

‘BEAUTY’ AND ‘THE BEAST’: ANALOGISING BETWEEN COSMETIC SURGERY AND FEMALE GENITAL MUTILATION

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ABSTRACT¹

Cosmetic surgery is a relatively new set of procedures that is increasing in popularity and that is widely-accepted as lawful, whereas female genital mutilation is an age-old set of procedures that has recently been criminalised within the Western world. This article contends that these two sets of procedures share key conceptual similarities, including similarities in the harms that they inflict and the patriarchal cultural understandings that underpin them, such that they should be recognised as analogous to each other. Counter-arguments against this analogy that raise possible differences, such as in relation to issues of consent and effect, can be refuted. On the strength of this analogy, this article argues that the similarity between these two sets of procedures necessitates law reform in order to resolve the dissimilarities in their legal treatment.

I INTRODUCTION

Body alterations have been practiced within human societies for thousands of years, as the result of various aesthetic, cultural, religious and medical understandings. Many of these practices - such

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as tattooing, piercing and scarification - continue today throughout the world.² Recently, some Western liberal democracies, including Australia, New Zealand and the United Kingdom, have explicitly criminalised the set of traditional body alterations known collectively as 'Female Genital Mutilation' (FGM).³ At the same time, however, within these countries a new set of body alteration procedures termed 'cosmetic surgery' has recently gained immense popularity. In contrast to the strict Western legal oversight on FGM procedures, in 2008 1.7 million cosmetic surgical procedures were carried out in the USA alone.⁴

As the result of growing awareness of the issue in the West during the 1970s and 1980s, commentators (particularly feminists) have generated a large amount of material considering FGM. A

² For a detailed description of these procedures and many more, both historically and contemporaneously, see, Armando Farvazza, *Bodies Under Siege: Self-Mutilation and Body Modification in Culture and Psychiatry* (John Hopkins University Press, 2nd ed., 1996).

³ There are terminological difficulties in adequately describing these practices. 'Female Genital Mutilation' (FGM) is criticised for being pejorative and value-laden: Ian Patrick, 'Responding to Female Genital Mutilation: The Australian Experience in Context' (2001) 36(1) *Australian Journal of Social Issues* 15, 16. 'Female Circumcision' (FC) implicitly suggests an apparently misleading similarity with male circumcision: Leti Volpp, 'Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism' (1996) 96 *Columbia Law Review* 1573, 1578. Also, both FGM and FC indicate that what occurs is a singular practice, whereas in reality it is a multitude of practices: Lois Bibbings, 'Female Circumcision: Mutilation or Modification?' in Jo Bridgeman and Susan Millns (eds.) *Law and Body Politics: Regulating the Female Body* (1995) 151, 151. While 'Female Genital Surgeries' (FGS) catches this plurality, the medical context that it evokes for a Western audience is not reflective of the non-medical reality of the practice. While these practices can take place in a hospital or health clinic, they are usually performed by a midwife or elderly woman and the instruments are 'not usually sterilised': Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General* (1994) 8, 21. In this article, I will use 'FGM' because this phrase is the one most commonly used in the secondary material. By drawing attention to the pejorative and singular connotations of 'FGM' in this footnote, I hope to defuse (or at least mitigate) their effect on this article.

⁴ American Society of Plastic Surgeons, *2008 Statistics* (2009) <http://www.plasticsurgery.org/Media/s_tats/2008-US-cosmetic-reconstructive-plastic-surgery-minimally-invasive-statistics.pdf> 6.

ubiquitous trend within such material is to draw an analogy, either explicitly or implicitly, between FGM and Western cosmetic surgery. While this analogy is frequently made (typically, it seems, as a throw-away comment),⁵ it is less common for it to be dealt with seriously and in detail,⁶ unless the author is focusing solely on female genital cosmetic surgery.⁷ In the Australian legal context this analogy is problematic: while FGM is explicitly criminal, the lawfulness of cosmetic surgery in Australia, as in other Western liberal democracies, is ‘broadly accepted’.⁸ If FGM and cosmetic

⁵ See, eg, David Fraser, ‘Heart of Darkness: The Criminalisation of Female Genital Mutilation’ (1994) 6(1) *Current Issues in Criminal Justice* 148, 150; Rosemarie Skaine, *Female Genital Mutilation* (2005) 3, 88-89; Erika Sussman, ‘Contending with Culture: An Analysis of the *Female Genital Mutilation Act* of 1996’ (1998) 31 *Cornell International Law Journal* 193, 213; Rowan Mangan, ‘Rights and Wrongs: Intercultural Ethics and Female Genital Mutilation’ (2006-07) 31 *Melbourne Journal of Politics* 56, 67; Kate Green and Hilary Lim, ‘What is This Thing About Female Circumcision?: Legal Education and Human Rights’ (1998) 7(3) *Social and Legal Studies* 365, 378-380; Carolyn Bowra, ‘The Debate on Clitoridectomy: “Act of Love” or Act of Oppression?’ (1994) 15 *The Australian Year Book of International Law* 183, 194; Cressida Heyes, ‘Normalisation and the Psychic Life of Cosmetic Surgery’ (2007) 22(52) *Australian Feminist Studies* 55, 64-65; Christine Mason, ‘Excising Excision: Medico-Legal Issues Arising from Male and Female Genital Surgery in Australia’ (2001) 9 *Journal of Law and Medicine* 58, 65.

