Medical Law Review, Vol. 25, No. 4, pp. 604–627
doi:10.1093/medlaw/fwx027
Advance Access Publication: May 24, 2017

REASON AND PARADOX IN MEDICAL AND FAMILY LAW: SHAPING CHILDREN'S BODIES

BRIAN D. EARP[1], JENNIFER HENDRY[2] AND MICHAEL THOMSON[3,*]

[1] Philosophy, Yale University, New Haven, CT, USA
[2] Law, University of Leeds, Leeds, UK
[3] Law, University of Leeds, Leeds, UK
*M.A.Thomson@leeds.ac.uk

ABSTRACT

Legal outcomes often depend on the adjudication of what may appear to be straightforward distinctions. In this article, we consider two such distinctions that appear in medical and family law deliberations: the distinction between religion and culture and between therapeutic and non-therapeutic. These distinctions can impact what constitutes 'reasonable parenting' or a child's 'best interests' and thus the limitations that may be placed on parental actions. Such distinctions are often imagined to be asocial facts, there for the judge to discover. We challenge this view, however, by examining the controversial case of *B and G* [2015]. In this case, Sir James Munby stated that the cutting of both male and female children's genitals for non-therapeutic reasons constituted 'significant harm' for the purposes of the Children Act 1989. He went on to conclude, however, that while it can never be reasonable parenting to inflict any form of non-therapeutic genital cutting on a female child, such cutting on male children was currently tolerated. We argue that the distinctions between religion/culture and therapeutic/non-therapeutic upon which Munby LJ relied in making this judgement cannot in fact ground categorically differential legal treatment of female and male children. We analyse these distinctions from a systems theoretical perspective—specifically with reference to local paradoxes—to call into question the current legal position. Our analysis suggests that conventional distinctions drawn between religion/culture and the therapeutic/non-therapeutic in other legal contexts require much greater scrutiny than they are usually afforded.

KEYWORDS: Children, Genital cutting, Religion, Shaping surgeries, Systems theory

I. INTRODUCTION

Legal reasoning often coheres around the determination of what can appear to be binary distinctions. For example, the adjudication of whether an act was lawful or

unlawful may depend upon an assessment of whether it was reasonable/unreasonable, proportionate/disproportionate, careless/reckless, and so forth. In terms of criminal and civil law standards that delimit acceptable parental action, consideration of whether a practice is religious or cultural or whether an intervention is therapeutic or non-therapeutic may be similarly determinative. Practices described as religious or therapeutic in nature are typically afforded greater protection from interference by the state than those that are described as non-therapeutic or 'merely' cultural. Neither of these distinctions is straightforward, however. As we shall demonstrate, rather than being ahistorical or apolitical in nature, dominant understandings of which practices do or do not deserve the labels 'religious' or 'therapeutic' are shaped by competing value claims and by overlapping, often evolving contingencies of culture, power, gender, race, and social class. As Alice Ludvig notes, law's 'dichotomies are not "neutral"; they have been the means of fixing meaning in ways that secure power relations and inequalities in and of themselves'.[1]

One particularly contentious area in which these binary distinctions are commonly drawn concerns the cutting of children's genitals. When such cutting is done to female children, it is often said to be a non-religious cultural practice, and one which, moreover, has no therapeutic benefit: if legal protection is to be granted, therefore, it should be to the girl and her unmodified genitals, rather than to those who might wish to cut them. When such cutting is done to male children, by contrast, it is commonly said to be a religious practice, and one with at least potential therapeutic benefit:[2] therefore, it must not be restricted—much less forbidden—by law. Accordingly, protection in this instance is afforded to the parents, or to the person or persons designated by the parents to cut the boy's genitals.

To interrogate these distinctions we turn to the English High Court decision of *B and G* [2015], in which Sir James Munby, President of the Family Division, considered the current disparity in legal responses to male and female genital cutting (MGC, FGC).[3] Potentially marking a shift in judicial thinking, Munby LJ found that both practices can constitute 'significant harm'.[4] Yet as Carol Smart has noted, 'harm' is not 'a transcendental notion which is automatically knowable and recognizable at any moment in history by any member of a culture'.[5] Rather, it is a culture- and context-sensitive notion, which can be shaped by differing perceptions, assumptions, and values, and by conscious or unconscious stereotypes about the object(s) of evaluation. Accordingly, one of our aims in this article is to shed light on such factors as they bear on judgements about harm to children's bodies—particularly insofar as these judgements diverge as a function of the child's sex or gender.

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1 A Ludvig, 'Differences between Women? Intersecting Voices in a Female Narrative' (2006) 13(3) European Journal of Women's Studies 245, 249.

2 Expert opinion is sharply divided. R Collier, 'Ugly, Messy and Nasty Debate Surrounds Circumcision' (2012) 184(1) Canadian Medical Association Journal E25; BD Earp, 'Addressing Polarisation in Science' (2015) 41(9) Journal of Medical Ethics 782.

3 *Re B and G (children) (care proceedings)* [2015] EWFC 3.

4 ibid, para 37.

5 C Smart, 'A History of Ambivalence and Conflict in the Discursive Construction of the "Child Victim" of Child Abuse' (1999) 8(3) Social & Legal Studies 391, 392.

In the ruling by Munby LJ, such divergence re-emerged soon after the initial, apparently sex and gender neutral, judgement about 'significant harm'. In other words, Munby LJ sought to 'rescue' law's current position, which treats females and males differently, in the manner we have just described: by contrasting religion with culture and the therapeutic with the non-therapeutic as a way of distinguishing the two types of cutting. Although these distinctions are generally accepted in law, and used to evaluate a number of contested practices, we shall argue that in the case of childhood genital cutting, at least, they are not valid.[6] Appealing to them, therefore, reveals deep contradictions in conventional legal reasoning.

To explain these contradictions we draw on systems theory. Approaching law as an autopoietic or self-creating system (self-creating in the sense that it constitutes itself from its own systemic elements), one can begin to see how contradictions and even paradoxes are an intrinsic feature of legal change. Rather than seeing such paradoxes as a weakness of law, systems theoretical approaches take them to be a defining and generative feature—arising from the need for law to maintain credibility and legitimacy whilst negotiating its internal tensions. Our focus is on the local paradoxes underpinning Munby LJ's ruling—'local' in the sense employed by Oren Perez to include 'doctrinal weaknesses and inconsistencies'.[7] These inconsistencies, we argue, stem from a differential appraisal of children's bodies that cannot be justified on the basis of an empirically defensible or conceptually lucid account of the harms to which they are exposed in having their genitals cut. Instead, such an appraisal rests more heavily on harm judgements that track questionable assumptions not only about sex and gender, as we have intimated, but also racial identity and ethnic affiliation.

In what follows we show that there are substantial overlaps in both the physical consequences and symbolic meanings of male and female genital cutting, when the full spectrum of such practices is considered and like compared with like. Moreover, these consequences and meanings transcend boundaries of health, religion, and culture, undermining the usefulness of these categories for justifying sex-based distinctions. Drawing on a children's rights perspective, we suggest that considerations of bodily

6 In this article, we focus on MGC and FGC. Nevertheless, we acknowledge that some of our arguments also apply to genital 'normalising' surgeries on children born with intersex conditions. Space precludes us from extending our analysis here, but we would highlight the following critical assessments, some of which explore commonalities among male, female, and intersex genital cutting practices: N Ehrenreich, 'Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices' (2005) 40 Harvard Civil Rights-Civil Liberties Law Review 71; M Fox and M Thomson, 'Cutting It: Surgical Interventions and the Sexing of Children' (2005) 12 Cardozo Journal of Law & Gender 82; I Morland, 'Intimate Violations: Intersex and the Ethics of Bodily Integrity' (2008) 18(3) Feminism & Psychology 425; M Fox and M Thomson, 'Sexing the Cherry: Fixing Masculinity' in N Sullivan and S Murray (eds), *Queer(ing) Somatechnics: Critical Engagements with Bodily (Trans) Formations* (Ashgate, 2009) 107–26; JS Svoboda, 'Promoting Genital Autonomy by Exploring Commonalities Between Male, Female, Intersex, and Cosmetic Female Genital Cutting' (2013) 3(2) Global Discourse 237; M Travis, 'Accommodating Intersexuality in European Union Anti-Discrimination Law' (2014) 21 European Law Journal 180; F Ammaturo, 'Intersexuality and the "Right to Bodily Integrity": Critical Reflections on Female Genital Cutting, Circumcision and Intersex "Normalising Surgeries" in Europe' (2016) 25(5) Social & Legal Studies 591; M Newbold, 'When Parents Choose Gender: Intersex, Children, and the Law' (2016) 24(4) Medical Law Review 474.

