



A sufficiency threshold is not a harm principle: A better alternative to best interests for overriding parental decisions

Ben Saunders 

Correspondence

Ben Saunders, Department of Politics and International Relations, University of Southampton, Southampton, SO17 1BJ, United Kingdom
Email: b.m.saunders@soton.ac.uk

Abstract

Douglas Diekema influentially argues that interference with parental decisions is not in fact guided by the child's best interests, but rather by a more permissive standard, which he calls the harm principle. This article first seeks to clarify this alternative position and defend it against certain existing criticisms, before offering a new criticism and alternative. This 'harm principle' has been criticized for (i) lack of adequate moral grounding, and (ii) being as indeterminate as the best interest standard that it seeks to replace. I argue that these are not serious problems. I take Diekema's negative point to be right—our actual standard for intervention is not literally the best interests of the child—but I disagree with his proposed replacement. First, Diekema's proposed harm threshold should be more carefully distinguished from Mill's harm principle. Second, there is no reason to assume that the standard for permissible intervention coincides with the threshold for harm (or serious harm). Thus, I propose that the best alternative to the best interests standard is not a harm principle, but rather a sufficiency threshold between adequate (or 'good enough') and inadequate (or 'substandard') parenting.

KEYWORDS

best interests, Douglas Diekema, harm principle, John Stuart Mill, parental decisions, sufficiency

1 | INTRODUCTION

Douglas Diekema argues that the so-called 'best interests' standard is not the appropriate threshold for overriding parental decisions.¹ Instead, he proposes that parental authority over children should be limited by a harm threshold. Others may legitimately intervene if parental decisions would expose the child to significant risk of a

serious and preventable harm, but not (as the phrase 'best interests' suggests) simply because their decision fails to be what is best for the child.² Diekema's paper is widely cited and so influential that others now refer to a growing 'harm consensus'.³ Thus, Diekema is representative of an increasingly popular view on the limits of parental authority, though one that has also come under attack.

¹Diekema, D. S. (2004). Parental refusals of medical treatment: The harm principle as threshold for state intervention. *Theoretical Medicine and Bioethics*, 25(4), 243–264. Following Diekema (p. 259, note 11), all references to 'parents' should be understood to include any legal guardians, whether or not they are the children's biological parents.

²It has recently been argued that different principles of intervention ought to apply to physicians and the state; see MacDougall, D. R. (2019). Intervention principles in pediatric health care: The difference between physicians and the state. *Theoretical Medicine and Bioethics*, 40(4), 279–297. Here, in keeping with most of the debate, I leave open who has appropriate standing to intervene.

³Birchley, G. (2016). Harm is all you need? Best interests and disputes about parental decision-making. *Journal of Medical Ethics*, 42(2), 111–115, pp. 111–112.

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Before introducing my own criticism, I wish to clarify and defend what I take to be correct in this argument: neither the state nor medical professionals may override parental authority simply because those decisions are not in the best interests of their child(ren). Our actual practice is not based on what is literally best for the child.

One might respond that the term 'best interests' is widely understood in less literal fashion. For instance, Kopelman concedes that 'if taken literally and without qualification, it [the best interests standard] instructs us to evaluate all options and act on that option providing the absolute best outcome for the individual in question, without regard to any one or anything else'.⁴ Yet, while this may seem like reason to reject this standard, she maintains that 'it does not require us to act in accord with what is literally best for a child, ignoring all other considerations.... Rather, it requires us to focus on the child and select wisely from among alternatives, while taking into account how our lives are woven together'.⁵

This non-literal interpretation is how the (so-called best interests) standard is often applied in practice.⁶ Clinicians are generally sympathetic to family interests—besides those of the child—and reluctant to involve courts, even when they disagree with parental estimations of best interests.⁷ But this is Diekema's point: the standard actually used for legal intervention 'no longer seems to be a best interest standard but some other threshold'.⁸ Referring to this threshold as 'best interests', even if that is intended in some non-literal sense, risks causing confusion.

Other authors have defended using the *language* of best interests. Coggon suggests that there may be pragmatic reasons to retain the phrase 'best interests' because it emphasizes the high level of concern that we should give to vulnerable children.⁹ Any alternative label may result in diminished protection. However, this reasoning is speculative; there is no clear evidence that terminological change will weaken protections for children. Even when decisions are couched in terms of the child's 'best interests', judgements of these best interests are often twisted to support whatever intervention is favoured. Thus, paying lip service to the 'best interests' standard

may actually distract us from what is really in the interests of the child in question.¹⁰ Birchley argues that 'best interests' is preferable because it is seen as less pejorative than 'harm'.¹¹ Birchley, op. cit. note 3. However, this is another empirical claim, for which he gives little evidence. Even if it is true that courts see things this way, it may not be the view of parents. They are likely to resent any interference and may prefer a higher threshold for intervention, whatever language it is couched in.¹²

Since the reasons for retaining 'best interests' strike me as unconvincing, I agree with Diekema and others that this label should be replaced by some more accurate term.¹³ However, though I agree with criticisms of the best interests standard, I think Diekema is wrong to identify this alternative standard with a 'harm principle'. What we need—and what we in fact use—is some threshold of adequate or sufficiently good decision making, such that bad decisions license outside intervention. This adequacy threshold need not be harm-based. Indeed, given Diekema's complaint that 'best interests' is misleading terminology, it is ironic that his proposed alternative invites confusion itself.¹⁴ I conclude by suggesting that our appropriate standard should be phrased in terms of what is adequate or good enough, rather than either what is best or what is harmful.

