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Bodily Integrity, Embodiment, and the Regulation of Parental Choice

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In this article we develop a new model of bodily integrity that we designate 'embodied integrity'. We deploy it to argue that non-therapeutic interventions on children should be considered within a decision-making framework that prioritizes embodied integrity. This would counter the excessive decision-making power that law currently accords to parents, protecting the child's immediate and future interests. Focusing on legal responses to genital cutting, we suggest that current legal understandings of bodily integrity are impoverished and problematic. By contrast, adoption of an 'embodied integrity' model carves out a space for children's rights, while avoiding these negative consequences. We propose that embodied integrity should trump competing values in any best interests assessment where a non-therapeutic intervention is requested. Drawing on Drucilla Cornell and Joel Feinberg's theories we argue that protecting a child's embodied integrity is essential to guarantee his/her right to make future embodied choices and become a fully individuated person.

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INTRODUCTION

While children's rights are now well established in United Kingdom and international law, there remains uncertainty about their parameters. In particular, controversy continues to surround the right of parents to take irrevocable non-therapeutic decisions on behalf of children who lack competence to decide for themselves. In this article we explore the limits that law does, and should, impose on parental rights to make irreversible decisions about surgically modifying their children's bodies in the absence of a clear therapeutic rationale.[1] Specifically, we seek to contest 'the extraordinary power'[2] that law accords parents in this situation, and, in so doing, to examine the potential of bodily integrity discourse to constrain or limit such power, thereby generating the space for a more complete realization of children's rights. The concept of bodily integrity underpins a range of legal doctrines and this discourse has been prominent in recent legal debates at national and supranational level, and in the framing of professional guidance. Indeed, Margaret Brazier has suggested that bodily integrity may constitute the 'core legal value' underpinning contemporary health law.[3] While recognizing the power of this discourse, we argue that it is problematic to position bodily integrity as conventionally understood as a core legal value given its indeterminacy and cultural contingency, as well as the gendered and racialized ways it operates in practice. We suggest that many non-therapeutic 'embodied practices'[4] including removal of reproductive organs, non-therapeutic normalizing surgery on intersex bodies, blepharoplasty, limb lengthening, modifying the facial features of children born with Downs Syndrome, and so forth, prompt concern about the surgical shaping of children. However, we agree with Francesca Ammaturo that 'the ramifications of the ''right to bodily integrity'' in connection to FGC, circumcision and intersex ''normalising surgeries'' are numerous and deserve particular attention.'[5] Consequently, in this article we

1 Clearly the designation therapeutic or non-therapeutic is contested. For example, whilst some cases of male genital cutting (considered below) are performed for therapeutic reasons (notably phimosis), in other instances the claims of therapeutic benefit have been seen to be heavily culturally dependent: see, for example, M. Frisch, et al., 'Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on Male Circumcision' (2013) 131 *Pediatrics* 796.

2 A. Ouellette, 'Shaping Parental Authority over Children's Bodies' (2010) 85 *Indiana Law J.* 955, at 956.

3 M. Brazier, 'Introduction: Being Human: Of Liberty and Privilege' in *The Legal, Medical and Cultural Regulation of the Body: Transformation and Transgression*, eds. S. Smith and R. Deazley (2009) 1, at 7.

4 The term is Carolyn Pedwell's. She uses it to interrogate 'those habits, rituals or performances that are oriented specifically towards intervening in and/or altering 'the body': C. Pedwell, *Feminism, Culture and Embodied Practice: The rhetorics of comparison* (2010) 132, n. 1.

5 F. Ammaturo, 'Intersexuality and the ''Right to Bodily Integrity'': Critical Reflections on Female Genital Cutting, Circumcision and Intersex ''Normalising Surgeries'' in Europe' (2016) 25 *Social & Legal Studies* 591, at 598.

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focus on legal responses to the genital cutting of children, and on the revealing language in which such interventions are debated.

These procedures are typically performed for non-medical reasons, are effectively irreversible, are likely to cause some form of bodily harm and, in extreme cases, to result in death. In most cases they will be performed on children who clearly lack the capacity to consent. Importantly, for our purposes they also demonstrate how parental decision making can be shaped by considerations of gender, religion, and culture to which law responds in variable and inconsistent ways.[6] We contrast recent high profile campaigns in the United Kingdom demanding that the criminal prohibition of female genital cutting (FGC) be legally enforced with the continuing legal and social tolerance of the genital cutting of boys (MGC). Analysing how bodily integrity arguments have been differently mobilized in debates about cutting children, and the contrasting legal responses to these claims, offers particularly valuable insights into both the potential and limitations of traditional notions of bodily integrity, given 'the complex web of cultural, religious and social factors intervening in the perpetuation of [these] practices.'[7]

We argue that traditional understandings of the concept – which we term *conventional bodily integrity* – are grounded in a mind/body dichotomy that prioritizes the physical body, conceptualized as bounded territory or property to be policed and defended against the encroachment of others. When accepted by courts and legislators, such constructions tend to result in punitive responses. Instead we posit a reformulated conception of *embodied integrity*. Our approach enriches conventional accounts by integrating physical and psychological dimensions of integrity in recognition of the child's emerging legal subjectivity. We view the embodied integrity conception that we flesh out in this article as better equipped than conventional understandings to guide health decision making. Our model serves to problematize excessive parental choice; yet, grounded in a nuanced and relational approach to the child's emerging legal subjecthood, it eschews an overtly punitive approach which we see as counterproductive. Furthermore, our concept of embodied integrity resonates with recent shifts in United Kingdom health law which recognize legal subjects as embodied, understand clinical interventions as biographical rather than simply bodily events, and stress the need to clearly articulate the rationale for judgements about best interests.

We begin by outlining how bodily integrity discourse has been mobilized in recent debates about genital cutting, and the legal implications when such arguments are accepted. We then turn to judicial pronouncements on the

6 Our argument could be extended to other forms of non-surgical interventions, including, for instance, vaccination or tooth extraction to fit orthodontic braces. However, for the reasons we identify, focusing on surgical modification of the genitalia is particularly illuminating. We thank an anonymous referee for clarifying our thinking on this point.

7 Ammaturo, op. cit. n. 5, p. 593.

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concept, analysing rulings applicable to the bodies of children who are too young to consent.[8] While acknowledging its value, we highlight the problematic aspects of conventional integrity approaches. We next trace an emerging jurisprudence that hints at something akin to our reformulated vision of embodied integrity, but argue that these tentative dicta require further development. To address this we draw on Drucilla Cornell's analysis of bodily integrity and Joel Feinberg's articulation of a child's right to an open future, arguing that together they provide a compelling justification for making embodied integrity central to determining the legitimacy of non-therapeutic bodily interventions on children who are too young to consent. While we focus on genital cutting as a particularly revealing case study, our revisioning of bodily integrity doctrine has wider implications for health decision-making and judgements about children's best interests, and indeed – as the value is increasingly invoked – for legal understandings of bodily integrity in general.

THE GENDERED POLITICS OF GENITAL CUTTING

Genital cutting of girls has recently attracted widespread media attention and condemnation by prominent political figures in the United Kingdom. The cutting of male children, by contrast, remains strikingly absent from debates over genital cutting. This exemplifies how the two practices are dramatically separated in the public imagination and in theoretical accounts.[9] Matthew Johnson, for example, demonstrates how Martha Nussbaum applies bodily integrity analysis asymmetrically to male and female cutting, attributing this to 'culturally particular beliefs concerning sexuality, physiology and gender relations' and a paradigmatic concern for religious toleration.[10] We agree that bodily integrity is valorized or disregarded according to a complex matrix encompassing the subject's gender, race, religion, and culture, and, crucially, how far that culture is perceived as mainstream – a perspective that Nikki Sullivan attributes to 'white optics'.[11] In consequence, Anglo-American law regulates male and female cutting within different legal

8 Clearly different issues arise when a child is old enough to participate in decision making and at pp. xxx below we argue for these sorts of irreversible interventions to be deferred until the child is competent to decide, thus respecting her emerging autonomy. Furthermore, for reasons of space, our focus is on jurisprudential arguments rather than the professional codes which guide clinicians, although clearly such guidance has significant practical bearing on decisions about children's bodies.

9 D. Davies, 'Male and female genital alteration: A collision course with the law' (2001) 11 *Health Matrix: J. of Law-Medicine* 487.

10 M. Johnson, 'Male genital mutilation: Beyond the tolerable?' (2010) 10 *Ethnicities* 181, at 202.

11 N. Sullivan, '"The price we pay for our common good?": Genital Modification and the Somatechnologies of Cultural (In)Difference' (2007) 17 *Social Semiotics* 395.

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paradigms.[12] Thus, while tort claims for damages against practitioners have succeeded in jurisdictions where MGC is legally tolerated,[13] few cases have squarely confronted the legality of the practice, and certainly not within the paradigm of criminal law that governs the cutting of females. Even where death has resulted, until recently no criminal prosecutions had been instituted, notwithstanding recorded negligence or malpractice.[14] English jurisprudence scrutinizing circumcision decision making is limited to three Court of Appeal and two Family Court rulings,[15] while in the United States a single State Supreme Court ruling exists.[16] In three of the five cases the procedure was questioned only because of parental disagreement; the others concerned a dispute between the parents and the local authority in the exercise of its parental responsibility. Each court limited its holding narrowly to the facts, implicitly assuming the legality of the practice where both parents agree. Indeed, ironically, the effect of legal challenges has been to entrench MGC as a legitimate choice for parents, justifiable in the best interests of the child. Such rulings demonstrate the wide discretion that parents or those accorded parental responsibility under the Children Act 1989 have. Of course, as Brazier and Cave point out, law does limit parental powers to consent. As they note, if parents 'propose to authorise some irreversible or drastic measure [they cite sterilisation as an example], their authorisation alone will not make that measure lawful. It must be shown to be in the child's interests.'[17]

12 M. Fox and M. Thomson, 'Foreskin is a feminist issue' (2009) 24 *Australian Feminist Studies* 195.

13 These include, in the United States, *Doe* v. *Raezer* 664 A.2d 102 (Pa. Super. Ct 1995); *Felice* v. *Valeylab, Inc.*, 520 So. 2d 920 (La. Ct. App. 1987). In the United Kingdom, see *Iqbal* v. *Irfan* [1994] CLY 164; *B (A Child)* v. *Southern Hospital NHS Trust* [2003] 3 QR 9. Of course, many cases are settled out of court.

