

# The child's welfare interest-based right to bodily integrity

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## Abstract

Children are individuals, and they are owed rights as individuals. Here, I offer a defence of the child's right to bodily integrity against genital cutting and modification practices. The liberal commitment to the right to bodily integrity works with the harm principle as a liberty limiting commitment within a system that respects people's embodied moral personhood and their decisions about their lives and bodies. Like adults within a political system committed to the equal protection of individual rights, children must have equal rights that transcend the differences between them. But, they are different to adults in important ways, both philosophically and empirically. I offer an account of the child's right to bodily integrity that recognises them as particular embodied individuals, and prioritises their *welfare interest* in having their bodily integrity respected.

## Keywords

Children's rights, bodily integrity, interests, child genital cutting and modification practices

## Introduction

My intention with this article is to make a positive contribution to the debate about the child's right to bodily integrity (RBI), with particular attention to how it should be used as a defence against child genital cutting/modification (CGC/M) practices.<sup>1–3,a</sup> Some scholars argue that at least some types of CGC/M are ethically permissible, do not violate a child's RBI, or should in any case be legally tolerated in Western liberal societies.<sup>4,b</sup> Others take a 'zero-tolerance' approach, arguing that all CGC/M practices are morally impermissible, and/or that all forms violate the child's RBI. Here, I will argue that the 'zero-tolerance' group of scholars engaged in the debate CGC/M,<sup>5,c</sup> if they are to be persuasive, should adopt an interests-based approach to the child's RBI that emphasises the child's *welfare interest* in bodily integrity as the primary interest that the right should protect.

I begin with a discussion and defence of the conceptual distinction between bodily integrity and bodily autonomy to highlight some of the nuance of what the RBI captures and protects. Drawing on Helga Varden's account of the RBI, I take the RBI to be a legal and political way to protect every moral person, and I include all born children as moral persons.<sup>6</sup> I claim, building on Varden, that the RBI is one of the most important rights within liberal human rights systems as formal recognition of the duty not to harm others. I distinguish two broad types of interest: *welfare* interests and *ulterior* interests. I conceive of bodily integrity

as a universal, by which I mean owed to every living person, welfare interest that should take priority over ulterior interests in cultural or social conformity. I claim that the child's RBI should be understood as an interest-based welfare right, where the welfare interest in bodily integrity takes priority over ulterior interest. Finally, I illustrate where arguments made in favour of and against CGC/M practices fit in relation to the account of the child's RBI as an *interests*-based right.

First, some clarifications: when I refer to 'children' I mean all human individuals between birth and 16. It is obvious that children, like adults, are different to each other, and have different capacities at different stages in their development depending on both their particular internal capacities and functioning, and the external conditions of their lives. By the external conditions of their lives, I mean both social norms and expectations, *and* the material circumstances they find themselves in. for this reason, I work with the assumption that children are in a process of *becoming autonomous*, meaning they are all developing

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and testing their autonomous decision-making capacities as they learn about the world, how it responds to them, and how they can affect it, socially and materially.<sup>7,8</sup> I take the view, like many others,<sup>9,10</sup> that children, especially the very young, are not able to give ethically valid consent for genital cutting and modification procedures.

The tense debate about CGC/M is ongoing in political, public, and academic spheres, and I intend to speak primarily to scholars engaged in the debate about whether, or when, it is permissible for an adult to prick, cut, or surgically alter a child's sexual anatomy whether for cultural, religious, or other reasons apart from urgent medical necessity. I take CGC/M to be medically necessary when it is required to save a child's life or prevent a long-term physical impairment, and there are no other less risky or invasive alternatives of similar or greater effectiveness.<sup>11</sup> For the purposes of this article, I assume a liberal theoretical framework and political context. While the empirical backdrop for this article is existing Western liberal societies that endorse human rights, in general, I take a universalist moral approach to human rights, meaning that if a person has a right in one political/cultural context, everyone *should* have that right, wherever they happen to live in the world, and whatever their cultural contexts.<sup>d</sup>

### On the principle of bodily integrity and the difference between bodily integrity and bodily autonomy

I endorse a moral commitment to a universal RBI that begins at birth, that is, when a person leaves their mother's body.<sup>e</sup> To make good on universal laws of moral freedom it is necessary to permit people to control their own bodies to the extent that this is possible, and to respect their RBI.<sup>6(p4)</sup> This is because the relationship between the body and the moral person is politically 'analytic', that is, 'one of necessary unity', and so how we treat one another's bodies is the same as how we treat one another's moral person.<sup>6(p4)</sup> According to this view, respect for a moral person is equal to respect for their body. Politically speaking, then, the person and their body must be the same thing, because 'the empirical boundaries of my person are identical with those of my body'.<sup>6(p5)</sup>

The moral priority of the liberal commitment to the RBI is the protection of bodily integrity, this is the principle of bodily integrity. The principle of bodily integrity is captured in the idea that the moral person is embodied, and it is through the body that they interact with the objective world.<sup>12(p566)</sup> A moral person's unique qualities, flaws, feelings, quirks, memories, and so on, cannot be separated from their body.<sup>f</sup> Experiences play out, personality is expressed and developed, always with and through the body.<sup>13</sup> The RBI, then, aims to protect the body, *and* the subjective internal person who emerges and acts through the body.<sup>3,8,14-17,g</sup> For Helga

Varden, the RBI is a political construction.<sup>6</sup> That is, Varden treats the right as a part of a liberal political system of rights and duties governing how people ought to treat each other physically, claiming 'it is in virtue of being embodied that we must determine how we should interact in the empirical world'.<sup>6(p4)</sup> On this view, the RBI is central to respecting a moral person's 'innate right to freedom', which all humans have.<sup>6(p3)</sup> So, the RBI is a, perhaps the, most important right within a universalist liberal framework because it protects individuals' innate right to freedom, and because humans are *embodied moral persons*.<sup>h</sup>

