SOME THOUGHTS ON LEGAL REMEDIES

David J. Llewellyn

In considering the efficacy of various legal remedies to curtail routine infant male circumcision, particular attention must be given to the psychological and religious issues surrounding it. Many who are opposed to the continued, wide-spread practice of circumcision are hopeful that a quick remedy will entail a few well-brought lawsuits. They contend that a class action on behalf of circumcised men or suits brought by men who have just come of age against their circumcisers will have the effect either of causing the various legislatures to outlaw the procedure or of causing the medical profession to abandon any sanction of it. Unfortunately, the experience in the courts, thus far, does not give much hope to those who would proceed in this manner. Undoubtedly, this is because of the strong emotional issues that surround this ritualised surgery. It has been the author’s experience, however, that the emotional biases supporting circumcision can be overcome with factual appeals to the intellect when presented in an emotional manner. Successful damage claims and suits can have a tremendous educational effect upon the general public, as well as upon the medical profession. In the movement against genital mutilation, they can be one of the most effective weapons, if properly brought.

It must be realised that the law almost never exists in a vacuum. The law of a given society, at least in a free society, usually reflects the values and opinions of the majority of its members. Even in Anglo-American jurisprudence, change comes slowly. While change can occur rapidly, it does so generally only when a moral, spiritual, or physical crisis presents the society with cogent reasons for a dramatic shift. Thus, slavery was outlawed in the United States only after the moral issues became clear to the majority. Those moral issues became clear only when a violent internecine war made it plain that the immorality of slavery had split the nation apart. Likewise, racial segregation was finally outlawed only after the brutal beatings of peaceful civil rights marchers in Selma, Alabama, and elsewhere throughout the American South, shocked the majority of the nation with their ferocity and caused most individuals to take a hard look at the inequities that had existed unquestioned for years. Whether the change comes from the courts by way of constitutional or legal interpretation or from the legislature by statutory enactment, it never comes unless the emotional underpinnings of the society have shifted.

The question for the lawyer, then, becomes twofold: how best to shift the
emotional underpinnings away from routine, socially accepted genital mutilation, and how best to use the legal system to accomplish this goal.

1. EMOTIONAL FACTORS UNDERLYING THE CONTINUING SUPPORT FOR CIRCUMCISION

First, it must be recognised that most individuals, particularly men, have extreme difficulty approaching the subject of circumcision rationally. Since the vast majority of judges and legislators are men, this is not an irrelevant factor. It is not, however, only men who cannot think clearly about circumcision. Women, too, are often unable to do so. Furthermore, it seems that doctors, like society in general, are often blinded by their emotions. Likewise, judges and jurors, being only human beings, bring the same emotional baggage to any legal or factual decision they may make.

Men and women are creatures of custom and habit. As a general rule, they are naturally conservative and afraid of change. Old ways die hard. Everyone wants to feel good about his body. No one wants to believe that his parents, religious leaders, or physicians would hurt him. Thus, in a society where circumcision is predominant, there is an innate resistance to abandoning a practice that has permanently altered the appearance and function of the genitals of a majority of its members. This undoubtedly explains why it has proven to be as difficult to eradicate female genital mutilation in Eastern and African societies as it has been to end male circumcision in the United States.

Three factors make it more difficult to approach circumcision rationally in the United States: sanction by the medical establishment; ignorance of normal anatomy; and fear of rejection and ridicule.

1.1. "Medicalization" of Circumcision

First, circumcision has become "medicalised." While the medical profession began circumcising American Gentiles for what are now viewed as specious reasons (the prevention of masturbation being chief among these), those reasons were medical ones. Physicians, not religious leaders, were responsible for the adoption of this surgery. They lent it, and still lend it, an aura of respectability. As one reason for circumcision has been shown to be without scientific validity, another has always arisen to take its place. Therefore, circumcision appears to be rational, if not necessary. After all, who can oppose circumcision when doctors claim it is conducive to good health and long life?

The medical profession usually trivialises the very real risks of circumcision, which are not insignificant.¹ For example, Dr. Terry W. Hensle, director of paediatric urology at Columbia College of Physicians and Surgeons in New York City, in a recent newspaper interview, stated, that the risks are low, and that, if given the choice, "most rational folks would choose to have their infant sons circumcised."² The risk of infection, which can have devastating results, is almost uniformly ignored by physicians and parents alike. Moreover, the indisputable physical damage of circumcision is denied. When asked about research that showed that the foreskin is more sexually sensitive than the glans³ Dr. Hensle ignorantly exclaimed, "How do they know that? The neuroreceptors are in the glans, not in the hood."⁴ Ever sex education books for adoles-