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Ritual Male Circumcision and Parental Authority

ABSTRACT: A recent judgment by a lower court in Germany brought the problem of ritual male circumcision to the consciousness of the wider public and legal academia. This essay weighs in on this emerging discussion and argues that ritual male circumcision is not covered by parental authority because it violates the human rights of the boy on whom it is imposed. It first considers and dismisses the best interest test of parental authority which, by focusing on the well-being of the child as opposed to his (future) autonomy, fails to take the boy's human rights sufficiently into account. Instead, the essay proposes what it terms the autonomy conception of parental authority, according to which parental authority must be exercised such as to ensure that the child will become an autonomous adult. While parents may raise their child in line with their ethical, including religious, convictions, respect for his autonomy requires that this be done in a way that allows the child to later distance himself from these values; this implies, among other things, that irreversible physical changes are impermissible. This conclusion holds even if it could be assumed that the child would later come to endorse his circumcision: a proper understanding of autonomy implies that the religious sacrifice of a body part can only be authorised by the person whose body it is. Thus, ritual male circumcision is outside the scope of parental authority because it usurps the child's right and responsibility to become the author of his own life.

I. Introduction

Despite activism against routine infant circumcision as practiced in the USA,² some opposition within Judaism to the *brit milah* (circumcision of newborn boys on the 8th day),³

¹ Associate Professor of Law, London School of Economics and Political Science. I would like to thank Jacob Bronsther, Conor Gearty, Alon Harel, Emily Jackson, Mattias Kumm, Shai Lavi, Avi Lifschitz, Tom Poole, and Iddo Porat for their helpful comments. Earlier versions of this paper were presented at the Legal & Political Theory Forum at LSE and the 2016 conference of the International Society of Public Law. I am grateful to the participants for their valuable feedback.

² See www.icgi.org/intactivist-organizations with further information and links.

³ See www.jewsagainstcircumcision.org.

and criticism from children's rights advocates,⁴ by and large it is accurate to say that until recently neither the general public nor the legal profession considered ritual male circumcision a problem worthy of serious attention from a human rights angle. This changed in 2012, when a lower court in Cologne, Germany, issued a judgment according to which the practice was in principle punishable because it permanently and irreparably harms the child's body for religious reasons and therefore violates his basic right to decide for himself at a later stage about his religious affiliation.⁵ The case was widely reported and discussed around the globe;⁶ in Germany, it led to the Bundestag passing a law that explicitly allows parents to have their sons circumcised. Thus, while the judgment has not led to a reversal of Germany's or any other country's position on the issue, its most significant outcome to date is that the issue of how ritual male circumcision relates to the human rights of infants and boys is now on the table, and it seems safe to predict that it will not go away anytime soon.

This essay weighs in on this emerging discussion and argues that ritual male circumcision is outside the scope of parental authority because it is unjustifiable to the infant or boy on whom it is imposed and therefore a violation of his human rights.⁷ It deliberately does *not*

⁴ See, for example, the resolution of the children's ombudspersons of the Nordic countries, supporting a ban on non-therapeutic circumcision of underage boys, available at: <https://www.crin.org/en/library/news-archive/male-circumcision-nordic-ombudspersons-see-ban-non-therapeutic-male>. For further references, see Jacqueline Smith, 'Male Circumcision and the Rights of the Child', in Mielle Bulterman, Aart Hendriks and Jacqueline Smith (eds.), *To Baehr in Our Minds: Essays in Human Rights from the Heart of the Netherlands* (SIM Special No. 21), Netherlands Institute of Human Rights 1998, 465-498; available online at: <http://www.cirp.org/library/legal/smith/>.

⁵ Landgericht Köln (District Court of Cologne), judgment of 07/05/2012, 151 Ns 169/11. An English translation is available at: <https://www.dur.ac.uk/resources/ilm/CircumcisionJudgmentLGCologne7May20121.pdf>.

⁶ For the academic discussion following the Cologne judgment, see the various contributions to the following: Matthew Johnson and Megan O'Branski (eds.), *Circumcision, Public Health, Genital Autonomy and Cultural Rights* (Routledge 2014), originally published in (2013) 3 (2) *Global Discourse*; the circumcision supplement by the British Journal of Urology, (1999) 83 Supplement 1 *BJU International*; the special issue on circumcision by the Journal of Medical Ethics, (2013) 39 *J Med Ethics*.

⁷ On human rights as based on the right to justification see Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach', (2010) 120 *Ethics* 711; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', (2010) 4 *Law & Ethics of Human Rights* 141; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012), ch. 4 and in particular p. 87. On the idea of a culture of justification see Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013), ch. 6.

discuss the case for exceptionally tolerating the human rights violation that, if my argument is correct, ritual male circumcision constitutes, for example in order to avoid instilling anxiety into minority religious groups that would feel disrespected or even persecuted by a ban, or in order to avoid practical problems such as forcing the practice underground and thereby creating additional risks to the health and well-being of infants and boys. Analysing such issues in a satisfactory way would require engagement with a host of complex empirical and normative questions and is beyond what can be achieved in this essay which, therefore, limits itself to demonstrating that circumcision is a human rights violation without comprehensively answering the follow-up question of what ought to be done about it.

Writing about circumcision from a critical angle may raise sensitivities for several reasons. First, ritual male circumcision is a practice that, for religious, cultural and historical reasons, is of central importance to many of those who engage in it. Especially in the case of Judaism, it represents the covenant made between God and Abraham which is seen as so important that in the course of history Jews have performed circumcisions even under the threat of the death penalty.⁸ The fact that even the large majority of unobservant Jews performs it on their sons⁹ is an indicator of the unique sense of identity that it is seen to generate and sustain among Jews and that will be hard to grasp and appreciate from the outside. By way of contrast, in Islam, most schools of thought consider circumcision as recommended but not obligatory and in any case not a condition for becoming a Muslim;¹⁰ its – nevertheless undisputed – importance therefore seems to be based primarily on tradition and culture. Second, the existence of anti-Semitism and Islamophobia inevitably overshadows any discussion of this topic; such attitudes – which need not always be conscious – may affect the critic's argumentation; conversely, a fair criticism of a Jewish or Muslim practice may be perceived as a discriminatory attack.

