick up newborn as form of protective custody). "Fontanelle" refers to the soft membranous intervals between the incompletely formed cranial bones of fetuses and infants. *See* AMERICAN HERITAGE COLLEGE DICTIONARY 520 (2d 1991).

⁸ *See* Ohlemacher, *supra* note 1, at 1.

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See* Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 *LAW & INEQ.* 1, 27 (2005) (stating, "a history

In the United States, the values and beliefs of the dominant culture determine the law. The dominant Anglo American culture blends our British roots with certain distinctly American values.¹⁴ Like parenting, the law is a product of Anglo American culture.¹⁵ For example, early British common law focused on the rights of parents and the duties owed by children to their parents.¹⁶ The first two Supreme Court cases on the parent-child relationship framed the legal question in terms of the individual rights of parents versus the state.¹⁷ In contrast, today, many jurists view the goal of the child welfare system as the protection of the rights of children against the conflicting rights of parents.¹⁸ The dominance of the rights paradigm reflects the value placed on individual rights by Anglo American culture.

This dominant culture does not operate in a sphere independent from the other minority cultures; instead, the cultures frequently interact and confront each other in a multicultural society in legal matters. However, when the laws of a community reflect only one culture and they are applied to individuals who are from other cultures, the potential for injustice is serious. Moreover, if the legal matter concerns the parent-child relationship, the consequences are tremendous.

Jill Korbin, a cultural and medical anthropologist, has written extensively on cultural conflict in the child welfare system.¹⁹ She

of racial subordination has caused enormous inequalities of wealth, political power, educational opportunity, and inequities in many other measures of well-being"); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 529-51 (6th ed. 2002) (discussing relative inefficiencies of modern political process).

¹⁴ See Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 237 (2006) ("[A] more accurate statement is that the dominant culture in the United States is Anglo American, and not actually Anglo Saxon culture. Members of this dominant culture are white, Protestant and English-speaking.").

¹⁵ "Undoubtedly all laws and practices are culturally constructed, the end products of a society's interpretive negotiations." ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 226 (2000).

¹⁶ See Bernard M. Dickens, *The Modern Function and Limits of Parental Rights*, in *CHILD LAW* 167, 167 (Harry D. Krause ed., 1992) (quoting Lord Denning).

¹⁷ For articles discussing *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), see David DeGroot, *The Liberal Tradition and the Constitution: Developing a Coherent Jurisprudence of Parental Rights*, 78 TEX. L. REV. 1287, 1288 (2000); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1036-37 (1992). See also *infra* Part I.B.1.

¹⁸ See Dickens, *supra* note 16, at 168.

¹⁹ See Jill Korbin, *Curriculum Vitae*, <http://www.case.edu/artsci/anth/korbin.html> (last visited Mar. 1, 2008).

describes how the conflict implicates even the most fundamental task of defining child abuse and child neglect.

As cultures come into contact with one another, different childrearing practices and beliefs create a situation ripe for cultural conflict in the definition of child abuse and neglect. Disparities . . . on a given act or practice can occur . . . among sub-cultural or ethnic groups within any one country.²⁰

Such definitions are key to the child welfare system because they define the point at which the state may intervene in the parent-child relationship. Interventions range from behavioral mandates to physical removals to terminations of parent-child relationships.

In her book, *Child Abuse and Culture: Working With Diverse Families*, Dr. Lisa Aronson Fontes further explains how the dominance of certain cultural norms leads to bias and unfairness.²¹ She notes that “[r]egardless of their own cultural background, most professionals in North America have been schooled to see people from the dominant group as the norm and people for other groups as deviant,”²² and these “cultural norms shape how we evaluate abuse and risk.”²³ The strongest evidence of this cultural bias is the disproportionate numbers of “[b]lack children who are in the child welfare system and permanently removed from their homes, despite similar rates of abuse across racial groups.”²⁴

Understanding this cultural bias in the regulation of parents is a necessary part of any serious undertaking to resolve the challenge of multiculturalism for the law. As Professor Martha Minow explains, the hardest struggles over cultural differences in our liberal democracy are about children (rather than women).²⁵

Honest consideration of the centrality of choice should make it clear that children, not women, lie at the heart of questions of cultural clash and accommodation. Indeed, children are the

²⁰ See Korbin, *supra* note 6, at 5.

²¹ See Lisa Aronson Fontes, *Child Abuse and Culture: Working with Diverse Families* 1-13 (2005) (describing both ethnic cultures and professional cultures).

²² See *id.* at 59.

²³ See *id.* at 63.

²⁴ See *id.* at 82.

²⁵ Martha Minow, *About Women, About Culture: About Them, About Us*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES* 252, 261 (Richard A. Shweder, Martha Minow & Hazel Rose Markus eds., 2002) (responding to perception that discussions of cultural conflict are focused on women).

prime targets of socialization, and children, even in liberal societies, are not viewed as yet capable of choice. Any genuine effort to enable choices must focus on children. Yet any such effort then collides forcibly at the heart of culture, at the center of immigrant communities, at the core of Third World societies, even at the most fundamental freedoms — to reproduce and raise children — ensured by law to individuals in Western, democratic societies Reconciling what it takes to equip children as choosers with what it takes to respects parents and communities as child rearers is as hard as any task gets.²⁶

Minow's invocation of the phrase "fundamental freedoms" reveals one additional complication: the constitutional dimension of the legal regulation of the parent-child relationship. Specifically, the Supreme Court has located a fundamental right to parental autonomy within the substantive due process guarantees of the Fourteenth Amendment.²⁷ Thus, a cultural differential may have constitutional implications.

In the evolution of my work on culture and the law, I arrive at this Article from earlier papers where I examined the intersection of the law on criminal defenses with minority practices.²⁸ Interestingly, many of the practices I discussed are parenting practices. This context of the parent-child relationship is not surprising because again, parenting is one behavior in which culture exerts a tremendous amount of influence. As I analyzed the ability of minority parents to mount a justification defense in criminal courts, I realized that the offensive use of the law was perhaps an even greater threat to their rights. The intersection between law and culture occurs at the definition of offenses in both criminal and civil settings. In this Article, I use the specific lens of parental autonomy, focusing on the definition of criminal offenses, to discuss the conflict between law and culture.

²⁶ See *id.* at 261.

²⁷ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); see also *infra* Part I.B.1.

²⁸ In these earlier papers, I looked at how current defenses in the criminal law express only the values of the dominant Anglo American culture and how alternative values from minority cultures are largely ignored and suppressed. I advocated for greater recognition and accommodation of minority cultures in our criminal defenses. These earlier works mostly discussed fatal instances of minority practices, but in my research, I frequently learned of examples of nonfatal practices, too. See, e.g., Elaine Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006); Chiu, *supra* note 14 *passim*.

I make two major claims. First, the practices and decisions of minority parents are scrutinized, regulated, and punished to a greater degree than the practices and decisions of parents from the dominant culture.²⁹ This occurs on several levels, including the passage of laws that directly target minority practices and the biased application of generally applicable laws.³⁰ The result is a relative lessening of the autonomy and freedom enjoyed by minority parents under the Constitution: a culture differential in parental autonomy. While individual instances may warrant greater scrutiny and less autonomy, the fact that a practice is not one of the dominant culture should not by itself justify heightened regulation and weakened autonomy.

An example of unwarranted culture differential is the federal statute criminalizing all female genital surgeries performed on patients younger than eighteen years old.³¹ The law prohibits minority parents from choosing that their daughters undergo such procedures for nonmedical, culturally based reasons. The statute targets the cultural practice because it provides a medical necessity defense while explicitly rejecting a cultural defense.³² Is such criminalization warranted? Is it constitutional?

This Article analyzes this federal statute as a potential violation of the substantive due process rights of minority parents. Defenders of the statute offer the expected “compelling state interests” justification, but the law fails to accomplish these objectives with minimal intervention of constitutional rights. Because the law ignores mainstream practices where parents invade the bodily integrity of their children for nonmedical reasons, it is woefully underinclusive. Because the law disallows symbolic nickings that accomplish the cultural goal without endangering children, it is also overinclusive. My goals here are not only to begin a much-needed conversation about the constitutionality of this statute, but also to make the larger

²⁹ See *infra* Part II.A.

³⁰ In this Article, I discuss at length an example of a targeted law: the criminalization of female genital surgeries. See *infra* Part II.G. I only mention here the biased application of generally applicable laws as another source of the culture differential among parents. For a longer discussion of this problem, see Fontes, *supra* note 21 *passim*.

³¹ See 18 U.S.C. § 116(a) (2000) (“[W]hoever 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.”); *supra* Part II.B.1 (explaining why I choose to use term, “female genital surgery” instead of “female genital mutilation” or “female genital circumcision”).

³² See 18 U.S.C. § 116(b).

point that we need to be vigilant about the protection of minority interests in the law.

Even if courts recognize and strike down ethnocentric laws as unconstitutional, is there a way to prevent such laws from being enacted in the first place? Can our laws prospectively avoid the culture differential? The second claim in this Article aspires toward this goal by adopting concepts from the study of intercultural relations. This field looks at the interactions of humans from different cultures and develops principles through which such interactions can be improved. It is relevant and helpful because in many instances, the first level of state intervention involves social workers or police officers from the dominant culture communicating with parents from minority cultures. Procedural reforms to ensure hard second looks or cultural mindfulness can be adopted not only at this administrative level but also at the legislative level. A current California statute demonstrates the promise of this approach.

Part I offers an understanding of parenting in modern society and its legal regulation. It begins with the constitutional protection afforded to all parents in the United States. Part II examines the claim that parents from different cultures enjoy different amounts of autonomy. It centers around a constitutional analysis of the federal criminalization of female genital surgeries. Part III describes important concepts from the field of intercultural relations and demonstrates how they can be used to reduce the culture differential in the laws regulating parents. This discipline offers a hopeful new direction in the work on law and culture.

I. THE PARENT-CHILD RELATIONSHIP AND ITS LEGAL REGULATION

A. *The Social Significance of Parents*

Although the living patterns of human beings vary over time and across cultures, there is one element that is nearly universal: the social unit of parent and child.³³

In a way that seems entirely natural to most people, the primary responsibility for . . . [the protection, nurture, and

³³ “Family — the basic biosocial unit in society having as its nucleus two or more adults living together and cooperating in the care and rearing of their own or adopted children (the association of adult [and children] is the necessary nucleus of any [family]).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 821 (1986) (quoting American anthropologist Ralph Linton).

education of children] . . . falls to [] parents. It is the biological parent or the adult acting in his or her place who must assume the central task of overseeing the physical, intellectual, and emotional development of the child into adulthood.³⁴

Some believe that the very survival of humanity depends on parents “rearing their young with the best possible care and optimal concern.”³⁵

The nearly universal reliance on the parent-child unit is due to the widely held belief or assumption that parents love their children.³⁶ A “cherished folk belief is [that] human nature compels parents to rear their young with solicitousness and concern, good intentions, and tender and loving care.”³⁷ Parental love has even been described as a presumption of natural law.³⁸ William Blackstone wrote that the “natural bonds of affection lead parents to act in the best interests of their children.”³⁹

Aside from loving their children, what else is it that parents do? There are certain goals in common for most human parents. These include the physical survival and health of the child, the economic independence of the child upon reaching maturity as an adult, and the capacity to maximize other culturally important values.⁴⁰ In striving toward these goals, parents have three primary roles: provider, decision maker, and teacher and role model.

One of the distinguishing characteristics of the human mammal is the relatively long period of time that human offspring are unable to

³⁴ See Mario D. Fantini & John B. Russo, *Introduction: Parenting in Contemporary Society*, in PARENTING IN A MULTICULTURAL SOCIETY, at xxix (Mario D. Fantini & René Cárdenas eds., 1980).

³⁵ See *id.* (“Parenting . . . involves us all since, ultimately, it represents not only the expression of a society’s concern for its children, but also that society’s concern for its own future well-being.”); see also Korbin, *supra* note 5, at 256 (“The survival and successful rearing of the next generation is the quintessential task of humanity.”).

³⁶ See Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 921-22 (2003) (offering assumption of love as one of five rationales for why law presumes that parents act in best interests of their children).

³⁷ See Korbin, *supra* note 6, at 3.

³⁸ See Alison M. Brumley, *Parental Control of a Minor’s Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333, 342 (1991).

³⁹ See Maldonado, *supra* note 36, at 921-22 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447 and 2 JEROME KENT, COMMENTARIES ON AMERICAN LAW 190 (2008)).

⁴⁰ See Robert A. Levine, *A Cross-Cultural Perspective on Parenting*, in PARENTING IN A MULTICULTURAL SOCIETY, *supra* note 34, at 17.

care for themselves and are dependent upon others for their physical survival.⁴¹ This is particularly true in our modern times.⁴² At the core of parenting is meeting the physical needs of children, such as food and shelter. However basic, this role as primary provider is a demanding part of parenting and should not be overlooked.

Furthermore, parents make countless decisions for their children that range from mundane to fundamental in nature. For example, everyday decisions address when and what a child eats, when and how much a child sleeps, where and with whom a child sleeps, how a child dresses, and how a child grooms his hair. More critical decisions involve the determination of where and with whom a child lives, with whom a child interacts outside of his home, and how frequently and for how long.⁴³ There are also the important choices parents make about the education and schooling of their children, their religious upbringing, and their medical care.

In addition to functioning as decision makers for their children, parents also serve as teachers and role models. Indeed, it is oft-repeated that parents are the most influential role models and teachers for their children.⁴⁴ As the old adage goes, “the apple does not fall far from the tree.” Parents teach their children how to speak, how to eat, how to interact with others, how to love, and how to conduct themselves in public, among many other things.⁴⁵ Thus, it is not surprising that children mimic their parents in certain ways. For example, children seem to acquire their attitudes about gender from

⁴¹ S.K. Morgan Ernest, *Life History Characteristics of Placental Non-Volant Mammals*, ECOLOGICAL ARCHIVES E084-093-D1 (2003), available at <http://esapubs.org/archive/ecol/E084/093/metadata.htm> (showing average age in months of female mammals at weaning age, age of first reproduction, and average life span).

⁴² Teresa M. Cooney & Peter Uhlenberg, *Support from Parents over the Life Course: The Adult Child's Perspective*, 71 SOCIAL FORCES 63, 64-65 (1992).

⁴³ See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (concerning dispute between paternal grandparents who were denied visitation time with their grandchildren by children's mother).

