CUTTING IT: SURGICAL INTERVENTIONS AND THE SEXING OF CHILDREN

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The social world constructs the body as a sexually defined reality and as the depository of sexually defined principles of vision and division. This embodied social programme of perception is applied to all things in the world and firstly to the body *itself, in its biological reality.*[1]

I. INTRODUCTION

While most other papers in this volume focus on medical interventions on the bodies of intersex individuals, this article shifts the emphasis to another form of non-consensual sexual surgery which is usually non-therapeutic, and was until recently, routinely performed on infants in the U.K. and the U.S.—the circumcision of male neonates. This article is not concerned with the competing and shifting arguments about the utility of male circumcision, but rather with the way in which circumcision may be seen to determine or stabilize the infant sexed body. Our broader argument is that surgery has historically been used to solidify the infant sexed body and sexuality. With a view to challenging surgical intervention in the case of babies and children who are unable to consent, this article identifies and examines the early justifications for circumcision, and demonstrates how they have much in common with the justifications promulgated for intersex surgeries.

The process of routine non-therapeutic circumcision is examined in part through a model of the sexed body as a variable idea in history, and as a product of cultural and economic relations. This article follows and utilizes Judith Butler's reading of the foreskin as feminized flesh[2] in order to analyze the desire to surgically define sex through the differentiation of genitals. We uncover a slippage between ideas of a singular and a binary sex model, which needs to be understood and examined in order to begin to frame policy or legal responses to these issues. We suggest that the acceptance of routine genital cutting of newborns in the context of circumcision may have paved the way for intersex surgery. Furthermore, largely

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[1] PIERRE BOURDIEU, MASCULINE DOMINATION 11 (Richard Nice trans., 2001).

[2] *See generally* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1992).

due to the efforts of intersex advocacy groups, we contend that many of the arguments that are now beginning to shape medical responses to intersex infants may be usefully adapted to other forms of non-consensual genital cutting of children.

II. DIFFERENCES AND INTERSECTIONS

Important issues of legal strategy and political allegiance are generated by the issue of whether alliances should be forged with other groups, such as transgender activists.[3] Yet, while some efforts have been made to trace the intersections between individuals who underwent surgery to assign them to a definite sex category, and those who sought gender reassignment surgeries,[4] it is surprising that the more obvious parallels between intersex surgeries and other non-consensual surgical interventions on infants have until recently attracted little ethico-legal attention. In this regard Stephanie Turner argued that "whereas adult transsexuals can choose from a range of surgical and hormonal treatments for a 'condition' that begins with their own self-diagnosis, intersexuals face the opposite scenario: mandated medical treatment prior to the age of consent.[5]

Although we take issue with the characterization of these procedures as treatment, Turner's statement contains clear echoes of the debates about non-therapeutic circumcision of infants. We are mindful of Leslie Haberfield's point that "it is too simplistic to link all cultural practices, or indeed even practices involving alteration of the human body, in examining their acceptability."[6] However, although differences do exist in the degrees of harm which may result from various forms of genital surgery, in the motivations for performing them, and in their implications for sex identity, we argue that to effect a shift in societal and legal responses to male circumcision, the practice must first be located in the context of the attitude to childhood genital surgeries as a whole.

The nexus between these forms of genital surgery on children has been noted in passing before, but its relevance has generally been denied or ignored. In considering such connections, Pak-Lee Chau and Jonathan Herring were typical in simply commenting that while a useful analogy may be drawn between female circumcision and intersex surgeries, routine male circumcision is distinguishable from other forms of non-consensual genital cutting:

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[3] Erin Lloyd, *Intersex Education, Advocacy & The Law: The Struggle for Recognition and Protection*, 11 CARDOZO WOMEN'S L.J. 283, 296, 298-301 (2005).

[4] *See, e.g.*, Anne Barlow, *A New Approach to Transsexualism and a Missed Opportunity?*, 13 CHILD & FAM. L.Q. 225. *But see* ANDREW SHARPE, TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW 47-49, 103-04 (2002) (explaining that U.K. judges have invoked an "transgender/intersex dyad," according to which post-operative surgery on intersex individuals is characterized as a process of "naturalisation" to be contrasted with the process of "denaturalisation" involved in gender reassignment).

[5] Stephanie Turner, *Intersex Identities: Locating New Intersections of Sex and Gender*, 13 GENDER & SOC'Y 457, 472 (1999).

[6] Leslie Haberfield, *The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues*, 23 MONASH U. L. REV. 92, 93 (1997).

> A useful analogy could be drawn with circumcision . . . . It could be argued that the lack of evidence of the benefits of surgery on intersexual children and the extent of the invasion of the body means that surgery on intersexual children is more analogous to female circumcision than male circumcision.[7]

In an important recent contribution to this debate, Nancy Ehrenreich has traced, in more depth, similarities between arguments utilised by opponents of both intersex surgery and female genital cutting.[8] While she is more sensitive to the issue of male circumcision, and is concerned not to condone the practice, she nevertheless suggests that:

> A number of factors distinguish male circumcision from intersex surgery, including: (1) religious reasons often stand behind the decision to circumcise an infant, raising First Amendment questions that are not raised by intersex surgery; (2) intersex surgery has a much more serious negative impact on physical well-being and sexual function than male circumcision usually does; (3) male circumcision does not permanently preclude alternative sex identities that may be more consonant with the felt identity of the individual; and (4) male circumcision does not seem to enforce patriarchal gender norms, as I argue FGC and intersex surgery do.[9]

This article takes issue with Chau and Herrings' skepticism regarding the valid comparisons that may be drawn between routine circumcision of male infants and early surgeries performed on children possessing ambiguous genitalia. Additionally, contrary to Ehrenreich's fourth contention, we argue that the practice of male circumcision implicates and enforces patriarchal gender norms by serving as a means of rigidly demarcating the sexes, and as a beginning to early training in masculinity.