⁸ J. M. Glass, 'Religious Circumcision: A Jewish View', (1999) 83 *BJU International*, Suppl. 1, 17. For an alternative perspective, see J. Goodman, 'Jewish Circumcision: An Alternative Perspective', (1999) 83 *BJU International*, Suppl. 1, 22.

⁹ Glass, *ibid.*

¹⁰ S. A. H. Rizvi, S. A. A. Naqvi, M. Hussain, and A. S. Hasan, 'Religious Circumcision: A Muslim View', (1999) 83 *BJU International*, Suppl. 1, 13.

While these problems must be taken seriously, they should not prevent a critical discussion of the issue. First, there is simply no alternative to public and academic discussions of the morality and legal protection of religious practices – be they majority or minority practices, central or peripheral –; we have no choice but to place our trust in the power of reason and reasoned argumentation. Second, treating the issue of ritual male circumcision as an inner-Jewish or inner-Muslim affair that outsiders should not critically discuss would fail to appreciate that Jewish and Muslim children are holders of *human* rights whose protection is of concern not only to members of their respective communities but to all humans. Third, it would not be respectful but, indeed, disrespectful to refrain from criticising religious practices such as ritual male circumcision for fear of hurting others' feelings: such behaviour would treat one's interlocutor as someone who is not capable of or interested in responding to moral reasons, and would therefore fail to treat him or her as a moral agent.

In order to develop the argument, the following section considers the best interest test, which is the most widely used conception of parental authority. According to it, parents can make decisions for their children under the constraint that the decision reflects what can reasonably be regarded to be in the child's best interest. Applied to the case of circumcision, essentially this approach would ask whether one can reasonably believe that it is better for a male person to be circumcised than not. As will be shown, the best interest conception, by focusing on the child's well-being as opposed to his autonomy, neglects the fact that children and infants are separate individuals from their parents and, therefore, have autonomy-based human rights, even if they cannot yet exercise all of them. The third section of the paper introduces an alternative conception of parental authority – the autonomy conception – which remedies this weakness. It holds that parental authority must be exercised so as to ensure that the child will become a free (autonomous) person as an adult. While parents may raise their child in line with their ethical, including religious, convictions, respect for his autonomy requires that this be done in a way that allows the child to later distance himself from these values. Ritual male circumcision irreversibly marks the boy and the adult who he is to become as belonging to a particular religious community; its imposition on a child therefore violates the autonomy constraint and is unjustifiable. This conclusion holds even if it could be assumed that the child would later come to endorse his circumcision: a proper understanding of autonomy implies that the religious sacrifice of a

body part can only be authorised by the person whose body it is. Thus, ritual male circumcision is outside the scope of parental authority because it usurps the child's right and responsibility to become the author of his own life. The final section of the paper refines the argument by addressing and exploring potential objections.

II. The best interest conception of parental authority

1. Theoretical Foundation

According to the conception of parental rights that is most widely used in legal practice, parental authority exists under the constraint that the parents' actions reflect what can reasonably be regarded as being in the best interest of their child.¹¹ Because of its practical importance and intuitive appeal, this essay considers this test first, in order to lay the ground for pointing out and responding to some of its weaknesses and limitations in the following sections. The rationale of the best interest test is the following. Adults will normally orient their actions towards what is in their own best interest, broadly conceived. But children do not yet have the capacity to lead their own lives, and therefore it makes sense to assign the authority to decide what is in their best interest to their parents. While the parents' authority will be broad and cover a wide range of educational measures and philosophies, in the interest of the wellbeing of the children it cannot be limitless. Hence, when parents make decisions for their children, these decisions must *reasonably* reflect what is in their child's best interest. For example, in many countries spanking one's child is no longer regarded as covered by parental rights precisely because while some parents believe

¹¹ In the case law of the European Court of Human Rights regarding the placing of a child for adoption, 'the best interests of the child are paramount' (*Y.C. v. United Kingdom*, appl. no. 4547/10, judgment of 13/03/2012, para. 134). Under UK family law, the Children Act 1989 stipulates in section 1(1) that 'the child's welfare shall be the court's paramount consideration'. Article 3(1) of the UN Convention on the Rights of the Child 1989 states that 'in all actions concerning children ... the best interests of the child shall be a primary consideration.'

While the best interest standard is widely used, it is not obvious what the term 'best interests' actually means. For the purposes of this paper, I will use it in the sense of 'well-being' as contrasted with 'autonomy'. While it may be possible, conceptually, to reconcile the two (by arguing that in order to protect a person's well-being, due regard must be had to his present and/or future autonomy; on this point see John Eekelaar's influential essay 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism', (1994) 8 *International Journal of Law and the Family* 42-61), I adopt the rigid distinction between well-being and autonomy in this paper for reasons of explication of the argument.

that it is an excellent way of educating children and teaching them obedience, the respective societies have concluded that this form of physical violence can no longer reasonably be regarded as serving the child's best interest.

2. Application

Applying this conception to the case of circumcision, the question would be whether one can reasonably think that it is in the best interest of the child to be circumcised. The assessment of this question would have to take a holistic perspective and ask whether all things considered, it can plausibly be regarded as better or preferable for a person to be circumcised than not. The considerations that would have to be taken into account in reaching a view on this issue range from sexual to aesthetic, medical, psychological, cultural, religious and social considerations.

Let us start by considering the effects of circumcision on sexual activity. I will restrict myself to the three most significant aspects. First, circumcision brings about a modification to the mechanics of sexual intercourse and masturbation. While the uncircumcised penis is usually stimulated by the foreskin sliding back and forth over the *glans penis* (the head of the penis),¹² this so-called 'gliding action' is no longer possible in the case of a circumcised penis, where ca. 50% of the penile skin has been removed.¹³ Second, circumcision leaves the sensitive glans permanently exposed and thus turns it from internal into an external structure. It is dry and, by virtue of its permanent contact with clothes, goes through a process of keratinisation.¹⁴ Third, the foreskin is richly enervated and serves a whole range of sexual (as well as other) functions; its amputation involves a loss in erogenous material.¹⁵ It is clear that these changes are significant, but it is harder to establish to what extent they affect sexual pleasure. While some researchers – especially in Europe – regard it as self-

¹² John Warren and Jim Bigelow, 'The Case Against Circumcision', 1994 *British Journal of Sexual Medicine* 6.