7 See O Perez, 'Law in the Air: A Prologue to the World of Legal Paradoxes' in O Perez and G Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart 2006) 3, 22–26.

integrity and self-determination provide a more compelling basis for assessing the permissibility of genital cutting, regardless of the individual's sex or gender.[8]

In so doing, we acknowledge the growing body of academic commentary arguing that neither religion nor culture can justify substantial intrusions into the bodies of children or other non-consenting persons, particularly when such intrusions result in a permanent alteration that the individual may later reasonably regard as a harm. With ritual genital cutting attracting increased legal and regulatory attention in a number of European jurisdictions and at the supra-national level,[9] and with commonplace assumptions about such cutting drawing heightened scrutiny from across disciplines, such an analysis is timely and essential.

However, the implications of our analysis are not limited to the genital cutting debate. Successful claims to religious or therapeutic status can have a legitimising effect in family and medical law in the context of other contested practices. Given the primacy of bodily integrity within the cluster of rights that law seeks to protect and promote,[10] our discussion bears most directly on other potentially harmful childhood body-shaping interventions where the designation therapeutic/non-therapeutic is disputed. Such interventions include sterilization, 'normalising' surgery on children born with intersex conditions, 'virginity restoration' (ie hymenorrhaphy), limb lengthening, growth attenuation, and so forth. To frame our analysis, we begin with an outline of *B and G*, followed by a discussion of some of the empirical and conceptual confusions that we claim underlie and undermine its conclusion.

A. *B and G*

B and G concerned care proceedings brought in the case of two children, B (a 4-year-old boy) and G (a 3-year-old girl). The central questions raised by the case were: (i) whether G had been subject to FGC; (ii) if she had, did this amount to significant harm; and (iii) what then were the implications for her and her brother. It was agreed in the process of the hearing that if G had been subject to FGC, it was Type IV, using the typology set out by the World Health Organization (WHO).[11] Type IV is defined

8 A full discussion of children's rights, and related debates over the status of parental rights, would take us too far afield. But the perspective of the child, and the notion of children's rights to bodily integrity, self-determination, and an open future, are central to this debate. See, eg, M Fox and M Thomson, 'Reconsidering "Best Interests": Male Circumcision and the Rights of the Child' in G Denniston and others (eds), *Circumcision and Human Rights* (Springer 2009) 15. See further, B Shell-Duncan, 'From Health to Human Rights: Female Genital Cutting and the Politics of Intervention' (2008) 110(2) American Anthropologist 225; DL DeLaet, 'Framing Male Circumcision as a Human Rights Issue?' (2009) 8(4) Journal of Human Rights 405; R Darby, 'The Child's Right to an Open Future: Is the Principle Applicable to Non-therapeutic Circumcision?' (2013) 39(7) Journal of Medical Ethics 463; RS Van Howe, 'Infant Circumcision: The Last Stand for The Dead Dogma of Parental (Sovereignal) Rights' (2013) 39(7) Journal of Medical Ethics 475.

9 SR Munzer, 'Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy' (2015) 37(2) University of Pennsylvania Journal of International Law 503; JS Svoboda, 'Growing World Consensus to Leave Circumcision Decision to the Affected Individual' (2015) 15(2) American Journal of Bioethics 46.

10 M Fox and M Thomson, 'Bodily Integrity, Embodiment and the Regulation of Parental Choice' (2017) Journal of Law & Society (forthcoming).

11 Note that the WHO uses the term 'FGM' for Female Genital 'Mutilation', which is also the term employed by Munby LJ. However, among scholars of genital cutting this term is highly controversial, having been

as 'all other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization'.[12]

Given significant problems with the expert evidence, it was found that the local authority had not proven its case. That is, there was no evidence that G had in fact been subjected to FGC. Nevertheless, Munby LJ moved on to address Type IV, which, he argued, raised an issue 'which cannot be shirked' and which took him to the question of 'male circumcision'.[13] In explaining the court's position, Munby LJ stated that whilst WHO Types I, II, and III FGC are 'more invasive than male circumcision',[14] some practices falling under Type IV FGC, such as pricking of the clitoral hood, are 'on any view much less invasive than male circumcision'.[15] Further, he acknowledged that Type Ia, cutting/removal of the clitoral hood or prepuce, 'is physiologically somewhat analogous to male circumcision'.[16]

In making these observations, Munby LJ aligned judicial thinking with an emerging consensus concerning clear similarities between male and female genital cutting when the full range of practices falling under those labels is considered.[17] His ruling, therefore, challenges the dominant view in both the legal and popular imaginations that such practices are fundamentally distinct. Looking to earlier case law, for example, Munby LJ's judgment departs from that of Baroness Hale in *Secretary of State for the Home Office v K* [2006][18] in which she asserted that FGC 'procedures vary from community to community but cannot in any way be compared to the removal of a boy's foreskin'.[19] Baroness Hale goes on to cite the UNICEF *Innocenti Digest*:

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criticised on numerous grounds, including its lack of value-neutrality: see B Shell-Duncan and Y Hernlund (eds), *Female "Circumcision" in Africa: Culture, Controversy, and Change* (Lynne Rienner Publishers 2000); DS Davis, 'Male and Female Genital Alteration: A Collision Course with the Law?' (2001) 11 Health Matrix 487. Increasingly, FGC is the preferred term, which we employ here except when quoting others.

12 The WHO typology is: **Type I**—Partial/total removal of clitoris and/or prepuce. **Type Ia**, removal of clitoral hood/prepuce only; **Type Ib**, removal of clitoris with prepuce. **Type II**—Partial/total removal of clitoris and labia minora, with/without excision of labia majora. **Type III**—Narrowing of vaginal orifice with creation of seal by cutting/appositioning labia minora and/or labia majora, with/without excision of clitoris. **Type IV**—defined above. WHO, 'Female Genital Mutilation: Fact Sheet' (World Health Organization, February 2016) <http://www.who.int/mediacentre/factsheets/fs241/en/> accessed 4 January 2017.

13 *Re B and G* (n 3) 58.

14 ibid 60.

15 ibid.

16 ibid. The procedures are analogous in that both alter/remove a genital prepuce; however, the penile prepuce is considerably larger: ~30–50 cm^2 in the mature organ. BD Earp, 'Do the Benefits of Male Circumcision Outweigh the Risks?' (2015) 3 Frontiers in Pediatrics 18.

17 Davis (n 11) 487; M Fox and M Thomson, 'A Covenant with the Status Quo? Male Circumcision and the New BMA Guidance to Doctors' (2005) 31(8) Journal of Medical Ethics 463; K Bell, 'Genital Cutting and Western Discourses on Sexuality' (2005) 19(2) Medical Anthropology Quarterly 125; DeLaet (n 8); M Dustin, 'Female Genital Mutilation/Cutting in the UK—Challenging the Inconsistencies' (2010) 17(1) European Journal of Women's Studies 7; M van den Brink and J Tigchelaar, 'Shaping Genitals, Shaping Perceptions: A Frame Analysis of Male and Female Circumcision' (2012) 30 Netherlands Quarterly of Human Rights 417; Svoboda (n 6); BD Earp, 'Female Genital Mutilation and Male Circumcision: Toward an Autonomy-based Ethical Framework' (2015) 5(1) Medicolegal and Bioethics 89.

18 *Secretary of State for the Home Office v K* [2006] UKHL 46.

19 ibid, 91. See also Lord Justice Moore-Bick in *SS (Malaysia) v Secretary of State for the Home Department* [2013] EWCA Civ 888. That is not to say that the potential harm of MGC has not been recognised by the judiciary. See, for example, Wall J's judgement in *Re J (child's religious upbringing and circumcision)* [1999] 2 FLR 678—noting that circumcision is potentially traumatic and may cause unnecessary pain and suffering.

> In the case of girls and women, the phenomenon is a manifestation of deep-rooted gender inequality that assigns them to an inferior position in society and has profound physical and social consequences. This is not the case for male circumcision, which may help to prevent the transmission of HIV/AIDS.[20]

Hale LJ's statement is indicative of the dominant Western understanding of male and female genital cutting practices. Yet, this understanding is mistaken in several respects. Before turning to the systems theoretical approach we use to address how law in this area has developed and may continue to change, we first highlight some of the key misunderstandings that underpin the prevailing view.

