PAPER

Harm is all you need? Best interests and disputes about parental decision-making

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ABSTRACT

A growing number of bioethic papers endorse the harm threshold when judging whether to override parental decisions. Among other claims, these papers argue that the harm threshold is easily understood by lay and professional audiences and correctly conforms to societal expectations of parents in regard to their children. English law contains a harm threshold which mediates the use of the best interests test in cases where a child may be removed from her parents. Using Diekema’s seminal paper as an example, this paper explores the proposed workings of the harm threshold. I use examples from the practical use of the harm threshold in English law to argue that the harm threshold is an inadequate answer to the indeterminacy of the best interests test. I detail two criticisms: First, the harm standard has evaluative overtones and judges are loath to employ it where parent behaviour is misguided but they wish to treat parents sympathetically. Thus, by focusing only on ‘substandard’ parenting, harm is problematic where the parental attempts to benefit their child are misguided or wrong, such as in disputes about withdrawal of medical treatment. Second, when harm is used in genuine dilemmas, court judgments offer different answers to similar cases. This level of indeterminacy suggests that, in practice, the operation of the harm threshold would be indistinguishable from best interests. Since indeterminacy appears to be the greatest problem in elucidating what is best, bioethicists should concentrate on discovering the values that inform best interests.

INTRODUCTION

Where medical decisions must be made for infants, English law directs decision-makers—primarily parents and doctors—to follow the best interests test. Yet judgments of best interests have long been criticised for their indeterminacy since they can be informed by a variety of values. Many bioethicists have also argued that parents, who must juggle their own needs, and potentially those of siblings as well, with those of the child, are poorly directed by the literal demand that they do what is best for the child. Of the many critiques that have arisen from the practical use of the harm threshold in English law to argue that the harm threshold is an inadequate answer to the indeterminacy of the best interests test. I detail two criticisms: First, the harm standard has evaluative overtones and judges are loath to employ it where parent behaviour is misguided but they wish to treat parents sympathetically. Thus, by focusing only on ‘substandard’ parenting, harm is problematic where the parental attempts to benefit their child are misguided or wrong, such as in disputes about withdrawal of medical treatment. Second, when harm is used in genuine dilemmas, court judgments offer different answers to similar cases. This level of indeterminacy suggests that, in practice, the operation of the harm threshold would be indistinguishable from best interests. Since indeterminacy appears to be the greatest problem in elucidating what is best, bioethicists should concentrate on discovering the values that inform best interests.

THE HARM CONSENSUS

Many commentators suggest that best interests is an opaque test that, taken literally, places unfair demands upon parents who will face the paradox of simultaneously trying to maximise benefits to all of their children while somehow maintaining their own well-being. In the face of these apparent problems with the best interests test, these commentators argue that a harm threshold should mediate (or perhaps replace) best interests. Calls to replace the best interests test are ambiguous because it is not clear if it is meant to apply only to specific uses of the test. To keep things simple, I will concentrate on claims that the harm standard should mediate best interests, in other words a harm threshold should govern which cases we consider appropriate to be decided by the best interests test.

Although accepting that best interests is the best guide for decision-making on behalf of a child, Diekema argues that the harm threshold is superior to best interests when judging whether intervention is justified against parental refusals of medical treatment. Elliot argues that intervention against parental decisions should only be made on the basis of harm, and only then if the choice that leads to those harms is unreasonable. Others suggest more specific uses for the harm threshold. Shah proposes a ‘secure child standard’ should govern parental decisions to enter children into research. Under this standard the courts should ‘defer to parental decision-making unless the child is exposed to some unjustified risk of significant harm’ (at 179). de Vos et al claim that parental requests for withdrawal of life-sustaining treatment should be allowed if they do not increase the risk of preventable harm. Gillam argues that harm indicates the scope of parental decision-making in situations of genuine dilemma. Indeed, a recent
review\textsuperscript{11} suggests that there is widespread consensus among bioethicists that the harm threshold should determine the permissibility of overriding parental wishes. I dispute the usefulness of these conclusions. While avoiding harm has been convincingly claimed to be the single moral principle likely to be common to all cultures and philosophies,\textsuperscript{12} this is only likely because harm can be understood in numerous ways, and these will not always be consistent with one another. The use of the harm threshold in English law exemplifies this, and I shall discuss this in due course.