¹³ J. R. Taylor, A. P. Lockwood, and A. J. Taylor, 'The prepuce: specialized mucosa of the penis and its loss to circumcision', (1996) 77 *British Journal of Urology* 291.

¹⁴ C. J. Cold and J. R. Taylor, 'The Prepuce', (1999) 83 *BJU International*, Suppl. 1, 34, 41.

¹⁵ Taylor, Lockwood, and Taylor (above n 13).

evident that sexual pleasure will be reduced,¹⁶ others – especially in the U.S. – argue that this has not yet been conclusively established, it being difficult to measure sexual pleasure in studies and the existing studies coming to contradictory results.¹⁷ In the overall calculation as to whether circumcision is in the child's best interest, we may not, therefore, be able to establish with precision the existence or extent of harm to sexual pleasure. It does not follow, however, that the harm to sexual pleasure should be considered to be non-existent; rather, we must feed the empirical uncertainty into the overall assessment (just as we would feed any likely but unproven side-effects of a particular immunisation into the calculation as to its justifiability).

Moving on to the aesthetic aspect of circumcision, a circumcised penis looks different from an uncircumcised one, the main differences being that the glans is always exposed in circumcised men and that there is a visible circumcision scar. Some people prefer the circumcised and others the uncircumcised look. Under the best interest test it is up to the parents to decide this issue for their child; thus, if they prefer the look of a circumcised penis, then this would provide them with a *prima facie* reason for considering circumcision to be in his best interest.

With regard to psychological considerations, circumcisions performed without adequate analgesia (as is usually the case in Judaism and often in Islam) are extremely painful. With regard to circumcisions in Judaism, it is relevant that the traditional medical view that newborn babies are not capable of feeling pain has been shown to be incorrect.¹⁸ A widely cited study has demonstrated that neonatal circumcision is associated with increased pain response in vaccinations performed four to six months later; this may represent an 'infant analogue of a post-traumatic stress disorder'¹⁹. With regard to circumcisions in Islam, which

¹⁶ Matthias Schäfer and Maximilian Stehr, 'Zur medizinischen Tragweite einer Beschneidung', in Matthias Franz, *Die Beschneidung von Jungen: Ein trauriges Vermächtnis* (Vandenhoeck & Ruprecht, 2014), 117: 'Pathophysiologically it would be even harder to explain why the loss of such a sensitive body part should *not* lead to a change in sensitivity' (my translation, emphasis in the original).

¹⁷ David Benatar and Michael Benatar, 'Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision', (2003) 3 *American Journal of Bioethics*, 35, 42-3: '[R]emoval of erogenous tissue does not necessarily entail diminished sexual pleasure if sufficient erogenous tissue remains.'

¹⁸ Benatar and Benatar (above n 17).

¹⁹ Anna Taddio, Joel Katz, A Lane Ilersich, and Gideon Koren, 'Effect of Neonatal Circumcision on Pain Response During Subsequent Routine Vaccination', (1997) 349 *The Lancet* 599.

are carried out at a later stage than in Judaism and can be done until the onset of puberty, a study undertaken in Turkey suggests traumatising of the boys undergoing the procedure.²⁰ While this certainly seems plausible, sceptics may argue that the evidence is not conclusive. Just as in the case of the above discussion regarding sexual pleasure, this does not mean, however, that the psychological harm should be accorded 'zero' weight; rather, the possibility of psychological trauma to the Muslim child must be factored into the overall calculation as to whether circumcision can be considered to be in his best interest.

As to medical considerations, some medical researchers especially in the U.S. believe that circumcision can have minor medical benefits because it may lead to a reduction of the risk of acquiring penile cancer and may offer some protection against infections (including HIV infections); others believe that these claimed advantages are non-existent, unproven, overstated, or outweighed by the risk of complications which include, in rare cases, penis amputations and death.²¹ Again, there exists considerable controversy and empirical uncertainty.

Finally, let us consider the religious, cultural, and social importance of circumcision. As pointed out in the Introduction, in Judaism circumcision is widely considered to be a religious duty; it is also seen as a practice of considerable cultural importance and some Jewish parents circumcise their sons more for reasons of tradition and culture than for religious reasons. In Islam, the question of whether circumcision is a religious duty is controversial but nevertheless it is widely seen as a religiously important practice. Thus, under the best interest approach discussed here, the parents could include these

²⁰ Gocke Cansever, 'Psychological Effects of Circumcision', (1965) 38 *British Journal of Medical Psychology* 321 ('The results obtained for the different psychological tests indicate that circumcision is perceived by the child as an aggressive attack on his body, which damaged, mutilated and in some cases totally destroyed him.'). See also Orhan Ozturk, 'Ritual Circumcision and Castration Anxiety', 1973 *Psychiatry* 36, who concludes that 'although ritual circumcision without anaesthesia during phallic and latency stages is associated with considerable castration fears, the societal preparatory experiences and meanings attached to it have more impact on the individual than the castration fears or stage-specific vulnerabilities' (36), while also acknowledging that 'all the children observed seemed terribly frightened during the circumcision. They all cried and screamed, and there is no doubt that a considerable part of this reaction was due to pain.' (55). There is not enough research available yet regarding the possible traumatising of Muslim children resulting not from physical pain but an experience of circumcision as abandonment, mutilation, and brutal violence. The psychoanalyst Matthias Franz describes such cases from his clinical work in 'Beschneidung ohne Ende?', in Franz (ed.), above n 16, 130.

²¹ For an overview see Benatar and Benatar (above n 17), 38-42.

considerations in their calculation as to whether it would be in the child's best (religious or cultural) interest to be circumcised. Furthermore, some parents today circumcise their sons for what we may call 'social' reasons. These can relate, positively, to strengthening the boy's sense of belonging to his cultural or religious community, with all the advantages that this may bring for his development, and, negatively, to the avoidance of harmful experiences, such as mockery of an (uncircumcised) child by his (circumcised) mates. These social considerations, too, may provide a *prima facie* reason for considering circumcision to be in the child's best interest.