Although the primary concern of this article is to trace the intersections between early intersex surgeries and routine neonatal male circumcision, it is important to first refute the assumption that a clear dichotomy may be drawn between male and female circumcision, since this is a key factor in understanding the construction of ethico-legal debates about male circumcision. In previous work, we have traced the tendency of legal commentators to contrast the harms of male and female circumcision,[10] as evidenced in the aforementioned quotes of Chau and Herring, as well as Ehrenreich. Another vivid example is provided by Layli Miller Bashir, who notes that "FGM [Female Genital Mutilation] would only

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[7] P.-L.Chau & Jonathan Herring, *Defining, Assigning and Designing Sex*, 16 INT'L J.L. POL'Y & FAMILY 327, 353-54 (2002).

[8] Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71 (2005).

[9] *Id.* at 73 n.9.

[10] Marie Fox & Michael Thomson, *A Covenant with the Status Quo? Male Circumcision and the New BMA Guidance to Doctors*, 31 J. MED. ETHICS 463, 469 (2005), *available at* http://jme.bmjjournals.com/cgi/content/full/31/8/463.

be similar to male circumcision if the penis was amputated."[11] Bashir's remarks are reminiscent of Ehrenrich's second contention regarding male sexual function, as both speak of a particular model of male sexual acts. In both cases, the loss of sensory function and other possibilities of harm that flow from circumcision are ignored.[12] Male sexual performance becomes functional, thereby privileging a certain popular understanding of male sexual pleasure and behavior. Such arguments act to further deny the harm caused by routine male circumcision. More generally, the downplaying of harm to male children, when contrasted to the harms inflicted on females seems particularly characteristic of certain strands of feminist scholarship.

Yet as Dena Davis noted:

> When one begins to question the normative status of the male newborn alteration in the West, and when one thinks of female alteration as including even an [sic] hygienically administered "nick," one begins to see that these two practices, dramatically separated in the public imagination, actually have significant areas of overlap.[13]

Davis highlights the problems with viewing forms of male and female circumcision as unitary and distinct procedures. Similarly, we, like Ehrenreich, are concerned about drawing distinctions rooted in patriarchal justifications for female circumcision. Like female genital cutting, male circumcision is also implicated in differentiating the sexes and in upholding patriarchal norms. This article attempts to establish that the intersections between the various forms of infant genital cutting lead to the conclusion that these practices should be eradicated in the absence of compelling medical justifications.

III. ACCEPTING VS. ACCEPTABLE MEDICAL PRACTICE

The most obvious parallel between non-therapeutic male circumcision and early gender reassignment surgery is the involvement of health professionals in surgical interventions which remove healthy tissue from the body of a child who is unable to provide consent. In both medical practices the aim is to surgically re-design the bodies of young children. However, in the case of intersex infants, the motivation is to "normalise" the child by assigning it to a definite sex category

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[11] Layli Miller Bashir, *Female Genital Mutilation in the United states: An Examination of Criminal and Asylum Law* 4 AM. U. J. GENDER & L. 414, 420. *See also* Haberfield, *supra* note 6, at 104. Other commentators argue that FGM should be regarded as a gender-specific human rights violation, without even acknowledging the routine acceptability of male circumcision. *See* Jaimee K.Wallerstein, Comment, *In the Name of Tradition: Eradicating the Harmful Practice of Female Genital Mutilation*, 22 LOY. L.A. INT'L & COMP. L. REV. 99 (1999).

[12] Christipher J. Cold & John R. Taylor, *The Prepuce*, 83 BRIT. J. UROLOGY 34 (Supp. 1, Jan. 1999), *available at* http://www.cirp.org/library/anatomy/cold-taylor/.

[13] Dena S. Davis, *Male and Female Genital Alteration: A Collision Course with the Law*, 11 HEALTH MATRIX 487, 488 (2001), *available at* http://www.cirp.org/library/legal/davis1/.

while in the case of male circumcision, it is to "perfect" the child's body and signal membership of a privileged category. In each case the fact that the law has refrained from regulating these surgeries has served to normalise and legitimise them.

Indeed, a striking similarity between the practices of male circumcision and intersex surgeries is the oddity that neither, in sharp contrast to female genital cutting, has been constructed as ethically or legally problematic until very recently. As to the discipline of bioethics, it appears that intersex surgeries have failed to attract attention since they have been shrouded in secrecy and perceived as relatively insignificant in number,[14] whereas male circumcision has eluded critical scrutiny because of its construction as a common and acceptable practice which is "almost part of the mainstream."[15] Citing Ronald Goldman, Davis notes that even the use of the term circumcision with its "vaguely medical" connotations serves to normalise the practice of male genital cutting.[16]

Interestingly, because these two forms of genital cutting take place on the terrain of the West, scientific medicine tends to screen both practices from legal enquiry even when things go dramatically wrong.[17] The most extreme example is the now infamous case of John/Joan, which highlights both the terrible harms that can be occasioned by sexual surgeries and the spurious basis of medical justifications for intersex surgeries. Ironically, this benchmark case which spawned the contemporary medical model for managing cases of intersex infants involved surgery on an infant who was clearly biologically male, but whose penis was ablated during a negligently performed circumcision to treat phimosis.[18]

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[14] Of course the number of children deemed to require "correctional surgery" as a result of an intersex condition is considerably less than the number of male infants circumcised, but the figures are more common than popularly assumed. Some estimates suggest that as many as two out of every thousand babies is born with ambiguous genitals resulting from various etiologies. *See* Chau & Herring, *supra* note 7, at 332-33 (citing Melanie Blackless et al., *How Sexually Diamorphic Are We?*, 12 AM. J. HUM. BIOLOGY 151 (2000), *available at* http://bms.brown.edu/faculty/f/afs/dimorphic.pdf).

The secrecy of the process is such that even the child subject is denied information about the procedures to which she or he has been subjected. *See* Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 7-8 (2000). The number of British men who have been circumcised has declined rapidly from about 50 % of the working class and 85 % of upper-class males in pre-World War II era to an estimated 5 to 6 % in 1993. *See* Marie Fox & Michael Thomson, *Short Changed?: The Law and Ethics of Male Circumcision,* 13 INT'L J. CHILD. RTS. 157, 162 (2005).