14 In 2012, a nurse in Manchester was found guilty of manslaughter by gross negligence after a four-week-old boy died following a botched circumcision performed without anaesthetic and for payment: see <http://www.bbc.co.uk/news/uk-england-manchester-20733674>. Perhaps significantly, given the importance of white optics, both defendant and the child's parents were originally from Nigeria where the practice is common.

15 *Re J (Specific Issue Orders: Child's Religious Upbringing and Circumcision)* [2000] 1 FLR 571 (CA) 576; *Re S (Change of Names: Cultural Factors)* [2001] 3 FCR 648 (Fam); *Re S (Specific Issue Order: Religion: Circumcision* [2004] EWHC 1282 (Fam), [2004] EWCA Civ 1257 (CA). We have analysed this case law in detail elsewhere: M. Fox and M. Thomson, 'Short Changed? The Law and Ethics of Male Circumcision (2005) 13 *International J. of Children's Rights* 161. More recently. the Family Court considered the issue in cases *In the Matter of A (A Child)* (unreported, 2015) and *Re L and B (Children) (Specific Issues: Temporary Leave to Remove from the Jurisdiction; Circumcision)* [2016] EWHC 849 (Fam).

16 *Boldt* v. *Boldt* 334 Ore 1. 76 P.3d 388 (2008); M. Fox, and M. Thomson, 'Older Minors and Circumcision: Questioning the Limits of Religious Actions' (2008) 9 *Medical Law International* 283.

17 M. Brazier and E. Cave, *Medicine, Patients and the Law* (2016, 6th edn.) 458.

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However, much turns on what counts as 'drastic' and – as we shall explore below – how the child's interests are assessed. In our view, such judgments are culturally determined. Thus, in the 2015 Family Court case *In the Matter of A (a Child)*, where Gareth Jones J denied an application by Muslim parents for a declaration that their six-year-old child who was in the care of the local authority be circumcised, he noted that '[o]rdinarily of course a parent exercising his or her parental responsibility would be authorised to provide consent for a child's circumcision on either a health or a religious basis.'[18] Such dicta highlight the wide-ranging powers accorded to parents to bring children up in their choice of religion and to make irreversible decisions on their behalf if these accord with societal norms. They demonstrate Katherine O'Donovan's argument that, although the legislation sought to focus on parents' responsibilities towards the child rather than their rights over the child, by structuring family law in terms of parental responsibility, it has failed to accord legal subjectivity to children.[19] Moreover, as Bridgeman notes, case law has been particularly hesitant in recognizing the agency of younger children,[20] thereby strengthening parental powers over children deemed too young to consent. As Archard and Macleod have suggested, the child is conceived as 'if not precisely a thing to be owned … in some sense, an extension of the parent.'[21]

Legal tolerance of infringements of the bodily integrity of boys through routine cutting of their bodies for religious or social reasons contrasts with the premium placed on preserving the bodily integrity of girls (responding to a social process whereby in/vulnerability is gendered and racialized).[22] Consequently, cutting female genitalia is perceived as analogous to other criminal violations, such as rape. As Ruth Miller observes, such practices are constituted as acts of bodily harm. They are 'conceived of as a violation of bodily integrity [which] … undermine an individual's (biopolitical) dignity.'[23] This deployment of the discourse of harm, violation, and mutilation has important legal implications. On a global level, statements from bodies such as the UN, WHO, and UNICEF clearly position FGC as a breach of a woman's bodily integrity, and thus an international human rights violation. The Report of the UN Special Rapporteur on Violence Against Women in 2002, for example, identified the procedure as one of several familial cultural practices which violate women's human right to bodily

18 *In the Matter of A (a Child)*, op. cit., n. 15, para. 57.
19 K. O'Donovan, *Family Law Matters* (1993) ch. 6.
20 J. Bridgeman, *Parental Responsibility, Young Children and Healthcare Law* (2012) 7.
21 D. Archard and C.M. Macleod, *The Moral and Political Status of Children* (2002) 1.
22 M. Thomson, 'A Tale of Two Bodies: The Male Body and Feminist Legal Theory' in *Transcending the Boundaries of Law*, ed. M. Fineman (2011) 143.
23 R.A. Miller, *The Limits of Bodily Integrity: Abortion, Adultery and Rape Legislation in Comparative Perspective* (2007) 113.

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integrity.[24] The centrality of bodily or physical integrity to prohibitions on FGC was restated in 2008,[25] and reiterated by the WHO in February 2012.[26] Furthermore, not only is the parental choice to surgically alter the genitalia of a female child radically circumscribed; law in the United Kingdom and some Australian states also precludes adult women electing to have their genitals cut.[27] Consequently, the invocation of bodily integrity in arguments opposing FGC allows little space for countervailing narratives, and legitimates an unusually sweeping and punitive legal response. For instance, in November 2012, a 'Female Genital Mutilation Action Plan' was launched in the United Kingdom to address the lack of prosecutions since FGC was criminalized in 1985. It contained commitments to gather more robust data on allegations of FGC, to identify issues that might hinder investigations and prosecutions, to explore the prosecution of the offence in other jurisdictions, and to examine whether it could be more readily prosecuted under different legislation, such as the Domestic Violence, Crime and Victims Acts (DVCVA) 2004 (as amended). The plan also sought to ensure closer liaison between police and prosecutors throughout investigations.[28] The wide-ranging discussion prompted by this policy has seen FGC characterized as an 'unpunished crime', and intensified scrutiny of parents who elect to have their female children cut – usually abroad – and of doctors who facilitate it.[29] As David Fraser correctly predicted in relation to such strategies in Australia:

> Those most likely to feel the effects of criminalisation and the exclusion which accompanies the process … are already excluded by the colour of their skin and their place in diaspora from Australia and their country of origin.[30]

24 UN, *Cultural practices in the family that are violent towards women: Report of the Special Rapporteur, Radhika Coomaraswamy* (2006) UN ESCOR, Commission on Human Rights, UN Doc. E/CN.4/2006/48, 3.

25 WHO*, Eliminating Female Genital Mutilation: An Interagency Statement OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO* (2008).

26 WHO, 'Female Genital Mutilation' (February 2012) Fact Sheet no. 241.

27 Female Genital Mutilation Act 2003; for the Australian position, see A. Kennedy, 'Beautification and Mutilation' (2009) 20 *Australian Feminist Studies* 211.

28 CPS website, latest news, 23 November 2012.

29 Campaigners have cited values such as 'physical autonomy' as justifying prosecutions which have proven controversial: J. Gillespie and H. Summers, 'Prosecutors weigh up female mutilation trials' *Sunday Times* 7 July 2013; S. Laville, 'First FGM prosecution: how the case came to court' *Guardian*, 4 February 2015. Such campaigns and evidence of the prevalence of FGM in the United Kingdom (A. Topping, 'FGM: more than 1,700 women and girls treated by NHS since April' *Guardian*, 16 October 2014) have also prompted tougher legislation, for example, the Serious Crimes Act 2015.

30 D. Fraser, '*Heart of Darkness*: The Criminalisation of Female Genital Mutilation' (1994) 6 *Current Issues in Criminal Justice* 148, at 150.

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The first high-profile United Kingdom prosecution resulted in March 2013.[31] The Crown Prosecution Service (CPS) deemed it in the public interest to prosecute Dr Dhanuson Dharmasena, under s.1 of the 2003 Act, when he reinfibulated at her request a patient who had earlier been genitally cut.[32] In February 2015 Dharmasena and Hasan Mohammed, who was charged with encouraging and aiding and abetting the offence, were unanimously acquitted. Dr Dharmasena invoked the defence of necessity, since until the woman entered emergency labour he was unaware that she had been cut, had received no training in dealing with FGC, and believed that restitching her to prevent bleeding was in her best interests. Sweeney J observed that the doctor 'had been badly let down by a number of systematic failures which were no fault of his own at the Whittington hospital'.[33] Yet notwithstanding this prominent failure, measures to tackle FGC continued apace.[34] The *Guardian* newspaper launched a high-profile anti-FGC campaign in February 2014,[35] which attracted support from the UN,[36] and a pledge from Prime Minister David Cameron for new legislation to end the practice.[37] This led to the enactment of ss. 70–75 of the Serious Crime Act 2015 which amended the 2003 legislation. Section 72 creates a new offence of failing to protect girl from risk of genital mutilation, while s. 73 empowers courts to issue Female Genital Mutilation Protection Orders 'for the purposes of (a) protecting a girl against the commission of a genital mutilation offence, or (b) protecting a girl against whom any such offence has been committed.' A number of such orders have been issued in cases where the court was satisfied that there was a risk of a child being taken abroad for the procedure.[38] Section 74 of the 2015 legislation controversially imposes

31 First prosecutions for female genital mutilation' CPS website, latest news, 21 March 2014.

32 M. Evans, 'Doctor becomes first person in Britain charged with performing a FGM procedure' *Telegraph*, 21 March 2013.

33 id.

34 Significantly, however, there have been no further prosecutions. Similar pro-criminalization imperatives in Australia have recently resulted in a successful prosecution. A New South Wales court sentenced a retired midwife, a mother of two girls who had been subjected to either Type 1 or Type IV cutting, and a Dawoodi Bohra community leader to the maximum sentence of 15 months in prison in March 2016 – see 'Three sentenced to 15 months in landmark female genital mutilation trial' *Guardian*, 18 March 2016.