2 | CRITICISM OF BEST INTERESTS

Re-reading Diekema's essay, it is not immediately clear what he is proposing. Sometimes his proposal seems to be a mere relabelling exercise.¹⁵ That is, what we commonly call the 'best interests' standard is not in practice about the best interests of the child, but rather about harm prevention, so we should call it by a more appropriate label.¹⁶ This purely 'terminological' argument is suggested by remarks such as:

¹⁰Further, it may sometimes be unreasonable to choose the option with the best expected outcome, if there is another option that is only slightly worse (in expected outcome) but much less risky. See Holm, S., & Edgar, A. (2008). Best interest: A philosophical critique. *Health Care Analysis*, 16(3), 197–207, p.199.

¹²Wilkinson, D., & Nair, T. (2016). Harm isn't all you need: parental discretion and medical decisions for a child. *Journal of Medical Ethics*, 42(2), 116–118, p. 118.

¹³'We should probably... get rid of all labels containing the term "best", since such labels are potentially misleading'. Holm and Edgar, op. cit. note 10, p. 206.

¹⁴I comment further on differences between Diekema's harm threshold and Mill's harm principle below. The latter is itself the subject of much interpretive controversy; see Brown, D. G. (1972). Mill on liberty and morality. *Philosophical Review*, 81(2), 133–158; Riley, J. (1991). 'One very simple principle'. *Utilitas*, 3(1), 1–35; Holtug, N. (2002). The harm principle. *Ethical Theory and Moral Practice*, 5(4), 357–389; Turner, P. N. (2014). 'Harm' and Mill's harm principle. *Ethics*, 124(2), 299–326; Saunders, B. (2016). Reformulating Mill's harm principle. *Mind*, 125(500), 1005–1032; Westmoreland, R. (2020). The liberty of the liberty principle. *Res Publica* forthcoming (published online 21 January 2020). 26(3), pp. 337–355.

¹⁵Birchley, op. cit. note 3, p. 114, rightly notes that simply renaming our test will not deal with substantive problems. However, we need not choose between these two options; we can both use a more accurate term *and* try to tackle problems with the test. Indeed, using more accurate terminology may help in resolving substantive problems.

¹⁶MacDougall, op. cit. note 2, p. 282 sees the disagreement as terminological: 'there is actually widespread agreement that intervention is justified when harm to the child is projected to cross some threshold. The disagreement is primarily about whether this threshold is best described under the best-interest paradigm or under the harm principle'.

⁴Kopelman, L. M. (1997). The best-interests standard as threshold, ideal, and standard of reasonableness. *Journal of Medicine and Philosophy*, 22 (3), 271–289, pp. 277–278.

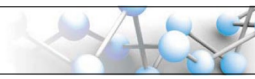
⁵Ibid: 279.

⁶Diekema, D. S. (2011). Revisiting the best interest standard: uses and misuses. *Journal of Clinical Ethics*, 22(2), 128–133, pp. 129–130.

⁷Birchley, G., Gooberman-Hill, R., Deans, Z., Fraser, J., & Huxtable, R. (2017). 'Best interests' in pediatric intensive care: An empirical ethics study. *Archives of Disease in Childhood*, 102, 930–935, pp. 932–933.

⁸Diekema, op. cit. note 1, p. 249. Indeed, Kopelman, L. M. (2018). Why the best interest standard is not self-defeating, too individualistic, unknowable, vague or subjective. *American Journal of Bioethics*, 18 (8), 34–36, p. 35 seems to concede that the best interests standard does not set the standard for *when* to intervene, but rather guides state officials as to what to do when intervening. However, Diekema, op. cit. note 6, p. 129 accepts this role for it. The issue here is with when parental authority can be overridden.

⁹Coggon, J. (2008). Best interests, public interest, and the power of the medical profession. *Health Care Analysis*, 16, 219–232, p. 230.



Continued reference to a best interest standard simply confuses physicians and others who must determine when parental refusals of consent should be tolerated and when state intervention should be sought.... In practice, it appears that the standard applied to parental decision-making for children is not truly a best interest standard, but rather something else.¹⁷

Here, it seems no substantive change in practices of intervention is required, but merely a more accurate labelling of the threshold that we already use in practice.