⁴⁴ Eugenia Hepworth Berger, *Parent Involvement: Yesterday and Today*, 91 ELEMENTARY SCH. J. 209, 209-19 (1991); A NATION AT RISK, RECOMMENDATIONS: A WORD TO PARENTS AND STUDENTS (1983), <http://www.ed.gov/pubs/NatAtRisk/recomm.html>.

⁴⁵ See, e.g., Greg Duncan et al., *The Apple Does Not Fall Far from the Tree* 1-4, 22 (Inst. for Policy Research Nw. Univ., Working Paper No. 3, 2002), available at <http://www.northwestern.edu/ipr/publications/papers/2002/WP-02-17.pdf> (examining role modeling theory in addition to genetics, socioeconomic status, and other theories as to how parents pass traits and behaviors to their children).

their parents⁴⁶ and this contributes to the tragic cycle of domestic violence.⁴⁷

B. *A Triad of Right, Responsibility, and Restriction*

Given how much society relies upon parents for the serious tasks of raising and taking care of children, it is only fitting that the law hold parents in special regard.⁴⁸ In the United States, this special regard is reflected in a triad of right, responsibility, and restriction. While parents may enjoy certain rights with respect to their children, they also have many legal responsibilities.⁴⁹ As the Supreme Court wrote, “[p]arents generally ‘have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.’”⁵⁰ In addition to affirmative obligations, the law also imposes restrictions on parents.⁵¹ This multi-layered legal treatment of parents is located in a myriad of laws that range from the common law to statutes, from civil rules to criminal offenses, and from federal law to local law.

1. The Right of Parental Autonomy

Indeed, more than eighty years ago, the Supreme Court declared a place for parents and the parenting function in the federal Constitution, finding in the Fourteenth Amendment’s Due Process Clause “the right of the individual . . . to marry, establish a home and *bring up children*, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of

⁴⁶ See *id.* at 23-25.

⁴⁷ See ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 23-35 (1987).

⁴⁸ In several opinions, the Supreme Court acknowledged the deep roots and the social desirability of the parent-child relationship in Western civilization: “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.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

⁴⁹ “Within the family, parents have legal power to make a wide range of important decisions that affect the life of the child, but are held responsible for the child’s care and support by the state.” See ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 2 (5th ed. 2005).

⁵⁰ *Id.*

⁵¹ See *infra* Part I.B.2.

happiness by free men.”⁵² The Court reiterated this two years later in the case of *Pierce v. Society of Sisters*.⁵³

As recently as 2000 in *Troxel v. Granville*, the Court’s plurality elevated parental autonomy over other individual freedoms. A “parent’s interest in the care, custody and control of her child,” the Court held, is “perhaps the oldest of the fundamental liberty interests recognized.”⁵⁴ Lower federal courts have declared parental autonomy “the most venerable of the liberty interests in the Constitution”⁵⁵ and placed it within the realm of human rights.⁵⁶

While parents provide for and teach their children, it is often their role as decision makers that the fundamental right to parental autonomy protects. *Meyer* and *Pierce* concerned educational decisions,⁵⁷ but both have been cited in a wide variety of other contexts. For example, the Supreme Court in *Troxel* upheld a mother’s right to decide how much time to allow her children to visit

⁵² See *Meyer*, 262 U.S. at 399 (emphasis added). This broad statement in *Meyer v. Nebraska* is responsible for the dominant view that *Meyer* and *Pierce v. Society of Sisters* from 1925 constitute the origins of the right to privacy in modern constitutional jurisprudence. See *Pierce*, 268 U.S. at 533-34; MNOOKIN & WEISBERG, *supra* note 49, at 51 (“The constitutional importance of *Meyer* and *Pierce*, especially in establishing the constitutional framework for American education, would be difficult to exaggerate.”).

This belief stems from the fact that the Supreme Court relied on *Meyer* and *Pierce* in the case in which it first articulated a right to privacy. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (finding state ban on use of contraceptives unconstitutional). The Court continued to cite to either one or both cases in other significant privacy decisions. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (establishing limited right to abortion).

⁵³ See *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399.

⁵⁴ See Lenese Herbert, *Plantation Lullabies: How Fourth Amendment Policing Violates the Fourteenth Amendment Right of African Americans to Parent*, 19 ST. JOHN’S J. LEGAL COMMENT. 197, 203-04 (2005) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

⁵⁵ *Hatch v. Dep’t for Children*, 274 F.3d 12, 20 (1st Cir. 2001).

⁵⁶ *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

⁵⁷ *Meyer* recognized the right of parents to hire private instructors to teach non-English languages to their children. See *Meyer*, 262 U.S. at 400 (“Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. . . . [T]he right of parents to engage [the plaintiff teacher] . . . so to instruct their children . . . are within the liberty of the [Fourteenth] Amendment.”).

Pierce allowed parents to send their children to private schools. See *Pierce*, 268 U.S. at 532 (contesting constitutionality of laws requiring every parent to send their children between eight and 16 years of age to public school). “The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.” See *id.* at 535.

with their paternal grandparents.⁵⁸ The lower court overrode the mother's decision, but the Supreme Court reversed, explicitly relying on the presumption that parents act in the best interests of their children.⁵⁹ This is significant because it highlights how the strong belief in parents' love for their children leads to the legal protection of their decisions.⁶⁰

2. Responsibility and Restriction

Though courts zealously guard parental autonomy, it is far from an absolute right. The law also mandates certain responsibilities and sets forth particular restrictions in trying to balance two distinct paradigms in family law: the interests of the state as the guardian of children, and the interests of children as autonomous individuals with independent rights. The paramount goal of both paradigms is the protection of children.⁶¹ This goal trumps parental autonomy. The balancing of parents', children's, and states' rights make regulating the parent-child relationship complex and challenging. I briefly describe the two paradigms because they help to explain the restrictions and responsibilities imposed upon parents.

In the first paradigm, the state regards itself as *parens patriae* of all children in its jurisdiction.⁶² It shares the tasks of parenting with individual parents.⁶³ Consequently, the state has an interest in protecting the welfare of children and thus "has a wide range of power for limiting parental freedom and authority in things affecting the

⁵⁸ See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (reversing lower court decision to override mother's decision to order additional visitation between grandparents and children).

⁵⁹ See *id.* at 72-73.

⁶⁰ See *supra* text accompanying notes 27-33.

⁶¹ See SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS* 2 (3d ed. 2004) ("[I]n the early years of the twentieth century . . . the idea that the state has a responsibility for the welfare of children, and that society has an interest in how children are reared, emerged and became widely accepted."); *id.* at 157 (explaining Justice Douglas's dissent in *Wisconsin v. Yoder* inspired children's rights movement by viewing role of law in lives of children as "not simply a matter of balancing the interests of the state and the parents" but instead also about recognizing that "the mature minor has a constitutionally protected interest in self-determination that may be implicated when important matters affecting her life are at stake").

⁶² "The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." *BLACK'S LAW DICTIONARY* 1144 (8th ed. 2004).

⁶³ See *supra* text accompanying notes 34-39.

child's welfare."⁶⁴ For example, the state may require children to attend school and forbid children from working.⁶⁵ The state also enforces parents' obligation to support their children.⁶⁶ For example, every day, law enforcement officials and judges garnish wages, revoke driving licenses, and even imprison deadbeat parents.⁶⁷ There is a fundamental Anglo American belief that parents ought to be responsible for the welfare of their children⁶⁸ and that the state, as *parens patriae*, ensures that they are.

In addition to setting the rules, the state as *parens patriae* exacts severe penalties in the child welfare system upon parents who violate the rules.⁶⁹ All fifty states have child welfare agencies dedicated to protecting children.⁷⁰ These agencies interfere with parental autonomy when parents have committed crimes against their children⁷¹ (child abuse) or failed their basic responsibilities toward

⁶⁴ See *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

⁶⁵ See *id.* at 166.

⁶⁶ See Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the 'Nontraditional' Family, 1996 UTAH L. REV. 569, 574 (1996) ("[B]y virtue of their acts of procreation, parents are obligated (with limited exit options) to support and take responsibility for their dependent children."). Courts regard the financial obligations of parents seriously. For example, courts reject the efforts of parents to avoid child support by claiming that they were deceived into having unprotected sex that led to the conception of their children. See *Pamela F. v. Frank S.*, 449 N.E.2d 713, 715 (N.Y. 1983).

⁶⁷ See Woodhouse, *supra* note 66, at 574.

⁶⁸ See John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origin*, 14 OXFORD J. LEGAL STUD. 159, 161-62 (1994).

⁶⁹ See Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 FUTURE OF CHILD. 23, 25 (1998) ("The doctrine known as *parens patriae* . . . was viewed as justification for governmental intervention into the parent-child relationship. . . . Children of the 'unworthy poor' were saved . . . by separation from their parents through indenture or placement in institutions. Actions taken on behalf of those children were typically justified on moral grounds, but they also served as potent instruments of social control." (italics in original)).

⁷⁰ Although these agencies will investigate all incidents of abuse and neglect of a child, whether the perpetrators are the legal parents of the child or not, most of their cases involve the parent-child relationship. ACS UPDATE ANNUAL REPORT 1-5 (2005), available at http://www.nyc.gov/html/acs/downloads/pdf/stats_update_5year.pdf.

⁷¹ Frequently states use their penal offenses in their definitions of what constitutes child abuse. See, e.g., N.Y. FAM. CT. ACT § 1012(e)(iii) (2006) (defining abused child as child whose parent "commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; allows, permits or encourages such child to engage in any act described in sections 230.25, 230.30 and 230.32 of the penal law; commits any of the acts described in sections 255.25, 255.26 and 255.27 of the penal law; or allows such child to engage in acts or conduct described in article two hundred sixty-three of the penal law. . . .").

them (child neglect).⁷² The presumption that parents act in the best interests of their children is rebutted because these parents act against such interests.⁷³ The state, through its child welfare agencies and family court judges, can restrict parents from certain practices and impose obligations, such as parenting classes or drug abuse programs. Its ultimate powers are to separate parent from child and to terminate their legal status as parent and child.

In order to work, this first paradigm requires a hierarchy. The Supreme Court has written that individual parents outrank the state in their shared parenting of children.

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.⁷⁴

Thus, courts evaluate the *parens patriae* actions of the state against the privileged place of parents.⁷⁵

This approach conceptualizes children in two distinct ways. First, children are persons, but they lack full status under the law.⁷⁶ They acquire status only through the passage of time and the attainment of minimum ages. As a result of this incomplete status, there is “no place for children’s voices or for recognition of children’s personhood.”⁷⁷ Instead, “the voice of children *as a group* [is] . . . subordinated to that of their presumptively caring, affectionate parents.”⁷⁸ Both individual parents and the state as *parens patriae* exercise authority over children.⁷⁹

⁷² See, e.g., N.Y. FAM. CT. ACT § 1012(f) (2006) (defining neglected child as child whose physical, mental or emotional condition has been impaired or is imminent danger of becoming impaired as result of failure of parent to exercise minimum degree of care in supplying child with adequate food, clothing, shelter, education, medical care, and supervision, or child who has been abandoned).

⁷³ See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (recognizing existence of child abuse and child neglect, but emphasizing that most parents do not engage in such behavior); *supra* text accompanying notes 27-33.

⁷⁴ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁷⁵ See *infra* text accompanying notes 75-85.

⁷⁶ See Dolgin, *supra* note 2, at 381-82.

⁷⁷ *Id.* at 382.

⁷⁸ *Id.*

⁷⁹ *Id.*

Alternatively, children are not persons, but rather they are property. Professor Barbara Bennett Woodhouse reinterprets *Meyer* and *Pierce* as reflections of a “property-based notion of the private child.”⁸⁰ This is consistent with a legal system that values “private ownership, hierarchical structures, and individualist values against claims of collective governance.”⁸¹ Under this conception, individual parents and the state *own* children.⁸²

The second paradigm imagines the state not as an additional parental figure, but instead as an arbiter in disputes between parent and child. The end purpose of the state is the same: the welfare of children. However, the nature of the state’s decisions has changed. No longer does the state make its own assessment of what is best for children; instead, the state has to decide between allowing children to decide for themselves or subjecting children to their parents’ authority.⁸³

This role as arbiter offers yet a third perspective on children. Children are full persons and are neither the property of the state nor individual parents. The rights of children are comparable to the rights of adults, but are not exactly the same.⁸⁴ For example, in the abortion context, the Supreme Court has subordinated a daughter’s right to abortion to her parents’ right to interfere and even prevent an abortion due to their status as her parents.⁸⁵ Subsequently, the Court has continued to struggle over the competing rights of children and their parents.⁸⁶

⁸⁰ See *id.* at 387 (quoting Woodhouse, *supra* note 17, at 997).

⁸¹ *Id.*

⁸² Woodhouse decries this conception of the child as dangerous. She argued *Meyer* and *Pierce* “constitutionalized a narrow, tradition-bound vision of the child as essentially private property” and “announced a dangerous form of liberty, the right to control another human being.” See *id.* at n.262 (quoting Woodhouse, *supra* note 17, at 997, 1001).

⁸³ See *DAVIS ET AL.*, *supra* note 61, at 157 (explaining Justice Douglas’s early recognition that children’s rights as autonomous legal persons “might . . . conflict with, and trump, the rights of parents to make decision about child rearing”).

⁸⁴ See Dolgin, *supra* note 2, at 368.

⁸⁵ See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (invalidating Massachusetts statute requiring parental consent in order for minor to have abortion on grounds that it lacked effective alternative judicial bypass procedure).

⁸⁶ See, e.g., *Lambert v. Wicklund*, 520 U.S. 292, 297 (1997) (upholding parental notification statute that included judicial bypass alternative); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (upholding one parent consent requirement with effective judicial bypass procedure).

C. *The Strained Coexistence of State, Parent, and Child*

Society relies tremendously on individual parents to raise children. However, as the triad of right, responsibility, and restriction expresses, this reliance does not translate into unlimited freedom. The final objective of society and its laws is not to respect individual parents, but instead to ensure the welfare the children. The law views the right of parental autonomy as a means toward that end.⁸⁷

In most families, the means and end intersect. Several scholars explain how the best way to protect children is to protect the autonomy of their parents.⁸⁸ Professor Katherine Bartlett believes that parents need the security of autonomy from state interference to act in the best interests of their children.⁸⁹ Professor Janet Leach Richards suggests that parental autonomy leads to family unity and closeness.⁹⁰ Even the famous Professor Joseph Goldstein in his continuity of care theory states that “the right of parents to raise their children . . . free of coercive intervention, comports well with the children’s psychological and biological need for unbroken continuity of care by his parents.”⁹¹

However, there are families where the means and the end are not aligned and where children need protection from the harmful acts of their parents. The interest of these parents is still to be free from state intervention; however, such interest contradicts the welfare of the children. What should happen in these families? Should the means of parental autonomy be sacrificed in the name of child protection? Or should child protection be vulnerable to the preservation of freedom?