All in all, can circumcision be justified under the best interest conception? To repeat, answering this question essentially involves an assessment of whether a reasonable male person could regard it as desirable to undergo a circumcision. Applying this standard, it seems clear that circumcision can, if at all, only be justified with proper analgesia because no reasonable person would agree not only to getting circumcised but also to suffering extreme and possibly traumatising pain along the way. As Benatar and Benatar, who are in favour of leaving the decision about circumcision to the parents and believe in the controversial proposition that the medical evidence suggests certain advantages, point out, '[p]erforming this procedure without adequate analgesia, as is usually the case, is of great moral concern.'²²

Assuming that, contrary to wide-spread practice, effective analgesia is used, while circumcision arguably has a harmful effect on men's sexuality, it could possibly be concluded by a reasonable person that its religious, cultural, and social significance outweighs those costs.²³ I will not examine this question in greater depth here because my goal in this essay is not to weigh in on the existing debate about what can reasonably be considered to be in the child's best interest but rather to transform the debate by

²² Benatar and Benatar (above n 17), 43.

²³ There is a further complication here, which I do not discuss in this essay, namely the issue of how male circumcision relates to female circumcision, or female genital mutilation (FGM). Some argue that milder forms of FGM, such as the ritual nicking of the clitoral hood or labiaplasty, are less damaging and/or intrusive than male circumcision and that, given that FGM is never considered to be in a girl's best interest, we should also conclude that male circumcision can never be in a boy's best interest. This is an interesting equality-based argument that may point to the existence of double standards in this debate. For a judgment struggling with this issue see *B and G (Children)* (No.2) (2015) EWFC 3.

demonstrating that the best interest conception is flawed and by replacing it with a superior test.

3. Critique

Before I offer a more developed alternative to the best interest conception in the next section, let me point out its weakness. The best interest conception is correct to choose as a starting point for its defence of parental authority the fact that children are not yet capable of leading their lives autonomously and that therefore authority needs to be vested in someone else – usually their parents – to make decisions for them. What is missing from the conception as articulated so far is an account of the relevance of the fact that the child will eventually become an autonomous adult, capable of and responsible for living his life autonomously. This is relevant in so far as many parental decisions affect their children not only during the period of their childhood but also as adults, and circumcision is an example in point. For example, under the best interest conception the parents' view that a circumcised penis is aesthetically more attractive would be given some weight; but this seems an illegitimate consideration given that while the *point in time* at which the decision about circumcision is made lies in the boy's childhood where he cannot yet exercise his autonomy about his preferences regarding the looks of his genitals, its *effects* affect the boy as well as the man he is to become. To give a further example, under the best interest conception, the parents' view that it is in the boy's spiritual interest to be circumcised would count; however, while it may be acceptable for the parents to determine what is in their son's spiritual interest during childhood, the man that the child is to become will have to live with his circumcision as a religiously imposed, permanent mark. To make the more general point, the best interest conception allows the parents to determine not only the life of the boy who cannot yet exercise his autonomy, but also the life of the man who he is to become. This is problematic because the rationale of the best interest conception does not provide support for this: it is based on the child's inability to exercise his autonomy, not on an assumed legitimacy of the parents' desire to shape their child's *adult* life in the way they perceive best. Thus, the failure of the best interest conception is that with its exclusive focus on the best interest of the child, it fails to take into account the autonomy of the man the child will become, and given that

personal autonomy lies at the core of human rights, the best interest conception fails to take the human rights of the child adequately into account.²⁴

III. The autonomy conception of parental authority

The promise of human rights is that every person will be treated as free and equal.²⁵ By ‘person’, we usually mean ‘adult’ because it seems clear that we cannot regard children as free in the way that we usually use that term; for example, they should not be free to smoke, nor should they be free to skip school. So we may want to modify the above statement and claim that the promise of human rights is that adults will be treated as free and equal. The weakness of this revised formulation is, however, that it leaves children out of the picture, and surely human rights have something to promise to children as well. I cannot offer a full account of that promise here,²⁶ but it is clear that human rights must also require that

²⁴ There may be further problems with the best interest approach which I do not explore here. I am grateful to one of the anonymous reviewers for pointing out that there may be moral constraints relating to the physical or psychological suffering of the child in the here and now (as opposed to his future autonomy) which may make circumcision impermissible (for example, a categorical prohibition on the infliction of intense physical and/or psychological suffering as a part of a religious upbringing).

²⁵ See, for example, Article 1 UDHR: ‘All human beings are born free and equal in dignity and rights.’ The idea that human rights are based on two principles, one of them a freedom principle and the other an equality principle can be found, for example, in Dworkin’s theory of rights, according to which rights flow from two principles of human dignity: the principle of equal and objective importance (an equality principle) and the principle of personal responsibility (a freedom principle); see Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006), ch. 1. For a reconstructive account of contemporary constitutional (human) rights law that regards an entitlement to be treated as free and equal as the foundation of rights, see Kumm (above n 7) and Möller (above n 7), ch. 5.

²⁶ The approach to children’s rights that is most relevant to the issue at hand is the idea of a ‘right to an open future’ which children are said to possess; this was developed by Joel Feinberg in his influential essay ‘The child’s right to an open future’, in Feinberg, *Freedom and Fulfilment: Philosophical Essays* (Princeton University Press, 1992), 76 and applied to the case of circumcision by Robert Darby in what strikes me as the most philosophically sophisticated analysis of the practice so far; see his ‘The child’s right to an open future: is the principle applicable to non-therapeutic circumcision?’, (2013) 39 *Journal of Medical Ethics* 463. A related approach is John Eekelaar’s idea of ‘dynamic self-determinism’ which holds that the child’s present or future autonomy should be considered relevant in the establishment of his best interest; this approach, too, leads to a presumption that it is better to wait and let the child decide at a later stage than to act and permanently foreclose options. See Eekelaar above n 11. Arguments and theoretical frameworks that broadly follow such a structure are compelling for the case of *routine* infant circumcision as practiced in the U.S., where the future options of the child are reduced for reasons that are, at best, weak (see IV.3. below). The case of *ritual*

whoever has authority over children – i.e. usually the parents – must treat them such that they *will become* free and equal as adults. Parental authority must be seen as *directed*, namely as directed towards producing free and equal adults.²⁷ It would be contradictory to build our society around the values of freedom and equality but then to give parents an entitlement to treat their children in ways that mean that they will never become free and equal.