⁶ Some key exceptions include the philosophical analyses contained in Sally Sheldon and Stephen Wilkinson, ‘Female Genital Mutilation and Cosmetic Surgery: Regulating Non-Therapeutic Body Modification’ (1998) 12(4) *Bioethics* 263; Clare Chambers, ‘Are Breast Implants Better than Female Genital Mutilation? Autonomy, Gender Equality, and Nussbaum’s Political Liberalism’ (2004) 7(3) *Critical Review of International Social and Political Philosophy* 1; Sheila Jeffreys, ‘Beauty and Misogyny’ (2005) 78 *Arena Magazine* 46.

⁷ See, eg, Birgitta Essen and Sara Johnsdotter, ‘Female Genital Mutilation in the West: Traditional Circumcision versus Genital Cosmetic Surgery’ (2004) 83 *Acta Obstetrica et Gynecologica Scandinavica* 611; Fiona Green, ‘From Clitoridectomies to “Designer Vaginas”: The Medical Construction of Heteronormative Female Bodies and Sexuality Through Female Genital Cutting’ (2005) 7(2) *Sexualities, Evolution and Gender* 153; Aileen Kennedy, ‘Mutilation and Beautification: Legal Responses to Genital Surgeries’ (2009) 24(60) *Australian Feminist Studies* 211-231; Virginia Braun, ‘The Women are Doing it for Themselves’ (2009) 24(60) *Australian Feminist Studies* 233. Clearly, this is a more limited form of the more general ‘cosmetic surgery’ analogy I want to engage with in this article.

⁸ Sheldon and Wilkinson, above n 6, 270.

surgery can be considered to be conceptually similar, then the disparity in their legal status seems to be *prima facie* unjustifiable. Furthermore, if we accept this disparity as unjustifiable, what are the legal implications of this? Should we read the analogy that can be drawn between FGM and cosmetic as a basis for legalising FGM or as a basis for criminalising cosmetic surgery?

In this article, I will argue that an analogy can be drawn between FGM and cosmetic surgery because they are conceptually similar sets of practices. This argument will proceed through the rest of Section I by way of a brief outline of cosmetic surgery and FGM and their respective legal statuses. In Section II the analogy is drawn out and justified, and is then defended in Section III by the refutation of counter-arguments that attempt to establish dissimilarities between the two. The argument concludes in Section IV with a consideration of the implications of this analogy for the development of the law.

A *Cosmetic Surgery*

Western cosmetic surgery is the ‘aesthetic improvement through surgical alterations of facial and bodily features’.⁹ This ‘improvement’ can take many possible forms, including the removal

⁹ This is to be contrasted against ‘reconstructive’ plastic surgery which ostensibly aims to ‘restore or improve physical function and minimize disfigurement from accidents; diseases, or birth defects’: Diana Dull and Candace West, ‘Accounting for Cosmetic Surgery: The Accomplishment of Gender’ (1991) 38(1) *Social Problems* 54, 54. However, the distinction between these two types is not so clear given that ‘[t]he content of medical diagnoses is shaped by social, economic, and political factors’, and thus the boundary between subjective aesthetics and purportedly objective ‘disfigurement’ is blurred: Janice Irvine, ‘Regulated Passions: The Invention of Inhibited Sexual Desire and Sexual Addiction’ in Terry, Jennifer, and Urla, Jacqueline, (eds.) *Deviant Bodies* (Bloomington and Indianapolis, Indiana University Press, 1995) 314, 316. A particularly problematic example of this is surgery to ‘normalise’ the appearance of an intersexed infant’s genitalia. Should this be considered reconstructive surgery to fix an objective ‘deformity’? Or is this merely cosmetic surgery to bring the child’s appearance into line with subjective dominant cultural norms regarding genital appearance?

of fat (liposuction), the increase or decrease in breast size (mammoplasty), the tightening of the facial skin (facelift), the reshaping of the nose (rhinoplasty), the remoulding of the stomach area (abdominoplasty), and so on. The level of surgical interference with the body varies from procedure to procedure, but all procedures are grounded in the medical manipulation of bodily tissue. As Watkins notes, the '[s]kin is cut, and material is inserted beneath it, or tissue sucked out. Cartilage is removed or remoulded'.¹⁰ It is an increasingly popular phenomenon, with the American Society of Plastic Surgeons estimating that more than 55 million cosmetic surgery procedures will be performed in 2015, more than four times the number of procedures carried out in 2005.¹¹ Despite the fact that more and more men are electing to undergo cosmetic surgery procedures,¹² it remains a 'deeply gendered' area,¹³ both discursively and in empirical terms of the 'disproportionate number of women' that undergo such procedures.¹⁴

The status of cosmetic surgery within Australian criminal law is clear, albeit somewhat technically complex. In practice, cosmetic surgeries are commonplace procedures carried out by trained and qualified medical practitioners and the occurrence of such surgeries has broad social and legal acceptance, hence the existence of public organisations such as the Australasian College of Cosmetic Surgery. Technically, though, cosmetic surgery procedures necessarily entail physical interference with the bodies of patients and such interference will *prima facie* fulfill the requirements for a number of possible assault-based offences, such as assault occasioning bodily

¹⁰ Amanda Watkins, 'Score and Pierce: Crimes of Fashion? Body Alteration and Consent to Assault' (1998) 28(2) *Victoria University of Wellington Law Review* 371, 380.