B. Making Distinctions

Theodore Bennett writes that male and female genital cutting 'are discursively conceptualized and legally treated as entirely different, even oppositional, practices'.[21] This is in tension, however, with the fact that both the degree of invasiveness of the interventions themselves, as well as the underlying motivations, root causes, rationales, and associated symbolic meanings are at times quite similar, the same, or even reversed, when comparing like cases.[22] For example, the notion that FGC is always associated with or a consequence of sexist and patriarchal norms, representing a lower status for women and girls, has been described by one expert as a 'gross oversimplification';[23] while at the same time, the patriarchal origins of MGC in some societies (eg within Judaism) has been noted many times.[24]

Specifics will help justify these claims. While it is true that in certain geographical contexts, particularly in parts of northeast Africa, FGC has become associated with pre-existing cultural and religious norms that emphasise female chastity and sexual purity in some groups, this association is not universal.[25] For example, with regard to the FGC-practicing Kono ethnic group of Sierra Leone—the country of origin of the applicant in *Secretary of State for the Home Office v K*—'there is no cultural obsession with feminine chastity, virginity, or women's sexual fidelity . . . because the role of the biological father is considered marginal and peripheral to the central matricentric unit'.[26] In Kono society, as in numerous other African ethnic groups, the FGC ceremony is organised and carried out entirely by women, while the analogous ceremony

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20 ibid, 93.

21 T Bennett, *Cuts and Criminality: Body Alteration in Legal Discourse* (Ashgate Publishing 2015) 68.

22 H Lightfoot-Klein, 'Similarities in Attitudes and Misconceptions about Male and Female Sexual Mutilations' in GC Denniston and others (eds), *Sexual Mutilations* (Springer 1997); van den Brink and Tigchelaar (n 17) 417.

23 L Wade, 'Learning from "Female Genital Mutilation": Lessons from 30 Years of Academic Discourse' (2012) 12(1) Ethnicities 26. See also AL Obiora, 'Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign against Female Circumcision' (1997) 47 Case Western Reserve Law Review 275.

24 MS Kimmel, 'The Kindest Un-cut' (2001) 16(3) Tikkun 43; SD Cohen, *Why aren't Jewish Women Circumcised? Gender & Covenant in Judaism* (University of California Press 2005) 560–78.

25 FS Ahmadu, 'Rites and Wrongs: An Insider/Outsider Reflects on Power and Excision' in B Shell-Duncan and Y Hernlund (eds), *Female "Circumcision"* (n 11); J Abdulcadir and others, 'Seven Things to Know about Female Genital Surgeries in Africa' (2012) 42(6) The Hastings Center Report 19.

26 Ahmadu, ibid 285.

for boys is managed entirely by men: in both cases, the primary intention is not to reduce the initiates' sexual pleasure (nor to reify a lower status for the females),[27] but is rather to confer on both sexes a community-recognised status as mature adults, earned through their participation in a symbolically complex, morally transformative, and, in some cases, deliberately painful rite of passage.[28]

Strikingly, the anthropological record reveals few or no FGC-practicing societies that do not also practice MGC, often in parallel and under similar conditions.[29] As John Caldwell and colleagues have argued, the failure of Anglo-American law, and of Western attitudes more generally, 'to relate the two types of circumcision is curious . . . because they have probably been regarded by most Africans as being related for aeons'.[30] To return to *Secretary of State for the Home Office v K,* it is worth noting that Bingham LJ is quick to draw a sharp distinction between MGC and FGC based on allegedly differing symbolic meanings. With respect to FGC, he argues,

> The contrast with male circumcision is obvious: where performed for ritualistic rather than health reasons, male circumcision may be seen as symbolizing the dominance of the male. FGM may ensure a young woman's acceptance in . . . society, but she is accepted on the basis of her institutionalised inferiority.[31]

This analysis is, in certain respects, too easy. To begin, Lord Bingham's assessment of Sierra Leonean society is inconsistent with that of anthropologists who specialise in the region, such as Fuambai Ahmadu, a Sierra Leonean-American who has written extensively about female and male initiation ceremonies among the Kono ethnic group in that context. According to Ahmadu,

> Kono culture promulgates a dual-sex ideology, which is manifested in political and social organization, sexual division of labor, and, notably, the presence of powerful female and male secret societies. The existence and power of Bundu, the women's secret sodality, suggest positive links between excision, women's religious ideology, their power in domestic relations, and their high profile in the 'public' arena.[32]

There are certainly normative gender roles in Kono society, as there are in all societies. However, it is far from evident that the role(s) for Kono females is associated with a 'lower' status, much less a kind of 'institutionalized inferiority' as Lord Bingham asserts. Ahmadu cautions that 'Scholars must be wary of imposing Western religious,

27 See, eg SM James and CC Robertson (eds), *Genital Cutting and Transnational Sisterhood* (University of Illinois Press 2005).

28 B Shell-Duncan and Y Hernlund (eds), *Female "Circumcision"* (n 11); HD Lyons, 'Genital Cutting: The Past and Present of a Polythetic Category' (2007) 53(4) Africa Today 3.

29 Abdulcadir and others (n 25); RA Shweder 'The Goose and the Gander: The Genital Wars' (2013) 3(2) Global Discourse 348.

30 JC Caldwell and others, 'Male and Female Circumcision in Africa from a Regional to a Specific Nigerian Examination' (1997) 44(8) Social Science and Medicine 1181.

31 *Home Office* (n 18) 31.

32 Ahmadu (n 25) 285.

philosophical, and intellectual assumptions that tend to place enormous emphasis on masculinity and its symbols in the creation of culture itself', leading to the automatic conclusion that the male roles must be of higher status.[33] To the contrary, according to Ahmadu, women in Kono culture occupy a complementary role to men that is just as valued in the local ontology. Making the more general point with reference to other FGC-practicing groups, Christine Walley notes that whilst the anthropological record supports the view that gender inequality is widespread:

> the cultural and historical particulars of how gender relations are constructed differently in different places, and the alternate sources of power and authority that women often hold, are ignored in these generalized assumptions about the oppression of third-world women.[34]

Indeed, such generalised assumptions may, themselves, be seen as expressions of patriarchy, as Arianne Shahvisi has recently argued: 'An extension of . . . patriarchy is the widespread idea that Europeans must protect women of colour from the "barbarism" of men of colour. It is from this misled belief that [Western] hypocrisy around FGM stems'. As she illustrates:

> UK law codifies the idea that adult women of particular cultures are not as capable of making their own decisions as are other women, let alone as capable as men. For, if a woman requests a labiaplasty (say) from a private cosmetic surgeon in the UK, her ethnicity will likely be used to determine her consent status, and in turn whether or not the procedure can occur legally. The current law [therefore] enforces differential access to [genital-altering] procedures on the basis of race.[35]

Turning to MGC and patriarchy, there are indeed some contexts in which the genital cutting of males is more directly associated with their elevated status, and thus with a lowered status for females. In Jewish ritual practice, for instance, only males are entitled to have their genitals cut as part of a perceived divine covenant. Shaye D. Cohen, the Littauer Professor of Hebrew Literature and Philosophy at Harvard University, argues that of all the rituals from which women are excluded by rabbinic culture, 'the exclusion from circumcision is at once the most obvious and the most problematic'. As he explains, 'the fundamental inferiority, marginality and Otherness of women were so self-evident [throughout Jewish history] that the presence of a covenantal mark on the bodies of men, and its absence from the bodies of women, seemed natural and inevitable'.[36] Contemporary Jews, Cohen argues, 'especially those sensitive to gender issues . . . might wish to argue that male circumcision needs to be abolished or

33 ibid.

34 CJ Walley, 'Searching for "Voices": Feminism, Anthropology, and the Global Debate over Female Genital Operations' (1997) 12(3) Cultural Anthropology 405, 420.

35 A Shahvisi, 'Why UK Doctors Should be Troubled by Female Genital Mutilation Legislation' (2017) Clinical Ethics (forthcoming).

36 SD Cohen, 'Why aren't Jewish Women Circumcised?' (1997) 9(3) Gender & History 560, 574.

de-emphasized as a ritual marker precisely because it has functioned within history to discriminate invidiously against women'.[37]

The lesson from these examples—just two of many more that could be raised—is that the non-physical 'meanings' of MGC and FGC differ from group to group, such that there is no single overarching symbolic framework that can quarantine the practices from one another on the basis of sex or gender.[38] When this lesson is combined with the 'overlaps' in physical consequences between the two procedures (depending on type) as recognised by Munby LJ from the bench for the first time, a puzzle is raised as to why they have conventionally been seen, at least in Western discourse, as being fundamentally distinct.