No critique of the harm threshold can ignore Diekema’s\textsuperscript{4} seminal paper, which remains the most considered and widely referenced discussion of the issue. While I concentrate upon Diekema’s analysis, my focus here is on developing a general critique of insufficiency of the harm threshold for overriding parental decisions.

**THE HARM THRESHOLD EXPLAINED**

Diekema considers that parenting children is a basic liberty right. He identifies the harm threshold first with Mill’s\textsuperscript{13} assertion that the only circumstance in which personal liberty may be infringed by a community is to prevent harm to others, and second with Feinberg’s\textsuperscript{14} argument that such infringement must be effective and the option of last resort. In order to further define the concept, Diekema links harm to a second concept, *basic needs*.\textsuperscript{15} While Diekema does not define these, basic needs are predicated upon Rawls’ natural primary goods, the things ‘a rational man wants whatever else he wants’ (at 79),\textsuperscript{16} and for children might form a notional list containing the minimum that will ‘enable children to embark ... on the process of self-discovery, self-determination and self-fulfilment’ (at 42).\textsuperscript{17} Using Feinberg’s contention that harm is the thwarting of an interest, Diekema argues that the existence of harms in children can be determined by the degree to which children’s basic needs are provided for. Where a parent persistently fails to provide for a child’s basic needs, harm is caused. Should these failures be significant and serious, intervention is warranted.

Diekema acknowledges that the non-self-evident nature of harm, even when coupled with terms like ‘significant’ and ‘serious’, means that the harm principle suffers from problems of indeterminacy.\textsuperscript{18} Diekema counterargues that a threshold based upon harm better fits the point where intervention against parental wishes is justified in practice and is therefore less likely to cause confusion in clinicians than the obfuscatory language of best interests. Dresser,\textsuperscript{19} arguing along similar lines, makes this point succinctly when she argues that it is difficult to conceive that male circumcision for religious purposes serves the child’s best interests, yet the purportedly harm-free nature of male circumcision leads to its widespread acceptance in many cultures. While harm is nevertheless indeterminate, it is only fair to say that Diekema does not appear overly concerned with indeterminacy, for he states (at 253):

The biggest problem with a best interest standard is not its subjectivity, but that it represents the wrong standard. State intervention is not justified because a decision is contrary to the child’s best interest, but because it places the child at significant risk of serious harm. Discussing the child’s ‘best interest’ fails to focus on the relevant standard for determining when state action is justified. The harm standard focuses discussion in the proper place.\textsuperscript{20}

Yet I suggest that Diekema, and others who have adopted his arguments, make a fundamental mistake. The challenge of indeterminacy is the central problem of the best interests test, and merely switching terminologies from best interests to harm does nothing to address this in any of the circumstances it has been proposed. Indeed, for reasons I explain below, the change in terminology is also unhelpful.

**THE HARM THRESHOLD CRITICISED AND DEFENDED**

Diekema’s contention that parental authority is a liberty right akin to any other exercise of autonomy is vulnerable to critique. The notion that personal liberty extends to *parental autonomy*—quite possibly a misuse of Mill’s doctrine—\textsuperscript{21}—conflicts with claims that children have rights on their own account. Such rights are often argued to extend beyond simple claims to physical integrity to at least leave some space for presumptive self-determination.\textsuperscript{16} 17 Most cogently seen in Feinberg’s\textsuperscript{18} argument that children have a right to an open future.\textsuperscript{22} On such a basis Hester\textsuperscript{19} argues bioethicists should go further than simply preventing harm and specify some positive interests of children which we are obliged to protect. While he does not develop the argument, Diekema’s specification of harm as damage to basic needs does not prevent us from making some positive specification of harms, which might deflect this critique somewhat.