However, other points suggest more than a mere change of terminology. Having argued that our real test for intervention is not properly described as best interests, but harm prevention, Diekema proceeds to 'further define the harm threshold'.¹⁸ These efforts suggest at least a degree of substantive change; if his proposal were merely to relabel the standard that is already applied in practice, there should be little need to elaborate on what this is. In fact, he says only that it is 'consistent with the threshold level suggested by most commentators and applied by most courts'.¹⁹ This suggests that some apply other standards.

Thus, when Diekema says that the best interests standard is 'the wrong standard',²⁰ it is unclear whether he actually means that the standard is substantively correct but wrongly described, as some of his remarks would suggest, or whether he is actually calling for a substantive change in the standards determining when intervention is legitimate. In fact, it is a bit of both.

The potential confusion is because, as noted above, the 'best interests standard' is actually used in different ways for different purposes.²¹ If it is understood literally, as requiring what really is best for the child, then this is the wrong standard for intervening in parental decisions.²² Parental decisions are not generally overridden simply for falling short of what is best for the child, so it is misleading to call our actual threshold for intervention a best interests standard. Medical professionals will rarely challenge, or seek to override, parental decisions, unless they think there is a significant risk of harm to the child.²³ On the other hand, if 'best interests' is understood less literally, as sometimes suggested,²⁴ then it may be the substantively correct standard, but confusingly mis-described. If this is indeed how it is used in practice, then Diekema's harm threshold need not significantly alter current practice, except insofar as it may reduce confusion over this standard.

¹⁷Diekema, op. cit. note 1, p. 248.

¹⁸Ibid: 251.

¹⁹Ibid: 249 (emphases added).

²⁰Ibid: 253.

²¹Diekema, op. cit. note 6.

²²Ibid: 130.

²³Ibid: 132.

²⁴Kopelman, op. cit. note 4, p. 279. See also Bester, J. C. (2019). The best interest standard and children: clarifying a concept and responding to its critics. *Journal of Medical Ethics*, 45,(2), 117–124, p. 122.

3 | PRIOR CRITIQUES OF DIEKEMA'S HARM PRINCIPLE

I believe Diekema is right that the proper threshold for intervention is significantly lower than anything short of the best. However, I will later argue that our standard for intervention need not be identified with harm. This is also misleading. Before going into this criticism though, I wish to show why some existing critiques of Diekema's proposal are unconvincing.

First, critics point out that Mill claims to derive his harm principle from his utilitarianism.²⁵ This may seem problematic for those who reject utilitarianism. It may be possible to provide alternative justification for the harm principle, but Bester argues that 'if it is possible to reframe the harm principle and ground it in a more widely accepted or authoritative different ethical framework, it is no longer Mill's harm principle, but something else at work'.²⁶ As it happens, I agree that Diekema's principle is not Mill's; this is why I prefer to call Diekema's proposal a 'harm threshold' rather than the 'harm principle'.²⁷ However, Bester's argument seems to confuse the harm principle with its grounding.

While Mill believed the harm principle to be grounded in his utilitarianism, some interpreters have thought them in conflict.²⁸ In any case, general moral principles can be accepted by different people for different reasons.²⁹ That people have different reasons for subscribing to a particular principle does not mean that they are subscribing to different principles. The content of a principle remains what it is, whatever someone's reasons for accepting it. Thus, while Mill adopts the harm principle for utilitarian reasons, others can accept his harm principle without embracing his wider moral theory.

This leads to a second criticism of Diekema's harm principle, namely that—shorn of Mill's utilitarianism—it lacks moral grounding. As one critic puts it, 'given that Mill's Harm Principle receives its normative force by the principle of utility, it is not clear how that Principle has any normative force in the absence of utilitarian grounding'.³⁰ Similarly, Bester argues that: 'Once one rejects utilitarianism as moral foundation for the harm principle, one has to introduce a new moral foundation to account for its moral force'.³¹ These critics are right that the

²⁵Bester, J. C. (2018). The harm principle cannot replace the best interest standard: problems with using the harm principle for medical decision making for children. *American Journal of Bioethics*, 18,(8), 9–19, p. 12; Taylor, M. (2020). Conceptual challenges to the harm threshold. *Bioethics*, 34,(55), 502–508, p. 504.

²⁶Bester, op. cit. note 25, p. 13.

²⁷Mill does not name the principle that he defends in *On Liberty*. Some commentators—such as Riley, op. cit. note 14 and Westmoreland, op. cit. note 14—prefer to call it the liberty principle, but it is commonly referred to as his harm principle. There are actually a number of distinct moral principles that might plausibly be called harm principles; see Edwards, J. (2014). Harm principles. *Legal Theory*, 20,(4), 253–285. Thus, Diekema's threshold may reasonably be called a harm principle, but it is not *the* harm principle (if, by that, we mean Mill's) and it is clearer to use a different label.

