Children Under the Knife: Current Interests, Future Interests or Parental Interests?

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I. Introduction

IT IS BOTH natural and essential to take a paternalistic approach to raising a child.[1] This is in order to protect the child's long-term interests from their immature judgement. Parents have a right to shape their child by raising them in accordance with their religion and values, choosing their diet, education and accommodation. However, it is a parent's duty to preserve their child's right to an open future and to not take irreversible actions which may deprive the child of future life choices.[2] There is a potential adult in every child, and it is this potential adult's autonomy which must be protected while they are young.[3]

In the context of health care decisions, the law supports a parent's right to make medical decisions on the behalf of their children. The general presumption is that a parent will make a decision on medical treatment with the child's best interests in mind.[4] Parental rights, however, tend to only be invoked where a decision is controversial.[5] Where there is an agreement on medical treatment between parents and doctors, it is presumed that the best interests standard has been satisfied. This parent-doctor presumption allows doctors to recommend, and parents to give consent to, medically unnecessary treatments. This leaves gaps in the law which potentially will lead to a failure in protecting a child's right to an open future.[6]

This article will examine the adequacy of the law in protecting the open

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1 Joel Feinberg, *Freedom and Fulfilment* (Princeton University Press, 1992), 76.

2 Robert Darby, 'The Child's Right to an Open Future: is the Principle Applicable to Non-therapeutic Circumcision?' (2013) 39 Journal of medical ethics 463, 464.

3 ibid.

4 Alicia Ouellette, 'Eyes Wide Open: Surgery to Westernize the Eyes of an Asian Child' (2009) 39 The Hastings Centre Report 15, 16.

5 Robert van Howes, 'Infant Circumcision: the Last Stand for the Dead Dogma of Parental (Sovereignal) Rights' (2013) 39 Journal of Medical Ethics 475, 475.

6 Anne Tamar-Mattis, 'Exceptions to the Rule: Curing the Law's Failure to Protect Intersex

future principle. As will be discussed, the law protects children against some non-therapeutic procedures but not others. It will be claimed that the malleability of the best interests standard leads to gaps in the law for three reasons. Firstly, if the surgery is not life-threatening it can often be justified through the harm principle. Secondly, there is a presumption that the parent will make a decision with their child's interests at heart, even though this is not always the case. Thirdly, the medical profession is afforded too much scope when applying the best interests standard. The arguments in this paper will focus on young minors who are not yet *Gillick* competent.[7]

II. The Best Interests Standard

Parental authority over healthcare decisions is not unlimited. For example, all UK blood transfusion refusals have been overridden on the basis that necessary transfusions represent the child's best interests, even if this conflicts with the religious views of the family.[8] The restrictions to a parent's power over their child's body apply not only to refusals of treatment but also to consent. This can be seen through the criminalisation of non-therapeutic surgery such as female genital mutilation (FGM) and sterilisation of children without court approval. In these situations, the law acknowledges and protects a child's right to an open future. In view of this, the law appears to agree with the claim that parents play a fiduciary role in a child's life rather than a property-owning one.[9] They are legally bound to hold their child's future rights on trust until they are old enough to exercise them. However, the laws limiting parental authority are only procedure specific and therefore do not protect children from being inflicted with other non-therapeutic treatment.

In regards to other non-therapeutic decisions, a parent-doctor presumption is applied. Parents may provide consent to procedures of a cosmetic nature such as ear-pinning, circumcision, limb-lengthening and genital normalising surgery by arguing that the procedure is in the child's best interests. The legality of such procedures raises questions concerning the adequacy of the best interests standard applied by the courts and medical professions in guarding the concept of an open future.

The best interests standard has been criticised for its inherent vagueness and lack of explicit normative guidance.[10] It has been described as an 'empty

Infants' (2006) 21 Berkeley Journal of Gender Law and Justice 39, 89.

7 *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] 1 FLR 224.

8 *Re S (A Minor)* [1993] 1 FLR 376; *Re O (A Minor) (Medical Treatment)* [1993] 1 FCR 925; *Re S (A Minor) (Consent to Medical Treatment)* [1995] 1 FCR 604.