¹¹ Anonymous, 'Cosmetic Surgery; Cosmetic Surgery Procedures to Exceed 55 Million in 2015, ASPSP Study Predicts' *Medical Devices & Surgical Technology Week* (2008) 763.

¹² See, eg, Michael Atkinson, 'Exploring Male Femininity in the "Crisis": Men and Cosmetic Surgery' (2008) 14(1) *Body & Society* 67.

¹³ Suzanne Fraser, 'The Regulation of Gender: Silicone Breast Implants, Regulatory Processes and Femininity' (2003) 7(1-2) *Journal of Interdisciplinary Gender Studies* 43, 43.

¹⁴ Dull and West, above n 9, 54.

harm, wounding or grievous bodily harm.¹⁵ However, cosmetic surgeons are considered to be legally insulated from any resultant criminal legal liability by the consent of the patient,¹⁶ or by the operation of statutory exemptions that apply to medical treatment.¹⁷ As a result, cosmetic surgery is lawful within Australia, and the mere performance of cosmetic surgery does not generally risk attracting criminal sanction.

B *Female Genital Mutilation*

Female Genital Mutilation (FGM) is a series of practices, dated as far back as 5,000 years old,¹⁸ that involve the removal or modification of parts of the female genitals. Four main types of FGM have been identified by the World Health Organization:

- Type 1 ('clitoridectomy'): partial or total removal of the clitoris and/or prepuce;
- Type 2 ('excision'): partial or total removal of the clitoris and labia minora, with or without partial or total removal of the labia majora;
- Type 3 ('infibulation', or 'Pharaonic circumcision'): narrowing of the vaginal orifice by cutting and appositioning the labia minora and/or labia majora, with or without partial or total removal of the clitoris; and,
- Type 4: all other harmful procedures for non-medical purposes, such as pricking, piercing, incising, scraping and cauterisation.¹⁹

¹⁵ See, eg, the offences contained in *Criminal Code* (NT) s 181; *Criminal Code* (Qld) ss 320, 323; *Criminal Code* (Tas) s 172; *Criminal Code* (WA) ss 317(1), 301, 297, and so on.

¹⁶ Consent to bodily harm is recognised as legally effective if it occurs within a medical context, see: *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, 719 (Lord Lane CJ); *R v Brown* [1994] 1 AC 212, 231 (Lord Templeman), 245 (Lord Jauncey of Tullichettle), 266 (Lord Mustill); *R v Dica*[2004] EWCA Crim 1103, 1269 (Judge LJ).

¹⁷ See eg, *Criminal Code* (WA) s 259 which provides a complete defense to all possible criminal charges if the cosmetic surgery is considered medical treatment administered reasonably, in good faith and with reasonable care and skill, for the patient's benefit. See also *Criminal Code* (Qld) s 282.

¹⁸ Skaine, above n 5, 8.

¹⁹ World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement* (2008), 4.

These practices do not all occur with the same frequency. Clitoridectomy and excision are estimated to make up about 80% of FGM procedures and infibulation to make up only 15%.²⁰ FGM is primarily practiced in African countries,²¹ but is also performed in some Asian countries,²² and the African diaspora within the immigrant populations of other countries such as Australia, Canada, Germany, France, the United Kingdom and the United States of America.²³ The specific incidence of FGM in Australia is unknown.²⁴ However, given the amount of immigration to Australia from countries where FGM is common and given the amount of anecdotal evidence about the practice, 'it would not be unreasonable to infer' that it was occurring in Australia before FGM was criminalised in the 1990s.²⁵ It is important to note that in some traditional cultures, FGM is performed on children. The average age of the child at the time of FGM varies from culture to culture, for example in Nigeria it typically occurs at birth but in Kenya it typically occurs around the age of 13 years.²⁶ However, it can also be performed on adults, usually just before 'marriage or after a woman's first pregnancy'.²⁷

The legal status of FGM in Australia is fixed by the various statutes in each jurisdiction. 'Female genital mutilation' is statutorily defined in all jurisdictions to include the excision, infibulation or

²⁰ Patrick, above n 3, 17.

²¹ Such as Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo and Uganda: Alexi Wood, 'A Cultural Right of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective' (2001) 12(2) *Hastings Women's Law Journal* 347, 362.

²² Such as India, Indonesia and Malaysia, primarily among the Muslim communities: Patrick, above n 3, 17.

²³ Wood, above n 21, 362.

²⁴ Family Law Council, above n 3, 13. Indeed, it may not even 'be possible to reliably gauge (its) incidence': Patrick, above n 3, 17.

²⁵ Family Law Council, above n 3, 13.

²⁶ Skaine, above n 5, 14-15.

²⁷ Naomi Mendelsohn, 'At the Crossroads: The Case For and Against a Cultural Defense to Female Genital Mutilation' (2004) 56(4) *Rutgers Law Review* 1011, 1012 (footnote omitted).

mutilation of any part of the labia majora, labia minora or clitoris,²⁸ as well as to include, in some jurisdictions, any procedure to narrow or close the vaginal opening.²⁹ Performing FGM is a criminal offence in all jurisdictions,³⁰ regardless of the consent of the person to be subjected to it.³¹ This applies even if the person consenting to undergo the procedure is an adult.³² It is also an offence to remove a person from the jurisdiction in order for them to undergo FGM,³³ (though in some jurisdictions this applies only if they are a child)³⁴ or if the acts constituting the offence occur outside the jurisdiction and the person subjected to the mutilation is ordinarily a resident of that jurisdiction.³⁵ In Australia, then, FGM has been specifically and explicitly criminalised in an exceedingly comprehensive manner.