In the U.S., some differences in the rates of circumcision exist among groups: 96% Jewish men, 81% of non-Hispanic white men, 65% of African-American men, 54% of Hispanic men. Susan Gilbert, *Study is Adding to Doubts About Circumcision*, N.Y. TIMES, Apr. 2, 1997, at C3.

[15] *See* Caroline Bridge, *Religion, Culture and the Body of the Child, in* BODY LORE AND LAWS 265, 284 (Andrew Bainham et al. eds., 2002) [hereinafter BODY LORE].

[16] Davis, *supra* note 13, at 589 (citing RONALD GOLDMAN, QUESTIONING CIRCUMCISION: A JEWISH PERSPECTIVE 5 (1998)).

[17] However, note that damages awards may flow from negligently-performed circumcisions in both the U.S. and the U.K. *See, e.g.*, Doe v. Raezer, 664 A.2d 102 (Pa. Super. Ct.1995); B (A Child) v. S. Hosp. NHS Trust, [2003] Q.R. 9.

[18] For further detail, see Beh & Diamond, *supra* note 14, at 5-12. *See, e.g.*, Chau & Herring, *supra* note 7, at 335-36; Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANNALS HEALTH L. 195, 202-04 (2002).

Pediatrician and psychologist John Money advised the child's parents that the best interests of the child required that the child be raised as a girl, and that the child should undergo hormonal and surgical treatments to make him appear female. Dr. Money aimed to further his theory that the acquisition of sexual identity is a matter of social conditioning rather than of biology. In the 1970s, Money proceeded to publish claims in the pediatric literature that this social and surgical experiment was a success, notwithstanding emerging but unreported evidence of 'Joan's' decisive rejection of the assigned sex. Following disclosure of the truth, 'Joan' opted for a mastectomy and phalloplasty in order to revert to his original sex.

Yet the case continued to be cited, and ultimately formed the basis for standard medical practice in the United States for another twenty years. As Chau and Herring pointed out, notwithstanding the absence of any corroborating evidence, "as late as 1996 Money's approach was still followed by the American Academy of Paediatrics", which in that year published guidelines advocating that sexual identity was a function of social learning for intersex children.[19] Only in the late 1990s, when the truth about this most prominent sex assignment experiment finally emerged, was medical orthodoxy regarding the appropriateness of early surgical intervention challenged. Citing the John/Joan case, Beh and Diamond criticized the process by which "standard medical practice sometimes develops from case reports, word of mouth and the gradual clinical acceptable of innovative therapy without true scientific scrutiny of its effectiveness."[20] They note the dominance of Money's theory and studies in the field of intersex management, which promoted a medical response based on the flawed premise that early surgical intervention is necessary to resolve any doubts concerning the child's sexual identity, and that details of such medical history should be withheld from the child patient.[21]

We turn now to a brief consideration of the emergence of routine male circumcision which will demonstrate that it shares with intersex surgery a tradition of spurious medical endorsement. Furthermore, both practices provided platforms for prominent members of the medical community to promote scientifically-flawed proposals that advocated routine surgical interventions motivated by shared ideals of ensuring sex or gender stability.

Money's prominence in the intersex field is paralleled in the history of male circumcision by that of Dr. John Lewis A. Sayre. In February 1870, this highly respected and influential orthopaedic surgeon examined a young patient suffering from paralysis. Unable to ascertain the cause initially, he soon discovered that the penis of the five-year-old boy, whilst otherwise normal, had a "very small and

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[19] Chau & Herring, *supra* note 7, at 335 (citing AMERICAN ACADEMY OF PEDIATRICS, *Timing of Elective Surgery on the Genitalia of Male Children with Particular Reference to the Risks, Benefits, And Psychological Effects of Surgery and Anesthesia*, 97 PEDIATRICS 590 (1996), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;97/4/590.pdf).

[20] Beh & Diamond, *supra* note 14, at 12.

[21] *Id.* at 12-22. *See also* SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED (1998).

pointed" glans "tightly imprisoned in the contracted foreskin, and in an effort to escape, [it] had become puffed out and red as in a case of severe granular urethritis."[22] Sayre concluded that because "[a]n excessive venery is a fruitful source of physical prostration and nervous exhaustion, sometimes producing paralysis, [he] was pleased to look upon this case in the same light, and recommended circumcision as a means of relieving the irritated and imprisoned penis."[23] The circumcision led to almost immediate improvements in the boy's health and before long he was walking with normal limbs. Sayre went on to perform a number of such operations and subsequently reported his findings. Circumcision, he informed his colleagues, was the answer to a range of ailments: "Many of the cases of irritable children, with restless sleep, and bad digestion, which are often attributed to worms, [are] solely due to the irritation of the nervous system caused by an adherent or constricted prepuce."[24]

The case marked the beginning of the professional and popular rise of Phimosis, an ill-defined and fluid pathology,[25] resulting in the recoding of the foreskin as pathological, and through the recoding, its feminization. Beyond the ailments of children, circumcision came to be seen as a cure for more problematic and elusive illnesses. Geoffrey Miller noted: "Within fairly short order, circumcision was promoted as a remedy for alcoholism, epilepsy, asthma, gout, rheumatism, curvature of the spine and headache . . . paralysis, malnutrition, night terrors, and clubfoot; eczema, convulsions and mental retardation; promiscuity, syphilis, and cancer."[26]

Significantly, medical circumcision emerged during a well-documented period of genital surgery. Such experimentation was motivated in part by the theory of reflex neurosis, a belief that "there was an intricate web of nervous affinity running through the spine of every organ of the body and that, in turn, each organ had its own sphere of influence on physical and mental health."[27] Thus, circumcision came to be accepted as a cure for a range of mental as well as physical illnesses. Moreover, it was promoted enthusiastically as a solution to the Victorian scourges of insanity and the more amorphous neurasthenia.[28] Equally important

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22 Lewis A. Sayre, *Partial Paralysis from Reflex Irritation, Caused by Congenital Phimosis and Adherent Prepuce*, 23 TRANSACTIONS AM. MED. ASS'N 205, 206 (1870).