9 Ouellette (n 4) 17.

10 Mary Donnelly, *Health Care Decision Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (CUP, 2010), 176.

rhetoric'.[11] The ambiguity of the phrase raises concerns that the standard can be manipulated in order to justify questionable treatments.[12] Despite this, supporters of the best interests standard agree that the concept is subjective but also highlight that as a society we have a general consensus about what a good life entails.[13]The standard is easily applied where the child's life is at jeopardy and parental autonomy rights are overridden.[14] However, in situations where a proposal for treatment lacks therapeutic intent, an application of best interests standard is not so straightforward.

III. The Court's Approach to Non-Therapeutic Procedures

The malleability of the best interests standard becomes obvious in its application to ritual male circumcision, a procedure which has no proven medical benefits. When weighing the benefits and the harms of the procedure in terms of the child's well-being, it is apparent that the surgery is not in the child's best interests. Irrespective of this, it was held *obiter dicta* in *R v Brown*[15] that ritual male circumcision is lawful.[16] The best interests standard is inherently centred on values,[17] and therefore a multitude of reasons can justify a procedure if more weight is attached to cultural values than the physical harm caused. Bridge claims that circumcision is justified under the best interests principle as it is important for the welfare of the child that he conforms to family traditions.[18] Such reasoning is also listed as a justification in the British Medical Association guidelines.[19] However, it is debatable whether cultural benefits justify impinging a child's right to an open future.

A right to an open future places value on self-fulfilment and liberty.[20] If actions are taken in childhood which later leave an adult unable to make future choices, the opportunity for self-fulfilment and liberty will be diminished. Although a child's relational background will influence their decisions later in life, the child may grow up to challenge the values of their parents. As circumcision involves permanently

11 Ian Kennedy, *Treat Me Right: Essays in Medical Ethics* (Clarendon Press 1991), 90.
12 Jonathan Herring, *Vulnerable Adults and the Law* (OUP, 2016), 208.
13 ibid.
14 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 193.
15 *R v Brown* [1993] 2 All ER 75.
16 *R v Brown* [1993] 2 All ER 75, 79.
17 Douglas Diekma, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics 243, 246.
18 Caroline Bridge, 'Religion, Culture and Conviction – the Medical Treatment of Young Children' (1996) 11 Child and Family Law Quarterly 1, 5.
19 British Medical Association, 'The Law and Ethics of Male Circumcision: Guidance for Doctors' (2004) 30 Journal of Medial Ethics 259.
20 Jonathan Morgan, 'Religious Upbringing, Religious Diversity and a Child's Right to an Open Future' (2005) 24 Studies in Philosophy and Education 367, 370.

altering the body, the child's freedom of religious choice may be restricted by their parents' decision.[21] On the other hand, Mills claims that providing children with an open future is both impossible and undesirable.[22] She argues that the idea of raising a child in a way which provides the ability to pursue all options is superficial and it is impossible to rear a child without encouraging them down one path or another.[23] However, this does not take into account that a child can be raised in a way which makes them aware of other ways of life so that, if they choose to, they have the option of living their life differently.

In the context of circumcision, Mills' thoughts can be applied to debate that, while Muslim parents may be viewed as closing off the right to religious freedom through circumcision, state intervention could also be seen as closing off a child's option of living in accordance with his family's values and belonging to a religion. In this way, it can be argued that state intervention will influence religious freedom. It is highly debatable where a line should be drawn between morally acceptable and unacceptable decisions.[24] Feinberg contends that state-neutrality is impossible.[25] In refusing to intervene, the state is still playing a part in closing off the child's options. With that being said, the state's decision to intervene may not have such a drastic effect as the child has the option of being circumcised as an adult. Increasing or reducing the likelihood of a child's faith will not close off their options. The child will still have the ability to reject or accept the faith they have been raised to follow when they become autonomous.