35 'FGM campaigner Fahma Mohamed urges Gove to help end cycle of abuse' *Guardian*, 25 February 2014.

36 'Ban Ki-moon puts UN weight behind Guardian-based FGM campaign' *Guardian*, 4 March 2014.

37 Editorial, 'The Guardian view on the campaign to end female genital mutilation: keep up the momentum' *Guardian*, 27 July 2014.

38 *Re E (Children) (Female Genital Mutilation Protection Orders)* [2015] EWHC 2275 (Fam), though compare *CE* v. *NE* (2016) EWHC 1052 (Fam); *Re F and X (Children)* [2015] EWHC 2653 (Fam); *Chief Constable* v. *S* (February 2016, unreported).

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responsibilities on health professionals to report FGC and family histories thereof.[39] In September 2016 a Home Affairs Committee report revealed that in the year to March 2016 5,702 new cases of FGM were recorded on women and girls in England, with at least 18 procedures having been performed in the United Kingdom. It castigated the 'lamentable record and the failure to identify cases, to prosecute and to achieve convictions', which it compared unfavourably with France and other EU jurisdictions,[40] and recommended that the Department of Health take a stronger line with health professionals who did not comply with their mandatory reporting responsibilities under the 2015 legislation.[41] This concerted political and legal response to FGC contrasts sharply with the ongoing silence and lack of action to address harms occasioned by MGC. Yet, as the Royal Dutch Medical Association (KNMG) noted in 2010, many complications have been associated with MGC, including:

> infections, bleeding, sepsis, necrosis, fibrosis of the skin, urinary tract infections, meningitis, herpes infections, meatisis, meatal stenosis, necrosis and necrotising complications, all of which have led to the complete amputation of the penis. Deaths have also been reported.[42]

Recently, the dichotomy in responses to the two procedures was challenged by Sir James Munby who acknowledged that they can cause comparable degrees of harm.[43] *Re B and G* concerned care proceedings brought by Leeds City Council in the case of B, a 4-year-old boy, and G, a 3-year-old girl, who allegedly had been subjected to FGC. It was accepted by the court that if G had indeed been genitally cut, then it was Type IV (using the typology set out by the WHO and others in 2008[44]). Type IV is defined as 'all other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization.' Although he concluded that the evidence did not support the Council's claim, Munby J nevertheless considered whether Type IV constituted 'significant harm' for the purposes of the Children Act 1989 – thereby satisfying the threshold test to begin care proceedings under s. 31. Having characterized FGC as 'an abuse of human rights … a ''barbarous'' practice which is ''beyond the pale'','[45] he then positioned WHO Types I, II,

39 M. Jefferson, 'FGM/Cutting: Contexualising Recent Legal Developments' (2015) 78 *J. of Criminal Law* 411.

40 Home Affairs Committee, Ninth Report, *Female Genital Mutilation: Abuse Unchecked*, HC (2016–17) 390, 25.

41 id., p. 23.

42 KNMG, 'Non-therapeutic Circumcision of Male Minors' (2010) 8, at <www.circumstitions.com/Docs/KNMG-policy.pdf>.

43 *In the matter of B and G (Children) (No 2)* [2015] EWFC 3, paras. 59–60.

44 OHCHR et al., *Eliminating Female Genital Mutilation: an interagency statement* (2008).

45 *B and G*, op. cit., n. 43, paras. 54–5.

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and III as 'more invasive than male circumcision'.[46] However, significantly, Munby acknowledged that some forms of Type IV are 'on any view *much less invasive* than male circumcision',[47] and noted that Type Ia (removal of the clitoral hood or prepuce) 'is physiologically somewhat analogous to male circumcision'.[48] Having thus stressed the comparability of harm and accepted that all forms of FGC constitute 'significant harm' for the purposes of care proceedings, Munby asserted 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, as in my judgement it does, then the same must be so of male circumcision.[49]

However, he then reciled from the implications of his argument that MGC constituted 'significant harm', noting that once this threshold test under s. 31 is met, the issue for the court becomes a test of 'reasonable parenting'. This allows the practices to be differentiated:

> It is at this point in the analysis … that the clear distinction between FGM and male circumcision appears. Whereas it can never be reasonable parenting to inflict *any* form of FGM on a child, the position is quite different with male circumcision. Society and law … are prepared to tolerate non-therapeutic circumcision … while no longer willing to tolerate FGM in any of its forms.[50]

Yet, these 'common sense' assumptions used to distinguish MGC and FGC are increasingly contested[51] and, as Theodore Bennett writes, a number of overlapping 'discursive techniques … are employed to construct and maintain the dissimilarities between' male and female genital cutting.[52] Elsewhere in Europe, meanwhile, similar logic to that underpinning Munby's judgment has prompted more radical conclusions. In 2012 the District Court of Cologne controversially decreed that a child's bodily integrity was implicated where a physician circumcised a four-year-old boy at his parents' request.[53] Two days later the child haemorrhaged and was admitted to the

46 id., para. 60.
47 id.
48 id., fn. 1.
49 id., para. 69. The harm of circumcision was also acknowledged by Gareth Jones J, *In the Matter of A (a Child)*, op. cit., n. 15, para. 75. He characterized it as 'an invasive and painful medical procedure … which A might not fully appreciate the need for and which would inflict a degree of pain, trauma and an aftermath of discomfort.'
50 id., para. 72.
51 See, for example, B.D. Earp, J. Hendry, and M. Thomson, 'Reason and Paradoxes in Medical and Family Law: Shaping Children's Bodies' (2017) *Medical Law Rev.* (doi.org/10.1093/medlaw/fwx034) 24 May 2017.
52 T. Bennett, *Cuts and Criminality: Body Alteration in Legal Discourse* (2015) 68. Elsewhere we have sought to contest these 'common-sense' assumptions in legal discourse: Fox and Thomson, op. cit., n. 15.
53 Landgericht Koln (Cologne District Court), judgment on 7 May 2012, No. 151 Ns 169/11.

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children's emergency ward of a local hospital, leading the Public Prosecutor's Office to press charges against the circumciser. The local court held the procedure to be lawful, but, on appeal, the District Court found that cutting a boy for religious reasons caused impermissible bodily injury and breached his right to physical integrity and self-determination. The ruling was clear that neither parental rights nor freedom of religion, as guaranteed by the Basic Law, could justify such cutting, and that circumcision amounted to 'serious and irreversible impairment of physical integrity'. Leave to appeal was denied.

The Cologne ruling incited international controversy. While most responses were hostile,[54] the case did prompt calls for a ban in neighbouring jurisdictions.[55] These arguments have subsequently gained ground, particularly in Nordic countries.[56] Reflecting an emerging unease about the procedure in northern European jurisdictions, the Cologne case was heard in the wake of the guidance by the KNMG we noted above, which adopted an unusually strong stance against MGC explicitly grounded in physical integrity:

> The child is not only protected by the right to religious freedom, but also by the right to physical integrity. This right, as laid down in Article 11 of the Constitution and Article 8 of the ECHR, is one of the most important basic rights.[57]

In Germany and the Netherlands challenges to parental rights to cut children were grounded in constitutionally protected rights to physical integrity and self-determination. While powerful, these seem principally concerned with policing the boundaries of the physical body, along the lines of the conventional bodily integrity model we will outline below. We attribute the controversy generated by the Cologne case, and to a lesser extent the Netherlands guidance, to the widespread (though faltering) common-sense acceptance of MGC as a non-issue in ethico-legal terms, which was ultimately to determine Munby J's position on the practice in *B and G*. Prevailing norms concerning the sanctity of religious beliefs entail that a ruling which casts MGC as bodily harm appears to violate private and legitimate parental choices. The controversy occasioned by the Cologne

54 Most attention focused on the issue of religious freedoms. See, for example, <http://www.independent.co.uk/news/world/europe/circumcision-ban-is-the-worst-attack-on-jews-since-holocaust-7939593.html>.

55 V. Fortier (ed.), *La circoncision rituelle* (2016).

56 See, for example, 'Let the boys decide on circumcision: Joint statement from the Nordic Ombudsmen for Children and paediatric experts', 30 September 2013, at <http://www.crin.org/docs/English-statement-.pdf>.

57 KNMG, op. cit., n. 42, p. 13, para. 5. Calls for action against circumcision have also surfaced in other European countries: for example, <http://www.businessinsider.com/a-norwegian-political-party-has-called-for-a-ban-on-religious-circumcision-2012-6#ixzz1xksT00Uw>.

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ruling has continued,[58] particularly in the wake of a Council of Europe Resolution in October 2013.[59] This located male and female genital cutting within 'a category of violations of the physical integrity of children which supporters of the procedures tend to present as beneficial to children themselves despite clear evidence to the contrary',[60] and expressed concern about modifying children's bodies without their consent. As Ammaturo notes, the Resolution for the first time legitimated calls 'to establish a common framework for the evaluation of all invasive medical and surgical practices on children carried out without their informed consent.'[61] Unsurprisingly, therefore, it too has generated counter measures.[62]

LEGAL UNDERSTANDINGS OF BODILY INTEGRITY

For our purposes, the debates on genital cutting suggest that one advantage of invoking bodily integrity discourse is that it renders visible the embodied harms that irreversible surgical and other interventions can cause. In turn, this has implications for how law responds, since, as Neff notes, courts have zealously promoted bodily integrity as 'sacred, inviolable, inalienable and fundamental'.[63] Bodily integrity doctrine explicitly grounds certain causes of action in tort and criminal law; for example, trespass to the person or battery. In some jurisdictions, as we have seen, a constitutional basis for protecting bodily integrity exists.[64] In most common law countries its legal foundation is less clear, although judicial dicta strongly vindicate some conception of bodily integrity, and as we noted above, Brazier has gone further, suggesting that bodily integrity is the 'core legal value' in health law.[65] Other legal scholars have also asserted its foundational status. For instance, Robert Ludbrook contends that '[t]he right to bodily integrity is the most personal and arguably the most important of all human rights',[66] while Nicollette

58 See, for example, M. Frisch, 'Circumcision Divide Between Denmark and Israel' *Copenhagen Post*, 24 January 2014.

59 PACE, 'Children's right to physical integrity', Resolution 1952 (2013), at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20174&lang=en>.