There are a number of solutions to this puzzle, with cultural familiarity being among the most significant.[39] Put simply, the Western world's familiarity with Jewish circumcision since antiquity has contrasted with its long-standing 'ignorance of female circumcision . . . the discovery [of which] during the eighteenth century was met with a combination of incredulity, fascination, and horror'.[40] In more recent times, it was not until the 1970s that African FGC practices were brought into the popular consciousness (often without any reference to their coincident male counterparts, some of which were more physically harmful), primarily through the work of activists following Fran Hosken who interpreted such cutting as evidence of global domination of women by men.[41] But as Walley notes, in their 'depiction of female genital operations for an international audience, the practices became largely severed from their sociocultural context'. Thus, despite the fact that male and female cutting were performed side by side in many of the African ethnic groups whose cultural traditions were being written about, in the 'Western-oriented literature opposing such practices there was an exclusive focus on the tormenting of girls, if not solely by men, then by a monolithic patriarchy'.[42]

This dichotomous discourse continues today. When FGC is raised in public conversation, it is usually the most severe forms in the least sanitary conditions that are emphasised (the young girl in a remote African village being cut and infibulated by a village elder), with limited mention of the more 'mild' forms of FGC, such as ritual nicking of the clitoral prepuce as is carried out by health professionals in some Muslim-majority countries including Malaysia.[43] However, when male circumcision is the focus of public discourse, it is most often described in its least invasive forms, and in sanitary conditions such as a hospital setting (common in the United States), with limited awareness of the more extreme and unsanitary forms of MGC that are carried out in other contexts (eg ritual circumcision among the Xhosa of South Africa, where

37 ibid, 561.

38 L Leonard, 'Interpreting Female Genital Cutting: Moving Beyond the Impasse' (2000) 11(1) Annual Review of Sex Research 158.

39 N Sullivan, 'The Price to Pay for our Common Good: Genital Modification and the Somatechnologies of Cultural (In)difference' (2007) 17(3) Social Semiotics 395.

40 R Darby, 'Moral Hypocrisy or Intellectual Inconsistency?' (2016) 26(2) Kennedy Institute of Ethics Journal 155, 156.

41 Bell (n 17).

42 Walley (n 34) 418.

43 See, AK Rashid and others, 'The Practice of Female Genital Mutilation among the Rural Malays in North Malaysia' (2010) 9(1) Internet Journal of Third World Medicine 1.

more than 400 boys died between 2008 and 2014 due to complications associated with their initiations).[44] Such thinking both stems from, and perpetuates, a gendered opposition that does not reflect the full reality. As anthropologist Zachary Androus has argued:

> The fact of the matter is that what's done to some girls [in some cultures] is worse than what's done to some boys, and what's done to some boys [in some cultures] is worse than what's done to some girls. By collapsing all of the many different types of procedures performed into a single set for each sex, categories are created that do not accurately describe any situation that actually occurs anywhere in the world.[45]

Consistent with this observation is Munby LJ's discussion of the 'curious situation' facing the court. Noting the Muslim identity of the family, he reasoned that it was likely that B either was or would in due course be circumcised. Yet:

> G's FGM Type IV (had it been proved) would have been relied upon . . . as justifying the adoption of *both* children, even though on any objective view it might be thought that G would have [been] subjected to a process much less invasive, no more traumatic (if, indeed, as traumatic) and with no greater long-term consequences, whether physical, emotional or psychological, than the process to which B has been or will be subjected.[46]

Having made these observations, Munby LJ turned to the specifics of the legal case before him. Section 31 of the Children Act 1989 provides that before the state can intervene, the local authority must first prove 'significant harm'. In accepting that all forms of FGC constitute 'significant harm' for the purposes of care proceedings, Munby LJ then asserts that:

> Given the comparison between what is involved in male circumcision and FGM Type IV, to dispute that the more invasive procedure involves the significant harm involved in the less invasive procedure would seem almost irrational. In my judgement, if Type IV amounts to significant harm . . . then the same must be so of male circumcision.[47]

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44 M Douglas and A Nyembezi, 'Challenges Facing Traditional Male Circumcision in the Eastern Cape' (*Human Sciences Research Council,* 2015) <http://www.hsrc.ac.za/uploads/pageContent/6391/Presentation%20-%20Challenges%20facing%20traditional%20male%20circumcision%20in%20the%20Eastern%20Cape.pdf> accessed 4 January 2017; LL Gonzalez, 'South Africa: Over Half a Million Initiates Maimed under the Knife' (*All Africa*, 20 June 2014) <http://allafrica.com/stories/201406251112.html> accessed 4 January 2017.

45 ZT Androus, 'The US, FGM, and Global Rights to Bodily Integrity' (Rothermere American Institute: US and Global Human Rights, University of Oxford, November 2004) <http://www.zacharyandrous.com/The%20US%20FGM%20and%20Global%20HR.pdf> accessed 16 June 2016, 3.

46 *Re B and G* (n 3) 62–63.

47 ibid 69.

C. Justifying Distinctions

This assertion is significant. It is the first time in English law that MGC has been described as a 'significant harm'. Nevertheless, since this is the threshold test for care proceedings, if 'significant harm' is identified, the question then becomes whether it was a result of parental care that fell below what it would be 'reasonable to expect' of a parent. It is here that Munby LJ identifies a 'clear distinction' between female and male genital cutting:

> There are, after all, at least two important distinctions between the two. FGM has no basis in any religion; male circumcision is often performed for religious reasons. FGM has no medical justification and confers no health benefits; male circumcision is seen by some (although opinions are divided) as providing hygienic or prophylactic benefits.[48]

In other words, Munby LJ rationalises the legal distinction between male and female genital cutting in terms of 'reasonable parenting' by pointing to purported differences between religion and culture, and between the therapeutic and non-therapeutic. In resorting to these distinctions, Munby LJ's ruling is, in one sense, a conservative judgement. But there is a certain nuance in his choice of language which hints at a more progressive view. This nuance concerns the question of harm and why the law would respond differently to the children in front of him if both had their genitals cut:

> The explanation, it must be, is simply that in 2015 the law . . . is still prepared to tolerate non-therapeutic male circumcision . . . while no longer being willing to tolerate FGM in any of its forms. Certainly current judicial thinking seems to be that there is no equivalence between the two.[49]

The language is tentative and contingent, both temporally and legally. In terms of legal contingency, his final ruling is on the 'narrow' legal question of the reach of section 31. In terms of temporality, Munby LJ states that 'in 2015' and in the light of 'current judicial thinking' law is '*still prepared to tolerate* non-therapeutic'[50] cutting of male children's genitals. One way to read this hedge is as follows: 'for now, at this time, we still let this happen'. Assuming that is a fair reading, the suggestion seems to be that the situation is untenable. Continuing to use *B and G* to frame our analysis, in the next section we turn to a systems theoretical approach to explain the processes of legal change. This approach foregrounds the importance of scrutinising distinctions that serve to underpin the legitimacy of current social and legal arrangements.

II. RATIONALITY, IRRATIONALITY, AND THE LEGAL METHOD

From Munby LJ's tentative language one may infer an implicit understanding of how law changes over time. This understanding has a teleological dimension according to which society and law are purposefully developing towards a progressive and logical

48 ibid 72.
49 ibid 64–65.
50 ibid 64 (emphasis added).

end: here, the protection of all children, regardless of sex or gender, from significant bodily harm. As John Harrington has written more generally of beliefs about change in medical law, the 'goals of universality and freedom are taken to be immanent . . . [t]he law will work itself clear of impediments to reason and liberty'.[51]

Systems theoretical approaches provide an alternative model of legal change. Such approaches position law as a recursive practice that is *operationally* closed to its environment.[52] As such, the legal system makes and remakes itself from its own normative resources (court judgements, for example rely on statutory provision and precedent cases), while its wider environment is constituted by other self-referential social systems (science, medicine, politics, and so forth) as well as the natural world.[53] This combination of systemic closure and self-reference establishes that 'a decision on lawfulness cannot be replaced by one on truth, profitability or therapeutic benefit and remain a *legal* decision'.[54]

A systems theoretical understanding of law recognises that there is no foundational justification for the distinction between law and non-law. The question of 'how can we rightly or wrongly differentiate the right and the wrong'[55] is the foundational paradox that results from this initial distinction—the essentially arbitrary (or violent) drawing of a line that designates one side as system (*the law*) and the other as environment. Hence law, esteemed in classic jurisprudence as the negation of violence—the Hobbesian contract—'in fact proceeds from it'.[56] The reproduction of the distinction between law and non-law in every subsequent legal operation has the effect of embedding contingency throughout the legal system.[57] This means that law is 'binding, but provisional; normative, but arbitrary'.[58]

Paradox is not only a defining feature of law, but is also generative of it. For as an autopoietic system, law 'cannot but find justification in [its] own circularity and cannot but produce regularities . . . that govern the transformation of their own irregularities'.[59] This circularity can be seen both in the foundational sense just outlined, but also in the form of 'local' paradoxes—those 'decisional paradoxes of daily legal

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51 J Harrington, 'Of Paradox and Plausibility: The Dynamic of Change in Medical Law' (2014) 22(3) Medical Law Review 305, 305. Nevertheless, Munby LJ also acknowledges less 'logical' modes of legal change, quoting Holmes J (from *The Common Law*, 1881): 'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed'. This does not seem to satisfy Munby LJ, however: 'the curiosity' before him 'remains'. *Re B and G* (n 3) 64.