IV. Is Imposing Harm Ever Justifiable?

It is suggested that the courts allow circumcision because it is thought to be a relatively minor procedure. Ouellette identifies that the best interests standard may merely be a question of identifying a harm threshold, above which parents will have discretionary powers.[26] One of the reasons that non-therapeutic surgery does not result in court proceedings is that the surgery is not life threatening.[27] It is suggested that the harm principle is applied rather than an assessment of what is in the child's best interests.[28] This indicates a sliding scale of parental authority

[21] Darby (n 2) 465.
[22] Claudia Mills, 'The Child's Right to an Open Future?' (2003) 34 Journal of Social Philosophy 499, 499.
[23] ibid 500.
[24] ibid 503.
[25] Feinberg (n 1) 85.
[26] Alicia Ouellette, 'Shaping Parental Authority Over Children's Bodies' (2010) 85 Indiana Law Journal 955, 970.
[27] Tamar-Mattis (n 6) 80–81.
[28] Sarah Elliston, *The Best Interests of the Child in Healthcare* (Routledge-Cavendish 2007), 53.

depending on the severity of the decision. This would explain why circumcision is justified through religion but blood transfusion refusals are not.

However, using the harm principle alone as a threshold to justify permanent body modifications on a child is inadequate.[29] A parental right to prevent harm does not extend to a right to impose harm on a child through unnecessary procedures.[30] Judging the degree of harm inflicted on the child is not only subjective, but it fails to give consideration to the open future principle. Parental consent should be restricted as it is a privilege, not a right.[31] Actions which will restrict the child's future right to make decisions about their life should not be taken by parents. To illustrate this point, Davis uses the example of deaf parents who wish to ensure that their child is also deaf.[32] He argues that the greatest moral harm caused would not be the physical effect, but the denial of choice. It would violate the child's autonomy as the scope of their choices would be restricted by the permanent disability. This will therefore impinge their right to an open future.

Davis' analogy highlights the need to prohibit, or at least delay, non-therapeutic surgery until the child is able to make an autonomous choice. The importance of this is further emphasised when examining the outcome of genital normalising surgery of intersex children. In the UK, genital cosmetic surgery for children with ambiguous genitalia remains part of standard medical care.[33] An issue with allowing parents to assign the gender of their child is that the child may later deviate from this assignment. Intersex people who have spoken out about their surgery argue that the decision to undergo surgery should not have been made by their parents but by themselves when they were competent.[34] This in itself provides a strong argument in favour of delaying non-therapeutic procedures until the child is old enough to take part in the decision-making process.

It has been argued that leaving ambiguous genitalia unaltered may lead to problems with the child's gender and sexual identity, causing long-term psychological harm.[35] In contrast, Fraser likens non-therapeutic procedures such

[29] Van Howes (n 5) 479.

[30] Darby (n 2) 464.

[31] Svoboda JS, Van Howe RS, Dwyer JG, 'Informed Consent for Neonatal Circumcision: an Ethical and Legal Conundrum' (2000) 17 Journal of Contemporary Health Law and Policy 61, 86.

[32] Davis DS, 'Genetic Dilemmas and the Child's Right to an Open Future" (1997) 27 Hastings Centre Report 7, 11.

[33] Lih-Mei Liao and Dan Wood, 'Parental Choice on Normalising Cosmetic Genital Surgery: Between a Rock and a Hard Place' *British Medical Journal* (28 September 2015) <https://pdfs.semanticscholar.org/57e4/d8d0e78eafd233e58d3169ccd19de1aa2731.pdf > (accessed 17 October 2017).

[34] Tamar-Mattis (n 6) 70.

[35] Maharaj et al. (n 34) 401.

as genital cosmetic surgery on children to FGM.[36] She argues that both FGM and genital cosmetic surgery have not shown to be medically beneficial. It is not proven to be detrimental to children who grow up with ambiguous genitalia. Further, the argument that children with ambiguous genitalia need to be normalised adopts a paternalistic approach which allows for the subordination of children's rights in order to conform to society's norms. The allowance of genital cosmetic surgery suggests that there are "rules of normality" which must be followed, when this is not strictly true.[37] Postponing surgery would leave the widest range of options open to the child.[38] They can decide for themselves for or against the procedure, and more importantly, they will have a choice over their gender identity.

Mills argues that in some cases it is impossible for the law to obligate parent's to provide an open future as options close all the time.[39] We are always faced with one choice or another, and we must close one option in order to pursue another. Although this is true, encouraging a certain choice does not impede the selection of another.[40] In the context of intersex children, making the decision to undergo surgery irreversibly alters the child's body. This can be distinguished from adults who wish to undergo gender reassignment surgery because they have made an autonomous decision to pursue that choice. Intersex children whose parents make this decision for them may feel resentment as they will have had this important choice taken away from them.