60 id., s. 2.

61 Ammaturo, op. cit., n. 5, p. 592.

62 A motion for a new resolution, aimed at counteracting the original, was submitted on 11 December 2013: PACE, 'Freedom of Religion and Religious Practices', at <http://www.assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20314&lang=EN>.

63 C.F. Neff, 'Woman, Womb, and Bodily Integrity' (1990) 3 *Yale J. of Law & Feminism* 327.

64 See M.T. Meulders-Klein, 'The Right Over One's Own Body: Its Scope and Limits in Comparative Law' (1983) 6 *Boston College International and Comparative Law Rev.* 29.

65 Brazier, op. cit., n. 3.

66 R. Ludbrook, 'The Child's Right to Bodily Integrity' (1995–96) 7 *Current Issues in Criminal Justice* 123, at 132.

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Priaulx refers to 'the fundamental importance of bodily integrity as a most basic psychological need'.[67] Its role in safeguarding the physical parameters of the person renders it for Christine Neff 'the cornerstone of all other liberties'.[68] Similarly, Nussbaum positions it as a basic human capability central to being fully human. For her, bodily integrity protects sovereignty over one's body and encompasses the ability to move freely, to have one's bodily boundaries respected, and to be afforded opportunities for sexual satisfaction and reproductive choice.[69] Judicial dicta also support the contention that bodily integrity is a core value, closely related to autonomy.[70] For instance, in 1984, Goff LJ stated in *Collins* v. *Wilcock* that human bodies were 'inviolable',[71] echoing Cardozo J's seminal statement in American law that every competent adult 'has a right to determine what shall be done with his own body; and a surgeon who performs or operates without his patient's consent commits an assault for which he is liable in damages.'[72] Similar dicta can be traced in other United Kingdom rulings, many of which have attained a canonical status that helps perpetuate their uncritical acceptance.[73] Explicit judicial references to 'bodily integrity' are less common, but again occur in high-profile cases. Thus, in *Montgomery* v. *Lanarkshire Health Board*, Lady Hale's understanding of patient autonomy was explicitly linked to corporeality when she stated that:

> It is now well recognised that the interest which the law of negligence protects is a person's interest in their own physical and psychiatric integrity . . . their freedom to decide what shall and shall not be done with their body.[74]

Yet, despite this embeddedness in Anglo-American legal culture, it is rarely articulated, in judicial dicta or legal scholarship, why law should value or strive to protect bodily integrity, or the legal implications of so doing. Consequently, we argue that judges operate with implicit and indeterminate understandings of the nature of human bodies that integrity discourse protects. Occasionally these ideas are explicitly articulated and reveal some

67 N. Priaulx, 'Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters' (2008) 16 *Medical Law Rev.* 169, at 179.
68 Neff, op. cit., n. 63, p. 328.
69 M. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000) 78.
70 Pedwell, op. cit., n. 4, p. 132, fn. 1.
71 *Collins* v. *Wilcock* [1984] 1 W.L.R. 1172.
72 *Schoendorff* v. *Society of New York Hospital* (1914) per Cardozo J. More explicit references to bodily integrity underpinned *Planned Parenthood of Pennsylvania* v. *Casey* 505 (U.S.) 833, 8499 (1992). The majority referred to the constitutional 'limits on a state's rights to interfere with a person's most basic decisions about family and parenthood as well as bodily integrity', per O'Connor, Kennedy, Souter, JJ.
73 For example, *Airedale NHS Trust* v. *Bland* [1993] 1 All E.R. 821 per Lord Keith, 860; *St George's Healthcare NHS Trust* v. *S.* [1998] 3 All E.R. 673.
74 *Montgomery* v. *Lanarkshire Health Board* [2015] UKSC 11, per Lady Hale, para. 108.

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troubling implications of the conventional integrity model. A striking example is the appeal to bodily integrity in *Re A*,[75] concerning the proposed surgical separation of conjoined twins who would both die if not separated. Surgery would offer the stronger twin ('Jodie') a reasonable chance of survival, but the weaker twin ('Mary') would inevitably die. Authorizing the surgery, Ward LJ stated 'the only gain I can see [for Mary] is that the operation would, if successful, give Mary the bodily integrity and dignity which is the natural order for all of us',[76] although he qualified this by recognizing the 'wholly illusory' nature of this goal, since Mary would die. Brooke LJ went further in asserting that '[t]he doctrine of sanctity of life respects the integrity of the human body. The proposed operation would give these children's bodies the integrity which nature denied them.'[77] In similar vein, Walker LJ determined that the operation would be in Mary's best interests because 'for the twins to remain alive and conjoined in the way they are would be to deprive them of the bodily integrity and human dignity which is the right of each of them.'[78] On this conception, 'the right to have one's own body whole and intact'[79] trumps other apparently fundamental values including sanctity of life, because, for Mary at least, it is attainable only in death.[80]

As we see it, there are four key problems with such judicial dicta on bodily integrity, notwithstanding its potential to protect children. First, it is apparent that bodily integrity is conceptualized largely in negative terms and deployed to shore up our bodily boundaries or to keep others off our bodies. As Elaine Scarry observes:

> The body, in this language, is conceived of as a palpable ground, the body has edges; it has specific boundaries – to cross over these boundaries without the authorisation of the person is an act of trespass.[81]

Such conceptions of the body – as a sacred territory to be defended against the encroachment of others – have been traced by Ngaire Naffine to the 'Kantian idea of a managed, distinct, intact body which is not debasing us and is not getting in the way of the proper dispassionate exercise of reason.'[82] Savell has

75 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147.
76 id., p. 184.
77 id., p. 240.
78 id., p. 258.
79 id., p. 259.
80 I. Karpin and R. Mykitiuk, 'Feminist legal theory as embodied justice' in Fineman, op. cit., n. 22, p. 124. In other contexts, such as tissue donation, this tension between bodily integrity and life plays out differently: see B. Lyons, 'Obliging Children' (2011) 19 *Medical Law Rev.* 55.
81 Scarry's focus is Cardozo's dicta in *Schoendorff*, op., cit., n. 72: E. Scarry, 'Consent and the Body: Injury, Departure and Desire' (1990) 21 *New Literary History* 867, at 868.
82 N. Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009) 148.

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highlighted how similar notions underpin Blackstone's influential notion of the 'sacred' and inviolable human body.[83] On these understandings, premised on the sovereignty and boundedness of bodies and their separation from the mind, violation of bodily integrity offends against the individual bodily wholeness that is necessary for human flourishing.[84]

Secondly, and relatedly, we suggest that conventional conceptions are rooted in a problematic boundary metaphor which leaves them ill-equipped to accommodate certain forms of embodiment. Dekker et al. have highlighted how, in addition to valuing anatomical wholeness, Kantian views of integrity encompass an important dimension of functional integrity which underpins biological intactness.[85] While intriguing notions of authorization, control, function, and flourishing ground these conventional narratives of bodily integrity, Jennifer Nedelsky highlights how the boundary metaphors that accompany them can be pervasive and destructive, arguing that 'in law the concept of boundary has become more of a mask than a lens'.[86] This resonates with Savell's argument that the boundary-dependent accounts of conventional bodily integrity, and the judicial dicta which they continue to influence, fail to capture the embodied complexity of what is at stake in such cases.[87] As we explain below, this requires human bodies to be understood as inherently relational, experiential, and subject to change by interactions with society.[88] By contrast, it is striking that existing legal accounts resonate with under-theorized conceptions of self-ownership which implicitly view the body as spatial property that needs to be defended from others.[89] Of course, property is a complex notion which can be conceptualized in progressive ways. Thus, commentators have argued that granting property rights over one's body and bodily parts and products can enhance one's ability to make autonomous choices and control what happens to one's body.[90] This view

83 K. Savell, 'Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law' (2003–4) 49 *McGill Law J.* 1093.

84 W. Dekkers, C. Hoffer, J.P. Wils, 'Bodily integrity and male and female circumcision' (2005) 8 *Medicine, Health Care and Philosophy* 179, at 186; G.P. McKenny, 'The Integrity of the Body: Critical remarks on a Persistent Theme in Bioethics' in *Persons and Their Bodies: Rights, Responsibilities, Relationships*, ed. M.J. Cherry (1999) 353.

85 Dekkers et al., id., p. 184; D. Leder, 'Whose Body? What Body? The Metaphysics of Organ Transplantation' in Cherry, id., p. 233.

86 J. Nedelsky, *Law's Relations* (2011) 107.

87 Savell, op. cit., n. 83; similarly, Nedelsky, id. observes that legal language is 'extremely poor at capturing … interconnection' (p. 11); J. Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30 *Representations* 162.

88 Our approach has much in common with Nedelsky's account of 'law's relations' in which she develops a vision of the 'self' as particular, embodied, and affective: see, Nedelsky, id. (2011), ch. 4.

89 See pp. xxx above.

90 See, for example, R.P. Petchesky, 'The Body as Property: a feminist re-vision' in *Conceiving the New World Order*, eds. F.D. Ginsberg and R. Rapp (1995); D. Dickenson, *Property in the Body: Feminist Perspectives* (2007).