52 Whilst it is operationally, or normatively, closed, it is 'cognitively' open, drawing on expertise and knowledge claims from other systems such as medicine, as we go on to acknowledge.

53 See N Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1991–92) 13 Cardozo Law Review 1419, 1420.

54 Harrington (n 51) 309 (emphasis added).

55 N Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' (1988) 15(2) Journal of Law & Society 153, 154.

56 Harrington (n 51) 310.

57 G Teubner, '"And God Laughed": Indeterminacy, Self-Reference, and Paradox in Law' (1990) 7 Stanford Literature Review 15, 26.

58 Harrington (n 51) 310.

59 G Teubner, 'How The Law Thinks: Towards A Constructivist Epistemology of Law' (1989) 23(5) Law & Society Review 727, 736.

practice'.[60] These arise as law addresses contingency in its daily operations and responds to dilemmas and pressures that are generated by social and political change. Included among these paradoxes are inconsistencies, contradictions, and weaknesses in legal reasoning.[61]

In managing such local paradoxes, law relies on processes of *distinction* and *displacement*. In the context of medical and family law, distinctions can be structured around categories such as age, reasonableness, parent, risk, and—as in the present case—the religious and therapeutic. The legitimacy or plausibility of such distinctions may then be supported by the displacement of the reasoning, and at times decision-making, into a different social field (such as medicine) relevant to the claimed distinction. Harrington illustrates this process with the example of the law governing the capacity of minors to consent to contraceptive treatment, an example that helpfully (for our purposes) straddles family and medical law:

> A distinction is drawn between over-16s and under-16s: the former are presumed competent, the latter must prove that they are. But . . . the actual decision on competence in the case of under-16s is displaced to the clinical judgement of the doctor. The underlying contingency of legal decision-making in this field will be effectively concealed for as long as this regime of distinction and displacement holds good.[62]

Rather than a process of logical development, therefore, we have a dynamic of legal change that is ordered through processes of distinction and displacement. A local paradox will be 'solved' by a process that relies on (increasingly fine) distinctions and—at times—the mobilisation of knowledge claims or decision-making from another social field. Paradoxes cannot be truly eliminated, however. Instead, they can only be bypassed by the drawing of further system-internal distinctions,[63] or by displacement into the environment. The task of making such strategies plausible is one that belongs necessarily to the judge.[64]

This understanding of the basis for legal reasoning can help us make sense of Munby LJ's judgement in *B and G*, as well as the wider discursive field within which it sits. The inconsistent treatment of MGC and FGC has typically been managed by drawing distinctions on the basis of harm. So, FGC is constructed as always harmful no matter how slight the intervention nor how sterile the equipment used, whereas MGC is constructed as always a benign parental choice, no matter how much of the foreskin is excised or the means by which this takes place.[65] Yet, this distinction

60 G Teubner, 'Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter' in O Perez, G Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart Publishing 2006) 50.

61 Perez (n 7) 22–26.

62 Harrington (n 51) 311.

63 See J Hendry and C King, 'How Far is Too Far? Theorising Non-conviction-based Asset Forfeiture' (2015) 11(4) International Journal of Law in Context 398, 404.

64 Harrington (n 51) 306.

65 Indeed, in the latter case, the risk of harm is typically reduced to and equated with the risk of 'surgical complications', R Darby, 'Risks, Benefits, Complications and Harms' (2015) 25(1) Kennedy Institute of Ethics Journal 1; BD Earp, 'Infant Circumcision and Adult Penile Sensitivity' (2016) 7(4) Trends in Urology & Men's Health 17. Even more peculiarly, in the case of MGC but not FGC, the risk of harm is often

strains credulity. Because law's distinctions and displacements must be perceived as reasonable for it to maintain its credibility, a tension is created that must be resolved.

Whilst much of the immediate commentary on *B and G* interprets it as reasserting the distinction between male and female forms of genital cutting,[66] or actively fails to engage with Munby LJ's reasoning (at times uncritically restating the assumptions he challenges),[67] we see the case as providing the potential for a shift in judicial thinking. Munby LJ no longer accepts the blanket harm distinction that has been automatically asserted in previous rulings, such as *Secretary of State for the Home Office v K*. It is no longer plausible due to the simple fact that there are legally prohibited forms of FGC that are on any view less physically harmful than even the most mild yet legally tolerated forms of MGC. According to Munby LJ, therefore, both male and female children suffer 'significant harm' in the eyes of the law.

Munby LJ's reconsideration of harm acts as a (momentary) 'reparadoxification': his statement foregrounds the inconsistent logic of the current legal position. How, then, is this paradox managed? In the case of *B and G*, it is managed by drawing distinctions based on, and displacing responsibility into, the domains of religion and medicine. However, the stability of this solution is open to question. As Teubner argues, partial or temporary management of inconsistencies along one dimension 'promises no solution of the crisis, but at most its . . . postponement, concealment, [and] repression. It is only a matter of time before the crisis breaks out again'.[68] One possibility, therefore, is that, just as the prior distinction relying on (gendered) understandings of harm has lost its plausibility—at least to Munby LJ—so too will the new distinctions relying on religion and medicine. In this context, 'scholarly and other critiques may function as "irritations" provoking the legal system to reconsider' its temporary and partial solutions.[69] In the following sections, we undertake such an analysis by questioning the plausibility of Munby LJ's distinctions and displacements—that is, his attempted 'deparadoxifications'—before returning to the implications of this assessment for legal change.

III. THE THERAPEUTIC/NON-THERAPEUTIC DISTINCTION

We begin with the distinction drawn between the therapeutic and the non-therapeutic. To understand the relationships among gender, genital cutting, and medicine, it is useful to consider some of the historical factors that led to the adoption of

articulated in terms of *failure* to cut male children—eg the child will be harmed due to being teased for having unmodified genitals or face other social disadvantages. When similar points are raised concerning 'uncircumcised' females, however, what is proposed is a change to social norms, not their genitals. BD Earp and R Darby, 'Circumcision, Sexual Experience, and Harm' (2017) University of Pennsylvania Journal of International Law (in press).

66 See, for example, G Morris, 'What Can be Learnt from the First FGM Case?' (*lexisnexis,* 4 February 2015) <http://blogs.lexisnexis.co.uk/family/what-can-be-learnt-from-the-first-fgm-case/> accessed 16 June 2016; R English, 'Male Circumcision can be Part of "Reasonable Parenting", but No Form of FGM is Acceptable – Family Court' (*UK Human Rights Blog,* 18 January 2015) <https://ukhumanrightsblog.com/2015/01/18/male-circumcision-can-be-part-of-reasonable-parenting-but-no-form-of-fgm-is-acceptable-family-court/> accessed 25 September 2016.

67 See, for example, RD McAlister, 'A Dangerous Muddying of the Waters?' (2016) 24(2) Medical Law Review 259.

68 Teubner (n 61) 48.

69 J Harrington, *Towards A Rhetoric of Medical Law* (Routledge Glasshouse 2017) 26.

MGC by Anglophone doctors in the 19th century. After providing this brief historical context, we identify problems with the frequent assertion that MGC is therapeutic whilst FGC has no health benefits.

Male circumcision emerged at a time of medical experimentation on the genitals of both sexes. Male and female genitals were subject to exploratory cutting, cauterising, and other interventions aimed at 'curing' a number of related Victorian scourges including hysteria, masturbation, degeneracy, insanity, and neurasthenia.[70] At the centre of this experimentation was a desire to manage sexuality and fears of sexual excess in both sexes. Thus FGC was embraced in a number of European countries and the United States, although it was treated with scepticism in the UK by most doctors (with a handful of notable exceptions).[71] Whilst medicine's experimentation with clitoridectomies and other 'clinical' interventions aimed at the vulva was fairly short lived,[72] the 1890s saw male circumcision become routine in Anglophone nations.[73] The entrenchment of MGC at that time has been explained in terms of cultural anxieties regarding hygiene, masturbation, and sexually transmitted diseases,[74] which saw the foreskin become 'the most vilified normal anatomical structure of the body'.[75]

Cultural anxieties concerning masturbation were particularly influential and focused on the individual child (who risked enfeeblement, paralysing lethargy, and perhaps insanity),[76] the family (threatened by men more interested in 'self-pleasure' than procreation),[77] and the ruling classes (a weakened ruling class 'stock' was seen as threatened by working class and immigrant populations who were perceived to be stronger and reproducing at a greater rate).[78] As Michel Foucault notes in *The History of Sexuality*, 'precocious sexuality was presented from the eighteenth century to the end of the nineteenth as an epidemic menace that risked compromising not only the future health of adults but the future of the entire society and species'.[79] Against this backdrop, MGC was believed to militate against masturbation as it reduced the incidence of adhesions and irritations which would otherwise lead to the penis being touched, thus encouraging 'self-abuse'.[80] Some advocates of circumcision believed that the anti-masturbation effects were bolstered by the pain of circumcision, which

70 GP Miller, 'Circumcision: Cultural-legal Analysis' (2002) 9 Virginia Journal of Social Policy and the Law 497; M Thomson, *Endowed: Regulating the Male Sexed Body* (Routledge 2008).