23 *Id.* at 206.

24 *Id.* at 210.

25 Frederick M. Hodges, *The History of Phimosis from Antiquity to the Present*, *in* MALE AND FEMALE CIRCUMCISION: MEDICAL, LEGAL AND ETHICAL CONSIDERATIONS IN PEDIATRIC PRACTICE 37 (George C. Denniston, Frederick M. Hodges & Marilyn F. Milos eds., 1999) [hereinafter MALE & FEMALE CIRCUMCISION].

26 Geoffrey P. Miller, *Circumcision: Cultural-Legal Analysis*, 9 VA. J. SOC. POL'Y & L. 497, 527 (2002).

27 David L. Gollaher, California Health Care Institute, *From Ritual to Science: The Medical Transformation of Circumcision in America,* 28 J. SOC. HIST. 5, 8 (1994), *available at* http://www.cirp.org/library/history/gollaher/.

28 Neurasthenia entails mental depression, wakefulness, headache, impaired memory, deficient mental control, morbid impulses, such as the impulse to kill oneself or others, or morbid fears, such as the fear of society, solitude, travelling, places, or diseases. *See* George M. Beard, *Circumcision as a Cure for Nervous Symptoms*, 4 PHILADELPHIA MED. BULL. 248, 248-49 (1882).

was the fact that at the same time circumcision was being advocated as therapy for an increasing number of problems, clitoridectomies and ovariotimies were being used to alleviate psychological symptoms in women, with the "clitoris subjected to a variety of surgeries, manipulations, and chemical preparations."[29] This common practice of female circumcision naturally led to the belief that male circumcision cured masturbation, which was perceived to cause degeneracy and insanity at that time.

The role of fear surrounding the masturbating child in the history of accepting routine circumcision deserves recognition. Circumcision of both female and male children allowed the Victorians to manage cultural anxieties regarding masturbation,[30] which had previously prompted an extensive and pervasive campaign against masturbation.[31] Emerging from this crusade was the forceful argument that circumcision diminished the incidence of masturbation since it removed or prevented adhesions, which otherwise led to the penis being handled, and in turn—almost inexorably—to self-abuse.[32] Indeed, curing masturbation was understood, at least by early supporters of circumcision, as its key health benefit.[33] To this end, certain medics also advocated circumcising young boys without anesthesia to create an association between the procedure, its pain, and masturbation.[34]

The acceptance of circumcision and its attendant pain may be understood in terms of an early training in masculinity.[35] Later justifications, beginning in the 1880s, focused on hygiene. By 1914, Abraham Wolbarst was calling for universal circumcision as a "sanitary measure."[36] This shift was accomplished within a social context that sought to identify cleanliness with good morals.[37] Assessing medical

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[29] Gollaher, *supra* note 27. For more detail on experimental sex surgeries in managing disorderly women in the U.K. and the U.S., see Ehrenreich & Barr, *supra* note 8, at 88-92; Isabelle R. Gunning, *Arrogant Perception, World Travelling and Multi-Cultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); BARBARA N. EHRENREICH & DEIRDRE ENGLISH, FOR HER OWN GOOD: 150 YEARS OF EXPERT ADVICE TO WOMEN (1978).

[30] For a comprehensive analysis of transatlantic anxiety regarding masturbation, see Geoffrey P. Miller, *Law, Self Pollution and the Management of Social Anxiety*, 7 MICH. J. GENDER L. 221 (2001). Whilst this was a transatlantic phenomenon, it should be noted that anxieties ran higher in the United States. As Hodges noted, "American doctors saw sexuality as more of a threat to public health and social stability than did their European contemporaries. The American medical professions intense focus on sexuality was due in part to economic pressures, the lack of a rigidly defined class system, the rise of the middle class, the rise of immigration, and other sources of social tension." Hodges, *in* MALE & FEMALE CIRCUMCISION, *supra* note 25, at 41.

[31] Miller, *supra* note 26, at 534.

[32] *Id.* at 527.

[33] *Id.* This assertion is better understood if one looks at the construction of masturbation as the root of nearly all illnesses.

[34] John H. Kellogg, *Treatment for Self-Abuse and Its Effects*, *in* PLAIN FACTS FOR OLD AND YOUNG: EMBRACING THE NATURAL HISTORY AND HYGIENE OF ORGANIC LIFE 295 (1888), *available at* http://users2.evl.net/~origins/pdf/kellogg.pdf.

[35] Fox & Thomson, *supra* note 10.

[36] Abraham L. Wolbarst, *Universal Circumcision as a Sanitary Measure*, 62 JAMA 92 (1914).

[37] Thomas Szasz located circumcision within a model of the "Therapeutic State," a political system where "social controls are legitimised by the ideology of health." Thomas Szasz, *Routine Neonatal Circumcision: Symbol of the Birth of the Therapeutic State*, 21 J. MED. & PHIL. 137 (1996), *available at*

opinion in the U.K. and the U.S., Wolbarst concluded that "the vast preponderance of modern scientific opinion on the subject is strongly in favor of circumcision as a sanitary measure and as a prophylactic against infection with venereal disease."[38]

IV. THE CENTRALITY OF GENITAL MORPHOLOGY

Having briefly outlined the genealogy of circumcision practice, and touched upon some points of commonality between various other genital surgeries and male circumcision, we turn to a striking feature of both narratives which is the preoccupation of Western medicine with genitalia and the role of the genitals in assigning and managing sex and sexuality. Significantly, the penis has been the main preoccupation, functioning as the marker of the standard or normal body. This fixation continues to play out in contemporary medical practice, with practitioners of sex assignment surgery and male circumcision displaying excessive concern with the morphology of the genitals in terms of measuring size and assessing aesthetics.