II DRAWING THE ANALOGY

The key conceptual similarities between FGM and cosmetic surgery are that both sets of procedures can be considered to be physically harmful, that they both target females and that they are based on particular patriarchal cultural understandings about femininity and female sexuality.

²⁸ *Crimes Act 1900 (ACT)* s 73; *Crimes Act 1900 (NSW)* s 45(1)(a); *Criminal Code (Tas)* s 1.

²⁹ *Criminal Code (NT)* s186A(3); *Criminal Code 1899 (Qld)* s 323A(3); *Criminal Law Consolidation Act 1935 (SA)* s 33(1); *Crimes Act 1958 (Vic)* s 15; *Criminal Code (WA)* s 306.

³⁰ *Crimes Act 1900 (ACT)* s 74(1); *Crimes Act 1900 (NSW)* s 45(1); *Criminal Code (Tas)* s 178A(1); *Criminal Code (NT)* s 186B(1); *Criminal Code 1899 (Qld)* s 323A(1); *Criminal Law Consolidation Act 1935 (SA)* s 33A(1); *Crimes Act 1958 (Vic)* s 32; *Criminal Code (WA)* s 306(2).

³¹ *Crimes Act 1900 (ACT)* s 74(2); *Crimes Act 1900 (NSW)* s 45(5); *Criminal Code (Tas)* s 178A(2); *Criminal Code (NT)* s 186D; *Criminal Code 1899 (Qld)* s 323A(2); *Criminal Law Consolidation Act 1935 (SA)* s 33A(2); *Crimes Act 1958 (Vic)* s 34; *Criminal Code (WA)* s 306(3).

³² The only exception is that an adult female in Victoria may lawfully have her clitoral hood removed: *Crimes Act 1958 (Vic)* ss 15, 32(2).

³³ *Crimes Act 1958 (Vic)* s 33.

³⁴ *Crimes Act 1900 (ACT)* s 75; *Criminal Code (NT)* s 186C; *Criminal Code 1899 (Qld)* s 323B; *Criminal Law Consolidation Act 1935 (SA)* s 33B; *Criminal Code (Tas)* s 178B; *Criminal Code (WA)* s 306(4).

³⁵ *Crimes Act 1900 (NSW)* s 45(2); *Criminal Code (NT)* s 186B(2).

A *Physical Harm*

The two sets of procedures can be seen to be similar because they both necessarily involve the cutting and shaping of the body in physically harmful ways. As they are both surgical (or quasi-surgical) procedures, their mere performance can be seen as potentially 'unhealthy and dangerous'.³⁶ Furthermore, the fact that neither set of procedures is aimed towards healing the patient, or somehow treating a condition/disease, means that their performance is not only 'risky' but is also medically 'unnecessary'.³⁷ While these arguments may demonstrate broad procedural similarities, Sussman takes this further by stating that the effects produced by each procedure can also be regarded as empirically similar. She notes that some critics see the 'horrible effects' of FGM as not being 'readily distinguishable from Western mutilative practices', and she cites cosmetic surgery and breast implants as specific 'parallels'.³⁸ The physical harms that FGM procedures may cause to women have been widely circulated by anti-FGM commentators, and they include bleeding, hemorrhage, infection, urinary tract infections, menstrual difficulties and scarring.³⁹ Less well-known are the physical harms that may result from cosmetic surgery procedures, some procedures involve the breaking of bone and cartilage, others may lead to scarring, infection, implant encapsulation, or fat necrosis, and the use of anesthesia and particular liposuction techniques have even resulted in cases of paralysis and death.⁴⁰ Both FGM and cosmetic surgery procedures, then, are potentially harmful.

It is possible to argue an empirical dissimilarity between the two sets of procedures on the basis that FGM necessarily involves physical harm to the female genitals, whereas cosmetic surgery only

³⁶ Bowra, above n 5, 194.

³⁷ Mangan, above n 5, 67.

³⁸ Sussman, above n 5, 133, 213.

³⁹ Greg Swensen, 'Female Genital Mutilation and Human Rights' (1995) 48(2) *Australian Social Work* 27, 28-29.

⁴⁰ Darrell Hodgkinson, 'Cosmetic Surgery Litigation' in *Plastic, Reconstructive & Cosmetic Surgery Negligence: 1999 Seminar Papers* (Sydney, LAAMS, 1999), 6-8.

contingently involves the genitals and may also physically harm to other parts of the body such as the breasts, buttocks, stomach, face, nose, and so on. This argument is unconvincing because it does not account for the fact that while the specific site of the body which the procedure is performed on may change, the body itself does not change. The almost inevitable femininity of the body forms a synecdochic connection between the two procedures: they both cut and shape the *female* body.⁴¹

B *Patriarchal Cultural Understandings*

This invocation of 'femininity' can be taken further and provides the second similarity of characteristics; that the reasoning behind both procedures relies on patriarchal cultural understandings about femininity and female sexuality. Although the academic material sometimes fails to 'contextualise the position of [FGM] within culture',⁴² it is clearly a cultural phenomenon.⁴³ It is specifically related to particular cultural conceptions built up around femininity,