V. Surgically Shaping Children

An area yet to be considered by the UK courts is cosmetic surgery on minors[41] and so there are no specific legal barriers to prevent its use.[42] Due to the lack of case law, the discussion in this section is purely theoretical. It is thought that a reason why cosmetic surgery is not brought before the courts is because parents are demonstrably concerned with the welfare of their child when seeking procedures.[43] Surgical shaping is often argued to be in the child's best interests. Commonly, parents claim that the surgery will improve the child's integration into society by reducing

[36] Sylvia Fraser, 'Constructing the Female Body' (2016) 9 International Journal of Human Rights in Healthcare 62, 69.

[37] Ellen Feder, 'In their Best Interests' in Erik Parens (ed) *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 214.

[38] Tamar-Mattis (n 6) 75.

[39] Mills (n 22) 499.

[40] Mianna Lotz, 'Feinberg, Mills and the Child's Right to an Open Future' 37 (2006) Journal of Social Philosophy 537, 542.

[41] Elliston (n 28) 62.

[42] Ouellette (n 4) 15.

[43] Tamar-Mattis (n 6) 80–81.

the amount of social stigma that they are exposed to due to their appearance.[44] Where the risk is low, it is thought that minor cosmetic surgery may be viewed in a similar way to male circumcision in that it will not have a detrimental effect on the child's interests[45] and therefore is to be left to the discretion of the parents.

It is challenging to refute parental wishes to 'normalise' their child as these desires often stem from the knowledge that their child may experience social grief if they are not "normalised".[46] However, cultural factors may inhibit the parents' ability to focus on the child's right to an open future.[47] It is easier to concentrate on the child's current needs rather than examining the needs of the child when they reach adulthood. The principle of an open future may provide a remedy to the paternalism which results from the best interests test. Where a child is too young to express a preference, the procedure should not be allowed if it will restrict their future options.

The notion that a parent has a right to alter a child's body in order to satisfy aesthetic, social or cultural norms is contrary to the open future concept.[48] Sullivan, who has personal experience of undergoing non-therapeutic body modifications as a child, highlights the importance of considering the impact the surgery will have on the child's identity as an adult.[49] She argues that a strong sense of identity is essential for a child to be able to deal with the difficulties of life. However, this sense of self may be damaged if, at a young age, the child is surgically shaped in order to fit into societal norms. Sacrificing identity for social acceptance is too high a price to pay.[50] There is a need for the law to distinguish between parental decisions which have immediate functional impact on the child and decisions which are designed to meet cultural or social norms and ultimately subordinate the child's interests.

There may be conflicting interests at play: the child's interest in an open future, and the parent's interest in having a 'normal' child.[51] This may interfere with the parent's ability to weigh other interests in making decisions about surgery,

[44] Elliston (n 28) 62.

[45] ibid 64.

[46] Tony Bogdanoski T, 'Every Body is Different: Regulating the Use (and Non-use) of Cosmetic Surgery, Body Modification and Reproductive Genetic Testing' (2009) 18 Griffith Law Review 503.

[47] Tamar-Mattis (n 6) 84.

[48] Ouellette (n 26) 971.

[49] Emily Sullivan, 'My Shoe Size Stayed the Same: Maintaining a Positive Sense of Identity with Achondroplasia and Limb Lengthening Surgeries' in Erik Parens (ed), *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 29.

[50] H. Lindemann, 'The Power of Parents and the Agency of Children' in Erik Parens (ed), *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 184.

[51] Tamar-Mattis (n 6) 84.

meaning that the surgery may neither support the open future principle or the best interests standard. This raises concerns as the belief that parents will put the interests of their child first is the foundation for parental authority to make medical decisions. If there is a conflict of interests the basis of this presumption will be undermined. After all, the rationale for restricting parental authority in non-therapeutic sterilisation cases is that conflict of interests may be present.[52] The parents of a disabled child may be more inclined to have the child sterilised to ensure it is easier to care for her when she is older, and also to prevent the burden of an unwanted baby. If conflicting factors are also present in providing consent to cosmetic surgery on minors, then matters should also be brought before the court.