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has been especially influential in recent health law scholarship, particularly in the context of our growing ability to fragment and commodify bodies.[91] Yet we are not persuaded by the idea that all legal subjects may be regarded as owning their bodies in the somewhat simplistic manner that judges and theorists ranging from Blackstone to Nussbaum have assumed. For us, such views fail to capture the complexities of embodiment. As Alan Hyde has argued, many of us inhabit less inviolable bodies and law facilitates social use or invasion of our bodies 'by constructing various discursive bodies, sometimes defined as interests in liberty or property, sometimes as things or property, sometimes through euphemistic language which makes the body disappear.'[92] Law thereby enables 'certain modes of bodily being' while simultaneously it 'denigrates or forecloses others'.[93] It follows, for instance, that aberrational bodies which challenge legal boundaries between persons or categories (such as conjoined twins or intersex persons) must be surgically normalized. In this vein, Bogdonoski shows how the bodily choices permitted by law tend to be those that promote 'socio-culturally acceptable forms of embodiment'. Thus, conventional cosmetic surgery or MGC is legally tolerated, whereas forms of surgery which give rise to socially transgressive embodiment are rendered illegitimate.[94] Furthermore, law's reification of a distinct, individuated body leaves it – and the conventional integrity model – ill-equipped to cope, not only with 'anomalous' bodies, but also common forms of conjoined embodiment, notably the pregnant body.[95] As Isabel Karpin notes of pregnancy, 'the woman's body is seen as neither container nor separate entity from the foetus. Until the baby is born the fetus *is* the female body. It is part of her body/self.'[96] Yet, as conventionally articulated in Anglo-American legal discourse, bodily integrity discourse is unable to accommodate such complexity and its gendered implications, to the point that Drucilla Cornell has contended that notions of self-ownership are illusory in the pregnancy context.[97] More broadly, still, it is questionable

91 See, for example, J.K. Mason and G.T. Laurie, 'Consent or Property: Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 *Modern Law Rev.* 710; R. Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (2007).

92 A. Hyde, *Bodies of Law* (1995) 259.

93 N. Sullivan and S. Stryker, 'King's Member, Queen's Body': Transsexual Surgery, Self-Demand Amputation and the Somatechnics of Sovereign Power' in *Somatechnics: Queering the Technologisation of Bodies* eds. N. Sullivan and S. Murray (2009) 49, at 50–1.

94 T. Bogdonoski, 'Every *Body* Is Different: Regulating the Use (and non-Use) of Cosmetic Surgery, Body Modification and Reproductive Genetic Testing' (2009) 18 *Griffiths Law Rev.* 503.

95 V. Munro, 'Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights' (2001) 10 *Social & Legal Studies* 459.

96 I. Karpin, 'Legislating the Female Body: Reproductive Technology and the Reconstructed Woman' (1992) 3 *Columbia J. of Gender and Law* 325.

97 D. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (1995) ch. 2.

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how many of us actually inhabit or possess intact bodies, given bodily susceptibility to disease, illness, and aging processes; certainly, it is difficult to measure intactness or completeness, especially since this is culturally determined.[98] Consequently, we would argue that property discourse and its accompanying metaphors of space, territory, and ownership are not productive in examining how law regulates bodily interventions. This is particularly true of interventions on children's bodies, where constructing the body in property terms carries additional risks. As we saw above, the tolerance of parental choice in the MGC cases supported O'Donovan's argument that the denial of legal subjectivity to children results in their construction as legal objects, over whom parents exercise power and control.[99] Conceiving of all human bodies as property in line with conventional bodily integrity approaches serves only to facilitate such parental control over their children.

Thirdly, given how the conventional model is limited to protecting physical corporeal boundaries, we are troubled by its propensity to justify intrusive and paternalistic state regulation in opening up all bodies to increased surveillance. This process is traced by Miller in her analysis of laws regulating reproduction and sexual intercourse. She outlines a shift occurring in the twentieth century from legal models rooted in consent to those based on bodily integrity. Whereas consent is 'a specific, narrowly defined legal' concept that can be exercised only by 'mature, sane politically active individuals',[100] Miller suggests that bodily integrity rights can be more widely invoked. Yet she cautions that, while typically read as a narrative of progress,[101] this history contains a regressive undercurrent, since, in conceptualizing women's bodies as space, bodily integrity approaches have rendered women 'subject to more extensive searches and to further regulation'.[102] In the case of children, comparable or greater dangers of overzealous state intrusion exist, especially since, as we have suggested, the rhetoric of self-ownership arguably encompasses the problematic idea of parental ownership of the bodies of their children.

Finally, we are concerned that, as is apparent in the Cologne ruling and 'FGM' debates, once certain forms of embodiment or bodily interventions are cast as illegitimate in the ways that Bogdonoski outlines, this mandates a punitive state response. Although we believe that United Kingdom law

98 Bogdanoski, op. cit., n. 94, p. 524; Karpin and Mykitiuk, op. cit., n. 80, p. 118.
99 See O'Donovan, op. cit., n. 19.
100 Miller, op. cit., n. 23, p. 7.
101 This narrative of progress can be traced in global liberalization of abortion law: R.J. Cook et al. (eds.), *Abortion Law in Transnational Perspective* (2014); R. Rebouche, 'Abortion Rights as Human Rights' (2016) 25 *Social & Legal Studies* 76. Yet, in line with Miller's note of caution, it is important to note the continuing regressive impact of criminalization: S. Sheldon, 'British Abortion Law: Speaking from the Past to Govern the Future' (2016) 79 *Modern Law Rev.* 283.
102 Miller, op. cit., n. 23, p. 15.

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currently offers inadequate protection to the interests of the child,[103] we would demur at casting these parental choices as criminal. First, we would argue that prosecutions often reveal how parents and doctors have acted with good motivations. Moreover, as we have seen, the gendered[104] and racialized[105] dimensions of conventional bodily integrity and its tendency to be mobilized in normative and judgmental ways, has impacted on prosecutorial decision making.[106] Criminalizing such actions simply increases the likelihood that high profile prosecutions will fail or that juries will be reluctant to convict, and will likely generate a backlash against progressive legal initiatives, as witnessed in the wake of the European Parliament resolution.

FROM BODIES TO EMBODIMENT; FROM BODILY INTEGRITY TO EMBODIED INTEGRITY

It is worth stressing that, notwithstanding our critique of conventional bodily integrity doctrine, we recognize its important role in problematizing non-consensual shaping of children's bodies. As Savell has argued, the continuing appeal of conventional integrity arguments lies in the enhanced protection they afford against unwarranted intrusion:

> The 'invasion' narrative prevents doctors from interfering with bodies without consent, in anything other than exceptional circumstances. This narrative engages the concepts of 'dignity', 'inviolability of the person' and 'bodily integrity' and deploys metaphors of invasion to problematize the imposition of [for instance] sterilisation without consent.[107]

Nedelsky too has highlighted the power of such narratives in contesting interference,[108] and we agree that their value lies in countering parental power and limiting irreversible interventions on children's bodies, as was evident in the Cologne case. Consequently we reject the views of some commentators that conventional bodily integrity doctrine should be jettisoned.[109] Rather, we concur with Cornell that it is precisely because our corporeality is susceptible to change and development, and dependent on others for its realization, that bodily integrity doctrine is so valuable in protecting it. However, conventional approaches need to be supplemented by

103 Fox and Thomson, op. cit., n. 15.
104 Savell, op. cit., n. 83.
105 Sullivan, op. cit., n. 11.
106 The race/ethnicity of health professionals who have been prosecuted is striking, see nn.14, 30, 34.
107 Savell, op. cit., n. 83, p. 1124.
108 J. Nedelsky, 'Property in Potential Life? A Relational Approach to Choosing Legal Categories' (1993) 6 *Canadian J. of Law and Jurisprudence* 343; Nedelsky, op. cit., n. 86, ch. 2.
109 C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (2008).

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a more complex and nuanced vision of bodily integrity that incorporates what Emily Grabham has referred to as 'more socialised understandings':

> A propertied or sovereigntist understanding of embodiment as the subject's ownership and determination of the soma is often usefully surpassed, or augmented, by other theoretical imaginings of embodied selfhood, such as ideas of bio-social entanglements between cultural, social and technical processes.[110]

These nuanced and relational 'theoretical imaginings' not only complicate conventional legal accounts, but are consistent with a theoretical shift in contemporary health law from the body to embodiment as a focus of concern.[111] Embodiment scholarship has been attentive to the importance of integrating physical and mental dimensions of bodies and health,[112] in order to avoid replicating the mind/body split which, as we have seen, contributes to problematic readings of the legal subject[113] and continues to structure dominant legal understandings of bodily integrity. As Simon Williams and Gillian Bendelow argue, embodiment theory rejects the tendency 'to theorise *about* bodies in a largely disembodied … way' and instead validates 'a new mode of social theorising *from* lived bodies'.[114] This approach recognizes that bodies are not simply instrumentally valuable, but rather are 'a constitutive part of who we are',[115] and who we may become. It accommodates more fluid visions of bodily integrity which, far from being static, accommodate the mutability and plasticity of bodies. Such conceptions encompass not only decisions to modify our bodies but highlight the importance of transcending our bodies. As Priaulx observes:

> Being able to take one's body more or less for granted (quite irrespective of what one's existing physical state actually is), rather than being conscious of and consumed by one's physicality all the time, is what is best captured by bodily integrity. It is a sense of self, a stable platform for pursuing one's plans, rather than an actual descriptor of our physicality.[116]

110 E. Grabham, 'Bodily integrity and the Surgical Management of Intersex' (2012) 18 *Body & Society* 1, at 3.

111 M. Fox and T. Murphy, 'The Body, Bodies, Embodiment: Feminist Legal Engagement with Health' in *A Research Companion to Feminist Legal Theory*, eds. M. Davies, and V. Munro (2013); N. Naffine, 'The Legal Structure of Self Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 *J. of Law and Society* 193.

112 R. Cain, '"A View You Won't Get Anywhere Else"? Depressed Mothers, Public Regulation and "Private" Narrative' (2007) 17 *Feminist Legal Studies* 123.

113 T. Murphy, 'Feminism on Flesh' (1997) 8 *Law & Critique* 37.

114 S.J. Williams and G. Bendelow, *The Lived Body: Sociological Themes, Embodied Issues* (1998). In this regard, embodied approaches draw on phenomenology: see V. Sobchack, 'Living a "Phantom Limb": on the Phenomenology of Bodily Integrity' (2010) 16 *Body & Society* 51.