Our embodiment means that our bodies are the boundary between our moral personhood and the external world, and act as the empirical juncture between one person and another.<sup>6</sup> For Varden, a physical coercion of the body is a violation of the person's innate right to freedom.<sup>6</sup> A moral commitment to the innate right to freedom held by all persons is consistent with a political conception from the liberal tradition, whereby rights and duties function to govern interactions between persons to ensure that no one person, or group of people, is treated as mere means to achieve others' ends. Liberty, as a foundational concept for liberal political philosophy, is a fundamental organising principle for liberal society. This organising principle means that everyone within a liberal political community is entitled to freedom from interference from the state and other citizens, and a crucial site of individual liberty is the person's *body*.<sup>i</sup>

Varden illustrates the political significance of the body and the RBI with the example of a person having a scarf taken away from them. If person A owns a scarf it is her property, and if person B takes that scarf from person A's house without her permission, he has wronged person A by taking her property, but he has not violated person A's *person*. A's person remains unaffected. If person B forcibly grabs person A's scarf while she is wearing it, he wrongs her both by taking her property, *and* by touching her person in 'unauthorized ways' because he touches and pulls the scarf from her body.<sup>6(p5)</sup> It is a more serious wrong because her body, and thus person, has been 'wronged': 'my embodiment entails that when you violate my bodily integrity, you wrong my person'.<sup>6(p5)</sup> Thus, for Varden, the justification for the RBI comes from the idea that respecting it entails respecting the moral duty to respect other persons' innate right to freedom.

The principle of bodily integrity suggests that the body be respected as a moral priority. It reflects a political and social commitment to the value of the body itself, regardless of the internal subjectivity of the person, as an important site of experience in the world.<sup>12,13,18,19</sup> Applying the commitment to bodily integrity universally means that respect for another person's bodily integrity should be upheld whatever the differences between us; cultural heritage, sex traits, age, decision-making capacities, and so on.

This commitment is related to, but importantly different from any commitment to protecting a person's bodily

autonomy, especially when it comes to its practical role in the RBI. Bodily *autonomy* refers to the person's ability to consent to and make considered decisions about their body. Such decisions may include authorising physical contact with the body, or a breaking of the skin, by cutting, scratching, severing, by other people.

So, there is an important normative difference between bodily *integrity* and bodily *autonomy*.<sup>12</sup> Herring and Wall have explored the way that bodily autonomy and bodily integrity are often treated as though they are the same concept within rights scholarship and legal practice.<sup>12</sup> In many senses, the concepts are related, particularly when considering interactions with a person's body whose status as autonomous is broadly uncontested – a female academic in her mid-30s who has the appearance of good mental health, let's say. If she were to be cut with a scalpel across her abdomen without her consent, this would be a violation of both her bodily integrity *and* her bodily autonomy. The cut across the abdomen would disrupt her bodily integrity by slicing through the empirical boundary of her embodied personhood. The lack of consent given for the procedure would undermine her bodily autonomy, that is, the value and respect given to a person to make decisions about physical interactions with their bodies. If, however, the same woman were pregnant and needed (or wanted) to give birth by caesarean section, she would be required to give consent for surgeons to cut through seven layers of her bodily tissue. She would have the procedure explained to her, and the various risks, and would sign a form (or several forms) to declare that she understood the procedure, the risks involved, and consented to the surgery. In this case, cutting her abdomen would not be a violation of her bodily autonomy, because she consented to it having had the procedure explained, but it would still disrupt her bodily *integrity*. The integrity of her body would be altered – albeit with her consent – but it would not be a rights violation because she was both assumed to have sufficient autonomy to consent to the procedure, and had given explicit consent to the particular intervention with knowledge of what would happen.

This distinction is important for how I conceptualise the child's RBI. Taking bodily integrity and bodily autonomy to be conceptually and practically different has implications for what the right can plausibly protect. The right must entail both a commitment to bodily integrity as prioritising the body as the empirical boundary of the moral person whether or not that person is autonomous,<sup>7,20</sup> and a commitment to a person's bodily autonomy (and related capacity to make autonomous choices), which is cultivated throughout childhood and (often) for the rest of our lives.

### On the difference between *interests* and *choices*

Children's rights theorists generally rely on an *interest*-based approach, rather than a *choice*-based approach, to conceiving

of and justifying children's rights.<sup>21(p2),22(p188),3-5,10,23,24j</sup> Robert E. Goodin and Diane Gibson defend children's rights from a position that prioritises their interests, and point out that:

[I]t does not matter that rights-holders are not in a position to assert rights... what it is to be a right-holder... is merely to be a direct intended beneficiary of someone else's duty-bound performance... All that is strictly required [to be a right-holder] is that one have interests which are recognisable by others who are duly empowered, by the moral community more generally, to press those claims on one's behalf.<sup>22(p188)</sup>

I follow this approach to rights in general and children's rights in particular. Some interests may be particular to a given individual, but others are universal, where by universal I mean owed to everyone within the broader moral community, and that generate a duty in others within the community to protect and defend those interests.<sup>24(pp43-44)</sup> To argue against CGC/M by appealing to children's RBI, then, the account of the child's RBI should be constructed in a way that protects their *interests*.

