# A Defence of the Counterfactual Account of Harm

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## Introduction

Harming individuals is generally considered to be A Bad Thing.[[1]](#footnote-1) Given that many discussions in bioethics take as their starting point John Stuart Mill’s influential maxim that ‘[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’,[[2]](#footnote-2) whether something causes harm to other people is believed to determine the limits of acceptable conduct. What constitutes harm is also of enormous practical consequence as claims can only be brought in the tort of negligence, for example, if harm has occurred.[[3]](#footnote-3)

Given this, it is important to have an understanding of what it means to be harmed. The dominant theory of harm has been the counterfactual account, most famously proposed by Joel Feinberg.[[4]](#footnote-4) This determines whether harm is caused by comparing what actually happened in a given situation with the ‘counterfacts’ i.e. what would have occurred had the putatively harmful conduct not taken place. If a person’s interests are worse off than they otherwise would have been then a person will be harmed.

Yet this definition has faced criticism from bioethicists who, believing it to be severely flawed, wish to replace it with their own theories of the concept. The first challenge came from Professor John Harris. In several books and articles he has proposed an alternative theory based upon whether a person is placed in a harmed state.[[5]](#footnote-5) He states ‘Where B is in a condition that is harmed and A and/or C is responsible for B’s being in that condition then A and/or C have harmed B’.[[6]](#footnote-6) A harmed state, he says, will be one that a person has a rational preference not to be in.

The second opposition to the counterfactual account is more recent and comes from Dr Guy Kahane and Professor Julian Savulescu.[[7]](#footnote-7) They believe that Feinberg’s comparative theory of harm fails to explain the intuitive reactions people have towards different conditions. Kahane and Savulescu hold that there is an important distinction between things such as being severely intellectually impaired or dying in one’s twenties on the one hand, and things such as lacking an IQ of 160 or dying in one’s hundred and thirties. They maintain that people see the former as harms but the latter as not and that the counterfactual account struggles to accommodate this distinction because Feinberg’s theory perceives both scenarios as making an individual worse off and thus harmed. As a result, they propose that whether a condition is statistically normal will be a morally significant factor in determining whether a person is harmed or not: the former harmful conditions fall below what is statistically average whereas the latter non-harmful ones are not. Causing someone to be in a condition that is below what is statistically normal will be to cause them harm under this theory.

The purpose of this article is to defend the counterfactual account of harm from these two attacks. At first sight this might appear a rather esoteric debate. After all, blinding someone or causing them to contract Ebola is likely to cause harm under all three theories. However, these theories can lead to different answers to the question of what causing harm entails. Since many arguments in applied ethics currently rely upon the counterfactual account of harm, any deviation from this understanding of the concept is likely to have a large impact on contemporary bioethical problems. For example, Derek Parfit’s Non-Identity Problem utilises the counterfactual definition of harm and its conclusion appears to imply that, provided a child born will have a worthwhile life, bringing into existence an impaired individual does not cause that individual harm if that is the only condition they could have existed in.[[8]](#footnote-8) This would mean it does not cause harm to select a congenitally deaf embryo for implantation. The child born would not be worse off as being deaf is the only state they could exist in (if a non-deaf embryo was selected then a different individual would be result) and so they would not be harmed by such reproductive choices.[[9]](#footnote-9) In contrast, Harris’s and Kahane and Savulescu’s theories, being non-comparative, would be able to say that having a deaf child would cause harm to the child born as a result: the child might have a rational preference not to be in that state and deafness falls below what is statistically normal.[[10]](#footnote-10)

In this article I will argue that the shortcomings Harris, Kahane and Savulescu believe are present in Feinberg’s theory are illusory and that it is their own accounts of harm that are fraught with logical errors. The first part of this article will give an overview of Feinberg’s theory. Harris’s alternative account will then be addressed and I will explain why it is unconvincing. Next, Kahane and Savulescu’s criticisms of the counterfactual account and their own theory of harm will be presented and rebutted. I will demonstrate that the arguments presented to refute Feinberg’s theory not only fail to achieve this goal and can be accommodated within the counterfactual account but that they actually undermine the theories presented by their respective authors. The final conclusion will be that that these challenges are misconceived and fail to displace the counterfactual theory.[[11]](#footnote-11)