⁴¹ This is not to say that any and all procedures that have a female body as their subject are analogous. Clearly, there must be some other points of similarity between the procedures as well: as there is here. This is why Sussman's drawing of an analogy between FGM and *sati* (the Hindu Indian practice of widow-burning) is problematic: Sussman above n 5, 225-237. In *sati* the female body is necessarily destroyed and the purpose of the practice is specifically to kill the woman. In FGM, the female body is merely modified and, although there is a certain risk to all quasi-surgical procedures, is not intended to kill. One wonders why Sussman tried to draw such a long bow in making her analogy, especially given that Western cosmetic surgery is a much more similar and is much closer to home for her as an American writer. Perhaps it is the very cultural Otherness of both FGM and *sati* that render them more readily identifiable as analogous from a less self-reflexive Western perspective?

⁴² Mangan, above n 5, 67.

⁴³ In 1985, the UN Working Group on Traditional Practices Affecting the Health of Women and Children released statistics showing that approximately 54% of people practicing FGM advised that they did so because of tradition: Family Law Council, above n 3, 11. The recognition that FGM is a cultural phenomenon clearly underpins the relativism versus absolutism debate in which FGM is frequently cited, see particularly: Bowra, above n 5; Nancy Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism' (1993) 25 *Columbia Human Rights Law Review* 49.

such as that a woman who has not undergone FGM is 'unclean' and has an 'uncontrolled sexuality',⁴⁴ and that FGM is a 'rite of passage marking a girl's transition to womanhood'.⁴⁵ FGM, then, is not just something that is conceived of as 'normal for a woman',⁴⁶ but rather the woman who has undergone FGM is the embodied cultural ideal of normative femininity and normative female sexuality. This ideal, and the cultural conceptions that underpin it, has been contextually located within a broader patriarchal hegemony that coalesces associated institutions to reinscribe and reinforce this ideal.⁴⁷ For example, in many cultures that practice FGM, virginity is a prerequisite for entry into the economic and socially important institution of marriage, and virginity can only be conclusively proved by evidence that the bride has undergone FGM.⁴⁸ FGM is thus required within some societies for a woman to achieve patriarchal cultural ideals of femininity.

Similarly, Western cosmetic surgery is also 'designed to help women achieve hegemonic standards of feminine beauty'.⁴⁹ These standards are clearly locatable within broader patriarchal cultural structures; cosmetic surgery seems to have the 'sole purpose of enhancing women's sexual desirability'⁵⁰ in the context of a sexual erotica where 'inter-personal interaction' is dominated by the 'male gaze'.⁵¹ Cosmetic surgery thus also adopts and reinscribes certain patriarchal cultural ideals about normative femininity and normative female sexuality. Women are culturally valued for their physical appearance, and that physical appearance should conform to the

⁴⁴ These characteristics are understood in strong negative terms in traditional FGM-practicing cultures: Family Law Council, above n 3, 11.

⁴⁵ Patrick, above n 3, 19.

⁴⁶ Ibid.

⁴⁷ David Ranson, 'Female Genital Mutilation' (1996) 3 *Journal of Law and Medicine* 229, 229.

⁴⁸ Thus, a 'woman who has not participated in [FGM] is likely to be denied the possibility of marriage': Bowra, above n 5, 194.

⁴⁹ Patricia Gagne and Deanna McGaughey, 'Designing Women: Cultural Hegemony and the Exercise of Power among Women who have Undergone Elective Mammoplasty' (2002) 16(6) *Gender and Society* 814, 814.

⁵⁰ Mangan, above n 5, 67.

⁵¹ Gagne and McGaughey, above n 49, 835.

'beauty norms' of Western society.⁵² Further, 'appropriate' female sexuality should conform with, and be apprehended by, the patriarchal male gaze. Although the particular cultural ideals that inform FGM and Western cosmetic surgery vary, they are both complicit with broader patriarchal hegemonies and they both adopt and reinscribe normative ideals of femininity and female sexuality. Ultimately, both procedures reify these ideals by writing them on the living bodies of the women who participate in those cultures. As Wilson argues, the 'similarities between' both female genital mutilation and cosmetic surgery 'stem from the fact that these practices are culturally embedded in systems of male domination and female subordination'.⁵³

To successfully draw this analogy, it is important to note that cosmetic surgery is a Western *cultural* practice, rather than an objective, universalisable, medical procedure that seeks to rectify physical problems. Recognition of this is suppressed by the naturalisation of such procedures within Western society, part of what Green notes as the West's 'ability to slough off its own cultural practices'.⁵⁴ Western medical discourse is not exempt from the influence of wider cultural and patriarchal norms, and neither are medical practice and specific medical diagnoses.⁵⁵ Even though cosmetic surgery is elective, surgeons still only perform on 'good' candidates and this judgment is informed by cultural beauty norms.⁵⁶ Thus, prominent racial and ethnic features (which are often culturally constructed as undesirable in white Western society) become 'factual, trans-situational grounds for surgical interventions in appearance'.⁵⁷ Furthermore, the very notion of cosmetic surgery is itself culturally symptomatic of late capitalism, the economic model which is the hallmark of Western societies. Late capitalist societies are consumer societies, and cosmetic surgery is a relatively new

⁵² Jeffreys, above n 6, 46.