The above point, simple and, I believe, intuitively appealing as it is, has far-reaching implications for the ways in which parents can legitimately treat their children. For example, an obvious issue is religious education: does raising the child in a particular faith violate the freedom constraint because the adult will be shaped by the religious education he received as a child? I cannot examine this issue comprehensively here;²⁸ for present purposes, I will make a modest claim which I hope will be relatively uncontroversial, namely that whatever ethical values²⁹ guide the parents' lives and their behaviour towards their children, the freedom constraint requires that the child, once he has become an adult, *can distance himself from these values and freely choose to live his life in a different way*.³⁰ With regard to religious education this means that it would be impermissible to raise one's child in such a way as to

circumcision is more complicated, however, because ritual male circumcision is also intended to open up options to the child that would not otherwise be available to him (such as the option of living a life as a good Jew or Muslim, or the option of integration with the child's religious or cultural community). Thus, under the above-mentioned approaches one would have to balance the loss in autonomy brought about by ritual circumcision against the potential gains. This strikes me as the wrong way to analyse the issue because, as will become clear, the value of ethical independence insists that ritual circumcision be considered illegitimate largely independently of its possible religious or cultural benefits to the child.

²⁷ See, for example, Harry Brighouse and Adam Swift, *Family Values: The Ethics of Parent-Child Relationships*, Princeton University Press 2014, 90 with a similar point.

²⁸ For a philosophical discussion of this issue, see Matthew Clayton, *Justice and Legitimacy in Upbringing*, Oxford University Press 2006, ch. 3; Brighouse and Swift (above n 27), ch. 6.

²⁹ I use Ronald Dworkin's terminology here and distinguish between *morality* – which concerns the duties that a person has to *others*, such as duties to pay taxes or to refrain from killing – and *ethics*, which concerns duties that a person has to *himself*; this includes deciding for himself what should count as a good life. See Dworkin above n 25 at 20-21.

³⁰ I propose this 'freedom constraint' as a *necessary* condition of parental authority, not a *sufficient* one. In other words, there may be additional constraints; for example, some would argue that *any* religious education violates the child's human rights. I limit myself to the relatively narrow and, I hope, relatively uncontroversial freedom constraint in this paper because it is all that is needed to demonstrate the impermissibility of ritual male circumcision.

make it excessively difficult for the child to later denounce his religion; for example, instilling such fear and anxiety with regard to questioning religious authorities into the child that will make it impossible or excessively difficult for the adult to question his religion would not be covered by parental authority, whereas a religious education that goes hand in hand with a development of the child's capacity for critical reflection would be legitimate.

With regard to physical alterations, the freedom constraint prohibits irreversible religiously or culturally motivated changes to the child's body: precisely by virtue of being irreversible, such changes make it impossible for the child to ever distance himself from them and to live his life free from a religiously or culturally imposed physical mark.³¹ To this it could be objected that while the child cannot later distance himself from his circumcision, he remains free to distance himself from the parents' religious belief and become an atheist, agnostic, or take on another religion, and that therefore the freedom constraint is not violated. This distinction between mind (whose integrity must be preserved) and body (whose integrity may be violated) is, however, unconvincing; this becomes clear when placing oneself in the position of a man who has distanced himself from Judaism or Islam but finds himself unable to distance himself from the circumcision that was imposed on him in the name of his former religion. This man may understandably perceive a permanent physical mark imposed on him in the name of a religion as overstepping a boundary and therefore as an act of abuse (he might ask angrily, *'How dare they? It's my body!'*). Similarly, imagine Christian parents tattooing a Christian cross on their child's body; the fact that the child can later distance himself from Christianity does not make the tattoo legitimate and we could understand his upset about having to carry this religiously imposed, permanent mark, which he, too, might understandably perceive as overstepping a boundary (and therefore as

³¹ Thus, the point here is *not* that circumcision forecloses certain options, such as limiting men's sexuality or their ability to decide for themselves whether they want to be circumcised as adults (on approaches that focus on the child's future options, see above n 26). The limitation of options alone cannot be decisive because parental decisions regarding the upbringing of a child will inevitably and regularly foreclose future options; for example, the decision to send the child to violin lessons as opposed to piano lessons will usually foreclose a career as a pianist. (Of course, parental authority can also be limited out of a concern for the future options of the child, but this is not the line of reasoning that I pursue here.) Rather, my concern is with the child's ethical independence and his ability to later distance himself from the ethical values that guided his upbringing. Parental decisions which foreclose certain future options do not usually pose a problem from the perspective of ethical independence; for example, a person can easily distance himself from the imposition of violin lessons on him during his childhood by abandoning the violin as an adult, and the fact that he will no longer have the option of becoming a professional pianist does not affect his ethical independence.

abuse). In both examples the person finds himself 'locked in'; the specific wrong of circumcision lies in the fact that his body has deliberately been marked in a way that is impossible to overcome. This way of explaining the wrong of ritual male circumcision also shows why the fact that the sight of a circumcised penis cannot be taken to stand for any particular religious affiliation (given that that two religions advocate circumcision and that many people are circumcised for non-religious reasons) is irrelevant. The point here is not that the few people who see the circumcised person naked will draw conclusions about his religion; rather it is that the missing foreskin will serve as a reminder to the circumcised man *himself* of the permanent mark that Judaism or Islam have left on his body.

In the previous paragraph, I referred to the example of a man who is upset about having been circumcised. However, it seems that most circumcised men (as well as most uncircumcised men) do not object to their respective circumcision statuses. In light of this, one could argue that it is acceptable for parents to circumcise their child because while the procedure is irreversible, the fact that circumcised men, on the whole, do not seem to object to their circumcisions shows that parents can assume that their son, too, will later be happy with his penis; so they may assume that there exists the child's hypothetical consent to the procedure.