Children's and adults' RBI are necessarily different when it comes to choices and/or consent. While adults' RBI can be thought of as prohibiting non-consensual contact of most kinds (assuming consent is possible for the adult at the given time), or preserving and protecting their choices about their bodies, this is not so straightforward for children, who require physical contact. The differences between adults and children make it complicated to claim that many forms of non-consensual physical contact are impermissible. To take the point even further, it is not in children's *interest* for many forms of non-consensual contact and disruptions of their bodily integrity to be prohibited because, especially in the case of infants and very young children, they depend on physical contact to survive and flourish, and they cannot give ethically valid consent for the interference. For instance, babies require adults to clothe and clean them. They have their bodies picked up, touched, and moved to make sure they are dressed, warm, and clean. But, because they cannot speak or understand what is happening the way that an adult would, they cannot give consent to parents and carers who clothe, wash, and change them, and it would be more harmful for their well-being *not* to change their dirty nappies, clothes, and so on. This means that many children (and all infants) need some non-consensual contact to be healthy and to survive.

That said, the fact that children need some non-consensual contact and interference to survive and flourish should not mean that parents and adults can do whatever they like to a child's body; their interference with a child's body is justifiable insofar as it promotes and protects children's overall *interests*. Parents and carers have a duty to protect their children's interests which at times may

mean interfering with their bodily integrity. As pointed out by Ludbrook, '[w]hen it comes to an invasion of the child's bodily integrity parents can rely on their parental powers only to the extent that they can show this is necessary in furtherance of parental responsibilities'.<sup>25(p126)</sup> Parental responsibilities within a liberal system must prioritise a commitment to the principle of bodily integrity as a most important consideration for respecting the child as a *particular embodied person*. The child's RBI, then, is a right that means some interference is permissible, but only if the interference protects the child's overall and most serious interests, and must be defensible on the basis that disruptions *are indeed* in the child's best interest overall.

So, children's rights theorists should emphasise children's interests and not their choices. The account of the child's RBI below stresses the need to protect bodily integrity as a *present welfare interest*, rather than (or, as well as) their future *choices* affecting their bodily integrity. This argument generates the potential response that CGC/M is in some children's interest – children from particular religious or cultural groups in which cutting would ensure some social benefits. My approach is intended to tackle these arguments head on by claiming that the interest in bodily integrity takes normative priority over any social interest in genital cutting/modification, within a complex context of competing interests.

### Welfare interests versus ulterior interests

Drawing on Joel Feinberg's work on harm, I distinguish 'welfare interests' from 'ulterior interests'.<sup>26</sup> Welfare interests are basic and universalisable across differences. Ulterior interests are specific to individuals and refer to the interests a person may have once they have developed a considered idea about their life plans and preferences, that is, once they have more fully developed their capacities for autonomy.<sup>26(pp37–38)</sup> Once a person has a fleshed out understanding of the kind of life they would like to lead, and the kind of things they would like to achieve, their ulterior interests are interests that help them to live their life in that way or to realise those goals. As such, ulterior interests are contingent on the person's considered preferences, and they are particular. Welfare interests on the other hand are basic and universal; that is, everyone has them, whatever their preferred way of living and whatever their life goals. Being basic, universal, and fundamental for advancing and developing ulterior interests, *welfare interests take priority* within a system of rights that protect interests, as necessary for treating people equally.

According to Feinberg:

One's interests, then, taken as a miscellaneous collection, consist of all those things in which one has a stake, whereas one's interest in the singular, one's personal

interest or self-interest, consists in the harmonious advancement of all one's interests in the plural.<sup>26(p34)</sup>

Thus, interests are things in which we have a stake, that is, things on which our well-being and happiness depend. Consider some ultimate goals or aspirations that I have: writing and publishing a novel, or two; being a good parent; coming top of my age and gender category in a marathon. These are objectives I work towards, things I hope for, and expect to bring me a sense of happiness and reward if I achieve them. If something is in my interest, it helps me to achieve those ultimate goals: a creative writing course; a parenting course or just some good and warmly delivered advice; joining a runners' club and speed training for long distances. All these things would help me in my endeavour to achieve these goals and are thus in my interest as ulterior interests.

Welfare interests and ulterior interests are different in kind and different in so far as the state and others have a duty to respect and protect them. Welfare interests are the *means* for achieving ultimate goals. As such, they are the least particular, but most important type of interests.<sup>26(p37)</sup> They are the basic platform from which to develop and pursue interests related to our conceptions of the good (*ulterior* interests). We can assume that I have an interest in being reasonably physically healthy, as I would be unlikely to live long enough to achieve my ultimate goals if I had very poor health. I have an interest in having a certain level of intellectual capacity, at least as much as is required to write a novel and get it published. Feinberg lists several welfare interests, including:

[T]he integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement... emotional stability... a certain amount of freedom from coercion and interference.<sup>26(p37)</sup>

Thus, individuals have ulterior interests that correspond to their aspirations and life plans, *and* they have welfare interests that correspond to being physically, intellectually, and emotionally healthy in order to achieve those aspirations and life plans.<sup>26(pp37–38)</sup>

Harry Brighouse echoes the view that welfare interests take priority in his discussion of children's rights.<sup>24</sup> He conceives of welfare interests as things such as basic health provision, a certain level of education, and some level of income and shelter, as these needs must be met before we can build a life-plan and pursue our 'agency' interests.<sup>24(pp38–39)</sup> Our agency interests are interests that we develop with our consideration of what we think would be a good life, and thus as part of our autonomous evaluation of our lives. For Brighouse, welfare rights, which protect welfare interests are generally universal and 'justify themselves'.<sup>24(p39)</sup> This is a compelling position, as without a basic level of emotional, physical, and psychological functioning, our ability to work towards any

autonomously developed aspirations would become considerably more difficult, and may be of little importance. Although we might consider our ulterior or agency interests to have greater significance in terms of our life-plans than our welfare interests, without welfare interests being met, our ulterior/agency interests become less and less possible, and less and less important. My aspiration to write a novel would plummet in significance if I did not have any food or shelter.

