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Female Genital Mutilation As a First Amendment Right? Five Lawyers Weigh In

BY LILLY DANCYGER

A Michigan doctor was arrested in April for allegedly performing female genital mutilation on two seven-year-old girls who traveled from Minnesota with their families. The arrest—the first time a U.S. doctor has been arrested for the practice—came after the FBI got a tip that Jumana Nagarwala, M.D., was performing the procedure. In addition to Dr. Nagarwala, Fakhruddin Attar, M.D., and his wife, Farida Attar, were also arrested. According to authorities, the Attars were present during the procedures, which were performed at Dr. Attar's clinic.

Now these defendants will claim in U.S. federal court that performing female genital mutilation, which is widely condemned by doctors and human rights advocates around the world, is their religious right, protected under the First Amendment of the U.S. Constitution. We asked five lawyers what they think of this argument and whether they see any chance of a successful claim to the constitutionally protected right to mutilate young girls.

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None of them expressed any confidence in the defense's ability to stand up in court, and they each provided some insight into why, exactly, the argument is doomed to fail—and why the defendants' lawyers are presenting it anyway:

Visiting criminal law scholar at the University of Houston Law Center Melissa Hamilton explains the central problem with the argument that female genital mutilation should be protected by the First Amendment:

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The defendant is unlikely to win on First Amendment grounds. Like other constitutional rights, there are limits to them. Winning a religious freedom case as against criminal laws that apply to all is also very difficult. In this case, causing physical injury to young girls who cannot consent to it is of greater importance. It is also of note that it is harder for the doctor to claim protection for her religious beliefs when she is carrying out a practice on others, i.e., the girls.

This idea of religious freedoms having their limits in certain cases when they go against the law of the land is well established. Family law and criminal defense attorney Jef Henninger provided a historical example of the limits of the First Amendment's protection for the free exercise of religion, putting this current argument in context:

While many questions in law are not that easy to answer, this one is. Most people know that Constitutional rights are not absolute. The most common example cited by lawyers and lay people alike is that you cannot shout "fire" in a crowded movie theater. To provide a more specific example, I would point people to Reynolds v. United States, which goes all the way back to 1878.

George Reynolds, a member of the LDS church turned himself in for bigamy so that the LDS church could challenge the antibigamy laws. He was charged and convicted, and he appealed his case up to the U.S. Supreme Court. Reynolds argued that his conviction for bigamy should be overturned on four issues: that it was his religious duty to marry multiple times and the First Amendment protected his practice of his religion.

The Court rejected his arguments and affirmed his conviction. Chief Justice Morrison Waite, writing for a unanimous court, investigated the history of religious freedom in the United States and quoted a letter from Thomas Jefferson in which indicated that there was a distinction between religious belief and action that flowed from religious belief. The former "lies solely between man and his God," therefore "the legislative powers of the government reach actions only, and not opinions." The Chief Justice found that if polygamy was allowed, someone might eventually argue that human sacrifice was a necessary part of their religion, and "to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." In conclusion, the First Amendment forbade Congress from legislating against opinion, but allowed it to legislate against action.

Thus, while it's a creative argument, it's not going to work.

So religious-expression arguments don't always work. But even if they did, this one has a fatal flaw that might exclude it from the discussion of First Amendment protections. As Neal Davis, another criminal defense attorney, explained, the argument may be moot, because FGM is more cultural than religious:

The issue is whether the First Amendment of the United States Constitution—specifically, the Free Exercise of Religion Clause of the First Amendment—prohibits criminalizing FGM in the United States. Many have argued that, given the lack of Islamic or Christian scripture mandating the practice of FGM, the First Amendment does not apply. Rather, FGM is a tradition or custom that is not protected under the First Amendment. Given Supreme Court precedent on criminal laws that intersect with religious freedoms, it is highly unlikely that the defense will prevail in claiming FGM violates the First Amendment.

In general, the legal community doesn't seem to be taking this argument very seriously. Norm Pattis, criminal defense lawyer and author of Taking Back the Courts, summed up the general sentiment on this issue pretty neatly:

That is a ridiculous idea.

Mutilation is mutilation. This defense is going nowhere. The lawyer wins an A for effort, but he is flunking this exam.

But, as criminal defense attorney Edward Griffin points out, it's a defense attorney's job to try any and every tactic, even the really long-shot, doomed-to-fail tactics:

It is a defense attorney's job to pursue every possible defense and advocate zealously on behalf of your clients.

Novel defenses can lead to changes in the law. For example, Miranda rights, which we now take for granted, are a direct result of the Miranda case and zealous advocacy by defense counsel on behalf of their client, Mr. Miranda. Miranda lead to a change in both police and criminal procedure, because of the defense developed and pursued by counsel in that case. Now everyone is, or should be, familiar with their Miranda rights, and when those rights are violated, pretrial motions can often defeat a criminal prosecution.

Sometimes defense counsel use pretrial motions as a bargaining chip to try to negotiate a better deal.

Other times, such as this, we know we have an issue in advance due to a client's political or religious beliefs, which tend to be the most difficult cases a defense attorney can encounter during their career. In the District of Columbia we get our fair share of protestor/political cases. When a client is fighting for political or religious beliefs, it is usually total war with no opportunity to negotiate a deal.

And sometimes we have no choice but to throw shit against the wall and see if any of it sticks.

Generally, the reaction from these lawyers is that this defense will never work and is more splashy than effective. When deciding whether a practice is religious expression protected under the First Amendment, the courts have a history of imposing limits when the purported religious expression causes harm to others. It's impossible to deny that harm here, with the global medical community decrying female genital mutilation as a barbaric, cruel practice. And the argument for protected religious expression here is weakened further when you take into account that the practice is not a religious requirement but a cultural one.

Fortunately, this argument isn't being treated as a real threat, because it's such a long shot. But given the trend these days of valuing religious freedom over individual rights, who knows how this landmark case will play out? ■