⁸⁷ See DAVIS ET AL., *supra* note 61, at 1 (“The foundation of legal regulation of the family is the premise that parents are the ‘first best’ caretakers of children and that parents have an interest in this role that warrants legal protection. . . . State policies regulating parents thus are subject to constraint. . . . It is generally assumed that this basic arrangement . . . serves both the interests of children and society.”)

⁸⁸ “[T]he benefits to children . . . stand as an independent justification for continuing to afford parents a tremendous degree of control.” Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 656 (2002).

⁸⁹ See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 902-11 (1984) (describing how parents are encouraged to do best job they can if they know that their decisions will not be unduly second-guessed and scrutinized by state).

⁹⁰ See Maldonado, *supra* note 36, at 922 n.345 (quoting Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 737 (1992)).

⁹¹ See Herbert, *supra* note 54, at 199 (quoting Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 649-50 (1977)).

In constitutional jurisprudence, the answers to these questions influence the appropriate level of analysis. Despite numerous opportunities, the Supreme Court has yet to provide a satisfying resolution to these important questions.⁹²

The dramatic language the Court used to describe the fundamental nature of parental autonomy suggests strict scrutiny as the proper level of analysis. The state may interfere with the fundamental autonomy of parents only when the state action is narrowly tailored to achieve compelling state interests. For example, in the context of child abuse, strict scrutiny would require actual or threatened harm be of a serious and unjustified nature before a state can act. Protection from minimal physical pain would not be sufficiently compelling.⁹³

Despite the appeal of the strict scrutiny standard, the Supreme Court has been inconsistent in its choice of a level of analysis.⁹⁴ The Court has used the rational basis test in some cases⁹⁵ and has failed to identify precisely what test it was using in other cases.⁹⁶ Many observers⁹⁷ and even one of the Justices⁹⁸ are frustrated by the Court's wavering on this issue. The only consensus is that while the Supreme Court has not always applied strict scrutiny, recent cases appear to reject the rational basis test, instead using some form of heightened scrutiny in analyzing state actions against parents.⁹⁹ Unable to theorize with satisfaction the Court's analyses across cases, legal scholars instead offer their own opinion of the appropriate balance between parental autonomy and child welfare.¹⁰⁰

⁹² See Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 365-69 (2002).

⁹³ See, e.g., *State v. LeFevre*, 117 P.3d 980 (N.M. 2005) (reversing conviction for battery because act of grabbing child's hand was isolated act of punishment that used only reasonable force and resulted in only temporary bruises).

⁹⁴ See Herbert, *supra* note 54, at 207-08.

⁹⁵ See *id.* at 206-07; see also Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 454 (2002) (arguing that in both earlier and contemporary cases, Supreme Court has not shown much deference to parental actions that may harm children).

⁹⁶ See Maldonado, *supra* note 36, at 882.

⁹⁷ See Dolgin, *supra* note 92, at 365-69.

⁹⁸ See *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

⁹⁹ See *id.* at 65 (providing heightened protection for right of parental autonomy); Herbert, *supra* note 54, at 207-08.

¹⁰⁰ See, e.g., Barbara Bennett Woodhouse & Sacha Coupet, *Troxel v. Granville: Implications for at Risk Children and the Amicus Curiae Role of University-Based Interdisciplinary Centers for Children*, 32 RUTGERS L.J. 857, 869 (2001) (rejecting strict scrutiny as inappropriate for family law cases).

The majority of parents in the United States are not troubled by this confusion in constitutional jurisprudence. For them, there is very little interference by the state in their lives. From the moment of their children's births, they exercise tremendous authority over their children. Parents decide what clothing a child wears, what food and when a child eats, where a child lives, what language she speaks, where she goes to school, what faith the child practices, and with whom she associates and for how long. Although there are minimum educational, shelter, food, and medical care requirements, and prohibitions against child labor and excessive corporal discipline, for many parents, the state's boundaries are symbolic and do not affect the decisions they make.¹⁰¹

However, for an important minority of parents, the laws are real incursions of their parental autonomy. Having described the complexity of the legal regulation of the parent-child relationship, I turn in the next part to the first claim in this Article: parents from the dominant culture enjoy more autonomy than parents from minority cultures. While others have focused on the race differential,¹⁰² this Article emphasizes a culture differential. This differential may be less obvious but also poses difficult questions of equality and justice.

II. THE CULTURE DIFFERENTIAL IN PARENTAL AUTONOMY

The differential leads to a grave lessening in the enjoyment of a constitutionally protected right. Parents from minority cultures experience it in an assortment of ways. For instance, agency representatives may require parents to explain or justify particular parenting decisions. They may compel parents to go to testing and parenting programs, or impose other restrictions.¹⁰³ State laws may

¹⁰¹ Statistics about the percentage of children who are the subjects of child welfare investigations are more readily available, but by logical inference, these statistics support the fact that only a limited number of parents are involved in the child welfare system. Out of every 1000 children, 48.3, or an estimated 3.6 million children, received an investigation by Child Protective Services ("CPS") agencies during 2005. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 25 (2005) available at <http://www.acf.dhhs.gov/programs/cb/pubs/cm05/chapterthree.htm#subjects>. Nearly 80% of the perpetrators of the cases determined to be child abuse or child neglect were the parents of the children. See *id.* at 70, available at <http://www.acf.dhhs.gov/programs/cb/pubs/cm05/chapterfive.htm#character>.

¹⁰² See, e.g., DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

¹⁰³ See Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 252-61 (1994)

prohibit parents from making certain culturally derived decisions for their children. Such prohibitions may apply universally, but actually burden only parents from specific minority cultures because only those parents are inclined to do what is outlawed.¹⁰⁴ Finally, the state may even terminate an individual's parental rights.¹⁰⁵ Because of the serious consequences, the culture differential is significant and thus warrants a careful examination.

In this part, I start by describing the culture clash that exists between family law and minority parents. I then focus on a particular example to demonstrate the culture differential: the federal criminalization of female genital surgeries. After juxtaposing the criminal statute with the dearth of legal regulation in other similar mainstream practices, I conclude that the law creates a culture differential that is not justified as a matter of child protection.

A. *The Culture Clash*

The origins of the culture differential lie in three basic truisms. First, parenting is a cultural construct. Second, laws on parenting are also a cultural construct. Third, when the culture of a parent does not match the culture of the law, a culture clash arises. In such cases, the law will typically emerge victorious, leaving parents with a loss of their autonomy and quite possibly, a loss of their children.¹⁰⁶

In the words of anthropologist Margaret Mead, parenting is the process by which “[t]he little Manus becomes the big Manus, the little Indian the big Indian.”¹⁰⁷ This simplification implies that all parents are grooming their children into adults. There is a “commonality of tasks that must be accomplished in rearing the next generation.”¹⁰⁸ Yet, despite this shared goal, parenting varies widely around the

(describing how racial or ethnic bias influences all stages and factors involved in termination proceeding from assessments of mental status and parenting skills of parents, to degree of compliance with service plans, to their maintenance of appropriate home, etc.).

¹⁰⁴ See, e.g., *infra* Part II(B.1) (explaining how only certain cultures promote female genital surgeries which are outlawed as federal crime).

¹⁰⁵ See Azar & Benjet, *supra* note 103, at 249 (arguing because of largely discretionary nature of termination decisions, they may be particularly vulnerable to biases based on race and ethnicity).

¹⁰⁶ See, e.g., Nancy A. Wanderer & Catherine R. Connors, *Culture & Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 839 n.36. (1999).

¹⁰⁷ See Korbin, *supra* note 5, at 256 (quoting MARGARET MEAD, *GROWING UP IN NEW GUINEA* (1930)).

¹⁰⁸ See *id.* at 257.

world. The reason is that “virtually all aspects of parenting — beliefs as well as behaviors — are shaped by culture.”¹⁰⁹

Parenting differs along many dimensions. Cultures vary as to who is responsible for raising children.¹¹⁰ Additionally, cultures vary in the content of the rules being taught to children, in the techniques allowed for enforcement of the rules, and in the ages at which children are expected to behave according to the rules.¹¹¹ To give a simple illustration, middle-class Americans believe that each child should have his or her own bed, if not his or her own room.¹¹² A new trend is specialty books like *The Sleepeasy Solution* and consultants like the Sleepy Planet group in Los Angeles that help parents to teach their children how to sleep in their own beds, in their own rooms, and to avoid the family bed.¹¹³ In contrast, traditional Hawaiian and Japanese children share beds with other family members, including adults.¹¹⁴ Such arrangements foster closeness and dependency in intra-family relationships as opposed to independence.¹¹⁵

Anthropologist Jill Korbin further observes that such practices survive for longer periods of time than other cultural customs because they are less open to change.¹¹⁶ “[C]ultural practices related to child-rearing are adhered to so tenaciously. Traditional modes of child care and socialization are often maintained long after marked changes have occurred in other realms of culture such as religion, politics, and economics.”¹¹⁷ Ironically, parenting practices last longer because people fail to appreciate that parenting is a cultural construct. “The child-rearing practices of one’s own culture may seem ‘natural,’ but in

¹⁰⁹ See PARENTHOOD IN AMERICA: AN ENCYCLOPEDIA 152 (Lawrence Balter ed., 2000) (“The origins of variation in maternal and paternal caregiving are extremely complex, but culture is among the factors of paramount importance.”).

¹¹⁰ See *id.* at 153.

¹¹¹ “In all societies the helpless infant . . . must be changed into a responsible adult obeying the rules of his society. Societies differ from each other in the precise character of the rules to which the child must be taught to conform. . . . [S]ocieties differ, moreover, in the techniques that are used in enforcing conformity, in the age at which conformity is demanded to each rule of adult life . . . and in countless other details of the socialization process.” See Korbin, *supra* note 5, at 257 (quoting JOHN W.M. WHITING & IRWIN L. CHILD, CHILD TRAINING AND PERSONALITY: A CROSS-CULTURAL STUDY (1953)).

¹¹² See *id.* at 6.

¹¹³ See Penelope Green, *Whose Bed Is It Anyway?*, N.Y. TIMES, Mar. 1, 2007, at F1.

¹¹⁴ See *id.*

¹¹⁵ See PARENTHOOD IN AMERICA, *supra* note 109, at 153.

¹¹⁶ See Korbin, *supra* note 5, at 258.

¹¹⁷ See *id.*

actuality they may be unique in comparison with others.”¹¹⁸ By equating what seems natural with what is right, parents not only fail to question their own practices but also seek to impose their practices upon others.

Similarly, the laws governing parenting are products of culture that reflect these persistent parenting practices. After all, the very same unquestioning individuals who grew up to parent according to culturally determined practices also write the laws. Lawmaking is a human enterprise. Indeed, family law has operated throughout history as a tool for reinforcing cultural norms.¹¹⁹ It rarely has functioned to initiate cultural change.¹²⁰

The dominant culture in the United States today is the Anglo American culture.¹²¹ As a result, it is also the culture expressed in our substantive parenting laws. To demonstrate the truth of this statement, I briefly discuss a well-settled baseline in American family law: the nuclear family. A postmodern definition of the nuclear family includes “two parents of opposite genders and their dependent . . . biological or adopted children.”¹²² An earlier understanding of the nuclear family also required that the two adults be married, the husband be the sole breadwinner, and the wife be a full-time homemaker.¹²³ This earlier understanding reflected the reality of American households in 1970, when approximately 40% of Americans lived in such nuclear families.¹²⁴ Such living arrangements, where parents and children lived exclusively with one another, reflect the dominant Anglo American culture.¹²⁵ Minority cultures have very different living patterns,

¹¹⁸ See PARENTHOOD IN AMERICA, *supra* note 109, at 154.

¹¹⁹ See Dolgin, *supra* note 92, at 355 (citing IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 5 (3d ed. 1998)).

¹²⁰ See *id.*

¹²¹ See Chiu, *supra* note 14, at 236 (defining Anglo American culture).

¹²² See Dolgin, *supra* note 92, at 381.

¹²³ See *id.* at 381 n.232 (citing Judith Stacey, *Backward Toward the Postmodern Family: Reflections on Gender, Kinship, and Class in the Silicon Valley*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 91, 93 (Barrie Thorne & Marilyn Yalom eds., rev. ed. 1992)).

¹²⁴ See Jason Fields, America's Families & Living Arrangements: 2003, U.S. Bureau of the Census, Current Population Reports, P20-553, at 2, 4 fig. 2, available at <http://www.census2010.gov/prod/2004pubs/p20-553.pdf>.

¹²⁵ See C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J. L. & PUB. POL'Y 431, 479-84 (2004) (describing work and critiques of sociologist David Schneider and presenting more class-based understanding of nuclear family).

including kinship care, where additional adults with kinship bonds are also present in the household.¹²⁶

The Supreme Court has repeatedly relied on the nuclear family as a baseline of propriety.¹²⁷ Recently in *Troxel*, the Supreme Court upheld the decision of a biological mother to restrict visitation of her children with paternal grandparents.¹²⁸ In a nuclear family, a parent is superior to a grandparent, so the Court did not consider other possible family arrangements.¹²⁹

Today, less than 25% of American families live in nuclear families.¹³⁰ The downward trend is partly due to the fact that the faces and cultures of Americans have changed and continue to change.¹³¹ The U.S. Census Department predicts that by the midpoint of this century, a large non-Hispanic white majority will be reduced to only a slight majority.¹³² The corresponding increase in population will occur in the communities of minority cultures such as Hispanics, Asians, South Asians, Middle Easterners, and Africans.¹³³

These shifting demographics mean that the practices of parents in this country will increasingly reflect the values, beliefs, and principles of cultures other than the Anglo American culture. While the population and practices are changing, the substantive laws are not. The gap between the law and the practices of American parents is

¹²⁶ See Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 415-18 & n.57 (2005) (citing statistics from Urban Institute that report approximately 43% are Black but non-Hispanic and 17% are Hispanic, out of 2.3 million children estimated to be residing in kinship arrangements).

¹²⁷ See Hopkins, *supra* note 125, at 497-500.