A second argument advanced by a number of authors\textsuperscript{4 6 7 9} is that the harm threshold is more readily understood than best interests by legislators, doctors and parents. This claim is problematic for two reasons. First, although harm may appear a readily understandable concept, the ready understandability hides the fact that judgements of harm, especially in complex ethical dilemmas, contain complex value judgments. For example, fatal withdrawal of treatment is a harm of indefinable proportions—perhaps catastrophic, or perhaps not even harm at all. While, for the sake of brevity, I accept without argument (here) that fatal withdrawal of treatment is sometimes justifiable in a patient’s interests,\textsuperscript{23} such situations do not always sit well with the concept of harm as understood in the vernacular. This muddles the claim that harm is the correct threshold because it is simple enough to be generally understood and suggests harm is at least as problematic as best interests in this regard.\textsuperscript{24}

This indicates a second, related, problem: harm may not capture all the considerations we need to capture to make a decision. This is problematic because if harm is the *only* concept on which attention can justifiably be focused, this invites any otherwise justifiable claims against interests which are not readily labelled as harms to nevertheless be labelled as harms. Such labelling inevitably transforms the harm threshold

\textsuperscript{11}Lists of basic needs are rarely specified, and Rawls specified only an incomplete list which included health and vigour, intelligence and imagination. Basic needs (or their inverse, basic interests) may be criticised separately, although this is not the focus of this paper.

\textsuperscript{12}Thereby anticipating criticisms from those who feel that harm is too anemic or plastic a concept.

\textsuperscript{16}Since Mill argued the state might place very great restrictions upon parenting and complains: “it is in the case of children, that misapplied notions of liberty are a real obstacle to the fulfilment by the State of its duties. One would think that a man’s children were supposed to be literally, rather than metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them; more jealous than of almost any interference with his own freedom of action: so much less do the generality of mankind value liberty than power” (at 88–89).\textsuperscript{13}

\textsuperscript{17}Even those who dispute claims that children have rights tend to accept that children have interests.

\textsuperscript{18}Albeit we have little evidence of how best interests are understood in this context.
into a complex test when it is used in the wide variety of situations wherein the best interest test is currently employed. While I concede that, unembellished, claims of self-evident physical harm might provide one plausible standard to judge overriding a parental consent and refusal in some contexts (such as vaccination, intrasibling tissue donation and paediatric research)—albeit one that remains contestable on the basis of the non-self-evidence of parental rights—any appeal to clarity is lost once harm is the only gateway to the best interests test. Indeed, because English law contains a harm threshold, we have examples of these problems at first hand.\(^{41}\)

THE HARM THRESHOLD IN ENGLISH LAW

English law uses a harm threshold in cases where a child may be removed from its parents.\(^{47}\) If only a child is being harmed or is at risk of harm will the court decide what home is best for it.\(^{21}\) This indicates more evaluative term than best interests. This is a problem.\(^{22}\) Although my focus is on English law, my understanding is that other legal systems also use harm in this way.\(^{6}\)

My first claim is that the courts view ‘harm’ as implicitly a more evaluative term than ‘best interests’. This is not to claim that the best interests test does not involve evaluation, but instead to argue that, as a legal term of art, a judgement that an action is against a child’s best interests may appear less pejorative than a judgement that an action is harmful. The way the courts use harm to narrowly focus upon (defective) parental care, and reserve best interests to consider a much wider range of issues than the harm threshold gives reasons for thinking this is the case.

An indication of this is the general avoidance of the term ‘harm’ in English legal cases where the courts do not wish to indicate that parental care is substandard. For example, religious refusal to consent to life-saving blood products is not described as harm in contemporary cases.\(^{23}\) While I acknowledge a variety of explanations for this approach—for instance application of the harm threshold is demanded by statute only in cases where the courts consider applications for care and supervision or residence and contact orders—an approach favouring the use of best interests under the inherent jurisdiction of the court has arguably arisen because of reservations about using the harm standard where the courts perceive a legitimate plurality of views.

If the aim is to respect parental privacy in parenting, it is of course sustainable to say that the pejorative connotations of the language used are moot since interference on any basis is problematic for the parents concerned. Yet the family courts regularly perceive that, as well as the parents concerned, they address standards of parenting in general,\(^{24}\) and in this context concerns about language may gain more traction. It might nevertheless be argued that the lack of transparency in the best interests test make it a more problematic way to offer this more general guidance to parents. Yet this assumes that guidance on the basis of harms is more transparent, a claim I shall now dispute.