The distinction between ulterior or agency interests and welfare interests is important for illustrating the many things in which a person might have a stake, but it is also important for illustrating the different ways that the law might be involved in protecting those things. At this point, we might further distinguish the idea of ulterior/agency interests into *community-based* ulterior interests and *individual* ulterior interests. By community-based ulterior interests, I mean the interests that are directly associated with community belonging and inclusion. These interests are maintained by the specific cultural and/or religious group, and there is a broader expectation that belonging to the group requires conforming to that norm. For instance, a Christian person living in a religiously diverse society whose community has the norm that they attend church on Sunday mornings, has an ulterior interest in there being a general acceptance that people do not attend work on Sunday mornings. An example particularly relevant for the broader topic of the article is the interest a Jewish or Muslim male might have in being circumcised to ensure his inclusion in the group and adherence to its norms and expectations.<sup>27,k</sup> The distinctive quality of a *community-based* ulterior interest is that the interest is associated with belonging to a particular group or community. This kind of interest is different from an *individual* ulterior interest that may develop independently from the person's community or parents' preferences. For instance, a person who develops a love for playing the piano or writing a novel, despite growing up in a house and village without music or books, can be said to have developed an individual ulterior interest in doing the things that enable them to play and write, that is separate from any community-based interests that they may have developed in dialogue with their parents' preferences.

Ultrior interests can only be protected by the law *indirectly* through the ways that it protects welfare interests.<sup>26(pp62–64)</sup> I can reasonably expect the state to protect my interest in having shelter, basic health care, and bodily integrity, but I cannot reasonably expect the state to protect my personal interest in writing a novel. Although an individual might consider ulterior interests to be the most important for achieving overall happiness, they are not as important for day-to-day functioning as welfare interests. If the state were to attempt to protect every person's ulterior interests by ensuring that each of our life-goals were provided for and protected, it would be virtually impossible to maintain, and would risk interfering with the liberty of other citizens unreasonably, thus upsetting one of their essential welfare interests.<sup>26(pp62)</sup>

The idea of the child's RBI fits in here as protecting their welfare interests in the first instance as a normative priority over any individual ulterior interests that they may develop, or community-based interests that they may have through their parents' cultural and religious communities. It should also take priority in cases where parental community-based ulterior interests come into conflict with a child's welfare interests, such as in the case of CGC/M practices. The child's welfare interest in bodily integrity conceived as such, should also take priority in cases where there is a parental or community-based preference for interference with their body, such as infant ear-piercing. Conceived of in this way, children's welfare interest in bodily integrity should also take priority in trickier cases involving their diverse ulterior interests, such as in the care and treatment of trans and gender dysphoric preteens.<sup>8,28–30</sup>

Brighouse suggests that welfare interests are generally universal,<sup>24</sup> but for Feinberg, while welfare interests are more common to all than ulterior interests, they are not possessed by all 'without exception'.<sup>26(p188)</sup> All people do have interests, but what those interests are may vary from one to another. It is more likely that many people will have welfare interests in common than ulterior interests. This is because most people can be expected to need a degree of emotional stability, physical integrity, and freedom from interference to function at a basic level and to pursue their ulterior interests. It cannot plausibly be said that each citizen has the same welfare interests if we take seriously the idea that all individuals are distinct and have diverse abilities. Nonetheless, the liberal state ought to protect and defend the welfare interests of *all* citizens with equal zeal, which implies that general laws protecting welfare interests should be applied equally to all citizens.<sup>26(p188)</sup> This might be in the form of legal protection of the RBI. Or, with regards to the case at hand, it means that all children's interest in bodily integrity should take priority over any community-based interests that they or their parents might have.

In a discussion of the political and philosophical tension between group rights and individual children's rights, Samantha Godwin has argued that prioritising the group's rights to conduct certain practices and norms has several inequalitarian consequences.<sup>31</sup> These are: (1) that it would protect children from 'minority' groups less than those from the 'dominant culture'; (2) that parental preferences would be given legal priority over children's development of their 'own cultural identity'; and (3) that prioritising group rights to conduct particular practices 'comes at the expense of erasing the separate interests of children'.<sup>31(pp65–66), 32,33,1</sup> I broadly agree with the normative and legislative aims of this argument to protect children's space to develop their own sense of personal and cultural identity above parental rights to conduct their preferred norms and practices.<sup>m</sup> However, I should stress that I do not hold it to be the case that only 'minority children' have their rights compromised by their parents'

preferences.<sup>31(p65)</sup> Indeed, the view that only ‘minority’ groups conduct practices that interfere with their children’s development of a cultural identity is misguided and would reveal a blind spot when it came to the practices of dominant cultural groups.<sup>34–36</sup> Community-based ulterior interests and preferences may be maintained within dominant cultural groups in a way that violates children’s welfare interests, as well as within marginalised minority groups.

For instance, the cultural expectation in the USA that boys have their foreskin removed can be understood as a community-based ulterior interest sustained by the parents and other community members (dominant group members), conformity to which may lead the child to receive some social benefits as an adult because, for example, dominant group women in the USA have been reported to prefer the appearance of a circumcised penis.<sup>37</sup> Likewise, the dominant cultural expectation that bodies should look particular ways informs parental and medical decision-making with regards to children with variations in their sex characteristics in ways that seriously violate their welfare interest in bodily integrity in the USA, Canada, the UK, and across Europe.<sup>37–46</sup> In short, not only minority groups within Western societies conduct practices that undermine their children’s bodily integrity. The frequent occurrence of violations of children’s bodily integrity across dominant and marginalised minority groups due to community-based ulterior interest preferences for cut and modified genitalia, is among the reasons for the need to articulate and defend a universal conception of the child’s RBI.