Before showing what's wrong with this argument, let me challenge some of its premises. First, we do not know how many circumcised men are unhappy about their circumcisions because as far as I can see, this has not been studied. It is certainly not surprising that men will usually avoid the embarrassment of talking publicly about the fact that they perceive their own penises to be deficient or even mutilated. Second, as pointed out above, it is a possibility that a circumcision, especially one carried out under Islamic rites, traumatises the child and that the painful feelings associated with it are therefore repressed and not accessible to the conscious mind. Third, while the argument that men are not bothered by their circumcisions may have been true in the past, in light of the growing controversy about circumcision it is less clear now that a child that is born today will be happy with his circumcision in a few decades' time. Fourth, even if it were true that the large majority of men are happy with their circumcisions, hypothetical consent requires knowledge of the relevant advantages and disadvantages of the procedure one (hypothetically) consents to. It may be the case that men who are not opposed to circumcision hold their views because

they do not know what they have lost. In my personal observation, I have talked to several intelligent and highly educated circumcised men who were almost consistently surprised to hear certain trivial and uncontroversial facts regarding circumcision, such as the facts that uncircumcised men stimulate their penises with their foreskins, that they do not need lubricant for masturbation, and that the foreskin is erogenous material (some thought it is just a useless piece of skin). While these observations cannot be generalised without further study, it is a possibility that one of the reasons why many or most men do not object to their circumcisions is simply that they do not know enough about the issue. If that were the case, then the presence of hypothetical consent on the part of the child could not be assumed.

My main point is a different one, though. I want to argue that the idea of freedom requires that some decisions have to be made by the agent himself and cannot be taken for him by others. Thus, applied to the case of circumcision, my point is that even if we knew for sure that a given infant or child would later whole-heartedly endorse his circumcision, it would still be wrong to circumcise him. In other words, the only morally acceptable way to achieve the desired outcome of a person being circumcised is to convince him of its appropriateness (religious, cultural, aesthetic or otherwise) so that he, as an adult, can give his full and informed consent to the procedure and have it carried out subsequently.

The concept of freedom, just as the concept of human rights, is today mostly interpreted as being about personal autonomy (positive freedom): the value in being free is the ability to create one's own life; to be the author of one's life.³² There are certain decisions in a person's life that cannot be made for him and that therefore only he himself can make, precisely because it is his life and he has the entitlement (as well as the responsibility³³) to live it. An adult man who freely chooses to undergo a circumcision as a sign of his religious faith or his wish to be fully integrated into a religious or cultural community has made a momentous

³² On personal autonomy see Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), ch. 14 and in particular p. 369: 'The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.' Accounts of human rights that see them as based on the value of autonomy (and possibly equality) include those by James Griffin, *On Human Rights* (Oxford University Press, 2008), ch. 2; Möller (above n 7); and Dworkin (above n 25). I do not subscribe to any particular comprehensive conception of autonomy in this paper.

³³ Dworkin forcefully makes the point that freedom is not only an entitlement but flows from a personal responsibility to realise value in one's life in *Is Democracy Possible Here* (above n 25), 17.

decision: to sacrifice a part of his penis, the most private and intimate part of his body, as a sign of his commitment to his faith or community. By undergoing circumcision he shapes his life and writes an important chapter of his own life story. But an act as intimate and personal as the religiously or culturally motivated sacrifice of a body part must be one's own decision; it must not be imposed on one by others even if one later comes to agree: that would misunderstand what the freedom that every human being is entitled to requires, namely allowing a person to live his own life himself, as opposed to having others live it for him and thus having others write his life story. Parents can make a decision *for* their child, but while such a decision may reflect what the child would want or will want in the future, they can never make it the child's *own* decision.³⁴ Ritual male circumcision is outside the scope of parental authority because it usurps the child's autonomy-based human right, as well as his responsibility, to be the author of his own life.

IV. Objections

1. *'Other educational measures that are covered by parental authority can have irreversible consequences, too, and can be more harmful to the child than ritual male circumcision.'*

One might object to the my argument in the previous section by pointing out that educational measures are usually considered to fall into the sphere of parental authority even if they create psychological harm that may be irreversible and more severe than the harm in circumcision, and that therefore circumcision should also be considered to fall into the sphere of parental authority. For example, a child raised as a devout Catholic may experience certain feelings of guilt and shame as an adult; he may be unable to change this and it may constitute a greater impediment to his living a fulfilled life than the impaired sexual function of his circumcised penis for another man raised as a Jew.

As a preliminary point, there is a number of qualitative differences between physical and psychological harms which make it problematic to assess the two on the same scale. First,

³⁴ This does not preclude the possibility that the child may later come to terms with his circumcision and accept it as part of who he is, and therefore as part of his 'life story': fortunately people can often integrate aspects of their past where they have been wronged, sometimes in terrible ways, into their lives and accept them. My point is moral, not psychological: ritual male circumcision remains a wrong because it writes an aspect of the child's life story that *should not* have been written for him. I am grateful to one of the anonymous reviewers for raising this issue.

psychological harms – such as recurring feelings of shame and guilt – are part of complex and multi-faceted psychological patterns which are not usually experienced as entirely negative or entirely positive but contain elements of both; for example, our devout Catholic may also have developed a helpful moral compass and the habit to routinely and critically question his own behaviour, which he may experience as valuable and which sit alongside his feelings of shame and guilt. To ‘grade’ the psychological harm brought about by a certain way of upbringing, we would therefore have to assess a complex psychological ‘package’, which would seem very difficult and in many cases impossible to do. Second, an important difference between psychological and physical harms is that psychological harms can, to an extent, be ignored and suppressed; they can be worked on over time and sometimes be modified, transformed, or even made to disappear. By way of contrast, permanent physical changes to the body have a different quality: they cannot be suppressed or hidden (except possibly, and within limits, from others), they can never be changed and all that the person can do is to come to terms with the loss of which he will nevertheless be constantly reminded. Put differently, in the case of psychological harms, there is usually hope for the future, whereas there is a finality to permanent physical alterations which means that there can be no such hope. Third, psychological harms are usually caused unintentionally (and where they are not, they are on the whole less likely to be considered justifiable) whereas circumcision is inflicted deliberately, and this difference, too, may be morally relevant.

Be that as it may, my main point is that the real issue with regard to clearly identifiable, avoidable and irreversible psychological damage to the child is *not* whether inflicting it is protected by parental authority; I cannot see a good reason to hold that it is. For example, if a parent instils severe fear of hell into a child, creating irreversible anxiety, then the child has been wronged; therefore, the parental behaviour cannot be regarded as protected by a right. Rather, the real issue with regard to such behaviour is whether there is a role for the *law* to effectively prevent such damage; but, by and large, apart from the extreme measure of taking the child out of the family – which in itself can be expected to inflict considerable harm on the child – there does not seem to be much the law can achieve in such situations. By way of contrast, the law has long successfully been employed to protect people’s physical integrity. So it is imprecise to say that parental authority often covers the infliction of

irreversible psychological harm on the child; rather, such behaviour will often be tolerated despite not necessarily being protected by the right; however, there is no comparable reason to tolerate violations of a child's physical integrity.