²⁸See the discussion of 'Mill *contra* Mill' in Himmelfarb, G. 1974. *On liberty and liberalism: The case of John Stuart Mill*. New York: Knopf.

²⁹Rawls, J. (1987). The idea of an overlapping consensus. *Oxford Journal of Legal Studies*, 7,(1), 1–25; Sunstein, C. R. (1995). Incompletely theorized agreements. *Harvard Law Review*, 108,(7), 1733–1772.

³⁰Taylor, op. cit. note 25, p. 504.

³¹Bester, op. cit. note 25, p. 12.

harm principle does not intuitively seem like a foundational moral principle. Therefore, there must be some more ultimate moral theory that justifies it.³² However, this criticism seems to confuse the logical and epistemic grounding of moral claims.³³

It may well be that some more ultimate theory justifies the harm principle, but it does not follow that we need to identify this ultimate theory before we can have confidence in any putative moral principle.³⁴ We often have more confidence in the truth of particular moral principles than in the moral general theories constructed to explain them; indeed, this is often how we test the acceptability of moral theories. We usually start from particular judgements or principles and construct theories that coherently explain (most of) them. We do not generally require a complete moral theory first.

There are other criticisms of Diekema, but I have chosen these in particular, first, to illustrate why I find some existing criticisms unconvincing and, second, because these points help to clarify Diekema's project, at least as I understand it. Those who advocate a harm threshold, as an alternative to the best interests standard, need not be concerned about the grounding of their principle. The harm threshold can be justified in the same way as other principles, including the best interests standard itself, by appeal to our considered intuitions and by incorporation into any acceptable moral theory.

4 | DIEKEMA'S HARM PRINCIPLE IS NOT MILL'S HARM PRINCIPLE

Though I have argued that one could endorse Mill's harm principle for non-utilitarian reasons, there is some truth to the criticism that Diekema's 'harm principle' is not Mill's. To be fair, Diekema does not explicitly say that it is, although the fact that he cites Mill before introducing what he simply calls the harm principle certainly gives that impression. In fact, Diekema's principle is closer to Feinberg's, which he also cites. Perhaps confusion arises because Diekema does not emphasize the differences between Mill and Feinberg.³⁵ Thus, while he might not be confused on these points himself, he is somewhat culpable for any misunderstanding.

While both Diekema and Mill are addressing when it is permissible to limit someone's freedom, their concerns are rather different. Mill's harm principle does *not* say that it is wrong to cause others harm, or that we are permitted to interfere with people's actions

whenever they do cause harm to others. Rather, it says that preventing harm to others is the *only* good justification for coercive interference.³⁶ Mill's purpose is to preclude other supposed justifications for interference, in particular the agent's own good. As he puts it, 'the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant'.³⁷

If an action does not harm others, then it should be immune from interference. However, Mill adds that 'it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference'.³⁸ Thus, Mill does not argue that we ought to interfere with action that harms others. Again, his point is that we ought *not* to interfere with what does not harm others. Hence, it is not really apt to characterize Mill's harm principle as a liberty *limiting* principle. While it does concern the limits of individual liberty, it does so in the sense of identifying the *minimum* freedom that should be protected for all competent adults, rather than where our freedom ends. The only liberty it limits is the liberty to restrict the liberty of others.

There are affinities between Diekema's proposal and Mill's harm principle. Part of Diekema's argument is that we should not interfere with suboptimal parenting, provided that it does not amount to causing harm. This much, at least, is in keeping with Mill's principle. Mill thinks that parents have certain obligations to provide for their children.³⁹ Further, he thinks that one can count as causing harm through inaction, where one is in breach of some positive duty to others.⁴⁰ Thus, the harm principle licenses interference with parents who neglect their children.⁴¹ However, assuming that parents do not have an obligation to do what is literally best for their children, sub-optimal parenting choices are not harmful.⁴² Thus, since Mill's harm principle permits the state to interfere only with harmful actions, it would preclude interference with merely sub-optimal but

³²Cohen, G. A. (2003). Facts and principles. *Philosophy & Public Affairs*, 31,(3), 211–245.

³³The distinction between logical and epistemic grounding is emphasized in Jubb, R. (2009). Logical and epistemic foundationalism about grounding: The trivality of facts and principles. *Res Publica*, 15,(4), 337–353.

³⁴I have previously suggested that moral principles are epistemologically prior to more general theories in Saunders, B. (2017). First, do not harm: Generalized procreative non-maleficence. *Bioethics*, 31,(7), 552–558, p. 556.

³⁵For elaboration of differences between Mill and Feinberg, see Saunders, op. cit. note 14, pp. 1021–1023. Taylor, op. cit. note 25, pp. 503–504 also notes the differences between Mill's harm principle and Feinberg's, but assumes that Diekema favours Mill's stronger version.