## The Counterfactual Account of Harm

Feinberg held that a person is harmed if their interests are put in a worse condition than they otherwise would have been*.*[[12]](#footnote-12) The theory is therefore counterfactual as it compares what actually happened with what otherwise would have been the case (the ‘counterfacts’). Feinberg stated: ‘A harms B only if his wrongful act leaves B worse off than he would be otherwise in the normal course of events insofar as they were reasonably foreseeable in the circumstances’.[[13]](#footnote-13)

Note that a person does not have to be made worse off than they were *before*. To illustrate this Feinberg uses the example of a Miss America contestant being detained the night before the competition – a competition she was certain to win. Although she is not worse off than before (she was not a competition winner *before* the putatively harmful detention), she is still harmed by such actions as she is worse off than she otherwise *would have been* (she would have been a Miss America competition winner had the detention not occurred).[[14]](#footnote-14)

One might object that a problem with this account of harm is that of causal overdetermination. Feinberg asks us to imagine a businessman who takes a taxi to the airport. On the way the reckless driving of the taxi driver causes a collision. As a result, the businessman is severely injured, rushed to hospital and misses his plane. He is made worse off and consequently appears to be harmed by the actions of the taxi driver. But what if the missed plane had crashed after take-off, killing all of the passengers? It would appear that the businessman would not be harmed – even though he is suffering from severe injures – because, counterfactually, he is not worse off as he has not died horribly in a plane crash.[[15]](#footnote-15)

However, this problem is not insurmountable. The businessman will still be harmed under the counterfactual account because, given we are not omniscient, we have to assign blame based on *reasonably foreseeable* events. The taxi driver has still caused harm because the overall benefits of avoiding death were not *foreseeable*. Whether an individual is harmed is therefore based upon socially-constructed expectations and whether the setting back of their interests was usual in the circumstances.[[16]](#footnote-16) Morality does not demand the impossible of people and so no account of harm will hold people responsible for events that could not be expected.[[17]](#footnote-17)

What, then, are interests? Feinberg takes interests to be components of a person’s well-being and believes this concept is useful because it acknowledges ‘the complexity of a person’s good [and] how it contains various components, some of which may be flourishing while others languish at a given time’.[[18]](#footnote-18) To use the above example, an individual’s interest in not being severely injured would be setback if it they were in a car crash but their (more important) interest in being alive would be benefitted by missing the fatal plane.

Hare once stated that ‘the notion of interests is tied in some way or other to the notion of desires and that of wanting’[[19]](#footnote-19) and that ‘it would scarcely be intelligible to claim that a certain thing was in a man’s interest, although he neither wanted it, nor ever wanted it, nor ever would want it’.[[20]](#footnote-20) This will be the definition of interests used in this article (though others can legitimately be countenanced).

## John Harris’s Challenge

The first challenge to the counterfactual account of harm is presented by Harris.[[21]](#footnote-21) Harris believes that ‘to be harmed is to be put in a condition that is harmful’[[22]](#footnote-22) and explains that to be in a harmed condition is ‘to be born with any impairment that one could have a rational preference to be born without.’[[23]](#footnote-23) To illustrate this Harris uses a thought experiment of ‘the emergency-room test’.[[24]](#footnote-24) If a patient was brought into hospital in a condition that could only be rectified there and then and the medical staff would be negligent if they failed to correct it then the patient will be in a harmed state according to Harris.[[25]](#footnote-25) Therefore when someone is in a condition they have a rational preference not to be in and another is responsible for this state of affairs then the latter will have harmed the former.

Most of the time this theory will not cause any problems and results in the same conclusions as Feinberg’s. If you cut off my arm then I will be harmed under Feinberg’s theory as, other things being equal, I will be worse off. I will also be harmed under Harris’s account as a surgeon would be negligent if they failed to repair the damage if they could and I have a rational preference to not have a missing arm.

### *A Puzzling Conclusion*

However, Harris’s account runs into a number of problems in harder cases. The first is that it is too expansive and so leads to conclusions Harris may well, or perhaps should, be unwilling to accept given his writings on other topics. Under Harris’s definition of harm it will be impossible to avoid causing harm if one chooses to have children. This is because everybody has certain characteristics that they might rationally prefer not to have. One might rationally prefer to be taller, less susceptible to common colds, have better eyesight, not die of old age, look like Elizabeth Taylor or Paul Newman in their prime or be more intelligent. In fact, if you picked any random individual existing on the planet you would certainly be able to find something, even if it is only minor, that is wrong with them. Something that one might rationally prefer to be improved and that a doctor would be considered negligent for not rectifying in an unconscious patient if they could. The implication of Harris’s account is therefore that we are all harmed by existence because we could always rationally prefer to be in a better condition than the one we currently are in. If existence is a harmed state this means that those who cause people to be in such a condition – namely their parents – have caused harm. As a result, having children will always cause harm.