VI. Power of the Medical Profession

It is argued that non-therapeutic surgery requires an objective justification to ensure that the child's right to an open future is not compromised.[53] The General Medical Council have released new guidelines concerning cosmetic surgery which came into force in June 2016.[54] These guidelines state that doctors must take "particular care" when considering cosmetic surgery on minors[55] and that a cosmetic intervention must be in the best interests of the child.[56] However, as previously discussed, best interests is a subjective concept. A parent cannot obtain treatment without an agreeable doctor, and therefore there is an imbalance of power.[57] The doctor's duty is to present an unbiased and objective assessment of best interests regardless of their personal values. Sensitivity is also key as the mere mention of an option may be interpreted by an anxious parent as a recommendation. The scope which the law affords to medical judgement results in a lack of legal tools to examine whether the medical standard is appropriate. It is argued that the best interests standard is negligent in accommodating the correct level of care to children's rights.[58] In the current approach, too much power lies in the judgement of the medical profession.

Jones comments that cosmetic surgery is often major, painful and always therapeutically unnecessary. Consideration should be given to outlawing all

[52] ibid 98.
[53] Elliston (n 28) 97.
[54] British Medical Council, 'Guidance for Doctors who Offer Cosmetic Interventions' *British Medical Council* (1 June 2016) <http://www.gmc-uk.org/Guidance_for_doctors_who_offer_cosmetic_interventions_210316.pdf_65254111.pdf> (accessed 17 October 2018.
[55] ibid 3.
[56] ibid 9.
[57] Svoboda et al. (n 31) 71.
[58] Tamar-Mattis (n 6) 82.

unnecessary non-therapeutic surgery on children.[59] Where shaping a child will encroach on their right to an open future, the state should intervene to protect the child's future ability to make choices.[60] Subjecting children to surgical shaping presents problems of psychological harm, injury to identity, long-term physical harm and even death.[61] Yet, arguments in merit of the procedures are usually framed around best interests, meaning that surgical shaping can be approved by parents and doctors without any legal overview. It appears that as long as the harm is not too severe, a procedure will be permitted without consideration of whether the choice should be left to the child when they are mature.

VII. Conclusion

There is a presumption that parental decisions will be made in the child's best interests. With this being said, parent's authority over their child's body is limited. The law seeks to protect children through criminalisation of FGM and unnecessary sterilisation. However, these laws are procedure specific and therefore do not protect children from being subjected to other harmful non-therapeutic treatment. The reasons for this current gap in the law are threefold. Firstly, the harm principle is often applied in order to justify surgery. This means that procedures which are not life-threatening are often justified by arguing that the harm is not severe enough to outweigh the cultural and social benefits of the procedure. Secondly, there is a presumption that the parent will make a decision with their child's interests at heart. However, as discussed, there are often conflicting interests at play meaning that the surgery may accommodate the parents' interests rather than the child's. Lastly, there is too much power given to the medical profession to allow such procedures. Cosmetic surgery guidelines repeat the empty rhetoric of best interests rather than focusing on the open future principle.

The current law fails to adequately protect a child's right to an open future. The scope of parental decisions over a child's body should be questioned.[62] There is a need to distinguish between parental decisions which have immediate functional impact on the child or their right to an open future, from decisions which are designed to meet cultural or social norms. Only autonomous individual should be allowed to choose whether to subject their bodies to invasive procedures.[63]

[59] Jones RB, 'Parental consent to cosmetic facial surgery in Down's syndrome' (2000) 26 Journal of Medical Ethics 101, 102.

[60] Dena Davis, *Genetic Dilemmas: Reproductive Technology, Parental Choices, and Children's Futures* (Psychology Press, 2001), 24–28.

[61] Ouellette (n 26) 973.

[62] ibid 974.

[63] Adrienne Asch, 'Appearance Altering Surgery, Children's Sense of Self and Parental Love' in Erik Parens (ed), *Surgically shaping children: Technology, Ethics, and the Pursuit of Normality* (Johns Hopkins University Press, 2006), 248.

Presently, the law's approach is too intensely focused on the child and parents' current interests rather than the child's future interests as an autonomous adult. The idea of parental autonomy as a privilege rather than a right needs to be reinforced in order to prevent parents from taking actions which will restrict their child's future options.[64]

[64] Darby (n 2) 464.