2. *'The conception of autonomy advanced in this paper prohibits parents from exerting any ethical influence, which is both unrealistic and morally unappealing'*

It is a widely and, to my mind, correctly held view in political philosophy that the state should be neutral with regard to what Ronald Dworkin has called questions of ethics,³⁵ that is, the duties that a person has to himself (as opposed to questions of morality, which concern the duties a person has to others). My argument in this essay is structurally similar to this approach: just as the state must not force a particular idea of the good life on its citizens, parents must not force such ideas on their children in ways that the children cannot reject later.³⁶ The parallel is intentional: as pointed out above, if we insist that adults have the right and the responsibility to create their own lives, then parental authority must not be interpreted to allow behaviour that jeopardizes this. This may arguably lead me to incoherent results because, the hypothetical objection runs, it would be unrealistic and naive to think that parents should leave their own deep convictions about what constitutes a good life aside when raising children. I agree that this is neither possible nor desirable. While I do not offer a comprehensive account of parental authority in this paper, my proposed limitation of parental authority is very modest: parents can and often should pass on their ethical ideals to their children in various ways, but they must do this in a way that preserves the child's ability to later distance himself from these ideals. Thus, *irreversibly* imprinting the mark of the parents' religion or religious-cultural community on a child exceeds the parents' entitlements. What parents may legitimately do is to introduce the boy to and raise him in their religious or cultural tradition. They may hope that he, too, will come to endorse these values and practices – and if he does, he may choose to get circumcised as an adult, thus

³⁵ Dworkin above n 25, ch. 3. See also above n 29.

³⁶ This raises a further question which I cannot resolve here, namely whether living an autonomous life is also an ethical ideal, and whether it follows that parents must indeed impose at least one ethical ideal on their children, namely that of autonomy. I am grateful to one of the anonymous reviewers for pointing this out to me.

writing an important chapter of his life story –, but they must respect his autonomy-based entitlement not to.

3. *'The approach of this paper would unjustifiably limit parents' rights to make any medically indicated physical alterations to the bodies of their children'*

My argument in this paper could potentially be misunderstood to imply that medically indicated physical alterations of a child's body are never or almost never permissible. Take, for example, vaccinations, correcting cleft lip, or orthodontic treatment. Here, it could be said, the possibility exists that the child will be unhappy with the result, for example if he or she becomes a person who for religious reasons rejects all medical treatment, or if he or she turns out not to care about aesthetic appearance. Furthermore, in line with my above argument, it could be said that independently of the good brought about by such treatment, decisions about one's body cannot be made by anyone except the person whose body it is, and therefore parents cannot legitimately consent to such treatment.

This would, however, misunderstand my argument. My focus in this essay is not on the *outcome* achieved by circumcision (or any other treatment of the child) but on the *reasons* employed to *justify* circumcision (or other treatment). My point is that it is impermissible for parents to impose a conception of ethical value on the child from whose physical and psychological consequences the child cannot distance himself later in life. In all the examples mentioned above, there exist, however, other, entirely permissible reasons for the respective treatments. Take the example of correcting cleft lip. It would be wrong for parents to consent to this treatment on the grounds that they hold on to the aesthetic ideal that a cleft lip is ugly and they want a beautiful child: in fact this narcissistic reason is about the parents' needs and not the child's; it would therefore be irrelevant even under the best interest standard which, despite its limitations, at least makes it clear that the only person whose interests matter is the child. But there are two entirely legitimate considerations that may and usually will guide the parents. First, parents may legitimately restore the physical health of their children because physical health is partly a *precondition* of the child's ability to be free and write his own life story. A person's health is therefore structurally different from, say, a person's religion or cultural affiliation, which are not preconditions but aspects of his life. The justification for the categorical prohibition of irrevocably imposing a conception of

ethical value on the child lies in the child's right to be the author of his life; but restoring the child's health is precisely designed to enable him to become the author of his life. Second, it is legitimate for parents to give their consent to the treatment of cleft lip in order to spare their child from the experience of being an outsider, being ridiculed and generally having a harder time in life (I will address this point in greater depth below).

With regard to male circumcision itself, some argue that it confers medical benefits which make it justifiable to impose it on boys.³⁷ As explained, in principle medical reasons are of course permissible; however, an examination of this issue quickly reveals the correctness of the view of the overwhelming majority of doctors worldwide, namely that the assumed medical benefits of circumcision are at most minor and do not justify subjecting a child to an operation, let alone one which permanently alters the child's genitals in a way that the child may later perceive as disfiguring and/or damaging.³⁸ Furthermore, the assumed benefits (such as avoiding the very low risk of acquiring penile cancer at an old age or possibly reducing the risk of acquiring sexually transmitted diseases) could also be achieved through circumcision as an adult by those men who are convinced of their validity and importance; first, this would respect and preserve the person's autonomy, and second, the fact that adult men in the Western world are not known to choose to get circumcised in order to reduce the risk of acquiring penile cancer or sexually transmitted diseases shows the weakness of the medical argument: if almost no adult consents to a circumcision for medical benefits, it follows that the hypothetical consent of infants to the same operation cannot be assumed either. Thus, while arguments relating to medical benefits of circumcision are not categorically excluded, their dispassionate examination shows that they do not justify circumcising children.

4. *'Ritual male circumcision carries not only a religious but also a social importance; it should therefore not be considered to be categorically impermissible'*

³⁷ For an overview, see Benatar and Benatar, above n 17.

³⁸ See, for example, the British Medical Association's guidance for doctors: 'Doctors should ensure that any parents seeking circumcision for their son in the belief that it confers health benefits are fully informed of the lack of consensus among the profession over such benefits ... The BMA considers that the evidence concerning health benefits from non-therapeutic circumcision is insufficient for this alone to be a justification for doing it.' British Medical Association, 'The law and ethics of male circumcision: guidance for doctors', (2004) 30 *Journal of Medical Ethics* 259, 262.