It is not open to Harris to say that a doctor would not be negligent for failing to find a cure to the common cold or administer the elixir of life as none is currently available. His account does not depend upon this. He believes, for example, that a deaf child is harmed by being born in a disadvantaged condition ‘even though it is not possible for that particular individual to avoid the condition in question’[[26]](#footnote-26) and exist in any other state. According to Harris, therefore, a child susceptible to common colds will be harmed even if they could not exist in any other state as, unlike Feinberg’s, his account does not rest upon counterfactual alternatives. Whereas Feinberg would say that a child is harmed by being susceptible to colds if they could have existed in a state where they would not be so susceptible, Harris’s theory of harm would say they are harmed regardless of the alternatives.

What should we do then if all children are harmed by existence? The first solution is to say that one should not have *any* children. There are some philosophers who do think that we are all harmed by existence. David Benatar is one of them and he has given an interesting argument that ‘[b]eing brought into existence is not a benefit but always a harm’.[[27]](#footnote-27) Indeed, it is perfectly possible that this is the case and that we should not have children at all as doing so causes harm. But whatever the merits of this conclusion, this get-out is not available to Harris. Why? Because he has previously rejected it. Harris has stated ‘[s]o long as it is not possible to produce a healthier, and probably happier, alternative child there are still good moral reasons to produce children so long as their lives are predictably well worth living’.[[28]](#footnote-28)

Leaving aside the fact that Harris does not convincingly explain why an individual being harmed is dependent on whether another healthier person is waiting in the wings to replace them, if Harris does not accept that it is wrong to have children even though they will be harmed then there must be no duty to avoid causing harm. This is because, as Brassington has said, it is blameworthy to fail to fulfil a duty.[[29]](#footnote-29) As we cannot be blamed for not performing the impossible, we cannot have a duty to do the impossible. Accordingly, if parents are allowed to have children then bringing them to birth in a non-harmed state (in other words, performing a duty to avoid causing harm) would be impossible. The failure to fulfil this duty not to cause harm will therefore not be blameable so it will not be a duty at all. This is the second unpalatable conclusion of Harris’s account: it potentially sees causing harm as being completely morally unproblematic.

Regardless of whether these two conclusions – that we should never have children; or that there is no duty to avoid harming people – are acceptable or not, this demonstrates a major inconsistency with Harris’s account of harm that is not apparent in Feinberg’s. Under Feinberg’s conception of harm bringing a child into existence only causes them harm if the child has a life that is not worthwhile (i.e. if they are worse off by being alive and so better off dead) and that is the only state they could be in. Given these problems, it is difficult to see why Harris’s account of harm should displace Feinberg’s.

### *The ‘Blighty Wound’ Soldier*

Why then might we be tempted to adopt Harris’s view? Harris believes that it explains situations where we supposedly harm another even though they benefit overall. An illustration he gives in support of this is that of the ‘Blighty wound’ soldier, where in the First World War soldiers would shoot themselves in the foot in order to be sent home to England.[[30]](#footnote-30) Harris states that adopting the counterfactual account would deprive us of describing these soldiers as being harmed as they are better off overall, whereas under his account they are harmed – people rationally prefer not to have foot injuries – but not wronged. Harris believes the intuitive reaction people have that the soldier is harmed undermines Feinberg’s counterfactual account.

However, assuming that Harris is correct to state that the soldier is harmed, this may not pose a problem for Feinberg’s theory. The soldier has caused themselves a serious injury so *their interest in having a healthy foot* is set back quite radically. They are likely to be permanently disabled, have exposed themselves to a serious risk of gangrene, amputation, even death and, at the very least, will be court-martialled and punished if found out. Many back in ‘Blighty’ might view them as cowardly. We might therefore be tempted to agree with Harris that the soldier is harmed.