Turner has demonstrated that form is prioritized above the function of the genitalia or reproductive organs, noting that "the greater emphasis on genital form over reproductive function has served to uphold male social status and maintain heterosexuality despite the existence of the sexually ambiguous body."[39] Similarly, Chau and Herring comment on the widely-accepted sex assignment treatment in which a penis of less than two centimetres is removed:

> The traditional approach to deciding the assignation of sex was summarized by Money, '"too small now, too small later" is a useful working rule with regard to construction or reconstruction of a penis.' In the United States, the 'locker room appearance test' was seen as of particular importance. The doctors would imagine the child when older showering with other children: would the child be accepted by the others as a boy or girl or would they be teased?[40]

Unsurprisingly, given the employment of such tests, the vast majority of intersex children—some estimates suggest as many as ninety percent[41]—are assigned to the female sex after surgery to reduce the size of the clitoris, and/or to create a vaginal canal. As Suzanne Kessler comments, this percentage is indicative of the pervasive sexism of a medical establishment which "devalues the female body and female sexuality by emphasizing form over function—an aesthetically acceptable 'phallus' (a term applicable to the erectile tissue of both males and

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http://www.historyofcircumcision.net/index.php?option=content&task=view&id=70. Within this model, circumcision is emblematic of the "same Puritanical zeal for health-as-virtue that has fuelled other typically American crowd madnesses, such as Prohibition, the War on Drugs, and the Mental Health Movement." *Id.* at 140-41.

38 Wolbarst, *supra* note 36, at 95.

39 Turner, *supra* note 5, at 466.

40 Chau & Herring, *supra* note 7, at 337.

41 Cheryl Chase, *Hermaphrodites with Attitude: Mapping the Emergence of Intersex Political Activism*, 2 GLQ: A J. GAY & LESBIAN STUD. 189-211 (1998).

females) over a functional one capable of sensation."[42] Such patriarchal attitudes equally serve to devalue forms of male sexuality. Attempts by surgeons to attribute the preference for surgical gender assignment as female to the greater difficulties in constructing an artificial penis similarly expose the phallocentrism which underpins the medical management of sex reassignment. Thus as Alice Domurat Dreger notes:

> [C]linicians treating intersex children often talk about vaginas in these children as the absence of a thing, as a space, a "hole," a place to put something. That is precisely why opinion holds that a "functional vagina can be constructed in virtually everyone" because it is relatively easy to construct an insensitive hole surgically.[43]

Crucially, such practices also reinforce notions of female bodies as "non standard or aberrant (not-male) bodies."[44] Across a variety of contexts, the law is no less fixated with the penis and heterosexual penetrative sex.[45] The culturally-privileged model of masculine sexuality and embodiment—and more specifically, the centrality of the penis to its constitution—is narrated at several locations in law. One example is afforded by the only U.K. case to consider the implications of intersex surgery. Although the High Court did not address the legality of intersex surgery in *W. v. W.*,[46] Andrew Sharpe highlights how Judge Charles linked the ambiguous genitalia of the respondent with the female sex, notwithstanding the fact that the court accepted that she was genitally ambiguous, albeit more male than female because she was chromosomally and gonadally male.[47] Seemingly it is the possession of a defective phallus which marks the respondent as lacking, and hence confirmed her designation in law as female.

V. THE PERFECTIBLE MASCULINE BODY

Given the previous discussion, combined with the more general centrality of the penis to understandings of masculinity, it may seem counterintuitive to propose that a man's circumcision status, rather than

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[42] Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 12 SIGNS 3 (1990).

[43] Alice Domurat Dreger, *"Ambiguous Sex"—or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CENTER REP. 24, 29 (1998).

[44] Ngaire Naffine, *The Body Bag*, *in* SEXING THE SUBJECT OF LAW 70, 88 (Ngaire Naffine & Rosemary Owens eds., 1997). "A feminist politics is clearly confronted by this idea that the category 'woman' should function to map persons whose genitalia are 'imperfectly' formed." SHARPE, *supra* note 4, at 49.

[45] *See, e.g.*, Andrew Bainham, *Sexuality, Sexual Relations and the Law*, *in* BODY LORE, *supra* note 15. It should be noted that Bainham goes on to conclude that there are "clear signs of the diminishing centrality of heterosexual, penetrative sexual relations," *id.* at 188, in both criminal and family law, although "we are still a very long way from being able to say that the area of consensual sexual intimacy is of no interest to the law." *Id.* at 181.

[46] W. v. W. (Nullity: Gender), [2001] Fam 111, 58 BMLR 15, [2001] 1 F.L.R. 324, *available at* 2000 WL 1544589.

[47] SHARPE, *supra* note 4, at 46.

> his "possession" of a penis *per se*, is the marker of difference between the sexes. Intuition, under a polarised two-sex model, suggests that the penis marks masculinity whilst the vagina denotes femininity. Anthropological research nonetheless serves to question the absoluteness of this binary, and points to a more complicated relationship. Referring to areas in Africa, Fran Hosken stated: Excision . . . is practiced to affirm the sex of the individual, because it is believed that the clitoris represents a male element in a female, and that the prepuce of the penis represents femininity in a boy. Hence, the girls are excised and the boys circumcised in order to establish their sex in society.[48]

The routinisation of male circumcision in the U.K. and the U.S. in the 1890s may be understood as marking the difference between the sexes in a similar way. This may be traced to the feminisation of the foreskin by pro-circumcision discourses that rely on and play into myths of female disease, contagion, and uncleanliness. The foreskin is either analogised to the clitoris or labia, or more generally feminised, and characterised as a permeable and dangerous interior space.[49] The former proposition is given greater currency when one explores historical understandings of the reproductive physiology of the sexes.