115 E.F. Kittay, 'Forever Small: The Strange Case of Ashley X' (2011) 26 *Hypatia* 610, at 617.

116 Priaulx, op. cit. n. 67, p. 187.

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By requiring merely that others leave our physical selves alone, conventional accounts of bodily integrity fail to capture this constitutive element of embodied approaches. Nor do they recognize how our bodies are mediated in numerous mundane ways by their dependency on the social environment in which they operate or their relationship with others.[117] Occasionally case law on therapeutic intervention has been attentive to the dependent relationships in which children are enmeshed, and has hinted at a more progressive approach to conceptualizing integrity. For instance, in *Glass* v. *UK*, the mother of David Glass – a severely disabled 12-year-old boy – witheld her consent to the administration of diamorphine which hospital staff, who believed David to be dying, wished to administer to alleviate his distress.[118] His mother contended that such medical intervention interfered with David's rights under Article 8 of the ECHR to 'respect for his personal integrity'. While accepting that David Glass had such a right, the European Court of Human Rights (ECtHR) paid scant attention to its content or contours, simply concluding that the NHS Trust concerned should have referred the issue of whether his treatment was legitimate and necessary for judicial determination. It thus found it unnecessary:

> to pronounce on the applicant's contention that the authorities had failed to comply with the positive obligations inherent in an effective respect for [David Glass's] right to personal integrity by failing to adopt the measures designed to secure respect for his personal integrity.[119]

Nevertheless the ECtHR's acceptance that the Article 8 rights of David Glass encompass not only his physical integrity, (which had been recognized in earlier rulings on Article 8[120]) but also his personal integrity, is significant. Given its failure to clarify what 'personal integrity' entailed, it would be contentious to read the ECtHR's recognition of 'personal integrity' as synonymous with 'bodily integrity'. However, we agree with Mary Donnelly and Ursula Kilkelly that the ruling acknowledged 'a right to physical and psychological integrity which is not dependent on the subject's decision-making capacity'.[121] The following year this was underlined in *Storck* v. *Germany*, when the Court ruled that states are under an obligation 'to secure to its citizens their right to physical and moral integrity', so that forced psychiatric treatment of a vulnerable patient could amount to a breach of Article 8.[122] Importantly for our purposes, Donnelly and Kilkelly interpret

117 G. Ramachandran, 'Against the Right to Bodily Integrity: Of Cyborgs and Human Rights' (2009) 87 *Denver University Law Rev.* 1, at 10.
118 *Glass* v. *UK* [2004] 1 F.L.R. 1019.
119 id., para. 74.
120 For example, *X&Y* v. *The Netherlands* 8978/80 8 EHRR 235 (1985); *Bensaid* v. *UK* 44599/98 [2001] ECHR 82.
121 M. Donnelly and U. Kilkelly, 'Child-friendly health care: delivering on the right to be heard' (2011) 19 *Medical Law Rev.* 27, at 49.
122 *Storck* v. *Germany* (2005) 43 EHRR 96.

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Glass as carving out for the child a distinct status as a rights-holding subject. In this sense the ruling seems to us to fit with Ammaturo's call in her work on normalizing intersex surgeries for a shift from medicalization to juridification. She argues that such a shift requires that the child's agency be recognized so that she:

> becomes the focus of attention, rather than the ultimate target of action, together with a consideration of all the corollary aspects relating to the … infant's cultural, social and religious background that play a role in influencing parents' decisions.[123]

Dicta in cases like *Glass* and *Storck* thus point to a shift from a static and spatial understanding of the right to private and family life towards one that is more dynamic and relational, able to encompass context and circumstances. Read in this way, *Glass* also supports our view that bodily integrity has a particular value for children and that a meaningful conception of the principle must encompass a psychological dimension, rather than simply policing bodily boundaries as envisaged by the conventional integrity model. By acknowledging both physical and psychic dimensions of integrity in order to ground an emerging legal subjectivity *Glass* hints at a move towards the embodied conception of integrity that we advocate. It also demonstrates how such a model can accord fuller protection to a child's interests than they have received under conventional applications of the best interests standard. As we highlight below, similar reasoning occurs in some United Kingdom cases dealing more directly with surgical modification of children. First, however, we examine the implications of situating body modification choices for children within this embodied integrity framework.

REFRAMING BODILY INTEGRITY DOCTRINE

1. *Cornell and bodily integrity: protecting emerging subjectivity*

We have suggested that the value of traditional bodily integrity doctrine lies in its protection of bodily boundaries but that this alone is not enough. We argue that the concept should be reframed in a way that reflects the theoretical shift from physical bodies to embodiment outlined above, and that is grounded in the lived experience of embodied beings. This would understand bodies both as a constitutive part of human identity and as existing at the intersection of the material, the institutional, and the symbolic.[124] In contrast to the mind/body split that continues to underpin conventional integrity, embodied integrity views the body as an intrinsic part of our ontology, of who we are. It thus acts as an indispensable platform for the realization of future

123 Ammaturo, op. cit., n. 5, p. 603.
124 See Williams and Bendelow, op. cit., n. 114.

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projects. Positioning embodied integrity as a core legal value would, in our view, facilitate new approaches to standard bioethical questions raised by bodily modification, and enable interrogation of how embodied choices are variously cast as socio-culturally legitimate or illegitimate.[125] As we have outlined above, United Kingdom law displays radically differential approaches to different forms of genital cutting. Below we contend that interrogating the disparity in attitudes to these practices should prompt a change that would entail placing a special value on embodied integrity as a starting point for biomedical decision making. In this regard we find Cornell's analysis of bodily integrity instructive since, for her, the doctrine is valuable precisely because our corporeality is susceptible to change – a bodily plasticity typically not acknowledged in judicial reasoning which continues to view bodies as fixed.[126] In contrast, Cornell conceives of all persons as unfinished entities in a constant state of flux or becoming. Consequently, bodily integrity must be understood as a process that is never completed, but which must nevertheless be absolutely protected as a prerequisite for equality.[127] Such protection carves out a space for individuals to transform themselves into persons able to 'participate in public and political life as equal citizens',[128] and to become fully individuated persons. Cornell's approach is clearly explicated in the abortion context, where she argues that unless access to safe legal abortions is guaranteed, women are effectively reduced to their maternal functions and denied the conditions of individuation or self-determination that men enjoy.[129] She states: 'To separate the woman from her womb or to reduce her to it is to deny her the conditions of selfhood that depend on the ability to project bodily integrity.'[130] The centrality of law in securing abortion access highlights how Cornell conceives of bodily integrity as a process which is dependent on our relations with others, and which can be facilitated by law. As Mervi Patosalmi notes:

> Although the person is a process, there is a demand to be treated as a whole, integrated, and rational unity despite the fact that that is not a condition that accords with reality. Because the personality is a process that is dependent on others, the state and the legal system should also be understood as confirming or denying the person's wholeness, and that those entities are also involved in the construction of the personality.[131]

Cornell thus demonstrates how bodily integrity can be rethought in ways that address the limitations of conventional integrity, in a manner compatible

125 R. Fletcher, M. Fox, and J. McCandless, 'Legal Embodiment: Analysing the Body of Healthcare Law' (2008) 16 *Medical Law Rev.* 321.
126 Ramachandran, op. cit., n. 117.
127 Cornell, op. cit., n. 97, p. 40.
128 id., p. 4.
129 See, also, Neff, op. cit., n. 63, p. 349.
130 Cornell, op. cit., n. 97, pp. 46–7.
131 M. Patosalmi, 'Bodily integrity and Conceptions of Subjectivity' (2009) 24 *Hypatia* 125, at 133.

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with our vision of an embodied health law. Although her focus is on women, we see her vision of bodily integrity as especially illuminating when applied to children, given the physical, hormonal, and emotional changes they undergo, which entails that they exist in an even greater state of flux. An embodied integrity model would go beyond respecting the physical boundaries of children protected by conventional conceptions, to encompass corporeal change and development, and acknowledge the importance of psychological integrity. It would also recognize the child as relational, rather than existing in isolation from her family. In this regard, Jo Bridgeman contends that *Glass* ultimately disappoints, despite the protection it offers the child from non-consensual interference. She reads the ECtHR's judgment as overly concerned to shore up the individual bodily boundaries of the child, arguing that it fails to flesh out a more relational approach to integrity which would:

> reflect the complex reality of the inevitable dependency involved: the dependency of a child with severe disabilities upon his or her parents, parental dependency upon health care professionals and the dependency of the state upon the care provided by parents to their child.[132]

Bridgeman advocates recognizing the child as both separate from, but situated within, these complex webs of care, attachment, and interdependency. She demonstrates the tightrope that the courts tread in such cases in seeking to recognize the child as relational while simultaneously not allowing her interests to be submerged, as happened in cases prior to *Glass*.[133] Although not fully realized, however, the judicial attempt in *Glass* to prioritize personal integrity as something belonging to the child alone is helpful in stressing the need to separate out the child's interests and the importance of protecting her from non-consensual interventions. Indeed, awareness of the risks of situating the child within a network of others on whom she is dependent may partly explain why the judges in *Glass* hesitated to fully endorse the relational approach advocated by Bridgeman. The case of MGC clearly shows how overemphasizing family integrity has led to cultural acceptance of cutting boys. Because of this we dispute Herring and Foster's contention that best interests is ultimately reducible to 'maintaining the child's place in his network of relationships'.[134] Rather, the value of embodied integrity lies precisely in how it underpins the child's emergent subjectivity, meaning that her needs are never synonymous with those of others.

As such, our embodied integrity model supplements the conventional conception by extending it beyond the material body and acknowledging the plasticity of bodies and those who inhabit them. Within this model, retaining the negative injunction to keep off children's bodies – as captured by the

132 Bridgeman, op. cit., n. 20, pp. 212–13.
133 See Fox and Thomson, op. cit., n. 15.
134 J.W. Herring and C. Foster, 'Welfare means Relationality, Virtue and Altruism' (2012) 32 *Legal Studies* 480.