However, Harris does not provide enough detail in this thought experiment to refute Feinberg’s theory. The soldier’s interest in being sent home, avoiding the war and surviving may not have been advanced that dramatically as they have only avoided a *risk* of death. This risk may have been small if the war was close to ending. If they survived they would have returned to ‘Blighty’ a hero. But by causing themselves injuries to avoid something that probably would not have happened anyway the soldiers might not have benefitted overall. As a result, the soldier would be worse off overall and thus harmed under Feinberg’s account. While we may have a *feeling* that the soldier is harmed, that intuition may be explained better by the counterfactual account rather than Harris’s own theory. There is simply not enough information in the thought experiment to conclusively determine whether any intuition that the soldier is harmed is better explained by Harris’s or Feinberg’s theory. If Harris put more content into this thought experiment to demonstrate that the soldier *was* benefitted overall then our intuitions might be different. After all, we might intuit that a soldier who shot themselves in August 1914 may not be harmed overall by such actions whereas one who did so in early-November 1918 would be. As a result, this thought experiment does not refute the counterfactual account of harm as it is insufficiently detailed.

### *Can One be Harmed and Benefited at the Same Time?*

But even if this is not the case it makes little sense to describe a person as harmed if they benefit overall, especially if the only way to obtain the benefit is to accept the detriments that go with it. If, for example, a life-saving operation leaves someone with a scar they are not harmed *overall* by having their life saved if it is a choice between that or leaving an unscarred corpse (though their *interest in not being scarred* may be harmed). This is so even though people have a rational preference not to be scarred. Accordingly, it is difficult to see any advantage in adopting Harris’s account over Feinberg’s. If one suffers a minor disadvantage in an otherwise overwhelming benefit, Harris’s account would render such conduct impermissible if we had a duty to avoid causing harm.

This problem is not apparent in the counterfactual theory as it is capable of seeing certain actions as setting back some interests but advancing others and is therefore more nuanced than Harris’s alternative.[[31]](#footnote-31)

## Kahane and Savulescu’s Challenge

We have seen that Harris’s theory of harm is less convincing than the one put forward by Feinberg. Might Kahane and Savulescu’s fare any better? Kahane and Savulescu state that ‘to be severely intellectually impaired, paraplegic, blind, or to die in one's 20s is to suffer, in different ways and degrees, from serious disadvantage and harm’.[[32]](#footnote-32) This list will be referred to as list (1) and it is hard to disagree with this point. Assuming blindness or dying young do not further an individual’s interests the items on list (1) will normally be considered harms according to the counterfactual account of harm.

However, Kahane and Savulescu believe the counterfactual theory ‘faces a serious problem’[[33]](#footnote-33) when one considers list (2). On this list are things such as: ‘to have less than an IQ of 160, to lack great artistic talent, or to live less than 130 years’.[[34]](#footnote-34) They maintain that these conditions could make people worse off but yet no one would describe this list ‘as instances of serious disadvantage, harm or misfortune’[[35]](#footnote-35) and state, ‘it seems absurd to describe these limitations (and the conditions that underlie them) as serious harms’.[[36]](#footnote-36) Putting someone in such a state does not appear to be equivalent to causing them harm. Consequently, Kahane and Savulescu believe that there appears to be a normative distinction between lists (1) and (2) and the aim of their paper is to determine what this distinction might be.

Kahane and Savulescu’s theory therefore rests on an intuitive distinction between list (1) and list (2). They critique several possible reasons for this before proposing that statistical normality provides the best explanation for this intuition. Accordingly, statistical normality, they believe, must be morally important in discovering whether someone is harmed. That is, as the conditions in list (1) fall below what is statistically normal putting someone in such a condition will cause them harm and as the items in list (2) are statistically normal they will not be harms. To avoid repetition I will outline their justifications for this in more detail when exploring the weaknesses of their argument in the following sections.

Under the counterfactual account of harm the things in list (2) could *theoretically* be harms. People might have an interest in having great artistic talent or living to be 130 years old, for example. Thwarting these interests would make a person worse off and so they would be harmed. However, we must remember that the counterfactual account requires, in order for an individual to be harmed, their interests to be setback in ‘the normal course of events insofar as they were reasonably foreseeable in the circumstances’.[[37]](#footnote-37) There is presently no course of conduct that could be performed that would mean a person with the conditions in list (2), things such as lacking great artistic talent or living to less than 130 years old, could have these interests furthered *in the normal course of events insofar as they were reasonably foreseeable in the circumstances*. It is not reasonable to expect anyone to administer a serum that will enable people to be as great a composer as Mozart if no such serum exists. To put someone in one of these conditions listed in (2) does not cause them harm unless there was a way that someone could, say, live that long or have such great artistic talent.