³⁶Mill is concerned only with a certain kind of interference; specifically, that which is coercive and against the wishes of the person interfered with. This permits non-coercive interference, such as advice or encouragement. For brevity, I leave these qualifications implicit; when I refer to interference or intervention, I mean of the kind precluded by the harm principle. As Taylor, op. cit. note 25, pp. 504–505 notes, Diekema is rather less explicit about the kinds of intervention he envisages.

³⁷Mill, J. S. (1859). On liberty. Reprinted in J. M. Robson (ed.) *The collected works of John Stuart Mill, Volume XVIII: Essays on politics and society* (pp. 213–310, p. 223). Toronto and Buffalo: University of Toronto Press (1977). This principle only applies to competent adult agents; Mill (ibid: 224) allows that children can be coerced for their own benefit, since they cannot consent to harm (Saunders, op. cit. note 14).

³⁸Mill, op. cit. note 37, p. 292.

³⁹Ibid: 302.

⁴⁰Ibid: 225.

⁴¹Ibid: 295.

⁴²At least, not in Mill's view. It has been argued that some failures to benefit do constitute harm; see Feit, N. (2019). Harming by failing to benefit. *Ethical Theory and Moral Practice*, 22 (2), 809–823.

non-harmful parental choices.⁴³ To this extent, Mill's harm principle does support Diekema's position.

However, whereas Mill argues that *nothing* except harm justifies interference, Diekema does not argue against all other putative grounds for interference.⁴⁴ He is only concerned to show that sub-optimal parenting does not warrant interference, unless it crosses the threshold of (serious) harm.⁴⁵ However, where there is such harm, he takes it to be a good reason for interference. In this respect, his harm principle is closer to Feinberg's version, which Diekema also cites.⁴⁶ Notably, Diekema explicitly acknowledges Feinberg, but not Mill, when he introduces his eight conditions for justified state intervention.⁴⁷

In short, Diekema's references to Mill are misleading, for the 'harm principle' that Diekema proposes is not that defended by Mill. Since the phrase 'harm principle' is so closely associated with Mill, I prefer to describe Diekema's proposal (as he sometimes does) as a harm *threshold* or *standard* for justified intervention, rather than a harm principle.

5 | PROBLEMS WITH THE HARM THRESHOLD

Thus far, I have chiefly sought to clarify and defend the critique of the best interests standard. We do not generally take ourselves to be justified in overriding parental decisions whenever they fail to maximally promote the interests of the child. It may be that no one has ever seriously defended such a literal best interest standard, instead using the term 'best interests standard' in a looser manner.⁴⁸ However, if the standard that we use does not actually require us to do what is in the child's best interest, then I see no good reason to continue calling it a 'best interest' standard. This merely invites confusion, particularly when such language is used in front of laypersons not trained in medicine or law.

However, while our actual standard for intervention is not best interests, at least if it is taken literally, I believe Diekema is wrong to identify this standard for intervention with harm. After surveying a number of proposals for when intervention is justified, Diekema sums them up by saying:

These commentators seem to be suggesting not a best interest standard, but rather a harm-based standard for intervention. The real question is not so much about identifying which medical alternative represents the best interest of the child, but rather about identifying a harm threshold below which parental decisions will not be tolerated.⁴⁹

To my mind, the negative part is right: the actual standards used do not refer to what is literally in the best interests of the child. However, it does not follow that our actual threshold for intervention is harm-based either. In fact, only one of the passages that Diekema quotes (that from Deville and Kopelman) explicitly mentions harm. Others simply refer to what standards are minimal, tolerable, or adequate. I see no reason to equate these notions with avoiding harm.

The problem with defining standards for intervention in terms of harm is that the term 'harm' is notoriously slippery. If there is disagreement over whether to intervene in some particular case, such as with parents who refuse to vaccinate their children, then it is likely that there will be consequent disagreement over whether this is harmful.⁵⁰ The point here is not simply that the notion of harm is indeterminate, but whether it is the right standard in the first place.

The indeterminacy of harm has already been noted by several critics,⁵¹ but Diekema acknowledges this himself.⁵² I do not think this is a particular problem for the harm threshold. Whether our preferred criterion for intervention is the child's literal best interests, the weaker 'best interests' standard commonly used in practice, or harm, we will need an account of what interests children have and further work to apply it to the particular cases at hand.⁵³ These are difficult interpretive tasks and there is no reason to expect ready agreement. However, best interests are similarly indeterminate.

⁴³Bester, op. cit. note 25, pp. 13–14, is right that Mill took parent-child relations to be 'other-regarding', but wrong to suggest these obligations go beyond harm avoidance. Mill, op. cit. note 37, does suggest that a man can be compelled to support his children (p. 295), but he considers the failure to discharge one's duties a harm (pp. 225, 281). Therefore, this is not an exception to his harm principle, but an application of it. See also Taylor, op. cit. note 25, p. 504, especially note 16.

⁴⁴Taylor, op. cit. note 25, p. 505. See also Brown, op. cit. note 14, p. 136.