In this regard it is worth looking to Thomas Lacquer's study in *Making Sex: Body and Gender from the Greeks to Freud*.[50] Laqueur, challenging conventional understanding of the sex/gender binary, argues that sex is situational and comprehensible only in the context of battles over gender and power. He discusses the fact that for thousands of years, until around the late eighteenth-century, the sexes were believed to share the same genitals. It was accepted that women were essentially men in whom a lack of vital heat—of perfection—had resulted in structures that are retained *within* in the female and visible *without* in the male. Within this one-sex model, "the vagina is imagined as an interior penis, the labia as foreskin, the uterus as scrotum, the ovaries as testicles."[51] Laqueur further states:

> Thus the old model, in which men and women were arrayed according to their degree of metaphysical perfection, their vital heat, along an axis whose telos was male, gave way by the late eighteenth century to a new model of radical dimorphism, of biological divergence. An anatomy and physiology of incommensurability, replaced a metaphysics of hierarchy in the representation of women in relation to man.[52]

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[48] FRAN P. HOSKEN, THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES 55 (4th rev. ed. 1994).

[49] Whilst it is questionable to "pick and choose" across the vast anthropological data that is available, it is interesting to note the practice of the Ndemu of northwestern Zambia, where the glans of the uncircumcised penis is understood as "wet and filthy" whilst the circumcised is "dry" and desirable. Miller, *supra* note 26, at 520 n.139 (citing VICTOR TURNER, THE RITUAL PROCESS 17 (1966)).

[50] THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD (1990).

[51] *Id.* at 11

[52] *Id.* at 5-6.

As discussed above, circumcision emerged as an accepted practice during a period of experimentation in genital surgery. In the 1890s, the persistence of male circumcision became routine whereas the sexual mutilation of women diminished. Such a development can be understood in the context of the one-sex model, with circumcision playing the role of distinguishing male from female. It also connects to a broader understanding of the foreskin as feminised flesh; representing what Judith Butler referrs to as "bodily permeabilities unsanctioned by the hegemonic order."[53] On this view, the foreskin provided an inner sensitised world which appeared incompatible with, and disrupted the aesthetic of, the culturally-privileged model of masculine embodiment.[54] Thus, the role of aesthetics in the history and practice of circumcision deserves at least some recognition.

The aesthetics of the idealised masculine body has been a celebrated focus of Western art and culture. This body is the valorised warrior body; the hard-muscled body whose representation has been a consuming, though not constant, passion from ancient works of Western art to contemporary advertising deploying the nude male body.[55] The uncircumcised penis with its inner dimensions and its permeability are at odds with this ideal masculine aesthetic, and as such, has much in common with the "defective" phallus of the intersex child. Indeed, the pervasive Western preoccupation with the aesthetics of the penis clearly connects to the concern with external morphology and the preference for form over function in the practice of intersex surgery.

William Goodwin provides a clear example of how circumcision, when it originally emerged as a prophylactic, was addressed in aesthetic terms. Goodwin wrote of the surgery as a "beautification comparable to rhinoplasty." The circumcised penis "appears in its flaccid state as an erect uncircumcised organ—a beautiful instrument of precise intent."[56] Within Goodwin's visual framework, the circumcised penis complements the ideal of the phallic body, its closure and impenetrability. In its circumcised state, it is also imagined as erect—ready for penetration and a clear symbol of masculinity. Similarly, in *Symbolic Wounds,* Bruno Bettelheim uncovers an association between the uncovered glans and ideas of enhanced masculinity.[57]

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[53] BUTLER, *supra* note 2, at 132.

[54] This may be understood as a continuation of the partiality of cultural representations of the penis:

> [T]he penis is figured culturally and for the most part biologically as a penetrative and excretory implement and not as a receptive orifice, although the urethra is entered in a variety of sexual practices and medical procedures .... The penis is a vestibule, a passageway to and from the interior of the body.

John Zuern, *The Future of the Phallus: Time, Mastery, and the Male Body, in* REVEALING MALE BODIES 62 (Nancy Tuana et al. eds., 2002).

[55] Susan Bordo, *Hard and Soft, in* THE MALE BODY: A NEW LOOK AT MEN IN PUBLIC AND IN PRIVATE 36-68, 171 (1999). Interestingly, as Bordo recognised, such contemporary images often seem to engage a gay aesthetic of the muscular yet sinewy form. *Id.* at 171.

[56] Miller, *supra* note 26, at 544-45.

[57] BRUNO BETTELHEIM, SYMBOLIC WOUNDS: PUBERTY RITES AND THE ENVIOUS MALE 33 (New, rev. ed., Collier Books 1971) (1954).

Contemporary studies continue to find an aesthetic preference for the circumcised penis within U.S. culture.[58] Thus, in a relatively recent scientific review of circumcision in the U.S., the authors observe that "a certain stigma . . . is attached to the uncircumcised penis in the white population."[59] This issue of stigma, derived from ideas of uncleanliness as well as racial and class prejudice, is central to the recognition of the state of circumcision as a marker of racial and other differences. Thus, while the feminisation of the foreskin marks the man with the circumcised penis as different from the female and the uncircumcised male, circumcision has long existed as a more general marker of masculine belonging. James Boon notes that "(non)circumcision involves signs separating an 'us' from a 'them' entangled in various discourses of identity and distancing."[60] He further conveys the multiplicity of ways in which circumcision and "un/circumcision" can mark belonging:

> Over time our ritual *topos* has been 'diacritical' to diverse peoples and personages. It marks off Muslim Indonesian from Hindu-Balinese Indonesian, but not from 'Hindu Javanese' or Tengger Indonesian. Generally, it can differentiate any Muslim from any Hindu man . . . . Un/circumcision has divided Paulien precepts from Christ, Christian from Jew, unmedicalized laggard from medicalized modern; and now demedicalized post-modern from still-surgicalized establishmentarian.[61]

Locating male circumcision within this racial and class dynamic helps explain the reason its routine practice long outlasted the sanitary movement, particularly in the U.S. Circumcision emerged as a signifier of social standing or distinction through the linkage between health and morals and its association with the physician "class." As Gollaher notes, "the trend was inspired by a kind of medical class who persuaded their private patients of . . . the 'utility of emulation.'"[62] During this period, childbirth for the middle- and upper-classes moved from the domestic setting to that of the medical under the management of physicians. Since midwives rarely performed the procedure, circumcision became literally a marker of the child's birth rite/right.