Ulterior interests have a very personal quality, even though it is perfectly possible that people will have some similar ulterior interests and ultimate goals. But, because one’s aspirations are subjective, it would be impossible for the state to protect all of its citizens’ ulterior interests at the same time. The time necessary to understand all citizens’ ulterior interests – personal and community-based – accurately, and to attain the resources required to protect them properly would be unfathomable. Thus, if a state were to decide to protect ulterior interests, it would likely end up protecting those of a few people, which would undermine any commitment to all citizens having an equal set of protective rights. It is fairer, then from the point of view of equality, for state institutions to focus on protecting *welfare* interests through application of the harm principle, with harm defined as a setback to those interests, and the most serious kind of harm as setback to the welfare interests that take priority, key among them, the interest in bodily integrity.

## Harm and interests: Different degrees of harm

So far, I have endorsed an interest-based approach to children’s rights, with an emphasis on protecting their welfare interests above the ulterior interests of their parents, or the ulterior interests that they may be developing

or be expected to develop. I move on here to outline the relationship between harm and interests.

The harm principle is one of the few liberty-limiting principles that is justifiable within a liberal framework. How we understand harm is important for defining the content, and setting the limits, of some rights. Feinberg, following Mill, defines harm as ‘setback to interests’.<sup>26</sup> Both broad types of interests discussed above can be set back or damaged, and thus one can be harmed in several ways. I can be harmed because one of my ulterior interests is set back, for example, if someone coercively chopped off my legs, my interest in going to a running club to help achieve my goal of improving my marathon time would be set back. A harm of this kind would set back my basic welfare interest in bodily integrity, and my personal ulterior interest in improving my marathon time.

So, there are multiple ways in which a person might be harmed by their interests being set back. There are many ways that a person’s ulterior interests might be detrimentally interfered with, just as there are many ways in which their welfare interests might be harmed. Following Feinberg, I view a setback to a person’s welfare interests as more harmful than a setback to their ulterior interests, or, more ‘serious’, because the latter depend on the former for realisation, and the former are required for basic and essential level of well-being.<sup>26(pp37–38)</sup> If you chop off a pianist’s fingers, you harm their welfare interests *and* their ulterior interests. This means that overall the pianist’s interests are setback to a greater extent than if they were not a pianist and did not need their fingers to play – but the rights violation would still be considerable if the person were not a pianist, because all people have a basic welfare interest in ‘the integrity and normal functioning’ of their body.<sup>26(p37)</sup> We need to have our basic welfare needs met before it is possible to pursue ulterior goals.

Consider the following examples where interests might come into tension. Groups that practice female CGC/M do so for many reasons, including ideas about what is clean and healthy, and what makes a woman desirable.<sup>47(pp3–13),48,49</sup> A key driver for the practice is simply that it is traditional for the group and non-conformity will lead to stigmatisation for the girl within the group.<sup>47–49</sup> Any interest a girl might have in female CGC/M is related to a community-based ulterior interest in conformity to enhance her belonging. In an adjacent but slightly different example, many medical professionals involved in cases where a child has variations in their sex characteristics, argue that it is in the child’s best-interest to have their genitalia or other sexual anatomy altered in order to fit a particular vision of what male and female bodies should look like and do.<sup>38–46</sup> In most cases, these interventions are not medically necessary, that is, they are not conducted ‘to correct problems that cause physical harm’ such as urinary tract obstruction, but rather to ‘normalise’ the child’s body.<sup>50(pp207–209)</sup> A key aim of this ‘normalisation’,

according to Dalke et al., is for bodies to be able to partake in ‘penovaginal penetration’ and to ‘respond to the parents’ desire to bring up a child in the best conditions possible’.<sup>50(p208)</sup> In the case of medically unnecessary surgeries and treatments for children with variations in their sex characteristics, the interests promoted by the medics and parents who conduct or authorise the surgeries can be understood as community-based ulterior interests that are committed to a heteronormative vision of what bodies should do and how they should appear.

It may be the case that some children with intersex traits will develop a desire to have their sex characteristics altered, which might be understood as a personal ulterior interest if they have not been subject to extreme external pressure to do so. It may also be the case that a girl from a marginalised minority group that practices female CGC/M might want to have her labia nicked as she grows older. But, until the child has developed sufficient autonomy to be able to give ethically valid normatively transformative consent to the procedure, their welfare interest in bodily integrity should be prioritised medically, legally, and politically.

### An interest in having a future choice

Finally, I discuss some implications of the welfare interest in bodily integrity approach to the RBI, in relation to the dominant argument against CGC/M within that current debate. Leading scholars and activists who oppose CGC/M often emphasise the fact that children are presently unable to give consent to CGC/M, but use a conception of the right that assumes that the right-bearer *could* give consent in the future. I examine arguments from some ‘zero-tolerance’ of CGC/M scholars that use consent as a way to illustrate that CGC/M is impermissible unless medically necessary and suggest that these arguments might be understood as emphasising the child’s ulterior interest in having choices preserved. I begin by recognising that consent is a significant consideration for interferences with bodily integrity within liberal philosophical and political contexts, before integrating my interest-based approach to the child’s RBI with dominant consent focused arguments against CGC/M.