⁴⁵Diekema arguably departs from Mill also in focusing only on *serious* harms. According to Turner, op. cit. note 14, Mill's harm principle should be easily satisfied by any form of harm.

⁴⁶Diekema, op. cit. note 1, p. 250.

⁴⁷Ibid: 252.

⁴⁸As claimed by Bester, op. cit. note 24, p. 122.

⁴⁹Diekema, op. cit. note 1, p. 249. A systematic review of the literature concludes that: 'There is a substantial consensus among ethicists that harm is the central moral concept when judging the appropriate threshold for state intervention in parents' medical decision-making'; see McDougall, R. J., & Notini, L. (2014). Overriding parents' medical decisions for their children: A systematic review of normative literature. *Journal of Medical Ethics*, 40,(7), 448–452, p. 452. However, harm is not mentioned by all sources and is rarely the sole moral concept where it is mentioned; see Birchley, G. (2018). The harm principle and the best interests standard: Are aspirational or minimal standards the key? *American Journal of Bioethics*, 18,(8), 32–34, p. 32.

⁵⁰I have discussed the difficulty of identifying harms in Saunders, B. (2015). Why procreative preferences may be moral—and why it may not matter if they aren't. *Bioethics*, 29,(7), 499–506.

⁵¹Holtug, op. cit. note 14; Coggon, op. cit. note 9; Bradley, B. (2012). Doing away with harm. *Philosophy and Phenomenological Research*, 85,(2), 390–412; Birchley, op. cit. note 3; Bester, op. cit. note 25, p. 15; Brummett, A. (2019). Whose harm? Which metaphysic? *Theoretical Medicine and Bioethics*, 40, 43–61.

⁵²Diekema, op. cit. note 1, p. 253.

⁵³McDougall, R. J. (2016). Indeterminacy and the normative basis of the harm threshold for overriding parental decisions: A response to Birchley. *Journal of Medical Ethics*, 42,(2), 119–120. For a recent take on the (dis)value of childhood, see Gheaus, A. (2015). Unfinished adults and defective children: On the nature and value of childhood. *Journal of Ethics and Social Philosophy*, 9,(1), 1–22; Hannan, S. (2018). Why childhood is bad for children. *Journal of Applied Philosophy*, 35,(s1), 11–28; Tomlin, P. (2018). Saplings or caterpillars? Trying to understand children's wellbeing. *Journal of Applied Philosophy*, 35,(s1), 29–46.

In fact, *pace* Bester—who argues that ‘concerns about indeterminacy and value imposition [are] just as applicable to the harm principle as the BIS [best interests standard]’⁵⁴—and Birchley—who claims that ‘harm is at least as problematic as best interests in this regard’⁵⁵—harm must be *no more* indeterminate, and probably less, than best interests. Bester, following Angus Dawson, argues that the harm principle (or threshold) is superfluous, because any determination of a child’s best interests requires us to consider harms, as well as benefits.⁵⁶ However, if the notion of best interests incorporates consideration of harms, then it must therefore inherit any indeterminacy inherent in the notion of harm.

If determinations of best interests also incorporate further elements—benefits—that are themselves indeterminate, then determinations of best interests are, if anything, even more indeterminate than determinations of harm. It might be responded that there is no additional indeterminacy around benefits, since they are simply the opposite of harms. This is not obviously the case. There is widespread agreement that certain things—such as pain, frustration, or degradation—are harms and so avoidance of those things is indeed a benefit. But benefits also cover things that are positively good and there is also much disagreement over what constitutes a good life.

Some have suggested that the apparent diversity of goods can be reduced if we adopt a sufficiently thin or abstract notion of good. For example, Finnis offers a list of seven ‘basic goods’: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.⁵⁷ He suggests that:

... other objectives and forms of good will be found, on analysis, to be ways or combinations of ways of pursuing (not always sensibly) and realizing (not always successfully) one of the seven basic forms of good, or some combination of them.⁵⁸

But, even if it is true that all objectives can be reduced to these seven headings, these still leave open many ways that we can be benefited, not only because there is no objective hierarchy amongst these different basic goods,⁵⁹ but also because each of these goods is sufficiently indeterminate that it can be pursued in many different ways—as knowledge is served not only by science and philosophy, but also detective stories and gossip.⁶⁰

Thus, while harm may be indeterminate, there is also considerable indeterminacy around the notion of positive benefits. Further,

note that even if there was no indeterminacy whatsoever about benefits, the best interests standard is still no less indeterminate than the harm threshold since, as noted above, it also considers harms. We have one standard (the harm threshold) that considers only harms and another (the best interests standard) that considers harms *and* benefits. So, however indeterminate we think harms and benefits are, the latter standard must be *at least* as indeterminate as the former.⁶¹ Thus, the above remarks suggesting that the harm threshold is *at least* as problematic as the best interests standard in this respect are puzzling. In fact, the harm threshold cannot be more indeterminate than best interests since, while both are affected by the indeterminacy of harm, the best interests principle (but not the harm threshold) incorporates additional sources of indeterminacy.⁶²

To be sure, neither standard will be straightforward to apply. To the extent that both are indeterminate, either may be misused. My point here, however, is merely a comparative one. Concerns about indeterminacy cannot give us any reason to favour the best interests standard over the harm threshold.⁶³ At worst, the two are equally situated (if anything, the harm threshold is less indeterminate).