¹²⁸ See *Troxel v. Granville*, 530 U.S. 57, 67-68 (2000); see also Maldonado, *supra* note 36, at 897-98 ("The law's deference to parental decisions concerning visitation reflects a dominant [w]hite, middle-class, nuclear family model in which parents alone raise their children.").

¹²⁹ For at least the past decade, a number of scholars have critiqued the nuclear family model and urged family lawmakers to change this norm. See, e.g., Beverly Horsburgh, *Deconstructing Children's Rights and Reimagining Children's Needs: A Gender, Race, and Class Analysis of Infanticide*, 10 ST. THOMAS L. REV. 229, 233 (1998). Such critics point to the legal norm of the nuclear family as being divisive in terms of race, culture, and socioeconomic class. See Maldonado, *supra* note 36, at 902-04.

¹³⁰ See Fields, *supra* note 124, at 2, Fig. 2 at 4.

¹³¹ Indeed, these two changes are related since minority cultures often live in nonnuclear arrangements. See Maldonado, *supra* note 36, at 902-04 (describing how many African American and Latino grandparents live with their grandchildren).

¹³² See U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN (2004), available at <http://www.census.gov/ipc/www/usinterimproj/>.

¹³³ *Id.*

growing.¹³⁴ As a result, the acts of minority parents are being evaluated according to standards that do not consider their cultures at all.¹³⁵ The culture clash is not simply a benign observation, but deeply problematic.

Exacerbating this predicament is the fact that decision makers in the child welfare system overwhelmingly belong to the dominant Anglo American culture. These decision makers include judges,¹³⁶ state or local attorneys, police officers, and social workers.¹³⁷ The lens through which they interpret and apply the laws is the lens of their own culture, the dominant culture. Thus, even if the substantive laws were more culture neutral, there is still the lens of the individual decision makers confronting minority parents.¹³⁸ The cultural bias then occurs at two levels. The dominating presence of the Anglo American culture in the substantive law and in the personal identities of decision makers leads to two inter-related but distinct problems.

This two-tiered culture bias results in a differential in parental autonomy. Minority parents enjoy comparably less parental autonomy. They are vulnerable to greater risks of unjust terminations of parental rights, of unfair separations of parents from their children, and of the placement of unnecessary restrictions, like parenting classes and supervised visitations. Their experience of the triad leans towards restriction and less towards right.

¹³⁴ See Nancy Boyd Webb, *Working with Culturally Diverse Children and Families*, in Nancy Boyd Webb, *CULTURALLY DIVERSE PARENT-CHILD AND FAMILY RELATIONSHIPS: A GUIDE FOR SOCIAL WORKERS AND OTHER PRACTITIONERS 5-6* (2001) (“[I]t is evident that pronounced changes are taking place in the racial and ethnic composition of the United States population. Inevitably, these changes will affect future contacts with children and families from culturally and linguistically diverse groups by practitioners in the social service, mental health, and educational systems.”).

¹³⁵ See Chiu, *supra* note 28, at 1317 (making similar point about gap between substantive criminal law and minority cultures of many defendants in criminal justice system).

¹³⁶ See BUREAU OF LABOR STATISTICS, *HOUSEHOLD DATA ANNUAL AVERAGES 213* (2007) (listing African Americans as only 8.1% of all judges, Asians as only 0.1%, and Hispanics or Latinos as only 9.1%), available at <http://www.bls.gov/cps/cpsaat11.pdf>.

¹³⁷ See *id.* (listing African Americans as only 22.9% of all social workers, Asians as only 3.2%, and Hispanics or Latinos as only 11.9%). In addition, data from the EEOC confirm the low numbers of minorities amongst all types of counselors and social workers nationwide. Their numbers are based on the 2000 U.S. Census. See Equal Employment Opportunity Data, <http://www.census.gov/eo2000/index.html> (last visited Apr. 8, 2008) (reporting that 69.1% of counselors are non-Hispanic white and 67.2% of social workers are non-Hispanic white); see also Webb, *supra* note 134, at 9 (citing study of social workers that found most are Caucasians of Anglo-European heritage).

¹³⁸ See Azar & Benjet, *supra* note 103, at 251-52.

Perhaps more convincing than syllogistic arguments based on parenting and the law and cultural constructs are actual examples of inequality in parental autonomy. I now turn to the main example in this Article: the federal criminalization of female genital surgeries. The reality is that parents from minority cultures bear the brunt of this law. Is targeting a minority cultural practice constitutional? I hope to inspire an earnest reevaluation of our approach to combating such surgeries. In my analysis, I look at how this statute is both overinclusive and underinclusive in protecting children, and I conclude that the cultural difference is the primary explanation for the criminalization approach to female genital surgeries, rather than an unbiased desire to protect children.

B. *The Criminalization of Female Genital Surgeries*

1. The Tradition of Female Genital Surgeries

Female genital surgery (“FGS”) is known by many other names, including “female genital mutilation” and “female genital circumcision.”¹³⁹ However, I deliberately do not use these two phrases, regardless of their popularity. The term “female genital mutilation” is problematic due to its ethnocentric tone of condemnation.¹⁴⁰ “Female genital circumcision” is a better description because it is more neutral;¹⁴¹ however, this phrase gives the impression that all such surgeries are the equivalent of male circumcision. This is wrong. Certain types of FGS are far from the anatomical equivalent of what is typically understood as male circumcision.¹⁴² The more

¹³⁹ See Holly Maguigan, *Will Prosecutions for “Female Genital Mutilation” Stop the Practice in the U.S.?*, 8 TEMP. POL. & CIV. RTS. L. REV. 391, 391 (1999).

¹⁴⁰ See *id.* at 392; see also Natalie J. Friedenthal, *It’s Not All Mutilation: Distinguishing Between Female Genital Mutilation and Female Circumcision*, 19 N.Y. INT’L L. REV. 111, 120-21 (2006).

¹⁴¹ “Efforts to empower women cannot begin with using language that offends them. . . . [W]e advocate the use of the term female circumcision in dealing with affected individuals, parents, or other community members. . . . It is important that we respect the feelings and beliefs of individuals ‘Female genital mutilation’ is the term most commonly used in [the United States’] criminal justice context.” See Maguigan, *supra* note 139, at 392 (quoting declaration found on website of The Research, Action & Information Network for Bodily Integrity of Women).

¹⁴² For a description of the more extreme versions of FGS, see *infra* text accompanying notes 145-46.

extreme versions of FGS are more akin to an amputation.¹⁴³ The term “female genital surgeries” is descriptive, nonjudgmental and accurate.

The need to explain my linguistic choice indicates two facts about the practice of FGS and the global crusade to eradicate it. First, the practice of FGS is complex and not reducible to a simple, unitary description. Second, the prior paragraph offers a glimpse into the hotly political, passionate movement against FGS. This is why even the selection of a term is such a sensitive and charged decision. The rest of this section summarizes the practice of FGS and the serious efforts that have been made throughout the world to eliminate it.

FGS is not any singular procedure, but instead is a term that refers to “various surgeries [that] have existed for over 2000 years, are practiced in forty countries . . . and are performed on girls and women of various ages, ranging from infancy through adulthood.”¹⁴⁴ The medical procedures themselves run the gamut 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.”¹⁴⁵ Although the extreme Pharaonic infibulations have received a lot of attention, it is estimated that they constitute a relatively small percentage of all FGS performed.¹⁴⁶ About 80% of the procedures involve excision of the clitoris and the labia minora.¹⁴⁷ There are also differences in terms of the age at which the procedure is done, which can range from birth to the later teenage years.¹⁴⁸

The World Health Organization estimates that over 140 million women and girls have undergone FGS in varying degrees of severity.¹⁴⁹ The practice of FGS occurs mostly in Africa, Asia, and the Middle East, and also in some immigrant communities in North America and

¹⁴³ See Friedenthal, *supra* note 140, at 137-38 (explaining that surgeries range from removal of clitoral hood, which is equivalent of foreskin of penis, to more extreme removal of entire clitoris, which is akin to amputation of penis).

¹⁴⁴ See Maguigan, *supra* note 139, at 392.

¹⁴⁵ See Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L.J. 717, 727 (1998).

¹⁴⁶ See Richard A. Shweder, *What About Female Genital Mutilation? and Why Understanding Culture Matters in the First Place*, in *ENGAGING CULTURAL DIFFERENCES*, *supra* note 25, at 224 (reporting that only 15% of FGS occurring in Africa are of this extreme sort).

¹⁴⁷ See Sara Corbett, *A Cutting Tradition*, N.Y. TIMES, Jan. 20, 2008, § MM (Magazine), at 44.

¹⁴⁸ See Shweder, *supra* note 146, at 223-24.

¹⁴⁹ See Corbett, *supra* note 147, at 44.

Europe.¹⁵⁰ Although statistics vary, one report estimates over a million African women and girls have undergone a FGS procedure and approximately 6000 such procedures are done every day.¹⁵¹ Some countries, such as Egypt, Ethiopia, Mali, Somalia, and Sierra Leone, have high incidence rates, from 80 to 98%; other countries like Kenya and Ghana have lower rates, from 30 to 50%.¹⁵² However, as more and more individuals from Africa and Asia have emigrated to other nations around the globe, they have brought their cultural practices with them.¹⁵³ The result has been a globalization in the practice of FGS, and concomitantly, a globalization in the awareness of FGS and opposition to it.¹⁵⁴

What accounts for this longstanding practice in these nations? Cultural anthropologist Richard Shweder at the University of Chicago explains that the “best predictor of circumcision . . . is ethnicity or cultural group affiliation.”¹⁵⁵ In other words, no other factor, such as country of residence, socio-economic status, or education level, is as accurate at predicting whether a woman has undergone or will undergo FGS. Like the practice itself, the cultural motivations for FGS are diverse and complex. For now, it is enough to state that many practitioners of FGS believe that the surgeries add to the beauty of women, that the surgeries symbolize the purity and goodness of women, and that the surgeries are necessary to ensure the marital prospects of women.¹⁵⁶ Girls and women without such cuttings are seen as ugly, dishonored, and unmarriageable.

¹⁵⁰ See World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement 1* (2008), available at http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf.

¹⁵¹ See Naomi Mendelsohn, *At the Crossroads: The Case For and Against a Cultural Defense to Female Genital Mutilation*, 56 RUTGERS L. REV. 1011, 1014 (2004) (citing FEMALE GENITAL MUTILATION: A GUIDE TO LAWS AND POLICIES WORLDWIDE 6 (Anika Rahman & Nahid Toubia eds., 2000)).

¹⁵² See Shweder, *supra* note 146, at 222.

¹⁵³ See A.M. Rosenthal, *On My Mind; Female Genital Torture*, N.Y. TIMES, Nov. 12, 1993, at A33 (attributing increase in likelihood of mutilation incidences in Europe and in United States to immigration of people from 30 countries, mostly in Africa); *UN Calls for End to Female Genital Mutilation*, CHI. TRIB., May 5, 1994, at C2.

¹⁵⁴ See Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 2 n.7, 34 (1995) (attributing increase in awareness and opposition to several high-profile immigration asylum cases and to work of Alice Walker).

¹⁵⁵ See Shweder, *supra* note 146, at 222.

¹⁵⁶ See *id.* at 224-25, 234-35, 242.

[I]t is a rite of passage, the means of achieving cleanliness and beauty, a necessary precondition to marriage, a mark of identity and status, and necessary to her full participation in the life of the community.¹⁵⁷

2. The Legal Crusade Against FGS in the United States

There is a powerful global movement against the practice of FGS. Numerous countries around the world, including the United States, France, Great Britain, and even some African nations like Egypt, have legislatively prohibited or regulated the practice of FGS.¹⁵⁸ Legislatures have attacked the practice with both criminal and civil laws.¹⁵⁹

In the United States, the effort began at the state level with support from the medical establishment.¹⁶⁰ In 1994, North Dakota and Minnesota became the first states to pass specific criminal laws against individuals who performed FGS.¹⁶¹ Representative Patricia Schroeder¹⁶² proposed a similar statute in Congress and in 1996, and the United States outlawed FGS at the federal level in the Federal Prohibition of Female Genital Mutilation Act.¹⁶³ Today, there are at least sixteen

¹⁵⁷ See Maguigan, *supra* note 139, at 395. In addition to this cultural meaning, some also believe that FGS is a mandate of the Muslim religion. This is an extremely controversial statement and many Muslims disagree over its accuracy. See Coleman, *supra* note 145, at 730-34.

¹⁵⁸ See Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER SOC. POL'Y & L. 415, 433-36 (1996). Recently, Egypt strengthened its ban on FGS by closing legal loopholes after two child patients died from procedures in 2007. See Michael Slackman & Mona el-Naggar, *Voices Rise in Egypt to Shield Girls from an Old Tradition*, N.Y. TIMES, Sept. 20, 2007, at A1.

¹⁵⁹ See Friedenthal, *supra* note 140, at 126-37 (describing criminal laws, immigration laws, and international laws).

¹⁶⁰ See *id.* at 128-29.

¹⁶¹ See MINN. STAT. ANN. § 609.2245 (West 1994) (stating "whoever knowingly circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another is guilty of a felony"); N.D. CENT. CODE § 12.1-36-01 (1995) (stating "any person who knowingly separates or surgically alters normal, healthy, functioning genital tissue of a female minor is guilty of a class C felony").

¹⁶² For descriptions and evidence of Representative Schroeder's role in the federal movement against FGS, see Bashir, *supra* note 158, at 432; Friedenthal, *supra* note 140, at 128 nn.90-91; see also Patricia Schroeder, *Female Genital Mutilation — A Form of Child Abuse*, 331 NEW ENG. J. MED. 739, 740 (1994).

¹⁶³ See Celia W. Dugger, *New Law Bans Genital Cutting in United States*, N.Y. TIMES, Oct. 12, 1996, at 1.

states with specific anti-FGS criminal statutes.¹⁶⁴ There are numerous differences among these laws:

Some forbid the practice entirely, and some forbid it only when performed on minors under the age of eighteen. Some by their terms impose criminal liability only on practitioners. Others explicitly make criminal the parental act of consenting to the procedure Finally, some provisions carry minimum mandatory penalties, while other statutes allow judicial discretion in sentencing.¹⁶⁵

The text of the federal statute has been influential¹⁶⁶ and is the only anti-FGS statute discussed in the rest of this Article. The federal statute criminalizes only the conduct of individuals who actually perform the FGS procedure on minors: “[W]hoever 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.”¹⁶⁷ Parents are subject to the statute only as accomplices to actual practitioners.¹⁶⁸ The statute does not address FGS procedures performed on adults.¹⁶⁹

In addition, the federal statute provides two defenses. The first is where the operation is “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.”¹⁷⁰ The second defense is similarly based on medical necessity but is restricted to when the operation is done “on a person in labor or who has just given birth.”¹⁷¹ The enumerated punishment ranges from a fine to imprisonment for a

¹⁶⁴ See Mendelsohn, *supra* note 151, at 1014 n.27 (including New York, Delaware, and Illinois). The most recent state to pass such legislation is Georgia, which did so on May 6, 2005. See Lateef Mungin, *Rite of Outrage: Man Accused of Circumcising His 2-Year-Old Daughter*, ATLANTA J. CONST., Oct. 22, 2006, at J1.