Given this, the ‘serious problems’ that Kahane and Savulescu believe the counterfactual account faces are not ones that it faces in our world at present. They are merely theoretical. And, being theoretical, any intuitions that are generated by such thought experiments are not ones that can be relied on in this world. It may be that if there was a world where it is foreseeable that people could live to be 130 years old and their lives were then cut short then people in that world would see such actions are harmful. Kahane and Savulescu appear, therefore, not to have fully grasped the nuances of the counterfactual account and this is not a promising start for their theory. Nonetheless, their arguments can be refuted in other ways and so I will ignore this flaw for the rest of this paper.

### *The Problematic First Premise*

The first problem with Kahane and Savulescu’s argument comes from their acceptance that the intuitive distinction concerning lists (1) and (2) is morally relevant for determining whether someone is harmed. Even if one concedes that people *do* have an intuition that the items on list (1) are worse than those in list (2), Kahane and Savulescu provide us with no evidence whatsoever that this intuition is, as they claim, a ‘normative’[[38]](#footnote-38) one.

The trouble with relying solely on intuitions is that they are often unreliable. If one person intuits that X is bad and another that X is permissible then relying solely on intuition does not tell us how we should proceed. The mere fact people intuit a difference between list (1) and list (2) therefore tells us nothing normative.

Kahane and Savulescu emphasise the fact that this intuition is ‘widely held.’[[39]](#footnote-39) But the idea that we should blindly follow the intuitions of the majority is unconvincing. For a start, a cursory look at history shows that the majority of people have held all sorts of questionable beliefs. At one point most people intuited that throwing ‘witches’ in ponds or owning slaves was perfectly acceptable behaviour.

Many people, for example, have an intuition that human cloning is wrong.[[40]](#footnote-40) But in an article supporting human cloning Julian Savulescu himself wrote:

[T]he fact that people find something repulsive does not settle whether it is wrong. The achievement in applied ethics, if there is one, of the last 50 years has been to get people to rise above their gut feelings and examine the reasons for a practice.[[41]](#footnote-41)

It is hard to disagree. How peculiar, then, that Savulescu and Kahane elevate their gut feelings concerning the items in (1) and (2) without fully considering whether this intuitive distinction is morally important.

After all, a non-moral explanation can be suggested for the intuitive distinction between the two lists: such intuitions could simply be a result of our evolved responses to such scenarios. Thousands of years ago our ancestors would have seen being severely intellectually impaired, paraplegic, blindness or dying in one’s twenties as undesirable because these conditions would all be things that would hinder their chances of reproducing. As these conditions would have prevented people passing on their genes, natural selection will have given us evolutionary reasons to avoid these conditions. Our evolved response to the things in list (1) is to have a gut-feeling that they are harms.

The same cannot be said of the items in list (2). To have an IQ of less than 160, to lack great artistic talent or to live less than 130 years were not only unnecessary for people to pass on their genes thousands of years ago, but they are not even required for it now. Natural selection will not have provided us with aversions to being in such circumstances as any alternative would not be available to our ancestors or particularly advantageous in enabling them to reproduce. Natural selection may have equipped us with intuitions that the items in list (1) are bad if we are to pass on our genes but those in list (2) are not bad for this purpose.

This distinction is not necessarily morally significant however. As Peter Singer has stated, ‘The direction of evolution neither follows nor has any necessary connection with, the path to moral progress’.[[42]](#footnote-42) Indeed, just because something is good at helping people pass on their genes does not mean that it is good morally.[[43]](#footnote-43)

If Kahane and Savulescu want to rely on this intuition to show that the concept of harm should be redefined then they need to present a reason why the fact people (might) maintain an intuitive distinction between list (1) and list (2) renders this distinction morally important. This is something they fail to do. Accordingly they do not provide enough evidence to convincingly conclude that it is the counterfactual concept of harm that should be changed rather than the, supposedly widely-held, intuition people have regarding their two lists. Without this, Kahane and Savulescu’s argument for the importance of statistical normality in determining whether someone is harmed rests on insecure foundations.