6 | WHY HARM IS THE WRONG THRESHOLD

Judgements of harm usually involve comparison, though there are well-known problems with identifying the relevant counterfactual comparisons.⁶⁴ Part of what generates indeterminacy and disagreement is the question of the relevant baseline for this comparison. For present purposes, it does not matter what account of harm one favours; the examples I offer can be adapted to suit one’s preferred theory.

There are cases where parental decisions can reasonably be seen as harmful, because for instance they make the child in question worse off, but do not license interference, because the child is still all

⁵⁴Bester, op. cit. note 25, p. 15.

⁵⁵Birchley, op. cit. note 3, p. 112.

⁵⁶Bester, op. cit. note 25, p. 14.

⁵⁷Finnis, J., 2011. *Natural Law & Natural Rights* (2nd ed.). Oxford: Oxford University Press, pp. 86–90.

⁵⁸Ibid: 90.

⁵⁹Ibid: 93.

⁶⁰Ibid: 84.

⁶¹The indeterminacy of H+B must be at least as indeterminate as H alone. To think otherwise seems to exhibit a conjunction fallacy similar to those in Tversky, A., & Kahneman, D. (1983). Extensional versus intuitive reasoning: The conjunction fallacy in probability judgment. *Psychological Review*, 90,(4), 293–315.

⁶²Birchley, op. cit. note 50, p. 33, suggests that indeterminacy is less problematic for an aspirational standard than a minimal one. This is probably true, since aspirational standards are not legally enforced, but here we are considering minimal standards. So the (potentially greater) indeterminacy of best interests is a problem when it is used in this context, even if it can be welcome for other uses.

⁶³Of course, they might give us reason to reject both of these standards and seek some third alternative. Perhaps this is Birchley’s point, given the suggestion in Birchley et al., op. cit. note 7, p. 934, that a new standard may be needed. However, while I do offer a third alternative here, I do not claim that it is any less indeterminate. I am not convinced that any standard can avoid indeterminacy here.

⁶⁴Shiffrin, S. V. (1999). Wrongful life, procreative responsibility, and the significance of harm. *Legal Theory*, 5,(2), 117–148; Carlson, E. (2019). More problems for the counterfactual comparative account of harm and benefit. *Ethical Theory and Moral Practice*, 22,(2), 795–807.

things considered very well off.⁶⁵ Parents might, for instance, have to relocate for a variety of reasons, such as work or other family commitments. This may cause disruption to children, who have to change schools, leave behind friends, etc. It is plausible that, as a result of such relocation, the child will be worse off than they were before and worse off than they would have been. Thus, on either baseline, the child is harmed. Further, depending on the particulars, this harm might be significant. However, it does not seem that this is reason to interfere, provided that the child on the whole still enjoys a good life.

Conversely, intervention may be justified where children suffer poor quality of care, even if we would not consider this to be a harm. This is harder to illustrate, because we may be inclined to think that parents are harming their children whenever they fail to provide them with adequate standards of care. Nonetheless, one might think that parents have duties not only to refrain from harming their children but also to benefit them.⁶⁶ On this account, parents who make their children neither better nor worse off, though not actively causing harm, are still falling short of what they ought to do. Again, one might construe this as harm, given that the children are worse off than the normative baseline.⁶⁷ However, though the notion of harm is commonly moralized in this way, it need not be. One could coherently think that (i) there is no harm done here, but (ii) there is a parental failing sufficient to warrant intervention.⁶⁸

One might respond to these counterexamples by suggesting that we could simply define harm in terms of what might be interfered with. Indeed, we often characterize something as harmful because we think it wrong, rather than vice versa.⁶⁹ For example, we may think that parents harm their children by not feeding them adequately, but do not think third parties harm those children, even though they (the third parties) are also not feeding them (the children). Consequently, we might want to describe parental choices that license interference as harmful, and those that do not as non-harmful.

However, this proposal cannot rescue Diekema's threshold. If something's being harmful is a consequence of intervention being

justifiable, then it cannot (without circularity) also explain why that intervention is justifiable. If harm is to do the explanatory work that Diekema requires, it must be something that can be identified independently of any judgement about the appropriateness of intervention. And if these two things (i.e., what is harmful and what justifies intervention) are different, there is no reason to suppose that they coincide.