71 R Darby, *A Surgical Temptation: The Demonization of the Foreskin and the Rise of Circumcision in Britain* (Chicago University Press 2005) 143. The best-known advocate of 'female circumcision' in the UK was the prominent doctor Isaac Baker Brown. IB Brown, *On the Curability of Certain Forms of Insanity, Epilepsy, Catalepsy and Hysteria in Females* (Robert Hardwicke 1866).

72 However, note that FGC was available as a 'medical' procedure on some health insurance plans—chiefly as a treatment for such conditions as 'hysteria'—in the US until the 1970s. SB Rodriguez, *Female Circumcision and Clitoridectomy in the United States* (University of Rochester Press 2014).

73 Darby (n 72) 143.

74 R Darby, 'Circumcision as a Prevention of Masturbation: A Review of the Historiography' (2003) 36 Journal of Social History 737.

75 CJ Cold and JR Taylor, 'The Prepuce' (1999) 83 BJU International 34.

76 Thomson (n 71).

77 S Garlick, 'The Biopolitics of Masturbation: Masculinity, Complexity, and Security' (2014) 20(2) Body & Society 44.

78 Thomson (n 71).

79 M Foucault, *The History of Sexuality* (Penguin 1990) 146.

80 Miller (n 71) 527.

would create an association in the mind of the child between touching the penis and pain.[81]

This early adoption of MGC as an individual and population level health intervention has circulated in different guises since this period. Whilst claims that now appear outlandish (that MGC will cure asthma, gout, alcoholism, malnutrition, eczema, and so forth)[82] have diminished, certain associations have persisted. Early pro-circumcision, anti-masturbation narratives were often linked not just with claims about hygiene, but also claims regarding sexually transmitted diseases. As a result, circumcision became an intended prophylaxis against (incurable) syphilis and was later mobilised against gonorrhoea.[83]

In contemporary terms, MGC continues to be promoted by some medical figures, primarily situated in the United States, on the basis that it may reduce the risk of urinary tract infections (UTIs), some sexually transmitted infections, and penile cancer, among other diseases. With respect to UTIs, boys with normally developing anatomy have an approximately 1% risk of infection in the first few years of life regardless of circumcision status, and these can be cured with antibiotics as they are for girls. As Benatar and Benatar explain, 'UTI does not occur in 99.85% of circumcised infant males and in 98.5% of un-circumcised infant boys'.[84] Accordingly, it would take more than 100 circumcisions to prevent a single UTI.[85] As for penile cancer, this is rare in developed countries, such that it would take between 909 and 322,000 circumcisions to prevent a single case.[86] This leaves primarily the claimed risk-reduction concerning sexually transmitted infections, which are preventable without surgery, often curable with antibiotics, and, if not curable, at least manageable with medications.

Notwithstanding these caveats, circumcision has recently been proposed as a public health response to HIV/AIDS, focused in the context of Sub-Saharan Africa. Here, evidence from three Randomized Control Trials suggests a partial protective effect of adult, voluntary circumcision against female-to-male transmission of HIV in areas with high base rates of such transmission and low baseline circumcision prevalence.[87] The scientific validity and ethics of these trials have been hotly debated.[88] More importantly, however, the relevance of these findings to circumcision of infants or young children, especially in more developed countries with different epidemiological environments and patterns of HIV transmission, is unknown. The balance of

81 See, for example, AW Johnson, 'On an Injurious Habit Occasionally Met with in Infancy and Early Childhood' (1860) 7 Lancet 344.

82 Miller (n 71) 527.

83 M Fox and M Thomson, 'HIV/AIDS and Male Circumcision: Discourses of Race and Masculinity' in M Fineman and M Thomson (eds), *Masculinity, Feminism and Law* (Ashgate 2013) 97–113.

84 M Benatar and D Benatar, 'Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision' (2003) 3 American Journal of Bioethics 35, 40.

85 AAP, 'Male Circumcision' (2012) 130 Pediatrics e756.

86 ibid.

87 See Fox and Thomson (n 84) 798; M Fox and M Thomson, 'The New Politics of Male Circumcision: HIV/AIDS, Health Law and Social Justice' (2012) 32(2) Legal Studies 255.

88 See discussion in M Frisch and BD Earp, 'Circumcision of Male Infants and Children as a Public Health Measure in Developed Countries' (2016) 19 Global Public Health 1.

opinion among global health authorities is that there is little or no such relevance.[89] Nevertheless, as has been evident throughout the history of medicalised MGC, the purported benefits have become entrenched in public, including legal, discourse.

In this context, it is worth considering the putative benefits of circumcision in relation to other modes of health promotion. To begin, it is likely that removing tissue from most locations on a child's body would reduce the future risk of medical problems affecting that tissue or introduced to other parts of the body through it. Yet as Eike-Henner Kluge argues, if this logic were accepted more generally, 'all sorts of medical conditions would be implicated' and we would find ourselves 'operating nonstop on just about every part of the human body'.[90] So, routinely removing parts of the paediatric vulva, such as the labia minora, for instance, might come to be seen as a sensible means of reducing the future risk of vulvar cancer in female individuals (according to this framework). Yet it is currently impermissible to collect the data that would be needed to support such an intervention, since neonatal or early-childhood labiaplasty is illegal in Western countries.

The question, therefore, is not whether certain health benefits may in fact follow from simply removing the tissue or body part in question, but whether those benefits are sufficient to outweigh the costs and harms of the intervention (physical, monetary, and moral) in light of alternative modes of prevention that are less risky and less invasive, as well as more effective and less ethically contentious.[91] Given this analysis, the plausibility of the distinction based on 'health benefits' can be challenged from at least two directions. The first direction involves critiquing the studies that purport to show health benefits in the male case, and/or arguing that even if these benefits do exist, they are not sufficient to outweigh the costs and harms. This is a common strategy, and it reflects the dominant view of health professionals who have considered the matter outside the United States.[92]

The second direction for challenging the distinction is less common, and relies on the fact that the apparent difference between male and female forms of genital cutting with respect to health benefits may in large part be a *consequence* of the current legal situation, rather than a valid prior justification for it. Specifically, as alluded to above, due to the fact that all forms of FGC are prohibited by law in Western countries, it is not possible to conduct an adequately controlled scientific study to determine whether a minor, sterilised form of the procedure in childhood would in fact confer some kind or degree of health benefit. And yet the vulva, compared to the penis, provides if anything an even more hospitable environment to bacteria, yeasts, viruses, and so forth, such that removing moist folds of tissue (with a sterile surgical instrument) might very well reduce the risk of associated problems.

89 JA Bossio and others, 'A Review of the Current State of the Male Circumcision Literature' (2014) 11(12) Journal of Sexual Medicine 2847; see also Appendix 2, RACP, 'Circumcision of Infant Males' *(Royal Australasian College of Physicians*, 2010) <https://www.racp.edu.au/docs/default-source/advocacy-library/circumcision-of-infant-males.pdf> accessed 20 March 2017.

90 EH Kluge, 'Dr. Kluge Responds' (1994) 150(10) Canadian Medical Association Journal 1542.

91 Frisch and Earp (n 89).

92 ibid. See also M Frisch and others, 'Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision' (2013) 131(4) Pediatrics 796; RACP (n 90).