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[58] In a recent study, "participants reported significantly reduced erectile function, decreased penile sensitivity, no significant change in sexual activity, and significantly improved satisfaction after circumcision. This improved satisfaction represented a more satisfactory appearance of the penis and less pain during sexual activity." Richard Sadovsky, *Adult Circumcision, Sexual Function, and Satisfaction*, 66 AM. FAM. PHYSICIAN 1080 (2002), *available at* 2002 WLNR 2049552 *and* http://www.aafp.org/afp/20020915/tips/7.html.

[59] Edward O. Laumann et al., *Circumcision in the United States: Prevalence, Prophylactic Effects and Sexual Practice*, 277 JAMA 1052, 1057 (1997), *available at* http://www.circs.org/library/laumann/.

[60] James Boon, *Circumscribing Circumcision/Uncircumcision: An Essay Amidst a History of Difficult Description*, *in* IMPLICIT UNDERSTANDINGS: OBSERVING, REPORTING AND REFLECTING ON THE ENCOUNTERS BETWEEN EUROPEANS AND OTHER PEOPLES IN THE EARLY MODERN ERA 556, 556 (Stuart B. Schwartz ed., 1995).

[61] *Id.* at 561.

[62] Gollaher, *supra* note 27, at 23.

Similarly, the procedure acted as a barometer of the medicalisation of childbirth and the social status of the profession.[63] In 1949, on the eve of the decline in circumcision rates in the U.K., one study of university entrants noted that eighty-four percent of students coming from the "best-known public schools" were circumcised in comparison to only fifty percent from other schools.[64] The distribution across class continues to the present day,[65] and may very well be a material factor in the persistence of the procedure. As Waldeck argues, "norms that are rooted in concerns about esteem and reputation often work to lock in inefficiencies."[66]

This emulation of class—particularly within the configuration class/science/health—was of growing importance with the changing demographics of the U.S. at the turn of the century. Specifically, circumcision status as a social marker flourished with the influx of immigrants from Southern and Eastern Europe, and as a racist discourse of pollution and contagion. Circumcision, race and class soon became enmeshed:

> So it happened that the foreskin, despised by the medical profession, came to broadly signify ignorance, neglect, and poverty. As white middle-class gentiles adopted circumcision, those left behind were mainly recent immigrants, African Americans, the poor, and others at the margins of respectable society.[67]

This recurring motif of uncleanliness also emerged, in part, from the association between the uncircumcised penis and a feminised interior,[68] thereby aligning the foreskin with negative biomedical and popular understandings of female genitals. In professional and lay publications of the time, the foreskin became characterised by disease and pollution. For example, Jonathan Hutchinson deploys the imagery of interior spaces of fluidity and disease to assert that the foreskin "constitutes a harbour for filth."[69] This was more fully articulated in E. Harding Freeland's work:

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[63] *Id.* It should also be noted that there remains clear financial advantages to the profession in the U.S. In the survey discussed by Fletcher, respondents reported fees ranging from $ 20 to $ 300. Christopher R. Fletcher, *Circumcision in America in 1998: Attitudes, Beliefs & Charges of American Physicians*, *in* MALE & FEMALE CIRCUMCISION, *supra* note 25, at 259, 266. The American Academy of Pediatrics noted that circumcision in the U.S. had an annual cost of between $ 150 and $ 270 million in 1999. AMERICAN ACADEMY OF PEDIATRICS, *Circumcision Policy Statement*, 103 PEDIATRICS 686 (1999), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;103/3/686.pdf. Beyond this there is also the issue of the commercial use of foreskins within both the biotechnology and pharmaceutical sectors. MALE AND FEMALE CIRCUMCISION, *supra* note 25, at vii-viii.

[64] Douglas Gairdner, *The Fate of the Foreskin: A Study of Circumcision*, 2 BRIT. MED. J. 1433, 1433-37 (1949), *available at* http://www.cirp.org/library/general/gairdner/.

[65] Miller, *supra* note 26, at 532.

[66] Sarah E. Waldeck, *Social Norm Theory and Male Circumcision: Why Parents Circumcise*, 3 AM. J. BIOETHICS 56 (2003).

[67] Gollaher, *supra* note 27, at 22-23.

[68] *See* Waldeck, *supra* note 66.

[69] Jonathan Hutchinson, *A Plea for Circumcision*, 2 ARCHIVES SURGERY 15 (1890), *reprinted in* 2 BRIT. MED. J. 769 (Sept. 27, 1890).

> Indeed, anyone who has taken the trouble to compare the dry, pink-parchment-like, cleanly appearance of the glans of the circumcised with the sodden, swollen, uncleanly structure which is frequently presented to view when the prepuce of the uncircumcised is retracted cannot fail to have been struck by the contrast. In the latter case the space between the prepuce and the glans forms the very *beau ideal* of a place for the implantation and multiplication of bacteria of all kinds, the pent-up secretions furnishing them with an efficient nutrient medium in which to grow, the heat and moisture favouring their development, and the excoriations which are so liable to exist forming a ready means whereby their products may gain access to the general circulation.[70]

Significantly, such unclean associations still recur, notwithstanding more recent accounts of the prepuce as a complex tissue.[71] For example, a recent article in a medical journal article referrs to the foreskin as a "piece of prehistoric human culture that now only exists as a reservoir of infection."[72] It is also worth noting that in 1998, thirty-four percent of physicians surveyed believed that circumcision "makes the penis cleaner."[73] In more general terms, such belief helps account for the shift towards cleanliness as a justification for circumcision since the 1880s. By the end of the nineteenth century, the circumcised penis was represented in medical books and journals—a practice subsequently followed by publishers of medical books designed for a lay readership,[74] and which still persists today.[75] Again, there are echoes of the "one-sex" model, suggesting enlightenment perfectibility—man perfecting manliness, finishing the work of God, removing the last vestiges of the feminine. The idea of perfectibility is also evident in more general medical discourses, as exemplified by R.W. Cockshut who remarked that "it does not seem apt to argue that 'God knows best how to make little boys.'"[76] A few decades later, Money and other advocates of intersex surgery harboured similar delusions as to their ability to perfect bodies through surgical redesign of the phallus.