Another hypothetical objection to my argument could be that I misconstrue the reasons for circumcision as being based on religious conviction narrowly understood. Some parents circumcise their children not for strictly religious reasons but in order to enable their smooth integration into their respective religious or cultural communities and thus facilitate their development; this is what above I referred to as a 'positive social reason'. Additionally, there are 'negative social reasons', that is, reasons to circumcise in order to avoid some negative social consequence that is attached to being uncircumcised. For example, an Israeli friend once told me that many Israeli parents have their sons circumcised for fear that otherwise, their son will be ridiculed at school or in the army.

Social reasons are in principle legitimate considerations for parents because they aim at creating the conditions of flourishing for the child. To demonstrate this point, let us imagine a society where being uncircumcised would inevitably expose a boy to severe harassment throughout his childhood and adolescence, creating great and permanent damage to his self-esteem. All things considered, in this society it may well be not only reasonable but indeed morally obligatory for parents to have their son circumcised because the loss in autonomy that the circumcision entails would be outweighed by the harm to his development that he would otherwise suffer.

While the example shows that social reasons are in principle valid, it does not follow without further argument that they are in any given case *strong enough* to justify the harm of circumcision. Rather, parents would have to carefully weigh the importance of the social reasons against the harm to autonomy. They must scrutinise their own motivations for considering circumcision because the possibility exists that other, illegitimate factors, cloud their moral assessment of the situation. In particular, there is a fine line between a possibly legitimate circumcision carried out for social reasons and an illegitimate circumcision in order to impose a conception of ethical value on the child that makes it impossible for the child to later distance himself from. The difference between the two is that from the perspective of the parents, a circumcision done for impermissible reasons would (wrongly) be considered to be a cause for *celebration* ('Today, we celebrate and reaffirm our son's bond with God', 'Today, we celebrate our son's joining the community of Jews / Muslims'), whereas a circumcision done for social reasons would be carried out with *regret* ('Today, with regret, we have to impose the evil of circumcision on our son in order to avoid the even

greater evil of him being harassed or socially isolated'). Thus, parents would have to be prepared, when confronted by their son who may come to (perhaps greatly) regret being circumcised, to provide a convincing justification to him that does not rely on the traditional, religious or cultural importance of the procedure in Judaism or Islam, but rather focuses on *his* needs in becoming an autonomous person and shows why the procedure was carried out in order to protect him from considerable harm to his development.

While it may sometimes be permissible for *parents* to circumcise their son for social reasons, from the perspective of the *state*, the belief of parts of the population in religious, cultural and/or social reasons for circumcision is (*prima facie*³⁹) a call for intervention; such intervention would deprive the social reasons of their foundation: if ritual male circumcision of children is prohibited, then the social reasons will disappear over time because after a transition period, (almost) all boys would be uncircumcised and no-one's social well-being would depend on being circumcised.

5. *'The approach of this paper would even prohibit ear piercings, which shows that it is extreme'*

This is an interesting issue that occasionally comes up in discussions about circumcision and the importance of physical integrity: supporters of circumcision reply to an argument that focuses on the child's right not to be subjected to permanent alterations of his body by pointing out that under that approach, even ear piercing would have to be considered outside parental authority.⁴⁰ In order to respond to this point, let me apply my approach to this issue. I would only agree to my daughter's ears being pierced if and once she expressed a sincere wish for this to happen. I just don't see any good reason that supports piercing the ears of girls that have not yet expressed a desire for this: my hypothetical aesthetic preference that small girls look cuter with ear-rings is irrelevant because my behaviour towards my daughter should never be guided by *my own* narcissistic preferences but only by *her* needs. Furthermore, I would presumably not fear significant social disadvantages for my daughter for not wearing earrings (this is of course contingent, and it is imaginable that there are places where such disadvantages would exist). Contrary to the case of

³⁹ Note that, as explained in the Introduction, I do not deal comprehensively with the pros and cons of legal interventions in this essay.

⁴⁰ Søren Holm, 'Irreversible bodily interventions in children', (2004) 30 *Journal of Medical Ethics* 237.

circumcision, however, I think that even a small girl can make the decision about earrings, whereas I don't think an underage boy can make a decision about circumcision, given that its significance can only be assessed by someone with maturity and, ideally, sufficient sexual experience to understand the role of the foreskin in sexual activity. I would hope and expect that if my daughter had her ears pierced, she would celebrate this occasion as an autonomous decision of some significance and take pride in it precisely because it will have been her *own* decision and she will therefore have written a chapter in the story of her life.

I suspect that some will find this line of reasoning too strict and would not object to parents piercing their daughters' ears even before the girl expresses this desire, presumably because they think that earrings look good on small girls, that ear piercing is only a trivial modification, that the girl is very unlikely to object later and in any case can of course choose not to wear earrings at any point. I disagree with this view but don't think much follows from this disagreement for the circumcision debate for two reasons. First, the wrong of ear-piercing (if there is any) pales by comparison with the wrong of circumcision. Second, I doubt that supporters of circumcision have found in the example of ear-piercing the Archimedean point from which to lift the Western world's commitment to personal autonomy off its foundation; the much more likely and more attractive scenario is that, should the (already existing) debate about ear piercing get more traction, further thinking about the practice will lead the Western world to question it, just as it now begins to increasingly question the practice of circumcision.

V. Conclusion

We should welcome the fact that the issue of the justifiability of ritual male circumcision is beginning to receive attention in national and global discussions about human rights. Whatever the right answer to this problem may be, surely it must be a step forward to acknowledge that a religious practice that irreversibly and significantly modifies the genitals of children raises questions from the perspective of not only the child's well-being but also his autonomy and human rights. In this sense, the judgment of the Cologne court acted as a catalyst for an important and indeed overdue debate. Furthermore, as this essay has demonstrated, the court was spot-on as a matter of substance; in fact, my argument here can

be seen as an expanded and refined reconstruction of the – fairly short – section of the judgment that deals with the justifiability of ritual male circumcision. In a nutshell, ritual male circumcision is outside the scope of parental authority because imposing an irreversible physical mark on a child's body for religious reasons violates an autonomy-based human right which even a tiny infant holds and which nobody may, or indeed can, exercise for him: the right to be the author of his own life.