We do not advocate that this be done. We are simply pointing out that the claimed lack of health benefits for childhood FGC is based on a near-exclusive focus on its most invasive and least hygienic forms, and on a paucity of research into any possible health advantages that might be associated with its more minor and most hygienic forms. As the medical historian Robert Darby has pointed out, official bodies working against FGC including the WHO 'have condemned medicalization of the procedure and funded massive research programs into the harm of the surgery'. He sees it as ironic that:

> [the] WHO also frames male circumcision as a public health issue - but from the opposite starting point. Instead of a research program to study the possible harms of circumcision, it funds research into [its] benefits . . . In neither case, however, is the research open-ended: in relation to women the search is for damage, in relation to men it is for benefits; and since the initial assumptions influence the outcomes, these results are duly found.[93]

Even so, as we have suggested, the health benefits that have been attributed to male circumcision, particularly as it is performed in childhood, and particularly in the Western context that is most relevant to the legal reasoning employed by Munby LJ and others, are generally agreed to be modest at best. This conclusion is further strengthened when the claimed benefits are weighed against the countervailing risks and other drawbacks of circumcision and the fact that they are generally achievable by other, less invasive, more autonomy-respecting means (ie safer sex practices and basic hygiene).[94]

IV. CULTURE VERSUS RELIGION

What about the plausibility of the distinction based on religion? According to Munby LJ, 'FGM has no basis in any religion [whereas] male circumcision is often performed for religious reasons'.[95] This is a common view. As Margherita Brusa and Y. Michael Barilan note, this distinction between cultural and religious motivations is widespread in the popular imagination:

> It is implied that 'religious' [ie, male] circumcision deserves protection and even assistance on the grounds of respect for people's faiths and own perception of divine commandments, whereas 'cultural' [ie, female] circumcision is more like a habit that deserves less tolerance.[96]

This view is problematic for at least two reasons, both of which challenge Munby LJ's attempted resolution of the paradox concerning harm. First, there is a good argument to be made that, within Islam at least, the religious justification for FGC is no weaker, on textual grounds, than it is for MGC, as we shall detail.[97] And second, even if a

93 Darby (n 40) 157.
94 See Frisch and others (n 93).
95 *Re B and G* (n 3) 55.
96 M Brusa and YM Barilan, 'Cultural Circumcision in EU Public Hospitals' (2009) 23(8) Bioethics 470, 471.
97 M Johnson, 'Male Genital Mutilation: Beyond the Tolerable?' (2010) 10(2) Ethnicities 181.

practice were *only* cultural in nature, this would not entail that it was any less deserving of moral or legal respect. Indeed, whilst human rights were not raised in the court, international human rights provisions protect both religion and culture.[98] Moreover, case law both domestically and in the European Court of Human Rights has stressed equal protection and provided an expansive definition of culture or belief. In terms of European jurisprudence on belief, what is required for legal protection is that a belief attains 'a certain level of cogency, seriousness, cohesion and importance'.[99] In fact, in the month that followed *B and G*, the UK Employment Appeals Tribunal held that what is required is that a belief is 'fundamental or integral to a person's individuality and daily life'.[100] As such, the cultural or religious origins of a belief or sense of obligation do not determine the level of its legal protection.

To return to our first point, although FGC is often associated with Islamic culture, no mention of FGC is found in the Qur'an: this is often taken as evidence that the practice is not religious.[101] However, just as in Judaism and Christianity where 'binding religious obligations can arise from oral teachings and extrabiblical sources (eg, rabbinic teachings, papal encyclicals), Islam looks to other sources to interpret and supplement Koranic teachings',[102] such as the Hadith, the prophetic sayings of the prophet Mohammed. Accordingly, as Alex Myers notes:

> [I]n Sunni Islam, the dominant branch of Islam, two of the four schools of jurisprudence, Shafi'i and Hanbali, consider Type 1 female circumcision to be obligatory, while the other two schools, Maliki and Hanafi, recommend the practice. *The scriptural support for this is no weaker than that for male circumcision*—both are derived from the secondary source of Islamic law . . . the Hadith . . . and neither is to be found in the Qur'an.[103]

To assert that because it is not in the Qur'an it is not part of the religion is, as Dena Davis notes, 'as nonsensical as telling a Roman Catholic that because there is no prohibition against abortion in the Bible she cannot claim to be opposed to abortion on religious grounds'.[104] Arora and Jacobs similarly argue that outsiders to a religious tradition 'cannot infer the practices of a religious system from a literal reading of its canonical texts'. So, for example, 'It is no more possible to define Islam within the four corners of the Quran than to define Christianity (which includes traditions ranging from Presbyterian to Pentecostal to Greek Orthodoxy) solely from a reading of the

98 Whilst our analysis focuses on the distinction drawn between religion and culture, we are aware of arguments that courts have implicitly drawn further distinctions between different religions, in the sense of being more willing to challenge the legitimacy of the practices of some religions (notably Islam) more than others. See L Peroni, 'Religion and Culture in the Discourse of the European Court of Human Rights' (2014) 10(2) International Journal of Law in Context 195.

99 *Campbell and Cosans v UK* App no 7511/76, 22 March 1983.

100 *General Municipal and Boilermakers Union v Henderson* [2015] UKEAT 0073_14_1303, 62.

101 Davis (n 11) 532.

102 ibid.

103 A Myers, 'Neonatal Male Circumcision, If Not Already Commonplace, would be Plainly Unacceptable by Modern Ethical Standards' (2015) 15 (2) American Journal of Bioethics 54, 55 (emphasis added).

104 Davis (n 11) 532; KS Arora and AJ Jacobs, 'Female Genital Alteration: A Compromise Solution' (2016) 42(3) Journal of Medical Ethics 148, 151.

Bible'. Rather, 'the content of religious belief and practice are guided by interpretive texts and traditions'.[105]

With respect to genital cutting practices in particular, Brusa and Barilan explain that the claimed distinction between the religious and the cultural is also historically unfounded: 'Research on the historical development of [both male and female] circumcision demonstrates very intricate links bridging religion, institutions of social power and metamorphoses in meaning and practice over time and space'. In practice as well as conceptually, then, religion and culture are not abstract, independent entities that maintain stable logical relationships with each other.[106] Supportive of this view is the work of Francis Raday, who argues that the schematic separation of culture and religion 'does not accurately represent the way in which traditionalist cultures and religion actually interact . . . [as] there appears to be a correlation between certain cultural practices and the religious environments in which they thrive'.[107] But even if religion and culture were conceptually distinct, independent entities, there would be little reason to think that a cultural practice was less worthy of legal protection than a religious one. Importantly, in a context in which we are looking at how law treats male and female individuals differently, Brusa and Barilan suggest that the distinction between religion and culture reflects biases in both class and gender. As they point out, the religiously educated (disproportionately men) locate and justify their practices in theological terms, while those less versed in official theological teachings (disproportionately women), may explain their equally valued goals in 'cultural' terms that are perceived to be less authoritative. The authors state:

> [W]e do not see a reason for trying to rank the value of circumcision to Senegalese Christians relative to those of tribal Africans or observant Muslims. In the same vein, we do not suppose that the few religious sentiments of a secular person, even an atheist, deserve less consideration than the religious values of the most piously orthodox, or of one who follows the ways of an ethnic group without adherence to any creed whatsoever.[108]

Davis makes a related point, asking her readers to compare two scenarios which she populates with a series of 'matched' couples. In the first scenario, she refers to a deeply religious Muslim couple who believe that they are religiously obligated to cut their daughter's genitals. In respect of this, they are willing to accept a medicalised ritual 'nick' to meet this obligation. Davis matches this couple with a similarly religious Jewish couple who wish to have their son cut in a religious ceremony. In these circumstances, and sitting comfortably with Munby LJ's initial reasoning, Davis argues that it is difficult to reconcile why the first couple's actions would be illegal and the second's not. Further, 'If we imagine that the Muslim girl's experience will be a tiny nick with proper pain control in a hospital context, while the Jewish boy's experience will be a

105 Arora and Jacobs, ibid 151.

106 Brusa and Barilan (n 97).

107 F Raday, 'Culture, Religion, and Gender' (2003) 1(4) International Journal of Constitutional Law 663, 675–76.

108 Brusa and Barilan (n 97) 472.

somewhat larger operation by a nonmedical practitioner without adequate pain control, the justification becomes even more difficult'.[109]

In Davis's second scenario, a Jewish couple is planning a circumcision performed by a physician in a surgical setting. Whilst the couple state that they will not educate him religiously and do not know if he will ever join a synagogue, they believe that to leave him uncut is 'unthinkable'. To leave him uncut 'will make him look odd to his Jewish friends, may have a negative effect on his ability to marry a Jewish girl, and will bring down the wrath of their parents'.[110] Davis matches this couple with a sub-Saharan African couple vague about their religious beliefs but who feel that to leave their daughter uncut will be in some sense un-Islamic. Further: 'they have good reason to fear that their daughter, if left uncircumcised, will be laughed at, perhaps ostracized, and have a very difficult time marrying within their culture'. As she concludes, and as we are inclined to agree, it is difficult to locate a sound justification for respecting the first couple's 'mix of beliefs and custom, but not the second'.[111]

V. LEGAL IRRITANTS AND CHANGE

In the preceding sections, we have challenged the validity, coherence, and consistency of the distinctions that are often used to justify differential treatment of MGC and FGC. In doing this we identify certain 'irritants', questioning the sustainability of the current legal position.[112] Until recently, the conventional distinctions have relied on forms of knowledge that have been relatively secure from such irritation by activists and academics. Religion and medicine have both functioned as 'black boxes', absorbing inconsistencies, contradictions, and challenge.[113] There is now significant dissent in terms of health-based claims, and changes in medicine more generally—including evidence-based practice and clinical guidelines—have further dented this black box. Religion, by contrast, remains more secure although the identification of 'harm' threatens this status: in other contexts, Western law does not allow parents to harm their children *simply* because it is called for or sanctioned by some religion.[114] The religious black box is also threatened by a growing body of scholarship that challenges the distinction between religion and culture, as well as by work that seeks to foreground the lack of homogeneity in religious practice. In terms of the latter, one might draw attention to the adoption by some Jewish communities of the *brit shalom* welcoming ceremony (which is gender neutral and which does not involve any genital cutting) as an alternative to the traditional *brit milah*.[115] Legal change may thus continue, as these

109 Davis (n 11) 565.

110 ibid.