VI. CONCLUSION

Weaving through the historical narratives of male circumcision and intersex surgeries is the belief in the power of surgery to normalise and perfect. In these narratives, the body of the child is seen as a mere surface to be inscribed and

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[70] E. Harding Freeland, *Circumcision as a Preventative of Syphilis and Other Disorders*, 2 LANCET 1869, 1870 (Dec. 29, 1900). Freeland further stated: "It must be borne in mind that the special object to be attained by circumcision as a preventative of syphilis is not only the removal of the prepuce, but, as far as possible, the obliteration of all folds about the glans." *Id.* at 1871.

[71] *See* John P. Warren & Jim Bigelow, *The Case Against Circumcision*, BRIT. J. SEXUAL MED., Sept./Oct. 1994, at 6, *available at* http://www.cirp.org/library/general/warren2/.

[72] Ross DeHovitz, *Wrestling with the Covenant*, 172 W.J. MED. 64 (2000), *available at* 2000 WLNR 4100854.

[73] Fletcher, *supra* note 63, at 265.

[74] *Id.* at 259.

[75] Hodges, *in* MALE & FEMALE CIRCUMCISION, *supra* note 25, at 54-57.

[76] R.W. Cockshut, *Circumcision*, 2 BRIT. MED. J. 764, 764 (1935).

improved. Additionally, both surgical procedures originated from *accepted* medical practice, as opposed to *acceptable* medical practice validated by defensible scientific research. The emergence of both procedures was dependent on a confluence at a particular historical juncture of personality, medical practice, class, and gender.

What aligns both forms of surgery and appears to distinguish them from female genital cutting is that they have been sanctioned and performed by practitioners of Western medicine. This factor partially explains the extreme difference in the legal response to female genital cutting. The notions of neutrality and objectivity that allegedly fuel Western scientific medicine and Western law has meant that traditions of genital cutting sanctioned in Anglo-American jurisdictions have been shielded from the accusations of cultural barbarity and attendant ethico-legal scrutiny applied to female circumcision. As Ehrenreich notes: "To the extent that scientific (in this case, medical) assessments of, and treatment protocols for, various human conditions are seen as merely descriptive of a biological reality, they are not seen as cultural, socially constructed, or contingent."[77]

Although the critical discourse on female circumcision and its punitive legal response is problematic, one positive feature of the legal regulation of female circumcision is its clear acceptance of the harmful nature of the procedure. In the case of intersex surgery, there are encouraging signs that the harms of early non-therapeutic genital surgery are being uncovered, although this has yet to be clearly signaled by law. One of the recurring themes of this article has been the similarity of the harms inflicted on young children when their bodies are moulded and redesigned by surgeons, regardless of whether their motivation is to normalise or to perfect. The harms of circumcision, however, have been rendered less visible by the long history and widespread acceptance of routine circumcision in North America, the United Kingdom and Australia.

The ready acceptance of the cultural ideal of circumcision has blinded society to the risks related to surgery, the pain occasioned by removal of healthy tissue, and the possibility of psycho-sexual problems in later life. To a limited extent these harms are now beginning to be publicly acknowledged by professional codes.[78] However, infant male circumcision continues to be constructed as a risky practice, rather than a harmful one. Consequently, the practice is deemed a private decision appropriately made by parents.[79]

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[77] Ehrenreich & Barr, *supra* note 8, at 89.

[78] *See, e.g.*, BRITISH ASSOCIATION OF PAEDIATRIC SURGEONS (BAPS), STATEMENT OF THE BAPS WORKING PARTY ON THE SURGICAL MANAGEMENT OF CHILDREN BORN WITH AMBIGUOUS GENITALIA(2001), *available at* http://www.baps.org.uk/documents/Intersex%20statement.htm; BRITISH MEDICAL ASSOCIATION, THE LAW AND ETHICS OF MALE CIRCUMCISION: GUIDANCE FOR DOCTORS (2003), *available at* http://www.bma.org.uk/ap.nsf/Content/malecircumcision2003.

[79] *See*, e.g., J. (A Minor) (Prohibited Steps Order: Circumcision), (2000) 52 B.M.L.R. 82, [2000] 1 F.L.R. 571 (CA (Civ. Div.)), *available at* 1999 WL 1142460; S. (Children) (Specific Issue: Religion: Circumcision), [2004] E.W.H.C. 1282, [2005] 1 FLR 236 (Fam. Div.); Fox & Thomson, *supra* note 10.

We suggest that compelling evidence of benefits should be established before parents are legally permitted to consent to such procedures. Moreover, the harmful effects of routine infant male circumcision extend beyond individual mutilations into more nebulous but pervasive harms occasioned by the form of masculinity which is implicitly sanctioned by routine male circumcision. This is a version of masculinity rooted in ideals of pain and sacrifice as well as class and racial division. Additionally, male circumcision, like intersex surgeries, serves to rigidly demarcate male from female, thus reinforcing a heterosexual imperative which, as Lois Bibbings has demonstrated, is implicated in perpetuating many harms.[80]

Thus, while harm is readily discernible and accepted by almost all commentators of female genital cutting, opponents of all sexual surgeries on unconsenting children should be more receptive to recognizing the harm entailed in each of these practices. Opponents of female genital cutting have distanced these practices from routine male circumcision for ethnocentric and political purposes. Whilst the focus of this article has been the parallels that may be drawn between intersex surgery and neonatal circumcision, there are political advantages to be gained from aligning in opposition to all non-consensual non-therapeutic surgeries on children. Such benefits are, of course, additional to the ethical and legal stances against such surgeries.

[80] Lois Bibbings, *Heterosexuality as Harm: Fitting In, in* BEYOND CRIMINOLOGY: TAKING HARM SERIOUSLY (Paddy Hillyard et al. eds., 2004).