Kahane and Savulescu try to extricate themselves from these difficulties by stating: ‘Those who reject our premises will naturally find our argument of limited interest.’[[44]](#footnote-44) However, this is not a sufficient get-out clause for them. The burden is on the person offering an argument to show that their premises are sound, otherwise their proposition is question-begging. Kahane and Savulescu have failed to do this with their first premise and so they cannot simply dismiss any rebuttals based on this and continue to argue that statistical normality is morally important. Given, therefore, that the initial premise of Kahane and Savulescu’s theory is uncompelling, it is hard not to conclude that their account of harm is inferior to the counterfactual one.

### *Statistical Normality*

Let us now be generous and presume that the intuition we have that list (1) is worse than list (2) is a normative one. Does this mean that statistical normality provides a satisfactory account of what it means to be harmed? In this section I will show that it does not and highlight that Kahane and Savulescu’s theory of harm leads to results that are far more counterintuitive – something they place great importance on – than the counterfactual account of harm.

Imagine there is a disease that has swept the population of Ruritania. Eighty per cent of the population has it and it causes them chronic pain. It is easily curable. Twenty per cent of the population do not have the disease. In this scenario the disease that the eighty per cent suffer from is statistically normal. The mode, mean and median of people suffer from it. If what is statistically normal was to determine whether a person was harmed then people are not harmed by suffering from chronic pain even though it could be easily cured. Furthermore, if say, only forty per cent of the population had this disease then there would be nothing to prevent someone, under Kahane and Savulesu’s account of harm, injecting as many people as possible with the disease in order to make the disease statistically normal and thus not a harm. Under this theory, causing someone to be in chronic pain would not cause them harm even if doing so brought no other benefits. Such problems do not, of course, arise under the counterfactual account as we could describe these people as harmed because, by not being cured, they are worse off than they otherwise would be in the normal course of events.

If we are concerned with the interests of people there are good reasons to reject Kahane and Savulescu’s account of harm. Provided you end up being above what is statistically normal it would sanction the reduction of your welfare even when this did not improve the welfare of others. Whacking, say, a modern-day Michaelangelo over the head so that he could no longer paint something as great as the Sistine Chapel would not be to cause him harm under Kahane and Saulescu’s theory provided he could still paint better than the average person. This would be so even if no one else was benefitted by such spiteful actions.[[45]](#footnote-45) The mere fact that list (1) sometimes correlates with what is statistical normal, whereas those in list (2) do not, is not a compelling reason for concluding that statistical normality is important in determining whether someone is harmed. In contrast, Feinberg’s theory allows us to say that minor harms are still harms and avoids these logical pitfalls.

### *Diminishing Marginal Utility and the Intuitive Distinction*

I have demonstrated that Kahane and Savulescu’s argument rests on a flawed premise and that a concept of harm based on statistical normality leads to counterintuitive results. Despite this, some may be tempted to draw a distinction between the two lists that Kahane and Savulescu present. They may see being paralysed as worse than, say, lacking the ability to fly. I would not disagree. The former is worse than the latter. But the best explanation for this is not the one provided by Kahane and Savulescu. The counterfactual theory of harm may be able to *better* account for the idea that list (1) is *generally* worse than list (2) in most circumstances because of the fact of diminishing marginal utility.

If something exhibits diminishing marginal utility then, according to Greene and Baron, ‘the more of that good an individual has, the less valuable having more of it will be to that individual.’[[46]](#footnote-46) This is because one tends to put off buying goods with less utility per pound until after one has bought more essential, basic goods.[[47]](#footnote-47) Simmonds provides a good illustration of this. He states:

Expressed very simply, this theory entails that an additional £1 given to a millionaire will make a negligible contribution to his welfare, whereas £1 given to a very poor man might make a significant contribution to his welfare, enabling him, say, to buy a meal that he could not otherwise afford.[[48]](#footnote-48)

Greene and Baron performed a study which showed that the utility people place on a wide range of goods – including extended lifespan – is marginally declining.[[49]](#footnote-49) If we must accept, as Kahane and Savulescu maintain, that any difference between list (1) and list (2) is a moral one this may explain why the items in list (1) are considered worse than those in (2).