⁵³ Tamar Wilson, 'Pharaonic Circumcision under Patriarchy and Breast Augmentation under Phallogentric Capitalism: Similarities and Differences' (2002) 8(4) *Violence Against Women* 495, 516.

⁵⁴ Green and Lim, above n 5, 378.

⁵⁵ Irvine, above n 9, 316.

⁵⁶ Dull and West, above n 9, 55.

⁵⁷ *Ibid* 58.

form of consumption in which ‘body parts can be purchased from the catalogue, arranged and rearranged’.⁵⁸ The ‘medical’ context in which cosmetic surgery is performed does not shield it from being placed ‘on a continuum’ of cultural practices which modify the body.⁵⁹ This same continuum, I would argue, includes FGM.

III DEFENDING THE ANALOGY

While cosmetic surgery and FGM converge and are identifiable as conceptually similar in some ways, it has also been argued that there are important points of divergence that make them conceptually dissimilar. This article will consider two of the strongest and most frequently made arguments about the dissimilarity of the two: differences in consent and differences in effect. If these arguments can be successfully refuted, the analogy between FGM and cosmetic surgery will stand.

A *Differences in Consent*

Undergoing cosmetic surgery in the West is said to be a consensual choice, whereas FGM has been argued to be neither chosen nor consensual. Toubia notes that this contrast in consent provides a ‘very important difference’ between the two procedures.⁶⁰ This argument proceeds on the basis that because of the young age at which FGM is typically performed, the female undergoing the procedure is generally a child (sometimes even just days old). Her consent, then, is unable to be obtained, and the choice to undergo the procedure is usually made for her by her parents.⁶¹ This argument is supplemented by the proposition that the consent of the parents, or the woman herself if she does happen to be older, is vitiated by a range of ‘cultural, religious, economic and societal pressures’ that

⁵⁸ Green and Lim, above 5, 378.

⁵⁹ Skaine, above n 5, 3.

⁶⁰ Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* (1993) 37, cited in: Sussman, above n 5, 213.

⁶¹ Bowra, above n 5, 199.

coerce the parties to consent.⁶² For example, a woman who has not undergone FGM may, within particular societies, risk being ostracised, being denied marriage (and other ‘privileges of her society’), being denied inheritance and having her children ‘declared illegitimate’.⁶³

This challenge to the analogy can be resisted at two levels. Firstly, we can specifically resist the application of this argument to Australia. The fact that Australian law criminalises FGM procedures even when they are performed on a consenting adult female means that even if this argument was wholeheartedly accepted, the current law has unwarrantedly moved beyond the legal boundaries it justifies. Furthermore, it is doubtful that the same level of sociocultural pressure that can be exerted in rural African communities can be brought to bear on females within the African diaspora of Australian immigrant populations. While they still may risk being ostracised from their particular minority immigrant community for not undergoing FGM, they do not risk ostracism from the wider culture (which can be seen as specifically disapproving of, and even condemning, FGM) and they do not risk being denied marriage rights, inheritance rights or sexual legitimacy.

Secondly, we can more generally resist this argument by raising similar questions about the capacity of Western females to consent to cosmetic surgery. Given the existence of ‘overt [and] covert social pressure to conform to certain physical ideals’ within Western societies,⁶⁴ the validity of every Western woman's consent to

⁶² Sussman, above n 5, 211.

⁶³ Bowra, above n 5, 194, 199. Indeed, some women see undergoing FGM as ‘their only chance for a “normal” life’: Heyes, above n 5, 64.

⁶⁴ Sheldon and Wilkinson, above n 6, 272. Such pressure is also brought to bear by those socially close to the woman undergoing the procedure, in much the same way that FGM occurs in a ‘family’ context. For example, Dr Ted Weaver, the chairman of the Royal Australian and New Zealand College of Obstetricians and Gynaecologists women’s health committee recounted the story of one woman who consulted a medical practitioner with the intention of undergoing vaginal plastic surgery. Her boyfriend also attended, ‘bringing in a Brazilian pornographic photo and saying: “Make my girlfriend look like this”’: Anonymous, ‘FED: Designer vaginas blacklisted by gynaecologists’ (2008)

cosmetic surgery procedures is also rendered suspect. The freedom of whether to undergo cosmetic surgery is influenced to such an extent by ‘hegemonic cultural norms’,⁶⁵ that the notion of autonomous choice is ‘often dismissed [by feminists] as the result of “false consciousness”’.⁶⁶ Even if one refuses to accept the notion that women who choose to undergo cosmetic surgery are such ‘cultural dupes’, it must at least be admitted that their choices are ‘bounded by a broader context of lack of choice’ and that they ‘make decisions under conditions ... over which they have, at best, only limited control’.⁶⁷ Furthermore, Western women whose appearance does not meet cultural ideals and who refuse to undergo cosmetic surgery are also at risk of losing societal privileges, such as removal from the ‘libidinal economy’.⁶⁸ Cosmetic surgery is also not solely performed on adults, it is also performed on minors whose capacity to consent is also more limited (but who may be legally competent or who may receive parental consent-by-proxy to undergo cosmetic surgery). Indeed, due to mounting concern in response to evidence about the increasing use of cosmetic surgery on children,⁶⁹ Queensland recently tried to prohibit this trend by passing the *Health Legislation (Restriction on Use of Cosmetic Surgery for Children and Another Measure) Amendment Act 2008* (Qld).