THE INDETERMINACY OF HARM

The indeterminate nature of harms raises a second problem that challenges claims that the harm threshold is more readily understandable than best interests. The definition of harm at section 31(9) of the Children Act 1989 as ‘ill-treatment or the impairment of health or development’ might appear clear and unambiguous. Yet, given that such a definition will include a wide range of circumstances, juridical use of the harm threshold has suffered from indeterminacy.\(^{25}\) for example, the question of whether a child’s cultural background should affect an assessment of the seriousness of harm has been answered negatively and positively in different cases.\(^{26}\)

A stark demonstration of the indeterminacy of harms is in a series of reports of baby trafficking cases Haringey Local Authority v C,\(^{27}\) Re E,\(^{28}\) Re D\(^{29}\) and Re A.\(^{30}\) These cases share a series of key features: all concern childless couples of African origin living in the UK who attend charismatic Christian churches. Conventional fertility treatments had failed these couples and all had sought unconventional treatments at clinics in Africa. Most admitted paying large sums of money for these treatments, after which many of the women had experienced phantom pregnancy (pseudocyesis). All had contacted their family doctors in the UK in the belief they were pregnant, and, if examined (one was not), were found not to be. All had undergone labour in African clinics, and were presented with babies who were removed by the state authorities when they returned.

\(^{41}\)Although my focus is on English law, my understanding is that other common law jurisdictions such as the USA and Australia use the harm threshold similarly in cases of child abuse or neglect.

\(^{47}\)The Children Act 1989 section 1 (3–4) specifies a harm threshold to be used residence and contact orders, and care and supervision orders, respectively known also as section 8 orders and part 4 orders. The circumstances of which these orders may be sought is elaborated at section 31(2).

\(^{42}\)Inded Elliston explicitly favours the extension of this model.\(^{6}\)

\(^{43}\)A number of commentators argue that they do so implicitly, however I do not think this negates my argument, since I acknowledge the indeterminacy of best interests test is a problem.\(^{22}\)

\(^{44}\)Whether the care is indeed substandard depends upon one’s metaethical (and jurisprudential) stance.

\(^{45}\)Consider refusal of consent to blood in, for example, Birmingham Children’s NHS Trust v B & C (2014) EWHC 531 (Fam); M Children’s Hospital NHS Foundation Trust v Mr & Mrs Y (2014) EWHC 2651 (Fam) NHS v Child B, Mr and Mrs B (2014) EWHC 3486 (Fam); Refusal of consent for HIV treatment represents a rare case that attributes the opposite approach e.g. Re JA (A Minor) (2014) EWHC 1135 (Fam).

\(^{46}\)Could be convincingly argued that the approach here was due to the facts of the case.

\(^{47}\)Consider, for example, Re H-B (2015) EWCA Civ 389

\(^{48}\)The persistent ambiguity of corporal punishment in English law is another fine example, although since it is usually outside the ambit of the harm threshold (being instead governed by the Children Act 2004, ss58(3) and case law, most notably R v H (2001) 2 FLR 431) it would be digressive to include it in the main discussion.

\(^{49}\)Compare Re D (Care: Threshold Criteria) (1998) Fam Law 656 and A Local Authority v N (2005) EWHC 2956 (Fam).
to the UK. None of the women were DNA matches for their child, although all were nevertheless convinced the child was theirs. In every case their physical and emotional care of the child was thought to be exemplary. Despite these strong similarities, the courts reached differing conclusions about whether the harm threshold had been reached. Thus in Haringey Local Authority v C,23 while Ryder J believed that the ‘mother’ had been the victim of a cruel deception, he ruled the child was at risk of harms consisting of growing up with false beliefs that he was a miraculous birth, potentially experiencing devastating consequences if he discovered his true origin and of facing possible difficulties due to the lack of family medical history. The child was permanently removed from the ‘mother’ on this basis. While there is no public report on the outcome of possible dif

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None of this mitigates the indeterminacy of the best interests test, and this paper has contended that this is the greatest challenge to deciding children’s interests. Recourse to a harm threshold offers nothing to this project, and the focus of bioethicists should be upon identifying and mapping the values that (should) inform best interests decisions.

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