Consent plays a crucial role in differentiating a surgeon from an assailant<sup>51,n</sup>; a lover from a rapist. Herring and Wall point out that the RBI is often defined as the following: ‘in short it is the right not to have your body touched or your body interfered with without your consent’.<sup>12(p566)</sup> It is not surprising, then, that consent is often used to argue that CGC/M should not be permitted. Indeed, in recent scholarship about CGC/M, there is ‘increasing concern on the right to bodily autonomy and consent’ in addition to ‘the pain and harm’ of certain CGC/M practices, including ‘ritual boy circumcision’.<sup>52(p1019)</sup>

The idea that children cannot consent to CGC/M arises frequently. In a collaborative expression of opposition to

CGC/M in Western societies, members of the Brussels Collaboration on Bodily Integrity state:

Under most conditions, cutting any person’s genitals without their informed consent is a serious violation of their right to bodily integrity. As such, it is morally impermissible unless the person is nonautonomous (incapable of consent) and the cutting is medically necessary.<sup>53(p17)</sup>

This argument treats consent as a ‘normative transformer’, meaning that other-affecting actions that would otherwise be regarded as morally abhorrent and impermissible, are transformed into actions that are morally permissible, because they have been consented to, or chosen, by the affected person.<sup>54,o</sup> The idea of consent being normatively transformative makes medically unnecessary genital cutting and modification permissible, if and only if, it is plausibly chosen by someone who is capable of consent. On the view of consent expressed above, and throughout the dominant literature arguing that CGC/M is impermissible, consent can only be given by people who are (sufficiently) *autonomous* with respect to such procedures.<sup>p</sup>

Emphasising children’s inability to consent to these procedures draws attention to a way that children are treated differently to adults. It would be a grave violation of an adult’s rights to cut their genitals without their consent and would be unequivocally condemned as assault. And yet, adults frequently cut children’s genitals without their consent; it is an empirical fact, demonstrated by CGC/M practices across the globe, that adults treat children as though they have a lesser RBI on a frequent basis.<sup>55,56</sup> According to critics of CGC/M procedures, it is important to draw attention to this disparity in how adults and children are treated to assert the idea that CGC/M is a serious wrong and violation of their rights.

In an early contribution to the debate about CGC/M, Moira Dustin argued that differences in policy on genital cutting practices should not be based on sex traits or cultural contexts, but rather ‘between adults who can choose how to modify their bodies in irreversible ways – however much the majority might deplore their choices – and children who cannot’,<sup>9</sup> also cited by Earp.<sup>57</sup> So, to ensure consistency across gender and sex with regards to genital cutting, the RBI should mean that children’s genitalia should not be cut ‘before an age of consent’, whereas adults (i.e., individuals who are sufficiently autonomous with respect to genital cutting to be able to give valid consent) should be permitted to have their genitalia modified, should they choose.<sup>9</sup>

Dustin’s now-classic contribution set the stage for more recent, and dominant, arguments against CGC/M. For instance, in ‘The child’s right to bodily integrity’, Earp argues that male and female CGC/M practices are impermissible because they violate the child’s RBI.<sup>10(pp217–235),28(p4),58–61</sup> He claims that any cutting of the body of a

person who is temporarily non-autonomous with respect to such cutting (i.e. incapable of validly consenting to it) that could be delayed until the person becomes capable of consenting 'without putting the person into a situation they would be *even less likely* to consent to (if they were autonomous)' than to the non-consensual cutting itself, wrongs the person and therefore constitutes a violation of their RBI. Since most cases of CGC/M could be delayed until consent becomes possible without putting the child in such a situation, they are, according to this view, a violation of the child's RBI and thus usually impermissible irrespective of any social arguments in favour of medically unnecessary genital cutting of children.

Earp thus differentiates a breach of a person's body envelope that wrongs them (and therefore violates their right to RBI) from a similar breach that does not wrong them (and so does not violate their right to RBI) on the basis of whether or not the person consented, or *would* have consented if capable of consenting. He then makes his case against CGC/M by claiming that we cannot *know* (i.e. be sufficiently certain) that a child would consent to an act of genital cutting that was not medically necessary, and so we should allow the child to become an adult who can later decide whether or not to have their genitalia cut.<sup>10(pp220–225)</sup> Earp suggests that children (considered as pre-autonomous individuals) are not yet able to exercise the right kind of judgement when it comes to choosing certain serious intervention into their bodies (in particular their genitalia), and his argument therefore emphasises a commitment to preserving the child's *future* choice.<sup>59(p25)</sup> Earp states 'pre-autonomous children should have their future choice preserved for how their genitalia should look and function'.<sup>59(p25)</sup>

Here, consent (either actual or hypothetical) is used as a marker to differentiate an interference with bodily integrity that wrongs a person, and so violates their right to RBI, from a physically similar interference that does not wrong them or violate their RBI.<sup>10</sup> An adult who was cut in childhood or infancy, upon becoming an autonomous adult, may decide that what happened is *not* what they wanted.<sup>10(p225)</sup> In such a case, the normatively transformative power of consent cannot justify the prior infringement. Given the fact that nobody can know (i.e. with a sufficiently high degree of warranted certainty) that the future adult would consent to having their genitalia cut for reasons other than medical necessity, it is impermissible to cut a child's genitalia on the basis that they would consent if only they could (i.e., if they were sufficiently autonomous to do so).<sup>10</sup>

In another article, Carmack, Notini, and Earp argue when examining cases of hypospadias that in almost all cases the child should be permitted to choose under conditions of informed consent whether they want surgery:

the choice should be reserved for the (future) individual either to refrain from surgery (if his hypospadias does not

bother him or if he sees the risks associated with the surgery as outweighing the potential benefits) or to elect the specific component(s) of a typical hypospadias surgery that would best suit his preferences and values.<sup>61(p1048)</sup>

They go on to emphasise the idea that surgeries of this kind should be delayed until the affected person can 'make his own informed decision regarding surgery when he is in a position to express his desires and preferences and understand the important issues that are at stake'.<sup>61(p1056)</sup> From the point of view of the interest-based account explored in this article, the argument that children should have the possibility to make a future choice about genital cutting and modification preserved can be understood as connected to their *ulterior* interests in changing their bodies (or not) to fit a preference that they develop either due to a desire to conform of community based expectations, or due to independent personal preferences.