¹⁶⁵ See Maguigan, *supra* note 139, at 410.

¹⁶⁶ See 18 U.S.C. § 116 (2000). New York, for instance, has borrowed from the federal statute and is only different in one respect. See William C. Donnino, *Practice Commentary to McKinney’s Consolidated Laws of New York Annotated* for N.Y. PENAL LAW § 130.85 (McKinney/Consol. 2004) (criminalizing parents explicitly if they consent to FGS in New York as opposed to federal statute, which requires accomplice liability to reach consenting parents).

¹⁶⁷ See 18 U.S.C. § 116(a).

¹⁶⁸ See Maguigan, *supra* note 139, at 409.

¹⁶⁹ See *id.*

¹⁷⁰ See 18 U.S.C. § 116(b)(1).

¹⁷¹ See *id.* § 116(b)(2).

maximum of five years or both.¹⁷² The likely punishment under the U.S. Sentencing Guidelines is a mandatory imprisonment term.¹⁷³

The final subsection of the federal statute directly addresses the culture clash between certain minorities in the United States and the substantive law itself. It explicitly states that in applying section (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.”¹⁷⁴ This is a purposeful and unapologetic rejection of the cultural rationales of minority parents and their children in believing that FGS is in the best interests of young women.

Although Professor Holly Maguigan limits the implications of this rejection by interpreting the final subsection to restrict cultural evidence for the medical necessity defense only and not for other aspects of proof such as mens rea,¹⁷⁵ this argument is not convincing. She is correct in that the prohibition against cultural consideration in the statute is restricted by its language to the defense provided in section (b)(1);¹⁷⁶ however, it is generally very difficult to get criminal courts to deem cultural evidence as relevant for criminal liability.¹⁷⁷ Therefore, by affirmatively declaring that cultural evidence is not to be considered in the medical necessity defense, the federal statute actually forecloses any discussion of the cultural rationales in FGS prosecutions.

The number of FGS procedures actually being done in the United States is difficult to assess.¹⁷⁸ Based on reports from the medical profession, the impression is that such procedures do occur.¹⁷⁹ However, there are challenging issues of underreporting, community ignorance, and lack of proof.¹⁸⁰ Indeed, the number of prosecutions

¹⁷² See *id.* § 116(a).

¹⁷³ See Maguigan, *supra* note 139, at 409 & nn.105-08 (drawing comparison to analogous crime of aggravated assault).

¹⁷⁴ 18 U.S.C. § 116(c). This explicit provision is repeated in some of the state statutes. Others are silent on the issue of cultural custom or ritual. See Maguigan, *supra* note 139, at 410.

¹⁷⁵ See Maguigan, *supra* note 139, at 408 (stating “courts must not interpret subsection (c) to justify a total exclusion of cultural evidence . . . because it goes to the heart of the mens rea requirement”).

¹⁷⁶ See 18 U.S.C. § 116(c) (qualifying section with phrase “In applying subsection (b)(1) . . .”).

¹⁷⁷ See Chiu, *supra* note 28, at 1333.

¹⁷⁸ See Bashir, *supra* note 158, at 417 & nn.5-6.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

under either federal or state statutes has been very low,¹⁸¹ despite the fact that these laws have existed for more than a decade. For example, it was only late last year that a man in Georgia was convicted and sentenced to ten years in jail for performing FGS on his two-year-old daughter.¹⁸² His conviction was newsworthy because it appears to be the first *trial* ever involving FGS in the country. The first *indictment* under the federal anti-FGS law was in 2004, in a bizarre case where there was no proof that the defendants had committed an FGS procedure; rather, they were charged for promising to perform FGS on two young women as part of an undercover sting operation.¹⁸³

While prosecutions may be hampered by reporting and evidentiary obstacles, this is small comfort to minority parents. For them, there still remains a very real threat of criminal prosecution for a serious felony. A conviction would probably lead to imprisonment along with deportation from the United States.¹⁸⁴ In addition to criminal prosecutions, judges may also order physical separation of parents from their children while their cases are pending, and ultimately, the termination of their parental rights.¹⁸⁵

3. The Constitutional Challenge

In his essay, *What About Female Genital Mutilation?*, Richard Shweder asks us to imagine a sixteen-year-old Somali girl living in Seattle who sincerely wants to have an FGS.¹⁸⁶

¹⁸¹ See Maguigan, *supra* note 139, at 406 (theorizing several factors are responsible for dearth of prosecutions: difficulty in obtaining report that FGS procedure has been performed, difficulty in assessing identity of practitioner, and challenge of proving that FGS procedure was done in this country).

¹⁸² See Rebecca Tuhus-Dubrow, *Rites and Wrongs: Is Outlawing Female Genital Mutilation Enough to Stop It from Happening Here?*, BOSTON GLOBE, Feb. 11, 2007, at E1. In this case, the defendant was actually charged with another crime because at the time of the FGS procedure, Georgia did not have a specific anti-FGS law. See, e.g., *Legislature in Brief 2005*, ATLANTA J. CONST., Feb. 10, 2005, at C5 (quoting Gwinnett County District Attorney Danny Porter for his support of anti-FGS law passed by Georgia legislature). Porter explained that without the anti-FGS law, he had to prosecute Khalid Adem, a father who allegedly used scissors to circumcise his two-year-old daughter, under the existing child cruelty statute. See *id.*

¹⁸³ See Steve Hyman, *No Victims Found in Genital Mutilation Case*, L.A. TIMES, Jan. 11, 2004, at B3. Ultimately, the defendants pled guilty to conspiracy, child pornography, and obscenity charges. See *Genital Mutilators Sentenced*, DAILY NEWS L.A., June 9, 2005, at SC1.

¹⁸⁴ See *supra* text accompanying notes 143-44.

¹⁸⁵ See, e.g., Wanderer & Connors, *supra* note 106, at n.36.

¹⁸⁶ See Shweder, *supra* note 146, at 244.

She likes the look of her mother's body and her recently circumcised cousin's body far better than she likes the look of her own. She wants to be a mature and beautiful woman, Somali style. She wants to marry a Somali man She wants to show solidarity with other African women who express their sense of beauty, civility, and feminine dignity in this way, and she shares their sense of aesthetics and seamliness. She reviews the medical literature and discovers that the surgery can be done safely, hygienically and with no great effect on her capacity to enjoy sex. After consultation with her parents and the full support of other members of her community, she elects to carry on the tradition.¹⁸⁷

Because of the federal statute, this sixteen-year-old girl's wish will be unfulfilled. Instead of a hospital in her hometown, she will have to resort to an underground procedure done in a more risky setting, probably by an unlicensed practitioner, or she will have to travel to Somalia for the procedure. However, it is not the rights of the teenager with which this Article is concerned.

Although there may be merit to the claim that teenagers have a right to determine their own medical treatment, the law has typically placed this right in the hands of their parents. This is true of medical decision making for children of any age. Parents are the primary decision makers.¹⁸⁸ The only exceptions occur when the state, as *parens patriae*, interferes with the decisions of individual parents or places additional procedural restrictions on the decision-making process.¹⁸⁹ Such exceptions, however, are not based on the rights of the children per se, but rather on the state's authority to act in the best interests of children.¹⁹⁰

From the perspective of the Somali teenager's parents, the federal statute outlawing FGS unconstitutionally prohibits the exercise of their right of parental autonomy. The statute forbids them from consenting to the performance of FGS upon their daughter, even if their motivations are culturally based. The federal prohibition is an absolute incursion on their autonomy to raise their daughter in accordance with their Somali culture; therefore, it is vulnerable to a facial challenge under the Fourteenth Amendment's guarantee of

¹⁸⁷ *See id.*

¹⁸⁸ *See Parham v. J.R.*, 442 U.S. 589, 603-04 (1979).

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

substantive due process.¹⁹¹ As described long ago by the Supreme Court, this part of substantive due process protects parents' autonomy in order to protect Americans' diversity.¹⁹²

Because the right of parental autonomy is of a fundamental nature, the federal statute must satisfy a heightened standard.¹⁹³ According to this standard, the statute must advance an important state interest to survive a constitutional challenge.¹⁹⁴ There have been two state interests repeatedly offered as justifications for the criminal laws prohibiting FGS. The first is the protection of children and the second is the protection of women.¹⁹⁵ While the legal protection of both classes of individuals is undeniably compelling, the fatal weakness of the statute is that it is not narrowly tailored to the achievement of these goals. Because I am concerned with the right of parental autonomy here and not the rights of women, this Article only examines the justification of child protection.

Opponents of FGS state that one of their goals is the protection of children from the physical, emotional, and psychological harm of such procedures.¹⁹⁶ During the congressional debates on the federal legislation described above, several U.S. Senators urged its adoption by likening FGS to child abuse or even to sexual abuse of children.¹⁹⁷ International agreements such as the 1989 United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child regard FGS as a traditional practice that is prejudicial to the health, welfare, dignity, normal growth, and development of children.¹⁹⁸ The problem with these depictions is twofold: first, the factual bases for many studies on FGS are

¹⁹¹ "A facial challenge to the constitutional validity of a statute considers only the text of the measure itself, and not its application to the particular circumstances of an individual. A party asserting a facial challenge to a statute seeks to vindicate not only his or her own rights, but also those of others who may also be adversely impacted by the statute in question." See 16 C.J.S. *Constitutional Law* § 113 (2007).

¹⁹² See *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 533-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923).

¹⁹³ See *supra* Part I.C.

¹⁹⁴ See *supra* Part I.C.

¹⁹⁵ See Female Genital Mutilation Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-709 ("[T]he Congress finds that . . . (2) the practice of female genital mutilation often results in the occurrence of physical and psychological health effects that harm the women involved; (3) such mutilation infringes upon the guarantees of rights secured by Federal and State law, both statutory and constitutional.").

¹⁹⁶ See Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices*, 40 HARV. C.R.-C.L. L. REV. 81-84 (2005).

¹⁹⁷ See *id.* at 82 nn.44-45.

¹⁹⁸ See Friedenthal, *supra* note 140, at 132-36.

questionable, and second, even if there was actual harm to children, the federal statute is both underinclusive and overinclusive in its protection.¹⁹⁹ Thus, despite the legitimacy of child protection as a state interest, the statute fails to satisfy a heightened standard of review.

The point of FGS is to create a permanent change of the physical body. However, the classic opposition to FGS contains a dramatic and alarming litany of the disastrous side effects of FGS procedures. There are reports that 15 to 30% of girls and women die from infection caused by FGS.²⁰⁰ Death can be caused by severe hemorrhaging and the resulting shock.²⁰¹ Up to 80% of FGS patients report experiencing at least one medical complication following their procedure.²⁰² These complications include wound infections, abscesses, ulcers, septicemia, tetanus, gangrene, dermoid cysts, difficulty with urination and menstruation, and severe pain and difficulty during sexual intercourse and childbirth.²⁰³ The denial of sexual enjoyment and female sexuality are oft-repeated as the conscious goals of a misogynistic practice.²⁰⁴ Acceptance of these descriptions in popular culture has been swift, easy, and relatively free of criticism.²⁰⁵

In 1999, there began a more demanding examination of these claims. Carla Obermeyer, a medical anthropologist and epidemiologist at Harvard University, challenges the existing studies and conducts her own assessment of FGS.²⁰⁶ She reviewed a total of 435 articles from the medical, demographic, and social science literatures and discovered that most of them did not contain original evidence but instead repeated the same claims over and over.²⁰⁷ She then studied the reports closely, with original evidence, and revealed that the most widely quoted reports were deeply flawed in their methodology and quality control procedures.²⁰⁸ For example, the weaknesses included the unrepresentative size of the samples, the lack

¹⁹⁹ See *supra* text accompanying notes 172-80.

²⁰⁰ See Bashir, *supra* note 158, at 421-22.

²⁰¹ See *id.* at 422.

²⁰² See *id.*

²⁰³ See *id.*

²⁰⁴ See ELIZABETH HEGER BOYLE, FEMALE GENITAL CUTTING: CULTURAL CONFLICT IN THE GLOBAL COMMUNITY 45-50 (2002).

²⁰⁵ See Shweder, *supra* note 146, at 219, 228 (“[T]here has been an easy acceptance of the anti-FGM representations of family and social life in Africa as dark, brutal, primitive, barbaric, and unquestionably beyond the pale.”).

²⁰⁶ See Carla M. Obermeyer, *Female Genital Surgeries: The Known, the Unknown, and the Unknowable*, 13 MED. ANTHROPOLOGY Q. 79, 79-80 (1999).

²⁰⁷ See *id.*

²⁰⁸ See *id.*

of control groups, and the vague language of survey instruments.²⁰⁹ Examining the small number of studies that Obermeyer deemed scientifically reliable, she reported that the dramatic medical complications stressed by the anti-FGS movement are actually the exception, rather than the rule and that the statistics on patients' deaths are not supported by the evidence.²¹⁰ Obermeyer's contrarian work on the medical effects is confirmed by other studies.²¹¹

Additionally, there has been new evidence that the effects on sexuality may be exaggerated. Dr. Lucrezia Catania, a practicing gynecologist at the Research Center for Preventing and Curing Complications of Female Genital Mutilation/Cutting in Florence, Italy, has conducted four studies of the sexual responses and attitudes of women who have undergone FGS. She writes that "the possibility of their enjoying sex 'represents an enigma for Western people' and that 'human sexuality . . . depends on a complex interaction of cognitive processes, relational dynamics, and neurophysiological and biochemical mechanisms.'"²¹²

Thus, the truth with respect to whether FGS causes harm to girls is at best contested. There are plenty of reasons for the conflict in information. There is the underlying political motivation of opponents to FGS that may exaggerate their willingness to believe studies with less reliable evidence. Equally responsible is the frequent conflation of all the different types of FGS as if they were the same unitary procedure, resulting in misimpression when the worst side effects of the most extreme procedures are stressed.²¹³ Finally, even if there are medical complications suffered by girls and by women, it is plausible that these medical complications are due largely to the illegal, underground nature of FGS today. Opponents often mention the use of barbaric instruments and the coercive conditions of FGS.²¹⁴ FGS would be much safer and healthier if these operations were legalized and regulated, instead of being criminalized.