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invasion narrative – is an essential counterbalance to actions that we would characterize as parental overreach. As Neff has argued, prioritizing bodily integrity 'provide[s] comprehensive protection against unwanted physical intrusion'.[135] Indeed, the importance of respecting bodily boundaries in order to support the child's ability to decide provides a necessary caveat to the sometimes uncritical endorsement of relational theory in child and health law.[136] Whilst commentators such as Gilmore and Herring argue that relational theory may (at times) allow parents to override decisions by their children when such decisions might lead to 'irreparable harm or death',[137] this view remains contentious.[138] Further, we would challenge a relational justification for a parent choosing a non-therapeutic intervention which might cause bodily harm or even death, as in the case of genitally cutting either sex. Instead, our embodied integrity model would shift the onus to those who propose medically unnecessary, irreversible, and non-consensual modifications to children's bodies to justify their actions. While Herring and Foster have asserted that 'a philosophically explicit protocol would quickly become tyrannous',[139] in our view placing embodied integrity at the heart of best-interest decision making counters criticisms of this standard that we address below, and accords with theoretical accounts of the importance of integrity for self-determination and self-realization in later life.

2. *The role of embodied integrity in protecting future interests*

Taking bodily integrity as a starting point once non-therapeutic shaping of children is proposed would alter the current operation of the best-interests standard by weighing more appropriately the respective obligations of parents, health professionals, and the state,[140] and countering the excessive parental power we have noted. Importantly, and as our discussion of genital cutting illustrates, it would highlight the diverse forms of harm that can result from irreversible surgery.[141] It also counters many criticisms that have been levelled at the best-interests test. Commentators have charged that the

135 Neff, op. cit., n. 63, p. 338.

136 J. Herring and P.L. Chau, 'Relational Bodies' (2013) 21 *J. of Law and Medicine* 294; J. Herring, 'Forging a relational approach: Best interests or human rights?' (2013) *Medical Law International* 32.

137 S. Gilmore, and J. Herring, '"No" is the hardest word: consent and children's autonomy' (2011) *Child and Family Law Q.* 3, at 24.

138 E. Cave and J. Wallbank, 'Minors' capacity to refuse treatment: A reply to Gilmore and Herring' (2012) 20 *Medical Law Rev.* 423.

139 Herring and Foster, op. cit., n. 134, p. 493.

140 See, generally, S. Elliston, *The Best Interests of the Child in Healthcare* (2007).

141 Our argument echoes Lacey's contention that the law regulating sexual offences needs 'to accord the embodied aspects of human existence their proper place' in order to fully theorize the harm that violations of bodily integrity cause: N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998) 117.

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standard is contentless,[142] its terminology is wholly unclear,[143] it offers no meaningful guide to judges,[144] operates to advance parental and professional interests,[145] obscures the prejudices, values, and common-sense notions of the judiciary,[146] and masks systemic or societal prejudices.[147] Finally, it has been suggested that best-interests assessments mean that the child's own views are often ignored in matters that affect her present and future wishes.[148] Certainly, in recent years, both legislation and court rulings[149] have engaged more fully with what best interests means. Section 1(3) of the Children Act offers a list of factors which courts should take into account in determining the best interests of the child, including the risk of any harm, the emotional and educational as well as physical needs of the child, and any of the child's characteristics which the court considers relevant.[150] Nevertheless, recent case law continues to bear out Rob Heywood's observation that, 'in practice the majority of parental views about medical treatment are actually respected and only on rare occasions are they challenged and overturned',[151] and Helen Stalford's contention that 'in reality best interests assessments are unnervingly instinctive and highly contingent on the subjective assessment and value framework of the decision-maker.'[152]

142 I. Kennedy, 'Patients, doctors and human rights' in *Human Rights for the 1990s*, eds. R. Blackburn and J. Taylor (1991) 90.

143 S. McGuinness, 'Best Interests and Pragmatism' (2008) 16 *Health Care Analysis* 208, at 209.

144 R.H. Mnookin, 'Child custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, at 251; M. Quigley, 'Best Interests, the Power of the Medical Profession and the Power of the Judiciary' (2008) 16 *Health Care Analysis* 233.

145 M.A. Fineman, 'The politics of custody and the transformation of American Custody decision making' (1989) 22 *University of California Davis Law Rev.* 829.

146 J. Eekelaar, '"Trust the judges": How far should family law go?' (1984) 47 *Modern Law Rev.* 593; J. Nedelsky, 'Communities of Judgement and Human Rights' (2000) 1 *Theoretical Inquiries in Law* 245.

147 J. Dewar, 'Family law and its discontents' (2000) 14 *International J. of Law, Policy and the Family* 59; D. Archard, 'Children, Adults, Best Interests and Rights' (2013) 13 *Medical Law International* 55.

148 J. Eekelaar, 'Families and children: from welfarism to rights' in *Individual rights and the law in Britain*, eds. C. McCrudden and G. Chambers (1994) 301.

149 In addition, rulings such as *Glass* and *Re S*, other recent cases to adopt a more nuanced approach to assessing children's best interests include *F* v. *F* [2013] EWHC 2683 (Fam); *An NHS Trust* v. *A*, *B, C and a Local Authority* [2014] 1445 (Fam); *Re JA (A Minor) (Medical Treatment: Child Diagnosed with HIV)* [2014] EWHC 1135 (Fam).

150 For adults, statutory guidance on assessing best interests is contained in the Mental Capacity Act 2005; M. Donnelly, *Healthcare Decision-making and the Law, Autonomy, Capacity and the Limits of Liberalism* (2010).

151 R. Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best interests' (2012) 20 *Medical Law Rev.* 29, at 32.

152 H. Stalford, 'The broader relevance of children's rights law: The "best interests of the child" principle' in *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?*, eds. E. Brems, E. Desmet, and W. Vandenhole (2017) 43.

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For all its problems, however, as Elliston notes, it is hard to think of a viable alternative, so entrenched has this standard become.[153] Rather than jettisoning best interests, therefore, we argue that explicitly taking bodily integrity into account as part of the best-interests decision-making process and casting it as a factor which trumps other values would serve both to give content to the standard and to ensure that children's interests are better protected. Prioritizing embodied integrity within these assessments alters significantly the very contested calculations of risks and benefits that best-interests judgments seem to mandate.[154] A prominent philosophical justification for curbing parental power is Joel Feinberg's thesis that children possess a right to an open future. Feinberg divides children's rights into two subclasses: dependency rights (which derive from the child's dependence on others) and rights-in-trust (which the child is not yet capable of exercising, but which must be protected so that they can be exercised by the future adult).[155] Conduct violates a right-in-trust when it 'guarantees now that when the child is an autonomous adult, certain key options will already be closed' to that individual.[156] The content of these rights vary, but they are essentially rights 'given to the child in the person of the adult she will become'.[157] They are characterized as 'anticipatory autonomy rights', which require that 'basic options are kept open and growth kept ''natural'' or unforced.'[158] Any 'serious and final commitments'[159] must be postponed until the child is mature and legally capable of making the decision herself. Consequently she should be 'permitted to reach maturity with as many open options, opportunities and advantages as possible.'[160] This duty to maximize options and opportunities clearly limits parental decision making, particularly regarding health care, education, and bodily interventions.

The open future principle has attracted criticism, with some suggesting that it is too concerned with the future individual at the expense of the child who is the subject of any decision.[161] However Alicia Ouellette disputes this, contending that the right to an open future is grounded in rights to bodily integrity and self-determination.[162] The principle therefore values and protects the child subject by respecting her bodily integrity from childhood.

153 Elliston, op. cit., n. 140.
154 Fox and Thomson, op. cit., n. 15.
155 J. Feinberg, 'The Child's Right to an Open Future' in *Whose Child? Children's Rights, Parental Authority and State Power*, eds. W. Aiken and H. LaFollette (1980) 124, at 125–6.
156 id., p. 126.
157 D. Archard, *Children, Family and the State* (2003) 31.
158 Feinberg, op. cit., n. 155, p. 127.
159 id., p. 129.
160 id., p. 130.
161 For example, C. Mills, 'The Child's Right to an Open Future' (2003) 34 *J. of Social Philosophy* 499.
162 Ouellette, op. cit., n. 2.

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Ouellette argues that its application also respects core parental rights and obligations since it would not interfere with medical decisions arising from a physical or psychological need. However:

> [d]ecisions to use medicine or surgery to shape a child based on a parent's social, cultural, or aesthetic preferences – especially those that limit the child's ability to make significant choices central to his or her identity – would be treated differently.[163]

While Ouellette does not explicitly engage with genital cutting, Robert Darby contends that circumcising male children violates the open future principle,[164] and therefore should be deferred until the child can choose for himself. In English law, we suggest that the seeds of such an approach can be traced in the High Court judgment in *Re S*, although, unlike *Glass*, it is not couched in the language of integrity. However, as in *Glass*, Baron J's reasoning, endorsed by the Court of Appeal, disentangles the interests of parents and children, rather than assuming that they are synonymous:

> Circumcision once done cannot be undone. It may have an effect on K if he wishes to practice Jainism when he grows up. He has been ambivalent about his religion and is not old enough to decide or understand the long-term implications. It is not in his best interests to be circumcised at present … By the date of puberty K would be *Gillick* competent and so he could make an informed decision.[165]

Her recognition that the decision properly belongs to the boy himself when he reaches the stage of *Gillick*-competence robustly defends the values of autonomy and bodily integrity, which mandates deferring decisions until a child is sufficiently mature to decide. This was also evident more recently in *Re L and B (children)*.[166] Again, the case involved a dispute between separated parents, in this instance regarding the care and upbringing of two boys aged 6 and 4. It concerned, among other things, an application by the father to have the two boys circumcised in accordance with their Muslim faith. The mother objected and argued that this should be left for the boys to decide when they were competent to make the decisions. Roberts J declined to make the order, claiming 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.[167]

163 A. Ouellette, 'Eyes Wide Open: Surgery to Westernize the Eyes of an Asian Child' (2009) 39 *Hastings Centre Report* 15, at 18.
164 R. Darby, 'The child's right to an open future: is the principle applicable to non-therapeutic circumcision' (2013) 39 *J. of Medical Ethics* 463.
165 *Re S*, op. cit., n. 15, para. 83.
166 *Re L and B*, op. cit., n. 15.
167 id., para. 143.