111 ibid 566.

112 See G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61 Modern Law Review 11.

113 Harrington (n 51) 305.

114 Indeed, harm has been posited as delimiting the special treatment that religion is afforded by law. See R Plant, 'Religion, Identity and Freedom of Expression' (2011) 17(1) Res Publica 7.

115 See N Bivas, 'Choosing Brit Shalom Over Brit Milah' (*Beyond the Bris*, 24 April 2012) <www.beyondthebris.com/2012/04/choosing-brit-shalom-over-brit-milah.html> accessed 4 January 2017; MD Reiss 'Brit Shalom Information' (*Britshalom.info*, 2016) <http://www.britshalom.info/> accessed 4 January 2017.

black boxes are opened and additional light is cast on the complexity of what is 'usually taken to be simple and inevitable'.[116]

Viewed through the lens of children's rights, the standing of *B and G* is ambiguous. Whilst Munby LJ identifies MGC as causing significant harm, this is nevertheless done in the specific context of section 31—and the harm is then characterised as arising from parental behaviour that in 2015 the law 'is still prepared to tolerate'. This limited reading played out in the case of *Re L and B (children) (Specific Issues: Temporary Leave to Remove from the Jurisdiction; Circumcision)*[117] that was heard just over a year after *B and G*. The case involved a dispute between separated parents regarding the care and upbringing of two boys aged 6 and 4. This case concerned, *inter alia*, an application by the father to have the two boys circumcised in accordance with the Muslim faith in which the children were being raised. The mother objected to the cutting of the boys and argued that this should be left for the boys themselves to decide when they were competent to make the decisions. In assessing the legal position regarding circumcision, Roberts J provides a detailed account of *Re J* [1999],[118] *Re S* [2004],[119] and the judgement that has served as the basis of our analysis. In addressing *B and G,* Roberts J observed that according to Munby LJ, '"reasonable" parenting is treated as permitting male circumcision'.[120] In other words, in the first case since *B and G* we see that Munby LJ's careful consideration of MGC has been reduced to its conservative conclusion.

There are three points to note, however. First, Roberts J declined to make the order allowing the father to circumcise the two boys. She claimed that she was 'simply deferring that decision to the point where each of the boys themselves will make their individual choices once they have maturity and insight to appreciate the consequences and longer term effects of the decisions which they reach'.[121] This claim is consistent with the earlier post-separation cases of *Re J* and *Re S* and moves us towards a consensus in such cases and in the academic literature. This consensus recognises that children have a right to bodily integrity and to participate in important decision-making that affects them.[122]

Secondly, whilst we see a rather minimal (if legally correct) response to Munby LJ's wider reasoning, the potential impact of his statement regarding the comparability of harms is nevertheless still great: it is an authoritative statement by one of the UK's leading judges. The legal and cultural life of judicial statements can be unpredictable and designating MGC as causing 'significant harm' may have effects beyond the confines of the case and the specific consideration of section 31. Yet whether this happens will rely, to a large extent, on the response of activists and academics. As we have

116 Harrington (n 51) 319.

117 [2016] EWHC 849 (Fam).

118 *Re J (child's religious upbringing and circumcision)* [1999] 2 FLR 678.

119 *Re S (Specific Issue Order: Religion: Circumcision)* [2004] EWHC 1282 (Fam).

120 [2016] EWHC 849 (Fam) (n 118) [52].

121 ibid 143.

122 The right of children to participate in decision-making that affects them has long been recognised in health care law and practice, see: M Donnelly and U Kilkelly, 'Child-friendly Health Care: Delivering on the Right to be Heard' (2011) 19(1) Medical Law Review 27–54. For a discussion of the conflict between parental rights and the child's right to bodily integrity in the context of non-therapeutic procedures see, B Lyon, 'Obliging Children' (2011) 19(1) Medical Law Review 55–85 and '"The Good that is Interred in Their Bones": Are There Property Rights in the Child?' (2011) 19(3) Medical Law Review 372.

emphasised, these groups may provide critiques that function as irritations, 'provoking the legal system to reconsider and abandon' the inadequate solutions it proposes to the paradoxes it creates.[123] Here Munby LJ's less than wholehearted turn to the religion/culture and therapeutic/non-therapeutic distinctions provides a renewed focus for these activists and academics.

Finally, there is one more paradox that remains to be addressed. Following the line of cases *Re J, Re S,* and *Re L and B* there is authority for stating that in post-separation families where there is disagreement about the cutting of a male child's genitals, the decision is likely to be deferred until the boy is old enough to make this decision for himself. This deferral recognises the harm, pain and risks involved, as well as the child's right to make decisions regarding his own body and permanent marks of religious affiliation.[124] The paradox here is that the law only recognises the child as having these rights when the parents disagree. Where the parents agree, these rights are not protected.

VI. CONCLUSONS

Many scholars now view the non-consensual, medically unnecessary surgical alteration of male, female, and indeed intersex children's genitals as morally impermissible, and a growing minority endorses efforts to eliminate these practices. In this article, we have challenged the differential treatment of genital cutting on the basis of gender, highlighting recent changes in understandings of harm that echo the way in which other harms experienced by children have become knowable at different times.[125] Further, we have interrogated two distinctions that are often uncritically asserted to justify the current legal position, and we have found that they do not withstand scrutiny. Our analysis has relevance to other parental actions where claims to therapeutic benefit or religious observance are used to justify choices that may violate children's rights. Specifically, the analysis presented here should provoke greater scrutiny of the cultural and historical particularities of such distinctions and demarcations. Whilst our analysis is most relevant to body-shaping surgeries where the designation therapeutic/non-therapeutic is contested, it is also relevant to other parental decision-making in non-medical contexts where fundamental rights, such as the right to education, may be violated.

The ultimate afterlife of *B and G* cannot be anticipated with certainty. It might be that the potential significance of Munby LJ's approach to harm is lost as subsequent cases sideline his nuanced analysis, as occurred with *L and B.*[126] Alternatively, it might be that the judgement inspires movement towards a point at which male and female forms of non-therapeutic genital alteration are no longer discussed in separate discourses, whether from a legal or moral perspective. This alternative future is possible when we consider law according to a systems theoretical approach that foregrounds

123 Harrington (n 51) 313.

124 These rights were recognised in a controversial case in Cologne in 2012: Landgericht Koln (Cologne District Court), Judgment on May 7 [2012] No 151 Ns 169/11. For discussions of this case and the response of the German government, see GB Levey, 'Thinking about Infant Male Circumcision after the Cologne Court Decision' (2013) 3 Global Discourse 326; Munzer (n 9); Earp and Darby (n 65).

125 Smart (n 5) 391.

126 See (n 118).

its contingent management of local paradoxes and the generative potential of challenging its inconsistencies:

> [P]aradoxes are far from being simply technical problems, quietly impelling legal evolution. Rather they constitute points of entry for political struggle in law and, thus, a focus for multiple strategies to establish and re-establish the terms and arrangements of social life.[127]

In this article, we have identified 'points of entry' for those who regard the law as it currently stands as falling short of protecting and equally valuing all children's right to bodily integrity.[128] Society must now consider how tolerant it is willing to be of practices which permanently shape children's bodies in the service of culture or religion, before the child can make his or her own determination.

ACKNOWLEDGEMENTS

We wish to thank Joshua Warburton for his research assistance, and Richard Amesbury, James Chegwidden, Beverley Clough, Robert Darby, Mitchell Travis, Richard Shweder, Ilias Trispiotis, and the journal's anonymous reviewers for their insightful comments on earlier drafts of this article.

Conflict of interest statement. None declared.

127 Harrington (n 51) 323–24.

128 See, M Fox and M Thomson, 'Older Minors and Circumcision: Questioning the Limits of Religious Actions' (2008) 9 Medical Law International 283; Earp (n 15); BD Earp, 'Between Moral Relativism and Moral Hypocrisy: Reframing the Debate on "FGM"' (2016) 26(2) Kennedy Institute of Ethics Journal 105; BD Earp, 'In Defense of Genital Autonomy for Children' (2016) 41(3) Journal of Medical Ethics 158; Fox and Thomson (n 10).