A more complete understanding of the statute shows that it seeks to protect children not only from potential physical harm, but also from emotional harm. Some opponents of FGS describe the emotional

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See Shweder, *supra* note 146, at 228.

²¹² See John Tierney, *Tierney Lab*, N.Y. TIMES, Jan. 15, 2008, at F8.

²¹³ See Bashir, *supra* note 158, at 422 (describing one particular effect as only being true for infibulation procedures). Richard Shweder reports that only 15% of FGS cases in Africa are infibulations. See Shweder, *supra* note 146, at 224.

²¹⁴ See Bashir, *supra* note 158, at 421.

harm to children as being forced to endure a painful medical procedure by their parents without any say in the matter.²¹⁵ The central problem here is the lack of consent by the children to a procedure that involves the invasion of their bodily integrity. However, it bears emphasis that the federal statute exempts those genital surgeries that are medical necessities.²¹⁶ Thus, there is some recognition of the right of parental autonomy to consent to physical procedures that are in the best medical interests of their children. This, of course, had to be the case, given the prevalence of medical decision making by parents on behalf of their children. Routine examples of nonconsensual treatments include immunizations, the administration of antibiotics, and the surgical removal of teeth, appendices, tonsils, etc. The law allows parents to choose these treatments because of their medical necessity. Thus, what the statute actually forbids is minority parents making a decision implicating the bodily integrity of their children for a nonmedical reason.

Even if the claims about physical and emotional harms to children are true, the federal statute still needs to be narrowly tailored to prevent these harms in order to pass constitutional review on the right of parental autonomy. The statute is not narrowly tailored because it is both underinclusive and overinclusive in substantial respects. Comparing the criminalized FGS procedures to the myriad of mainstream medical practices permitted under the law reveals the law's underinclusiveness. The practices I discuss are cosmetic surgeries on minors, including procedures done on sexual genitalia, intersex surgeries, and the administration of growth hormones to children.

The number of adolescent girls undergoing serious cosmetic surgery in the United States is high. In 2003, more than 331,000 cosmetic procedures were performed on patients eighteen years of age or younger in this country.²¹⁷ Almost 39,000 of those procedures involved breast lifts, liposuction, tummy tucks, and nose reshaping.²¹⁸ In 2003, nearly 4000 breast augmentations were performed on

²¹⁵ See Ehrenreich & Barr, *supra* note 196, at 81-84.

²¹⁶ See 18 U.S.C. § 116(b) (2000).

²¹⁷ See American Society of Plastic Surgeons, Briefing Papers: Plastic Surgery for Teenagers, <http://www.plasticsurgery.org/Media/briefing-papers/Plastic-Surgery-for-Teenagers-Briefing-Paper.cfm> (last visited Nov. 8, 2006).

²¹⁸ See Diana Zuckerman, *Teenagers and Cosmetic Surgery*, VIRTUAL MENTOR (Mar. 2005), <http://virtualmentor.ama-assn.org/2005/03/oped1-0503.html>.

patients eighteen years old or younger.²¹⁹ A popular high school graduation gift for a daughter in 2004 was a breast augmentation.²²⁰

These numbers have likely increased because in 2006, the FDA ended a fourteen-year moratorium on silicone breast implants by approving a new generation of such implants for general use.²²¹ Overall, breast augmentations are on the rise, with 291,000 performed in the United States in 2005 and 329,000 performed in 2006.²²²

I discuss breast augmentations because they are similar to FGS in many ways. They both invade the bodily integrity of children to achieve permanent changes in their bodies, and in particular, in the sexual organs of their bodies. In addition, they are regarded as major surgical procedures. Surgeons use the same skills of cutting, removing, transposing, and in the case of breast augmentation, even adding foreign substances to the body. Such procedures take a lengthy period of time and are done under general anesthesia.

The side effects of breast surgeries are also serious. Potential complications include breast pain, hardening of the breast, loss of sensation in the nipple area, reduction in ability to produce sufficient breast milk, significant interference with the detection of breast tumors, and possible infection leading to toxic shock syndrome, amputation, or death.²²³ Most women report, in studies done by implant manufacturers, at least one serious complication from this list within the first three years of their breast surgery.²²⁴ In addition, there are serious risks of side effects in performing breast augmentations on adolescents. This is because the bodies of adolescents are still developing.²²⁵

Moreover, because breast implants only last an average of ten years, an adolescent patient will need many future surgeries in her lifetime.²²⁶ In clinical trials of breast implant manufacturers, approximately one of every three patients required a second operation

²¹⁹ See *id.*

²²⁰ See Susan Kreimer, *Teens Getting Breast Implants for Graduation*, WOMEN'S E-NEWS (June 6, 2004), available at <http://www.womensenews.org/article.cfm/dyn/aid/1861/context/cover/>.

²²¹ See Natasha Singer, *Do My Breast Implants Have a Warranty?*, N.Y. TIMES, Jan. 17, 2008, at G1.

²²² *Id.*

²²³ See *Teens and Breast Implants*, http://www.breastimplantinfo.org/news/teen_implants.html (last visited Mar. 7, 2008).

²²⁴ See Zuckerman, *supra* note 218.

²²⁵ See *id.*

²²⁶ See *id.*

within four to five years.²²⁷ These follow-up operations include the repositioning of implants, biopsies, and removals of implants.²²⁸ These additional surgeries represent not only health risks but also financial burdens. One plastic surgeon from Denver explained her fee structure: \$7000 for breast augmentation, \$5000 for removal of implants, \$7500 for replacement of old implants, and \$9000 for removals of implants combined with a breast lift using the patient's own breast tissue.²²⁹ Dr. Carol Ciancutti-Leyva remarked that breast augmentation "can be a very expensive proposition, especially if you are young."²³⁰

Exacerbating the situation is the fact that there has been very little long-term research done on the impact of many cosmetic procedures.²³¹ For instance, the FDA's recent about-face on silicone implants was based on clinical trials that followed patients only for four to five years, even though the general consensus is that implants last an average of ten years.²³² The FDA did not insist upon studies with time horizons beyond ten years prior to their approval of the new generation silicone implants.²³³ Dr. Stephen Li, a member of the FDA panels that reviewed the safety of these implants, voted to approve them but acknowledged the lack of complete information: "The current implants are no worse than before and ought to be better, based on the clinical and laboratory data, which is the only way you could rationalize approving a device that you have only three or four years of data for."²³⁴

Breast augmentations are similar to FGS because the motivations of parents who consent to such procedures are much like the motivations of minority parents. While they may be less conscious of the cultural context of their desire for their daughters to have better looking breasts, such parents want to enhance the social acceptability of their children. Breast augmentation is a way to attain beauty, as measured by the dominant culture. It is important for identity because many girls, along with their parents, believe it will help them to attain self-

²²⁷ See Singer, *supra* note 221.

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ Dr. Ciancutti-Leyva is the director of a 2007 anti-implant documentary entitled *Absolutely Safe*. See *id.*

²³¹ See Zuckerman, *supra* note 218.

²³² See Singer, *supra* note 221.

²³³ See *id.*

²³⁴ See *id.*

esteem and confidence.²³⁵ Finally, both FGS and breast augmentations are regarded as insurance that one's daughter will be able to marry, or at least find a mate, because others will be more attracted to her due to her physical transformation.

Despite these factual similarities, the legal treatment of breast augmentations and other cosmetic surgeries for children is practically nonexistent. The FDA has officially approved the use of breast implants on women who are at least eighteen years of age.²³⁶ However, it is legal for physicians to perform breast augmentations for anyone *under* eighteen as an "off-label" use.²³⁷ It was not until December 2004 that the American Society for Aesthetic Plastic Surgeons adopted an official stance against breast augmentation on patients under eighteen. However, this is merely an official position of a professional organization and is not at all enforceable.²³⁸

Some try to distinguish cosmetic surgeries for minors from FGS on the ground that minors consent to the former procedures and not the latter ones. It is true that many plastic surgeons report extra caution in assessing the fitness and maturity of the minors prior to agreeing to do the surgeries.²³⁹ However, the consent secured by physicians from teenagers is contingent on two grounds. First, minors in general arguably lack the maturity to appreciate the long-term commitment of breast surgeries and the serious medical risks involved. They are highly susceptible to the influences of persuasive and pervasive advertisements and television makeover programs that stimulate demand.²⁴⁰ They tend to engage in short-term thinking and to minimize risk.²⁴¹ Moreover, the use of plastic surgeons to screen for

²³⁵ See Zuckerman, *supra* note 218 (describing how plastic surgeons regard responses from prospective teen patients such as, "I will feel better about myself" or "clothes will fit better" as reasonable rationales for breast augmentation).

²³⁶ See Breast Implant Questions and Answers (2006), <http://www.fda.gov/cdrh/breastimplants/qa2006.html#4>.

²³⁷ See *id.* "Off-label use" refers to the approved use of prescription medication for uses other than their intended applications. See MedicineNet.com, <http://www.medterms.com/script/main/art.asp?articlekey=4622> (last visited Feb. 29, 2008).

²³⁸ See Zuckerman, *supra* note 218; see also *Teens and Breast Implants*, *supra* note 223.

²³⁹ See American Society of Plastic Surgeons, *supra* note 217 (noting that official position of American Society of Plastic Surgeons is that surgeons take this extra level of care).

²⁴⁰ See Zuckerman, *supra* note 218.

²⁴¹ See *id.* (warning that teenagers do not appreciate real risks of such surgeries, and fact that for most teenagers, body image and self-confidence naturally increase with age).

maturity and fitness obviously presents a very troubling conflict of interest. It is an understatement to say that “it is difficult for a physician to neutrally present both the risks and benefits of an elective procedure that he or she is simultaneously selling.”²⁴² Finally, the defense of the criminalization of FGS as being grounded in consent is false because the federal statute itself does not even allow minor patients to give consent to a female genital surgery.²⁴³ The Somali teenager from Seattle may be the most mature adolescent the doctor has ever met, but he is nevertheless forbidden from doing any nonmedical surgery to her genitals.

Essentially, it is up to individual parents whether their teenage daughters get breast implants. Parents must give consent for all surgeries performed on children, including plastic surgeries. For cosmetic surgeries, parents themselves are subject to the incomplete research on the long-term effects of such procedures.²⁴⁴ However, once they have decided that a breast augmentation is in the best interests of their minor daughter, parents are free to find a willing doctor to do such a procedure. They do not need to worry about the threat of criminal prosecution; about the chance that their spouse, child, or physician will report them to the authorities; or about termination of their parental relationship with their children. It is not an exaggeration to state that the law does nothing to interfere with the autonomy of parents to have their daughters undergo breast surgeries. Even the Supreme Court in the case of *Parham v. J.R.* acknowledged that cosmetic surgery is within the right of parental autonomy.²⁴⁵

Breast reductions and augmentations are similar to FGS because they both involve the invasion of the bodies of children authorized by their parents for nonmedical reasons. Both present the risk of serious side effects. Yet the legal treatment of FGS stands in stark contrast to the absence of the laws regarding cosmetic surgeries for minors. Clearly, the federal statute prohibiting FGS is underinclusive in its failure to address serious cosmetic surgeries such as breast surgery that parents allow their children to undergo.

²⁴² *See id.*

²⁴³ *See* 18 U.S.C. § 116(c) (2000).

²⁴⁴ *See supra* text accompanying notes 195-97.

²⁴⁵ 442 U.S. 584, 603-04 (1979). *Parham* analyzed the discretion of parents to admit their children into mental health institutions, but the Court uses the example of cosmetic surgery to conclude that parents are the medical decision makers for children because children are usually not competent to make such decisions for themselves. *See id.*

Much less well-known than breast augmentations and FGS are procedures known as intersex surgeries. Professor Nancy Ehrenreich wrote a wonderfully informative and insightful article in 2005 on intersex surgery.²⁴⁶ In it, she reported that thousands of intersex genital surgeries are performed on children and infants every year in the United States.²⁴⁷ Such surgeries are performed to correct a wide variety of congenital conditions that result in anomalous sexual characteristics. Examples include a child born with the external genitalia of a male but with ovaries instead of a testes, an infant girl with an abnormally large clitoris, or an infant boy with an unusually small penis.²⁴⁸

In the article, Ehrenreich masterfully compared intersex surgeries to FGS. In terms of physicality, many intersex surgeries are similar to the FGS procedures, and some are even more intense and extreme.²⁴⁹ There are also harmful physical and psychological consequences of intersex surgery, including serious emotional and mental health issues, such as depression and also sexual impairment.²⁵⁰ In terms of motivation, both FGS and intersex surgeries share the same genesis: the desire of parents to change the bodies of their children to conform to cultural expectations and cultural definitions of beauty and goodness.²⁵¹ In short, there is not a medical necessity for these surgeries.

Ehrenreich also described how there is no legal regulation of intersex surgeries.²⁵² Despite the same physical invasion of children's bodily integrity, the law has never regarded intersex surgeries as an act of child abuse or bad parenting. As with breast augmentations, parents and doctors are free from any legal interference to do what they decide is best for their children. They exercise their parental autonomy to the fullest extent. Thus, intersex surgery is a second example of where a mainstream practice that reflects the dominant culture is permitted, despite the fact that it too invades the bodily integrity of infants without their consent to achieve a perceived cultural good and not a medical necessity. This second example again reveals the unconstitutional underinclusiveness of the criminalization of FGS.

A third and final comparison is between FGS and the administration of growth hormones to children for nonmedical reasons. This is a

²⁴⁶ See Ehrenreich & Barr, *supra* note 197, at 71.

²⁴⁷ See *id.* at 75.

²⁴⁸ See *id.* at 97.

²⁴⁹ See *id.* at 101-02.

²⁵⁰ See *id.* at 105-14.

²⁵¹ See *id.* at 102-03, 117-28.