Kai Moller also makes an argument against CGC/M using a commitment to the RBI.<sup>62</sup> Moller's important contribution asserts that there is something 'categorically impermissible' about non-consensual cutting of genitalia which means that under no circumstances can CGC/M be considered permissible in the UK.<sup>62</sup> To argue this point, Moller differentiates the way that UK law courts have assessed cases about male and female genital cutting into the 'balancing approach' and the 'categorical approach', respectively.<sup>62(pp7–8)</sup> The 'balancing approach' is usually adopted with regards to male CGC/M and involves taking into consideration relevant social facts about the affected child, such as their parents' religious commitments and whether on balance it might be in their best interest to be cut.<sup>27,9</sup> In this case, the ulterior interests related to religious and cultural expectations about male CGC/M are treated as equally important as the welfare interest in bodily integrity that each child has.

The 'categorical approach', that Moller identifies, on the other hand, advances from the position that there is something inherently and categorically wrong with female CGC/M, such that there are no social circumstances under which it is permissible. This approach can be understood as giving moral and legal priority to the child's welfare interest in bodily integrity above the ulterior interests that are related to community based norms and preferences of their parents. Moller argues that none of the contextual arguments used to justify CGC/M are convincing and defends the idea that CGC/M is categorically impermissible by emphasising the significance of every individual's 'personal freedom' within Western liberal societies.<sup>62(pp21–22)</sup> Moller argues that the impermissibility of CGC/M should 'flow' from the value of 'personal freedom', and that societies subscribing to the value of freedom cannot permit CGC/M because it violates children's personal freedom, stating '[a] society committed to personal freedom must



insist that *there are certain decisions in a person's life that the person must make him- or herself* and that cannot be made by others, including his or her parents' and cites tattooing, marriage, and sexual partners as other aspects of a person's life that must be decided by the individual (at a time when they are capable of consenting) out of respect for their personal freedom.<sup>62(p22).</sup> He later argues that 'the wrong of genital cutting flows not (in the first instance) from contingent empirical factors relating, for example, to harm or social structures, but from the *child's right to have his or her physical integrity respected and protected*'.<sup>62(p24).</sup> This view is compatible with Varden's defence of the universal 'innate right to freedom' contained in the body and captured by the principle of bodily integrity, and the idea developed in this article, that all children's welfare interest in bodily integrity should be the main focus of the child's RBI and must be given priority over ulterior interests in, for instance, community based belonging or personal preferences for conformity to an aesthetic ideal.<sup>63</sup>

The protection of the choice dimension of the RBI is important within a liberal system that has a commitment to enabling and respecting people's choices about their lives, so long as they are not harming others. This aspect of the RBI protects a person's bodily autonomy, and mean, for instance, that they should be permitted to choose to have their foreskin removed for whatever reason they like, so long as that choice were made without obvious constraints or coercion. Or that a person could permissibly undergo labiaplasty and sex reassignment surgery should they so choose.<sup>1</sup> This dimension of the RBI is important for enabling people to make decisions that they regard to be important for realising their ulterior goals, such as adults who may seek transformative surgeries, cutting, or hormone interventions. An adult individual who may seek such a surgery has this possibility to pursue their ulterior (considered and particular) goal to alter their body for whatever reason they give *enabled* and preserved by having had their welfare interest in bodily integrity prioritised over any ulterior interests there may have been in altering their sexual anatomy as children.

On the view defended within this article, the child's RBI must first and foremost be based on children's interests in having their present and actual bodily integrity protected, and any consideration about their future, hypothetical, or emerging bodily autonomy must be normatively secondary. This does not mean that the protection of the child's future autonomy or ability to make choices about their bodies is not important, it simply means it is not as important as the protection of their present interest in bodily integrity. Partly because they may never develop autonomy or the capacity to fully understand what is at stake in a decision to alter their sexual anatomy, but mainly, on my welfare interest view, because the protection of bodily integrity is basically and fundamentally valuable in itself. Imagine a case where

it is known that a child will not live until they are an adult, they would still have a RBI against CGC/M, but its aim would not be to preserve a future choice, it would be to respect and protect their body as valuable in itself, right now.

## Concluding remarks

Differentiating categories of interests helps to build a more robust account of the child's RBI as one that emphasises a specific understanding of bodily integrity. Stressing and prioritising the interest in bodily integrity as a welfare interest helps to respond to thinkers and groups who claim that CGC/M is in the child's interest as a prospective member of a cultural or religious group. This is because the interests related to our life goals and living according to a given set of norms and values, are *ulterior* interests, which are important, but are normatively secondary to welfare interests. A set back to a person's welfare interests, is more 'serious' than a setback to their personal or community-based ulterior interests.

I have pointed out that children's RBI cannot have exactly the same character as adults' RBI in part because they physically depend on others for their care and general survival. There are many instances when it is permissible and indeed important for there to be interference with children's bodies, especially very young children. But, on my view of the child's RBI, it cannot be permissible for that interference to advance any imagined or anticipated *ulterior* interests, nor for the ulterior interests of the parents to be realised through the child's body. A child belonging to a group that practices CGC/M for religious or cultural reasons, might be argued to have an interest in going through the rite or procedure to enhance their possibility for belonging to the group.<sup>27</sup> For the sake of argument, let us concede that a child does have that interest, and even that as an adult they would choose to be cut, or retrospectively endorse the decision taken by parents and group elders to have them cut. It would still be an inadequate argument to justify violating the child's *present welfare interest in bodily integrity*, because when interests come into conflict or tension within the consideration of children's rights, the present welfare interest in bodily integrity must take priority over any imagined or future ulterior interests.