We can see, then, that issues around the validity of consent do not constitute a point of divergence between the two cosmetic surgery and FGM, but rather an additional point of similarity. In both

AAP *General News Wire*, July 31. As another example, a 1995 *Glamour* magazine survey asked men, ‘If it were painless, safe and free, would you encourage your wife or girlfriend to get breast implants?’, 55% said yes: Jeffreys, above n 6, 47.

⁶⁵ Gagne and McGaughey, above n 49, 814.

⁶⁶ Bibbings, above n 3, 161.

⁶⁷ Kathy Davis, *Reshaping the Female Body: The Dilemma of Cosmetic Surgery* (New York, Routledge, 1995) 158.

⁶⁸ Margaret Gibson, ‘Bodies without History’ (2006) 21(49) *Australian Feminist Studies* 51, 55. Missed benefits may include ‘enhanced ... social interactions with others and increased ... social opportunities’: Gagne and McGaughey, above n 49, 823.

⁶⁹ Queensland Health Department, *Have Your Say: Children and Young People Using Cosmetic Surgery and Solariums in Queensland* (2007) <http://www.health.qld.gov.au/publications/cos_surg_chi ld.pdf>.

procedures, consent is rendered suspect by the female's age and/or by systematic cultural pressure to undergo such procedures.

B *Differences in Effect*

Another argument against the similarity of FGM and cosmetic surgery is premised upon an alleged distinction between their effects, specifically that cosmetic surgery is empowering and beneficial to those who undergo it whereas FGM is necessarily oppressive and harmful. This argument is generally couched in sexual terms, on the basis that whereas FGM 'removes the sexual identity of women',⁷⁰ cosmetic surgery allows women to more fully embrace and capitalise on their sexuality.⁷¹ FGM has been argued to be sexually oppressive because the removal of the clitoris is said to deaden the female sex drive and decrease 'sexual pleasure', and infibulation is said to render 'penetrative intercourse impossible'.⁷² The ostensible reason why FGM is used to bring about these effects is that modifying the body of a woman in these ways helps to ensure her chastity and virginity. The procedure, then, is about 'controlling ... females and female sexuality'.⁷³ In contrast, cosmetic surgery is

⁷⁰ Wood, above n 21, 371.

⁷¹ For example, Gagne and McGaughey draw the following story from their study: 'Amy, a 32-year-old, white, married mother of two, who had undergone breast augmentation surgery seven years before our interview, said: "I was very self-conscious [sexually]. I mean, I didn't want anybody to touch me there. You know? I'd get real self-conscious... It wasn't a sexual handicap or anything like that, but enough to where it would affect my experience."

We asked, "Did you ever leave clothing or a nightgown or bra on when having sex?" She replied:

"Yeah! I did that. Sure! As a matter of fact, I probably only in the last five years got comfortable being totally naked like that. Really! ... I don't know if it was because I was more satisfied [with my appearance], but..., we don't have the inhibitions in our sex life anymore": Gagne and McGaughey, above n 49, 823.

⁷² Sheldon and Wilkinson, above n 6, 273.

⁷³ Bibbings, above n 3, 155. Indeed, clitoridectomy was practiced during the 1800s and early 1900s in the USA as a medical procedure designed to 'cure' women of masturbation or lesbianism, see: Mary-Jane Ierodiaconou, 'Listen to Us!: Female Genital Mutilation, Feminism and the Law in Australia' (1995) 20 *Melbourne University Law Review* 562, 563; Wood, above n 21, 362-363.

said to be beneficial to female patients who use it to ‘increase their self-esteem’, ‘improve their self-image’,⁷⁴ and bring about ‘greater social opportunities’, ‘more positive reactions from others’ and feelings of liberation.⁷⁵ In sexual terms, cosmetic surgery is argued to increase a woman’s sexually desirability and make her ‘sexually freer’.⁷⁶ This argument contends that cosmetic surgery, in contrast to FGM, is about removing constraints on females and female sexuality.

This challenge to the analogy can also be resisted at two levels. Firstly, we can resist the notion that FGM is always oppressive and harmful. This procedure can also be used to empower women in certain ways, such as by ‘preserving and reaffirming [their] cultural identity’,⁷⁷ or allowing them to fit into a particular ‘cultural milieu’.⁷⁸ In physical terms, arguably neither ritual circumcision nor clitoral circumcision, insofar that the prepuce is removed, hamper a woman's physical sexual responsiveness. Ritualistic Type 4 circumcision typically involves only minor nicks which heal without long-term physical effects, whereas the removal of the prepuce has even been used in Western cosmetic surgery procedures to increase sexual sensation.⁷⁹ The sexual effects of excision and infibulation are arguably much more negative. However, it is epistemologically problematic to make pronouncements about the absence of pleasure in individuals from a position of cultural dislocation. Rogers argues that ‘[p]leasure is not a universal experience’ and that ‘[s]exual enjoyment cannot be universally learned or understood in terms of a standard response to standard stimulation’.⁸⁰ Thus, while an African woman who has undergone infibulation may seem ‘mutilated’ to a

⁷⁴ Dull and West, above n 9, 61.

⁷⁵ Gagne and McGaughey, above n 49, 822.

⁷⁶ Ibid 823.

⁷⁷ Bibbings, above n 3, 155.