²⁵² See *id.* at 130.

very recent phenomenon because the FDA only approved the use of growth hormones as safe and effective to treat a condition in children known as idiopathic short stature (“ISS”) a few years ago.²⁵³ Children with ISS are short but seemingly otherwise normal. They are at or below the 1.2 percentile on the standard growth chart but have no other discernible medical problem. Their own bodies even naturally produce growth hormones.²⁵⁴

Prior to 1985, pharmaceutical companies did not know how to manufacture growth hormones and hence, the low supply of naturally occurring growth hormones meant only children who did not make any quantity of the hormone on their own received growth hormones.²⁵⁵ In 1985, pharmaceuticals began to manufacture growth hormones, and faced with an endless supply, they applied to the FDA for broader distribution. They secured the approval of the FDA in 2003.²⁵⁶ Today, parents are free to request and give consent, and their children’s physicians are free to prescribe the growth hormone to children with ISS.

Children with ISS who have been treated with growth hormones for four or five years have grown an extra 3.7 centimeters or slightly more than 1 inch on average.²⁵⁷ With the rough cost of about \$20,000 per year per child, Dr. Harvey Guyda has described this outcome as “very expensive centimeters.”²⁵⁸ So why do parents want this drug for their children and why do physicians prescribe it? The biggest rationale for prescribing these hormones to short children is to accommodate the desire of parents for their children to be taller, to be at the normal average heights for the population, to be more socially accepted, and not to suffer the psychological and emotional trauma of being teased and being marginalized for being short. Perhaps the most convincing evidence of this culturally driven cosmetic rationale is a recent study that documents how many more male children than female children were being referred by parents for evaluations for growth hormone treatment.²⁵⁹ In other words, “short stature is often as much a cultural, and indeed familial problem, as it is a medical problem.”²⁶⁰

²⁵³ See Stephen S. Hall, *The Short of It*, N.Y. TIMES, Oct. 16, 2005, § 6 (Magazine), at 54.

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See The Children’s Hospital of Philadelphia, Gender Bias in Child Growth Evaluations May Miss Disease in Girls, http://www.prnewswire.com/cgi-bin/micro_

Studies have not yet found any long-term complications associated with the use of growth hormones.²⁶¹ In this sense, growth hormones are different from FGS, breast augmentations, and intersex surgery. However, this distinction is not fatal to the comparison. The administration of growth hormones is still similar enough in that it involves the parents' decision to invade the bodily integrity of their children without the children's consent — a decision grounded in cultural rationales and not true medical necessity. Because growth hormones are a part of the trend in dominant Anglo American culture to expand drug use beyond medical necessity, the fact that the administration of this drug is impacting children is simply ignored. There are no cries for the law to protect the welfare of children against their parents' wishes.

All three of these comparisons (FGS to breast surgeries, FGS to intersex surgeries, and FGS to growth hormones) demonstrate the underinclusiveness of the federal statute to criminalize all instances where children may suffer permanent physical harm and emotional trauma for the nonmedical, cultural reasons of their parents. This alone should defeat the statute as unconstitutional. To be complete, though, I also discuss how the statute is overinclusive.

The statute is overinclusive because even when there is the opportunity to allow for nonharmful versions of FGS, the law has squelched it. A community of African immigrants to this country recognized the American concern with the protection of children and offered a compromise, but their offer was soundly rejected. In 1996, a doctor at Harborview Medical Center in Seattle, Washington asked his patient, a pregnant immigrant woman originally from Somalia, if she would want her child circumcised if the child turned out to be a boy.²⁶² This was a standard question he asked all his pregnant patients. Her response, however, was not at all routine. "Yes," the Somali woman replied. "And also if it is a girl."²⁶³

This simple conversation touched off an effort by the Somali American community in the Seattle area to persuade their local public

stories.pl?ACCT=159681&TICK=CHOP&STORY=/www/story/02-07-2005/0002982501&EDATE=Feb+7,+2005 (last visited on March 21, 2008). This study reviewed the charts of all patients referred to the hospital for growth stature evaluation and was funded by National Institutes of Health and University of Pennsylvania Trustees Council.

²⁶⁰ *See id.*

²⁶¹ *See id.*

²⁶² *See Coleman, supra* note 145, at 717.

²⁶³ *See id.*

hospital to perform FGS. The Somalis believe such procedures are essential to the survival of their cultural identity.²⁶⁴ The administrators at the hospital formed a special committee to review the matter and ultimately sought guidance from the state's legal authorities.²⁶⁵ The committee asked whether they could perform a compromise procedure they called a "nicking." A nicking would involve a slight cut in the genitalia of female newborns, involving much less than what doctors did in removing the foreskin of male newborns.²⁶⁶ The Somali American community said they would be satisfied with such a procedure.²⁶⁷ In some parts of the world, these symbolic nickings *are* the cultural practice.²⁶⁸

Immediately, feminists and other opponents of FGS attacked the hospital's proposal. There were several months of heated public debate.²⁶⁹ Ultimately, the hospital decided to withdraw its proposal and stay with its original policy of not doing any cutting procedures on baby girls, even if they were requested by their pregnant Somali patients.²⁷⁰ Thus, even when a compromise involving minimal physical injury to children and no risk of any serious physical complications was proposed, the reaction was an absolute rejection. The overinclusiveness of the federal statute in forbidding even slight nickings demonstrates the lack of a relationship between the statute and the interest of child protection.

The varying nature of FGS procedures, the inconsistent findings of FGS side effects, and the underinclusiveness and overinclusiveness of the statute raise doubt that the federal criminalization of FGS is truly about protecting children. Instead, there is a real concern that the criminalization efforts reflect an ethnocentric view of good parenting. Arguably, minority parents are being penalized because their sense of beauty, their sense of cultural preservation, and their sense of their children's future and best interests do not comport with the majoritarian culture.

²⁶⁴ See *id.* at 739-44.

²⁶⁵ See *id.* at 744.

²⁶⁶ See *id.* at 744-45.

²⁶⁷ See *id.*

²⁶⁸ See Corbett, *supra* note 147, at 49 (describing how in some parts of Indonesia, practitioner will rub turmeric on female genitals or "prick the clitoris once with a needle to draw a symbolic drop of blood").

²⁶⁹ See Coleman, *supra* note 145, at 745-49.

²⁷⁰ See *Hospital Won't Circumcise Girls*, SEATTLE TIMES, Dec. 5, 1996, at B2.

III. A HARD SECOND LOOK: INTERCULTURAL DECISION MAKING

In Part II, I discussed an example of the culture differential in the enjoyment of the right to parental autonomy: the federal law that criminalizes the practice of female genital surgery on minors. The statute deliberately excludes consideration of cultural rationales of parents or their minor children for these procedures.²⁷¹ The decision makers in this example are congressional representatives. Other key decision makers in child welfare are social workers and judges. All three are often in the position of passing judgment on the practices of parents from cultures other than their own.

In this final part of this Article, I take a closer look at the racial and ethnic composition of these decision makers and then refer to the study of intercultural relations to better understand the process of their decision making as it pertains to minority parents. I close this Article by discussing how these intercultural relations point to procedural solutions for the culture differential that go beyond constitutional litigation. Specifically, I discuss the potential in exerting greater controls over the decision making process. There are two such procedural reforms already in place: a unique California statute aimed at removing ethnocentrism in child welfare decisions, and the growing use of structured decision making by child welfare agencies.

A. *Who Are the Decision Makers?*

The decision makers in child welfare include legislators, social workers, and judges. One of the more prominent newsmakers from Congress currently is Senator Barack Obama. He was born in the United States, and his father is originally from Kenya.²⁷² He is the only African American currently in the Senate.²⁷³ In addition to Senator Obama, there are four other current Senators of color.²⁷⁴ Five out of one hundred Senators is equal to five percent of the Senate being of minority descent. The statistics are better in the House of Representatives, but overall, the numbers of minorities in Congress

²⁷¹ See 18 U.S.C. § 116(b) (2000).

²⁷² See About Barack Obama, <http://obama.senate.gov/about/> (last visited Apr. 21, 2008).

²⁷³ See Ethnic Diversity in the Senate, http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Apr. 21, 2008).

²⁷⁴ See *id.*

pale in comparison to the numbers in the overall American population.²⁷⁵

The other two pools of decision makers have more comparable representation of minorities among their membership. For example, the Bureau of Labor Statistics reported in 2005 that African Americans made up 17.1% of community and social service occupations, while Asians and Hispanics/Latinos constituted 2.8% and 9.8% respectively.²⁷⁶ The Equal Employment Opportunity data for the 2000 Census is consistent. It shows that white non-Hispanics were the overwhelming majority of counselors and social workers at 68.1% out of more than 1.2 million such professionals.²⁷⁷

In March 2007, California released a statewide report describing how more than 70% of its judges are white.²⁷⁸ A representative from the state bar association suspects that the actual percentage is even higher, given that the 10% of judges who failed to respond to the survey were from counties with a large majority of white jurists.²⁷⁹ Such statistics are out of alignment with the population of California, which is only 46% white, 32% Latino, 12% Asian, and 8% Black.²⁸⁰ In New York, only 13.7% of state judges were persons of color in 2003.²⁸¹ In urging greater diversity on the state bench, the President of the New York State Bar Association argued that diversity “would result in judicial decisions that reflect insight and experiences as varied as New York’s citizenry.”²⁸² It is also significant because racial composition affects public confidence in the judicial system.²⁸³

²⁷⁵ See David D. Kirkpatrick, *Black Lawmakers Set to Take Crucial Posts Face Pressure*, N.Y. TIMES, Dec. 5, 2006, at A25 (stating African Americans are 13% of general population but only 1% of Senate and less than 10% of House of Representatives).

²⁷⁶ See BUREAU OF LABOR STATISTICS, *supra* note 136.

²⁷⁷ See EEO Residence Data Results for Total US, available at <http://www.census.gov>. (2000).

²⁷⁸ See Bob Elgelko, *Judiciary Heavily White and Male*, S.F. CHRON., Mar. 3, 2007, at B2.

²⁷⁹ See *id.*

²⁸⁰ See *id.*

²⁸¹ See Mark H. Alcott, *Achieving Gender and Ethnic Diversity in the Profession*, 78 DEC. N.Y. ST. BAR. J. 5, 5 (2006).

²⁸² See *id.* at 6.

²⁸³ See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 101 (1997) (“[T]he absence of minority judges on state trial courts contributes to an atmosphere of racial exclusion which, at the very least, marginalizes African American lawyers, litigants and courtroom personnel in many jurisdictions.”).

The racial and ethnic composition of decision makers in the child welfare system is an important factor in their decision making. It is important because the race and ethnicity of a person often sheds light on the cultural lens through which that person may make his decisions. Professors Sandra Azar and Corina Benjet explain that judges and the expert witnesses upon which judges rely in child welfare decisions have their own personal conceptions of what an adequate parent is.²⁸⁴ Their own race and ethnic backgrounds influence these personal conceptions.²⁸⁵ Because of the highly discretionary nature of child welfare decisions and the absence of clear statutory guidance and the validated criteria, human cognitive processes lead judges and expert witnesses to observe and judge parents through cultural filters.²⁸⁶ These filters can “operate outside their awareness and often will persist in their established views in spite of contradictory evidence.”²⁸⁷

However, I do not mean to suggest that race and ethnicity provide perfect predictions of a person’s decisions. Certainly there are many other determinants of a person’s worldview. For instance, a fifth-generation Japanese American from California can easily have a distinct cultural lens from that of a Filipino American who immigrated to the United States as an adult, even though they would both be categorized as Asian Americans. The degree of assimilation into the dominant Anglo American culture is another significant determinant of a person’s worldview.²⁸⁸ Of course, some minority judges and social workers may have completely assimilated such that their color, race, and ethnicity matter less, and their cultural lens may be the same as their white colleagues.

Conceding the influence of other factors, though, does not destroy the relevance of these statistics on the race and ethnicity of decision makers in the child welfare system. The point of highlighting these statistics is to explain that when members of Congress, social workers, and judges are making decisions about the practices of minority parents, they are often dealing with practices from a culture other than their own. This fact of a cultural gap between decision maker and minority parents is crucial due to the nature of relations between individuals from different cultures.

²⁸⁴ See Azar & Benjet, *supra* note 103, at 249-50.

²⁸⁵ See *id.*

²⁸⁶ See *id.* at 251-52.

²⁸⁷ See *id.* at 252.

²⁸⁸ See, e.g., *id.* at 260 (describing how immigrant children’s views of their parents’ behavior change with acculturation and align more with views of Anglo children).

B. Lessons from Intercultural Relations

Anthropologist Jill Korbin begins with the premise that child abuse and child neglect occur in all cultures and communities around the world and have occurred throughout history.²⁸⁹ Indeed, such instances occur with enough frequency that we have been forced to recognize that child abuse and child neglect “are well within the repertoire of human behavior.”²⁹⁰ In a subset of these determinations concerning child abuse and child neglect, however, there is a defining cross-cultural context.²⁹¹ For this context, there are two different perspectives that are both essential to the appropriate identification of child abuse and child neglect.²⁹² She terms these perspectives the *emic* perspective and the *etic* perspective.²⁹³ The former is “the viewpoint of members of the cultural group in question,”²⁹⁴ and the latter is an outside, wider perspective.²⁹⁵

To use an example to explain these two perspectives, Korbin compares the East African practice of scarification to orthodontic work in Western cultures.²⁹⁶ Scarification is the tradition of marking the face of children with lacerations so that children can later participate as adults in their East African tribes. The failure to do so is an act of parental neglect or abuse in the cultural context of such tribes.²⁹⁷ The *etic* perspective on scarification and on orthodontic treatment for children is the same: namely, the physical pain that is caused to children. This perspective alone, though, does not provide a complete understanding of these parental practices. In addition, the *emic* perspective warrants consideration. She notes that “viewed within their [cultural] contexts, both are practices that are aimed at benefiting the child by making him or her physically acceptable to other members of the culture.”²⁹⁸

²⁸⁹ See Korbin, *supra* note 5, at 256.

²⁹⁰ See Korbin, *supra* note 6, at 3.

²⁹¹ See *id.* at 4 (defining cross-cultural to include provision of services to ethnic communities in United States where there is remarkable cultural diversity).

²⁹² See *id.* (“An understanding of both *emic* and *etic* perspectives is a necessity in sorting out the impact of the cultural and social context in which behavior, including child abuse and neglect, takes on meaning.”).

²⁹³ See *id.*

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See *id.* at 8.

²⁹⁷ See *id.* at 5.

²⁹⁸ See *id.* at 8.