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Such rulings also reflect an emerging consensus amongst health law commentators. As Elliston argues:

> Male circumcision is a matter where serious consideration should be given to postponing decisions until children are of an age to be able to consider them for themselves, and I would say the same for other forms of elective surgery.[168]

While Baron J, Roberts J, and Elliston do not couch their stance in the language of bodily integrity, we read them as implicitly endorsing its role in guaranteeing the agency and subjectivity of the younger child in a manner similar to the invocation of integrity in *Glass*. Grounding such reasoning more explicitly in the vision of embodied integrity we have defended would enhance the logic of deferring embodied choices until they can be made by the person who will live with them. A similar approach underpinned the early, and widely applauded, sterilization case of *Re D*, where Heilbron J concurred with a doctor's opinion 'that it was wrong to perform this operation on an 11 year old, on the pretext that it would benefit her in the future.'[169] Heilbron's judgment also respects the emerging right of the child to make embodied choices for herself and recognizes her emerging legal subjectivity. As with *Glass*, this reasoning positions the integrity or autonomy of the child as ethically prior to the integrity or autonomy of the family and aligns with the core proposition of the open future principle that 'parental practices which close exits virtually forever are insufficiently attentive to the child as an end in herself.'[170]

Cornell's conceptualization of bodily integrity adds a further dimension to the open future principle in stipulating that the conditions for personhood must be legally guaranteed in order for one to be able to imagine oneself as whole. This remains true even if such wholeness will never truly be attained.[171] For adults, such considerations are central to other contested health-care interventions including gender reassignment surgery[172] and elective amputation,[173] which depend on the subject's ability to project his or her own vision of bodily integrity. In the case of children we see bodily integrity as similarly important in protecting their future capacity to shape their own bodies – a capacity which lies at the heart of cases such as *Re D, Re S*, and *Re L and B*. By revealing corporeal harms, and thereby helping to contest intrusive interventions on the bodies of children, approaches

168 Elliston, op. cit., n. 140, p. 98.
169 *Re D* [1976] 1 All E.R. 326, at 333.
170 D. Davies, 'Genetic Dilemmas and the Child's Right to an Open Future' (1997) 28 *Rutgers Law J.* 547, at 570.
171 D. Cornell, 'Are Women Persons?' (1997) 3 *Animal Law* 7, at 10.
172 S. Cowan, 'What a Long Strange Trip It's Been: Feminist and Queer Travels with Sex, Gender and Sexuality' in Davies and Munro, op. cit., n. 111, p. 105.
173 M. Travis, 'Non-normative Bodies, Rationality and Legal Personhood' (2014) 22 *Medical Law Rev.* 526.

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grounded in embodied integrity afford legal protection to children by casting them as moral agents who are not reducible to vehicles for parental desires. Hence, just as Cornell contends that her vision of bodily integrity 'demands that women's bodies are respected, treated as if they have equivalent worth and cannot be violated',[174] we argue that the concept demands this for children. To make decisions for them about the corporeal form they inhabit violates the principle of embodied integrity by denying the process of integration which allows them to become individuated beings. In this way our analysis helps deepen a child's right to an open future. It emphasizes the significance of embodied integrity in the processes of self-determination that enable the individuated self, and contrasts sharply with the static, propertied, and bounded notion often envisioned in legal discussions of conventional integrity.

In considering the legal protection that should result, Mianna Lotz has argued that the child's right to an open future encompasses both negative and positive rights. As she notes, and as we have argued of conventional integrity, the right is 'often collapsed into the negative injunction to refrain from violating conduct'.[175] Yet, the duty to 'keep a child's future open' can also be understood as a positive claim right.[176] Lotz argues that positive obligations encompass both *agent-internal* and *agent-external* autonomy conditions. Agent-internal conditions include 'the skills and capacities for information seeking, critical reflection, deliberative independence' and so forth,[177] and relate to the individual's context. As regards agent-external conditions, she argues:

> There are no doubt additional agent-external conditions, aside from those pertaining directly to the quantity and quality of a child's options, which parents – though importantly, not parents *alone* – may have positive duties in regard to. These might plausibly include duties to seek to protect children, as far as possible, from coercion, manipulation, enslavement, unjust imprisonment, and oppression.[178]

Although protection of bodily integrity seems implicit in Lotz's list, we would make explicit the obligation to promote it and so enable children to become individuated persons. This obligation, moreover, imposes duties on the state as well as on parents and health professionals. As Nussbaum reasons, 'the public conception must design the material and institutional environment so that it provides the requisite affirmative support for all relevant capabilities', including bodily or embodied integrity.[179] We have

174 Cornell, op. cit., n. 97, p. 9.
175 M. Lotz, 'Feinberg, Mills, and the Child's Right to an Open Future' (2006) 37 *J. of Social Philosophy* 537, at 538.
176 id.
177 id., pp. 546–7.
178 id., p. 547.
179 M. Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' in *Amartya Sen's Work and Ideas: A Gender Perspective*, eds. B. Agarwal et al. (2005)

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argued that prioritizing embodied integrity in best-interests assessments is a key step in this regard. However, in line with Cornell, this should be directed not only at protecting boundaries but also at securing the conditions which allow us to imagine things differently.

CONCLUDING THOUGHTS

In seeking to contest the excessive power that law has accorded parents to make irreversible non-therapeutic interventions on their children's bodies, this article has addressed Brazier's contention that bodily integrity now constitutes the 'core legal value' in health law.[180] We have argued that debates over a particular form of embodied practice – the non-consensual genital cutting of children's bodies – reveal both the appeal of and the indeterminacy inherent in the concept of bodily integrity. In part this indeterminacy is attributable to variations in how the concept is understood, articulated, and deployed in health and human rights law. Claims to bodily integrity are variously framed as a matter of personal or physical integrity, and slippages exist between these different terms and how they are used across time. Nevertheless, what is common to all conceptions of bodily integrity is their powerful rhetorical appeal in contesting non-therapeutic interventions on the bodies of children. They direct attention to bodily risks and harms which are typically obscured under conventional assessments of what is in the best interests of a child. In so doing, such discourse poses vital questions about the desirability and legitimacy, or otherwise, of particular bodily interventions. Yet, as conventionally articulated, we have argued that bodily integrity remains partial, gendered, and under-theorized in law. Consequently, across the practices and jurisdictions we have examined, law displays an uneven commitment to protecting bodily integrity. Further, we have relied on its invocation in the genital-cutting context to show that this discourse has been deployed in problematic and potentially counter-productive ways. On the one hand, it is questionable what the criminalization of FGC and calls for more intensive policing and prosecution have achieved, while on the other, we see it as problematic that the practice of MGC continues to be largely ignored by law, notwithstanding notable exceptions such as the Cologne case. This partiality and resultant impact on law and policy lead us to doubt the suitability of bodily integrity as conventionally understood as a core legal value.

35, at 57. Elsewhere we have endorsed the positive obligations that the capabilities approach imposes on the state and locate our approach to bodily integrity within this analysis: M. Fox and M. Thomson, 'Realising Social Justice in Public Health Law' (2013) 21 *Medical Law Rev.* 278.

180 Brazier, op. cit., n. 3.

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For the potential of bodily integrity discourse to be fully realized, we argue that it should be conceptualized in a more complex and nuanced way than dominant notions rooted in spatial conceptions of property, boundaries, and self/parental ownership of the body. Such narratives fail to capture what is at stake in making embodied choices, either for ourselves or others, and allows law to discriminate against certain bodies and embodied practices, while valorizing others. Therefore, while acknowledging the rhetorical force and protective power of what Savell has deemed the 'invasion narrative', we argue that Cornell's articulation of bodily integrity can contribute to reframing a thicker form of embodied integrity with stronger claims to be regarded as a core legal value. Her vision of bodily integrity more successfully captures the complexity of the doctrine and avoids valorizing particular normative conceptions of bodies, while also stressing the provisional and contingent nature of our bodily integrity and the plasticity of human embodiment. We suggest that Cornell's approach is particularly valuable in the case of children, as it acknowledges the child's agency (or future agency) and enriches our understanding of the child's right to an open future. In so doing, it highlights the importance of respecting the child's legal subjectivity – imposing obligations upon individual parents, health professionals, and the state. Importantly, this argument is also in line with emerging jurisprudential trends in both United Kingdom courts and the European Court of Human Rights, and the trend towards an embodied health law.

Casting embodied integrity as central to decision making on behalf of children also has practical value in serving to problematize and contest various surgeries and interventions currently countenanced by law. In the genital-cutting context we suggest that law should accord greater weight to the value of embodied integrity in making best-interests decisions, building on dicta in cases like *Re D*, *Glass, Re S*, and *Re L and B*. More broadly, we would contend that our embodied integrity model can help shape the parameters of parental decision making, and acts as a useful supplement to the current vogue for relational approaches. Our concern with such approaches is that thin understandings of relationality can collapse into little more than an acknowledgment of the importance of family relationships. In so doing, they risk continuing to prioritize family integrity over the child's interests and rights, thus reinforcing the parental power which has allowed parents to literally shape their children's bodies. Our embodied integrity approach would require instead that decision making about a child's best interests must start from the position that integrity is the core value which can only be overridden in exceptional cases. It thus makes embodiment central to the lives of children and all legal subjects.

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