None of this precludes the possibility that, in some particular case, the threshold for intervention will happen to coincide with the threshold of harmfulness. However, if these two thresholds do coincide, that is merely coincidence. The threshold that determines when we may justifiably intervene might be either higher or lower than the threshold that distinguishes harm from non-harm. Further, we may also have pragmatic reasons to avoid referring to harm here, since this may be taken as pejorative.¹¹ However, rejecting the harm threshold does not commit us to accepting best interests. This would follow only if these were the only two alternatives, but this is a false dichotomy. The next section outlines a third alternative.

7 | A BETTER ALTERNATIVE TO BEST INTERESTS

Diekema rightly notices that our actual threshold for intervention is not determined by the best interests of the child, taken literally.⁷⁰ In practice, we do not intervene whenever parental decisions are sub-optimal, but only where they are bad enough to fall below some threshold of adequacy or acceptability. However, he is wrong to identify this adequacy threshold with the threshold for harm (or significant harm). The problem here is not the indeterminacy of harm, since any other standard—including 'best interests'—will also need careful interpretive work to apply it to a given case at hand. Rather, the issue is that there is no reason to assume that those cases where intervention is justified will coincide with those involving harm (unless these two expressions are assumed to be equivalent by stipulation, in which case harm ceases to do explanatory work).

After rejecting literal best interests, as demanding too much, the obvious alternative is to focus on a 'good enough' standard. This standard is based on what is sufficient, rather than what is optimal, but that is what we ought to expect if we are seeking a threshold below which interference is justifiable. Of course, we might hope—and even expect—that parents will do more than this. Thus, maximally promoting the child's interests *might* have some role to play as a guiding ideal for parents (and for others, when overriding parental decisions).⁷¹ It is not, however, necessary in order to avoid interference.

We are justified in interfering only where parental decisions fall so far short of the ideal as to be bad, rather than merely suboptimal.

⁶⁵Diekema, op. cit. note 6, p. 131, notes that 'Not all harms should trigger state intervention', suggesting that intervention can only be warranted in cases where there is significant risk of serious harm. Thus, the threshold he endorses is not simply harm, but serious harm. Simply calling it the harm threshold may also be misleading, since it may suggest that any harm justifies intervention.

⁶⁶Birchley, G. (2016). The harm threshold and parents' obligation to benefit their children. *Journal of Medical Ethics*, 42,(2), 123–126. But, for a critical take on how far such duties may extend, see Woollard, F. (2019). Motherhood and mistakes about defeasible duties to benefit. *Philosophy and Phenomenological Research*, 97,(1), 126–149.

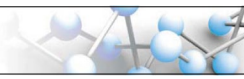
⁶⁷Even without a normative baseline, Feit, op. cit. note 42, argues that some failures to benefit constitute harm, since the could-be beneficiary is worse off than they would have been if they were benefited.

⁶⁸Taylor, op. cit. note 25, p. 507, makes an analogous argument regarding non-serious harms.

⁶⁹Bradley, op. cit. note 52, p. 410. Brummett, op. cit. note 52, adds that judgements of harm are not only value-laden but also sometimes depend on metaphysical assumptions. In more Rawlsian language, they are grounded in comprehensive views of the good (MacDougall, op. cit. note 2, p. 292). However, Coggon, op. cit. note 9, p. 225, observes that 'best interests includes not only straightforward welfare issues, but also arguable metaphysical interests' too.

⁷⁰Diekema, op. cit. note 1, p. 249.

⁷¹As suggested by Diekema, op. cit. note 6; though, again, it may be reasonable to choose less risky options rather than those that are expected to be better but have high uncertainty (Holm and Edgar, op. cit. note 10, p. 199).



This 'sufficiency threshold' raises many questions that cannot be settled here. For instance, one might ask whether the good enough threshold is an absolute standard, presumably the same for all, or whether what is good enough is relative to the best available in a given case. These are important issues that any account of when parenting is good enough must address.⁷² I do not propose to tackle these issues here. My positive contribution to the debate is that the appropriate standards for parental decisions need not coincide with harm avoidance. We might demand more than this of parents, while still not requiring the best, and/or we might regard certain harms as tolerable, provided sufficient standards are maintained overall. Thus, rejecting the 'best interests' standard should lead us to search for appropriate standards of adequate—or 'good enough'—parenting, without any supposition that these standards coincide with harm avoidance.

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CONFLICT OF INTEREST

The author declares no conflict of interest.

ORCID

Ben Saunders  <https://orcid.org/0000-0002-5147-6397>

AUTHOR BIOGRAPHY

BEN SAUNDERS is Associate Professor in Political Philosophy at the University of Southampton. His research interests include John Stuart Mill and various topics in applied moral/political philosophy.

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⁷²For attempts to grapple with some of these issues, see Shields, L. (2016). How bad can a good enough parent be? *Canadian Journal of Philosophy*, 46,(2), 163–182; and Gheaus, A. (2017). Sufficientarian parenting must be child-centred. *Law, Ethics and Philosophy*, 5, 189–197.