Korbin's work teaches how an understanding of the *emic* perspective carries two advantages. It allows for a more holistic view of a parent's behavior.²⁹⁹ The care of children is often a coherent pattern of behavior and no one single act should be analyzed in isolation from other aspects of childrearing in that culture.³⁰⁰ Understanding the *emic* perspective also permits an easier distinction between a parent who is adhering to culturally acceptable practices and a parent who has stepped out of the bounds of acceptability.³⁰¹ For most cultures, they "do not and cannot compromise the development and survival of their immature members by permitting" practices that "spill over into harm to the child."³⁰² In other words, each culture not only experiences the phenomenon of child abuse and child neglect, but also has limits past which acts are deemed abusive and neglectful. The *emic* perspective allows for a better understanding of each culture's limits.

What happens when the consideration of both *emic* and *etic* perspectives results in a disparity?³⁰³ This is most likely to occur with childrearing practices that are viewed as acceptable by one group but as abusive or neglectful by another group in a cross-cultural situation. FGS is an excellent example where the perspectives produce such disparity. The *etic* perspective is about physical pain, while the *emic* perspective is about social and cultural acceptance and beauty.

In such situations of disparity, a choice between the perspectives must be made, but therein lies a third advantage of the *emic* perspective. Having a deeper understanding of the cultural rationale of the offending parents forces decision makers from the protesting group to be more certain of their decision to pass judgment based solely on the *etic* perspective. In order to reject the *emic* perspective, the decision makers within the protesting group should search within their own parenting practices to see if any exist that are supported by a similar cultural rationale. If so, decision makers should then ask themselves whether in their own practices, parents are allowed to cause the harm found in the *etic* perspective to achieve the good of the *emic* perspective. They should question whether the *etic* perspective is even true. The result of this deeper analysis may be a shift from condemnation of practices like FGS as abusive and neglectful to an allowance or tolerance of the

²⁹⁹ See *id.*

³⁰⁰ See *id.* (citing E.H. ERIKSON, CHILDHOOD AND SOCIETY (1963)).

³⁰¹ See *id.* at 9.

³⁰² See *id.* at 8 (discussing physical discipline of children specifically).

³⁰³ See *id.* at 4.

minority practice. To summarize, the third advantage is a deeper, more intellectually honest assessment of minority practices.

It bears emphasis that the consideration of the *emic* perspective is not the equivalent of absolute cultural relativism where any parental act is acceptable simply if it is followed by a large enough group of people.³⁰⁴ As described above, it is also possible that after an assessment of rationales and a search amongst their own culture's parenting practices, decision makers could conclude that the protection of children still warrants condemnation of the offensive conduct. In such instances, the child welfare system is simply assured that the condemnation is not based on narrow-minded ethnocentrism; instead, the added consideration of the *emic* perspective restores the integrity of the decision making process.

Unfortunately, as demonstrated by the criminalization of FGS, the *emic* perspective is usually ignored or given little attention. Far too often though, decision makers in child welfare systems use only the *etic* perspective. As Ehrenreich has observed, "mainstream anti-FGC discourse constructs . . . FGC . . . as barbaric, primitive, and uncivilized . . . [and draws] analogies to torture, child abuse, and woman battering, and labels such as 'ritualistic' and 'barbaric,' . . . [and] thus 'others' African societies as uncivilized places engaging in irrational and misogynistic behavior, and elevates the United States as a site of enlightened, scientific practices that are consistent with feminism."³⁰⁵ Thus, it is not at all surprising that Congress passed the Federal Prohibition of Female Genital Mutilation Act in 1996. Such a decision reflects the *etic* perspective of the dominant Anglo American culture. The *emic* perspective was not seriously considered; instead, it was regarded as irrelevant.

C. *A Hard Second Look: Intercultural Decision Making*

Too quick judgments from outside a dense cultural web about events inside that web compound the reasons for epistemic doubt. The ramifications, consequences and, indeed, the meaning of some acts or gestures may be deeply shaped by the cultural context in which they take place. Well-settled, broadly pursued practices antithetical to those in the mainstream should encourage mainstream observers — especially, perhaps mainstream lawmakers — to take a hard second

³⁰⁴ See *id.*

³⁰⁵ See Ehrenreich & Barr, *supra* note 196, at 86.

look at their factual beliefs and normative judgments before regulating against such culturally endorsed practices.³⁰⁶

The suggestion of a hard second look by Professor Lawrence Sager is a suggestion for including an *emic* perspective when decision makers in Congress or at child welfare agencies make judgments about the parental practices of minority cultures.

As suggested by its very title, a *hard second look* is not easy. It requires more time, more effort, and more objectivity. No matter how difficult and challenging, a hard second look is essential. Professor Richard Shweder states that tolerance “begins with seeing the cultural point and getting the scientific facts straight”³⁰⁷ and “means setting aside readily aroused and powerfully negative feelings about the practices of immigrant minority groups long enough to get the facts straight and engage the ‘other’ in a serious moral dialogue.”³⁰⁸ In the end, “far more than overheated rhetoric and offended sensibilities” is needed “to justify a cultural eradication campaign.”³⁰⁹

How can the law mandate that lawmakers, judges, and social workers incorporate both an *emic* perspective and an *etic* perspective in their decision making? The child welfare system should not simply rely on the civic inclinations of individuals to take hard second looks. Instead, with the right of minority parents to provide for the best interests of their children at stake, such looks should be uniformly required. To close the cultural gap in parental autonomy, I propose that the child welfare system adopt procedural reforms aimed at the injection of the *emic* perspective in decision making.

There are two current measures that could effectively mandate the *emic* perspective. The first is a little-known, unique statute in California. The second is an approach to decision making used by an increasing number of child welfare agencies across the United States. Below are brief descriptions of both measures.

Section 16509 of the California Welfare and Institutions Code affirmatively states that:

Cultural and religious child-rearing practices and beliefs which differ from general community standards shall not in themselves create a need for child welfare services unless the

³⁰⁶ See Lawrence G. Sager, *The Free Exercise of Culture: Some Doubts and Distinctions*, in ENGAGING CULTURAL DIFFERENCES, *supra* note 25, at 169-70.

³⁰⁷ See Shweder, *supra* note 146, at 247-48.

³⁰⁸ See *id.*

³⁰⁹ See *id.*

practices present a specific danger to the physical or emotional safety of the child.³¹⁰

This statute was passed in 1982 as part of a package of amendments to an older 1969 law.³¹¹ What is extraordinary about the statute is not its protection of religious child rearing practices. There have been many times when states have given parents protection for their religiously motivated decisions.³¹² Its uniqueness is the protection that it extends to culturally motivated parents. No other state does this.³¹³

The primary motivation in 1982 for all the amendments was to move the state foster care system firmly toward the goal of family reunification or family preservation.³¹⁴ The motivations for this specific protection of cultural practices were more complex. In an oft-repeated quote from the 1979 medical neglect case of *In re Phillip B.*, a California judge explained that “[i]nherent in the preference for parental autonomy is a commitment to diverse lifestyles, including the right of parents to raise their children as they think best.”³¹⁵

The import of this statute is quasi-procedural, not substantive. It provides that differences in culture alone do not warrant the interference of the state. To the contrary, there must be a specific danger to the child before state action is justified. This requirement of a specific danger does not add anything substantively new to existing child abuse and child neglect definitions in California. The existing definitions already require such physical or emotional danger.³¹⁶ What this special statute in California does is to mandate decision makers to take a hard second look. In this heightened consideration, decision makers must put aside their *etic* perspective for a moment and adopt

³¹⁰ See CAL. WELF. & INST. CODE § 16509 (West 2006).

³¹¹ See Press Release, Cal. State Sen. Robert Presley, Senate OKs Presley Bill Making Sweeping Changes in Foster Care Programs (Jan. 29, 1982) (on file with author).

³¹² See Jay M. Zitter, Annotation, *Power of Court or Other Public Agency to Order Medical Treatment over Parental Religious Objections for Child Whose Life Is Not Immediately Endangered*, 21 A.L.R.5th 248 *passim* (1994).

³¹³ See Memorandum from Willey Hausey, Deputy Dir., Legislation, Gov't & Cmty Relations, Health & Welfare Agency, to Joan Bissell, Deputy Sec'y, Health & Welfare Agency 7 (July 6, 1982) (on file with author) (explaining how “[s]ection 58 . . . amends [the law] to protect groups of individuals whose child rearing practices may differ from the norm but do not constitute abuse or neglect . . . [and provides] parental protections regarding cultural and religious practices when removal of the child from the home is being considered”).

³¹⁴ See Press Release, *supra* note 311.

³¹⁵ See *In re Phillip B.*, 156 Cal. Rptr. 48, 50-51 (Ct. App. 1979).

³¹⁶ See, e.g., CAL. WELF. & INST. CODE § 300(b) (West 2006) (defining failure to protect).

the *emic* perspective in their search for a real harm to the child. This is the process that must occur before a decision maker can impose child welfare services.

Interestingly, the actual impact of this statute has been limited. To date, there are only a handful of California decisions that discuss section 16509.³¹⁷ Not one of them features the successful invocation of the section by parents to challenge the actions of the child welfare agency. Regardless of the actual experience California has had with its unique statute, I suggest it as a model for how the *emic* perspective can be injected into decision making at the legislative and agency levels and then reinforced through judicial oversight.

My second suggestion of a procedural reform to correct the culture differential is a relatively recent risk assessment tool known as structured decision making.³¹⁸ Professor Aronson Fontes included structured decision making as one of many suggested reforms in her book on working with diverse families in the child welfare system.³¹⁹ This is a model for reaching more consistent and more substantively correct decisions for families that are referred to state child welfare agencies. Today, agencies in sixteen states and three countries use this model or something similar to it.³²⁰ The model started with Alaska in the late 1980s, has been studied for its effectiveness, and has improved over time.³²¹

³¹⁷ See, e.g., *In re Michael E.*, nos. J34181, J34182, & J34183, 2002 WL 382856 (Cal. Dist. Ct. App. Mar. 12, 2002) (refusing to recognize parent's claim of Roma culture under 16509 as defense to termination proceeding); *In re Tania S.*, 7 Cal. Rptr. 2d 60 (Ct. App. 1992) (rejecting parent's claim of cultural practice and affirming order to remove children); *In re Petra B.*, 265 Cal. Rptr. 342 (Ct. App. 1989) (finding that parent's objection to medical treatment was not based on religious or cultural grounds).

³¹⁸ Structured decision making is a product of the Children's Research Center, which is a division of the National Council on Crime and Delinquency ("NCCD"). In 1986, NCCD worked with Alaska to devise a system that would bring structure to child welfare decisions. The result of these efforts was the original SDM model. See generally CHILDREN'S RESEARCH CTR., THE IMPROVEMENT OF CHILD PROTECTIVE SERVICES WITH STRUCTURE DECISION MAKING: THE CRC MODEL (1999), available at http://www.nccd-crc.org/crc/pubs/crc_sdm_book.pdf (introducing this new approach to decision making and risk assessment).

³¹⁹ See Fontes, *supra* note 21, at 80-82.

³²⁰ See Email from Raelene Freitag, Dir. of Children's Research Ctr., to Michael Schordine, Research Assistant, Professor Elaine Chiu (Feb. 8, 2007, 14:00:46) (on file with author) (announcing Connecticut, Massachusetts, and Louisiana as newest states to begin using or developing SDM).

³²¹ See CHILDREN'S RESEARCH CTR., *supra* note 318, at 298.

Its relevant principles include the mandate that “specific criteria *must* be considered for every case by every worker through highly structured assessment procedures”³²² and that each type of case must be associated with clearly identified differential service standards.³²³ To meet these principles, structured decision making relies on two core components: decision making tools for every stage of a referral from intake to reunification, and the delineation and assignment of appropriate service levels.³²⁴ The tools are basically detailed forms with various series of progressive questions for decision makers to answer as they make their assessments of families.³²⁵ The process of having to answer standardized questions can be used to force decision makers to consider the *emic* perspective alongside their natural tendency to judge through the *etic* perspective.

The creators of structured decision making were highly aware of the statistical overrepresentation of minority families in the child welfare system and aimed to build risk assessment tools that achieved equity across racial and ethnic groups.³²⁶ There were concerns that the tools are based on objective variables such as income, family size, and the number of caretakers in the household that comparatively disadvantage African Americans.³²⁷ A subsequent analysis in 1999 of data from the three largest states using structured decision making revealed that African American families were being assigned to high risk levels at the same rate as white families.³²⁸ The Children’s Research Center proudly declared that “[t]he level of equity attained by actuarial risk assessment systems is rarely experienced in the human service field.”³²⁹ Much remains to be studied to address the overrepresentation of minorities in the child welfare system and the racial and cultural differential in parental autonomy. The use of standardized assessment tools is a step in the right direction.

³²² See *id.* at 3.

³²³ See *id.*

³²⁴ See *id.* at 4.

³²⁵ See *id.*

³²⁶ See CHRISTOPHER BAIRD ET AL., RESEARCH-BASED RISK ASSESSMENT: ADDING EQUITY TO CPS DECISION MAKING 1-2 (1999), available at http://www.nccd-crc.org/crc/pubs/race_risk_1999.pdf.

³²⁷ See *id.*

³²⁸ See *id.* at 2-6 (studying data from California, Georgia, and Michigan).

³²⁹ See *id.* at 20.

CONCLUSION

This Article makes two claims. First, there are disturbing examples in which parents from minority cultures enjoy less autonomy and suffer more state interference than parents from the dominant culture. A major example is the federal criminalization of female genital surgeries in the United States. Although supporters of this law claim their goal is the protection of children, a deeper appreciation of the cultural rationale *and* comparisons of these minority practices to permitted practices of the dominant culture cast substantial doubt on their claim. I conclude that cultural ethnocentrism plays an undeniable role.

Under the law, parents and children have a relationship that is marked by a trilogy of right, responsibility, and restriction. The complications of this relationship are due to the large presence of the state as a third party in this relationship. Given the fundamental nature of the right to parental autonomy and the difficult coexistence of state, parent, and child, it is not acceptable for judgments to be made without due care and circumspection. The natural human reaction to unfamiliar parenting practices was recognized as dangerous by the Supreme Court in the 1972 case of *Wisconsin v. Yoder*, which involved Amish parents. The Court held, "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."³³⁰ After all, a fundamental liberty and a commitment to diversity demand much more from our decision makers.

Second, correction of the culture differential does not lie only in constitutional litigation, but also in decision making process reforms. Such reforms, whether driven by statute or by internal agency assessment tools, are a proscriptive mandate to inject the important *emic* perspective of minority cultures into such judgments. Starting from birth, the relationship of parent and child is a precious thing for individuals as well as for greater society. It should be handled with the utmost care.

³³⁰ See *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972).