⁷⁸ Heyes, above n 5, 64.

⁷⁹ L Obiora, ‘Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision’ (1996-1997) 47 *Case Western Reserve Law Review* 275, 298-299.

⁸⁰ Juliet Rogers, ‘Making the Crimes (Female Genital Mutilation) Act 1996, Making the “(Non) Mutilated Woman”’ (2003) 18 *The Australian Feminist Law Journal* 93, 112.

Western audience, Atoki opines that the woman may actually have been 'sexually enhanced' by the procedure because her genitalia conforms to culturally-specific sexual ideals about aesthetic appearance.⁸¹ Regardless, there is some empirical evidence that even infibulated women are not sexually 'deadened' by the procedure. A 1989 study by Lightfoot-Klein of 300 Sudanese women, mostly infibulated, found that 'nearly 90% regularly experienced sexual climax or had done so at some time in their marriages'.⁸²

Secondly, we can argue that while cosmetic surgery may empower women in some specific cases, it should still be considered a harmful practice generally. Not every cosmetic surgery procedure is ultimately successful, many procedures end up causing painful and debilitating long-term injuries,⁸³ and they also can be said to carry the risk of curbing female sexuality. As Mason notes, cosmetic breast surgery can 'reduce overall breast and nipple sensitivity and lead to lowered self-image and sexual fulfilment'.⁸⁴ Furthermore, even where the procedure is medically successful and results in a subjective experience of 'empowerment' for an individual female patient, it still has harmful societal effects. The successful patient embodies cultural beauty norms and validates the process of cosmetic surgery as a method of achieving these norms. By (re)presenting these concepts within society she becomes incorporated into the patriarchal cultural machinery that reinscribes and reinforces the dominant cultural values underpinning cosmetic surgery. Through this process, women become 'complicitous in disciplining themselves and one another':⁸⁵ they become pillars that prop up the patriarchal system's subjugation of themselves and other women.

⁸¹ Morayo Atoki, (1995) 3(2) *Feminist Legal Studies* 223, 228.

⁸² Hanni Lightfoot-Klein, *Prisoners of Ritual: An Odyssey into Female Genital Circumcision in Africa* (New York, Harrington Park Press, 1989), 80.

⁸³ Individual procedures carry their own risk profiles, for example there is a high risk of encapsulation and the building up of scar tissue for breast implant procedures. A number of individual cases are documented: see, eg, Davis, above n 67.

⁸⁴ Mason, above n 5, 65.

⁸⁵ Gagne and McGaughey, above n 49, 835.

We can see, then, that the effects of Western cosmetic surgery and FGM are actually very similar. While both may empower individual women in specific situations, they can also both be considered to be harmful and oppressive practices in a general sense.

IV IMPLICATIONS OF THE ANALOGY

In conclusion, an analogy can be successfully drawn between FGM and Western cosmetic. Clearly, these procedures are not identical: this is not something I believe nor is it what I have argued. There are, however, sufficient convergences between the sets of procedures that they should be considered to be conceptually similar. The types of harm caused by both sets of procedures are similar and both are similarly informed by patriarchal, cultural understandings about womanhood and female sexuality. The major arguments against this analogy, that they are dissimilar because of differences relating to consent and effect, can be successfully refuted.

The jurisprudential value in theoretically investigating whether FGM and cosmetic surgery are analogous comes in recognising the discrepancy between their conceptual similarity and their dissimilar legal treatment. The law does not treat FGM and cosmetic surgery in similar ways. In fact, under Australian criminal law, FGM and cosmetic surgery are treated as if they are binary opposites. FGM procedures have been explicitly, specifically and comprehensively criminalised, whereas cosmetic surgery procedures hold a widely accepted, settled lawfulness. Recognition of the conceptual similarity of these procedures raises questions about this legal disparity.

What, then, are the implications of this analogy for the law? I reject Sheldon and Wilkinson's suggestion that all this analogy does is 'suggest that more-careful thought be given' to the disparity in their legal status.⁸⁶ Given the strength of the analogy, I would argue

⁸⁶ Sheldon and Wilkinson, above n 6, 284.

that the legal disparity should be more than just noted and thought about, it should be abridged or abolished. However, the wholesale criminalisation of cosmetic surgery fails to respect the autonomy of women (howsoever their choices might be seen to be bounded by cultural forces) and the empowering effects cosmetic surgery procedures can sometimes have for specific women in specific circumstances. Similarly, the wholesale legalisation of FGM fails to account for the very harmful physical and sexual effects that FGM can sometimes have for specific women in specific circumstances.

The solution should be a mid-way point. In Australia, performing either FGM or cosmetic surgery on minors should be criminalised, but performance of either set of procedures on consenting adults should be lawful.⁸⁷ In addition, there should be strictly enforced legal requirements for the full disclosure of medical information about the effects of each procedure to prospective patients. This proposal deals with the issue of determining the validity of consent to such procedures by allowing females to weigh up the potential harms and benefits of each procedure themselves and thus giving them a more meaningful choice to run the risk of serious, permanent injury that these procedures can cause. Such changes would go some way towards bridging the legal disparity between these procedures and translating the conceptual force of this analogy into legal effect.

⁸⁷ This shift would bring Australian law into line with the federal law of the United States of America, which already allows a consenting adult woman to undergo FGM. By contrast, the Australian position seems to be overly restrictive.