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### Notes

- a. Within the history of liberal thought this idea is far from taken for granted. The “individual” is usually defined as having characteristics that automatically exclude children, and many others. This philosophical baggage notwithstanding, in recent discussions, there is a move towards respecting children as being owed rights as individuals themselves.
- b. With “The Child’s Rights to an Open Future”, Joel Feinberg offered a debate-shaping framework for differentiating the rights of adults (A rights) and children (C rights), identifying where they might overlap (A–C rights) which informs many current approaches to the child’s RBI.
- c. Brian D. Earp has identified a ‘zero-tolerance’ group of scholars engaged in the debate about child genital cutting and modification practices.
- d. This is a normative commitment to universal human rights that should transcend cultural contexts, but this does not mean I endorse liberal state interventionism. Whether human rights should be universally adopted by all countries in the world, or whether rights adoption should depend on culturally relativist considerations is beyond the scope of this article. My use of terms such as ‘universal’ should be read as meaning ‘universal (i.e. applying to all relevant parties) within a liberal political framework’, unless stated otherwise.
- e. Not all pregnant people and people who have given birth necessarily identify with being a mother.
- f. It has been pointed out that there is a philosophical debate about whether *embodied* personhood is a necessary or contingent element of personhood. This debate is beyond the scope and aims of this paper, which focuses on moral personhood as a characteristic of human embodiment. I will leave questions about transporting a person’s consciousness to a robot and what that would mean for their moral personhood to other spaces, and work with the assumption that moral persons are embodied in human bodies. This assumption may well age badly.
- g. Concepts of the moral person and personhood are significant philosophical considerations that are rigorously examined within the Western history of ideas. There is agreement amongst some leading philosophers that children simply cannot be regarded as “full-fledged” moral persons due to their differences in development to adults, either because of an assumed lack of self-awareness, or assumed lack of autonomy, or assumed lack of reason. Many contemporary theorists have rejected these takes on how children ought to be conceived and treated. I examine the idea of the child’s moral personhood extensively in my PhD dissertation (2021), where I develop an account of the child as an embodied moral person as a philosophical underpinning for their character as right-bearers. There is not space to re-state this account fully here, but I am using the idea that children have equal moral personhood to their adult counterparts, so when I state moral persons, I mean all humans who have been born. I should state for the record, that I roundly reject the idea that children should be thought of as less morally considerable than adults.
- h. My position is in line with Varden’s in the sense that I endorse a universal approach to the RBI meaning all humans have a RBI whatever their age, political, national, or cultural context, but reject the idea that the right begins at conception, that is, when an egg is fertilised. Instead, I suggest the right begins when an individual is born.
- i. This is generally agreed by liberal thinkers, with some exceptions, such as if a person has lost their entitlement to liberties by committing certain crimes.
- j. Many scholars argue that one of the most significant interests children have is the protection of their future choices. I agree that this is an interest that should be considered, but as I explain later, I do not hold it to be the most significant interest they have, as choices are related to *ulterior* interests, not *welfare* interests.
- k. See, for instance, Joseph Mazor’s defence of the child’s interest in circumcision in “The child’s interests and the case for the permissibility of male infant circumcision”.
- l. Godwin’s argument against parental rights builds on the tension between the protection of group rights and vulnerable people within those groups’ hard won individual rights, classically identified by Susan Moller Okin.
- m. I have defended this view elsewhere, see for instance “The child’s right to genital integrity” and “Culturally diverse societies and genital cutting controversies.”
- n. Arianne Shahvisi used the difference between a surgeon and an assailant to illustrate the normatively transformative role that consent plays in surgical settings in her conference talk “Choice for the west, culture for the rest”.
- o. Chambers introduces and discusses the idea of consent being taken to be a “normative transformer” for other-affecting actions that would otherwise be regarded as morally unacceptable in *Sex, Culture, and Justice*, esp. 167. It should be noted that Chambers discusses the idea that consent is normatively transformative during an interrogative analysis of the conditions within which the person makes the choice. Chambers suggests that when the consent is for something that is harmful to

the chooser, and the conditions of the choice are unjust, we should question whether consent really does have the normatively transformative power it is attributed in many contexts.

- p. A reviewer has pointed out that in medical ethics more generally, autonomy has a decision-specific role, that is, the typical argument made is that consent can only be given by an individual with the capacity to give autonomous consent to that intervention. This means that a person considered to lack ‘global’ autonomy may make an autonomous decision to give consent to a particular medical intervention. This is an important point of clarification, and further illustrates the confusion and lack of consensus around consent and autonomy when it comes to the RBI and CGC/M. On my understanding of this problem, autonomy is thought of in two distinct ways: (1) a person might be considered globally autonomous or not; (2) in relation to a particular intervention it might be decided that they have been given enough information about the intervention to give autonomous consent. I should state that my view of autonomy is incompatible with the idea that someone can be declared to lack or have global autonomy. I am suspicious of medical professionals and ethicists who declare that an adult person globally lacks autonomy, indeed, I am suspicious of philosophers who declare that some groups of people are more autonomous than others, because autonomy has been used as a tool to exclude people from rights and decision-making throughout history.
- q. Joseph Mazor makes an argument of this kind in “The child’s interests and the case for the permissibility of male infant circumcision.”
- r. My emphasis.
- s. My emphasis.
- t. It should be noted that, in practice, medical practitioners are not legally obliged to perform interventions if they do not consider them to be medically necessary. Further, a moral commitment to a strict choice right approach to adults’ bodily integrity does not mean that, in practice, any cutting or interference with a person’s genitals or bodily integrity would be deemed lawful, even if consented to within the contemporary British legal context. In the case of *R vs Brown (1993) 2 All ER 75*, it was ruled in court that the consent of the person affected by sadomasochistic sexual acts, could not be used as a defence of actual bodily harm to another individual (I would like to thank Jonathan Pugh for drawing my attention to this case). Furthermore, UK legislation on female genital cutting practices FGM Act 2003 states that the consent of a woman from a practising community is not legitimate to defend an act of genital cutting or modification on a woman for purposes of ‘custom or rite’ (FGM Act 2003). So, consent does not *always* have normatively transformative power in a practical sense.

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