The items in list (1), things such as blindness, paraplegia or having a short lifespan, are invariably things that if they were removed would bring much greater utility than the items in list (2), things such as lacking artistic talent or not having a really long lifespan. A person who has an IQ of 75 is more likely to get a greater benefit from having their IQ increased by 10 points than someone with an IQ of 150 would. The principle of diminishing marginal utility would see the things in list (1) as ones that generally setback interests more than list (2) and this is why people might have an intuitive reaction that list (1) is worse than list (2). However, this does not mean that the items in list (2) are not harms *at all* or even, in particular circumstances, not serious harms.

Whether someone is harmed is context-specific. The fact that diminishing marginal utility provides an explanation for the intuitive distinction merely means that *generally* the items in list (2) do not make life go as bad as those in list (1) and so are *usually* minor harms. Statistical normality is therefore not the only cogent explanation for any intuitive distinction that people may have between Kahane and Savulescu’s lists – the counterfactual account of harm provides a more plausible explanation of why list (1) might be perceived as making people worse off than list (2).

Kahane and Savulescu try to get around this by arguing that ‘We can stipulate, for our purposes, that enjoyment of these conditions [in list (2)] would significantly increase wellbeing, and that they would do so to roughly the same extent that the conditions listed in list (1) decrease it.’[[50]](#footnote-50) However, this stipulation is not open to them logically. In our world it is not possible that the conditions in list (2) are as equally bad or reduce welfare to the same extent as the items in list (1) and so any intuitions that are generated as a result of this are untrustworthy. Stipulating that not being as good a playwright as Shakespeare is the equivalent in terms of setbacks to welfare as being blind is the equivalent of stipulating that two plus two equals five, or that being tortured to death is equal to having ten pounds stolen off you: it is so difficult, if not impossible, for us to even comprehend such a thing that any intuitions generated are of dubious reliability in our present world. This ‘stipulation’ is therefore not a good enough escape route for Savulescu and Kahane and they cannot simply presume that list (1) and list (2) are equally serious.

It is unsurprising, though, that Kahane and Savulescu do not tackle this problem head-on and list examples of things that *do* equally setback welfare in our world. This is because if they actually used examples that *did* increase or decrease welfare to the same extent then our intuitions would probably indicate that both lists contain harms and their whole argument would be undermined. Accordingly, Kahane and Savulescu must provide examples in their lists that actually reduce welfare to the same extent if any intuitions regarding the two lists are to be useful.

Without doing this, they cannot rebut the idea that diminishing marginal utility indicates that list (1) and list (2) are unlikely to reduce an individual’s welfare to the same extent. This means the items in list (1) will setback welfare to a greater extent than those in list (2) will and so can be perceived as more serious harms under to the counterfactual account. Kahane and Savulescu therefore do not show that the counterfactual account of harm is an inadequate theory.

## Conclusion

It has been said that harm is ‘a subject of special moral concern because harm is presumptively bad to suffer and presumptively wrong to inflict.’[[51]](#footnote-51) It is therefore essential that we adopt a definition of the concept that is philosophically coherent. The counterfactual account of harm is capable of withstanding such scrutiny and this article has defended it from two challenges. It has been shown that the theories of harm proposed by Harris, Kahane and Savulescu are internally inconsistent and contain a number of flaws. Both the ‘harmed state’ and the ‘statistical normality’ accounts lead to conclusions that, even if their respective authors were willing to accept them, are unlikely to be satisfactory for anyone else. As a result, the attacks directed by Harris, Kahane and Savulescu towards the counterfactual theory are fail to hit their target. Instead, like the Blighty Wound Soldier they shoot themselves in the foot.

1. \* I am very grateful to Professor Rebecca Bennett, Dr Sarah Devaney and Dr Nicola Williams for helpful comments on an earlier draft of this article. Please cite the version available at (2016) 30 *Bioethics* 251.

   See for example the fact that non-maleficence is one of the four principles of bioethics outlined in Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* 7th Edn. (Oxford: Oxford University Press, 2013). [↑](#footnote-ref-1)
2. John Stuart Mill, ‘On Liberty’ in John Gray (Ed.), *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991) 14 [↑](#footnote-ref-2)
3. See Stephen Perry, ‘Protected Interests and Undertakings in the Law of Negligence’ (1992) 42 *University of Toronto Law Journal* 247. [↑](#footnote-ref-3)
4. Joel Feinberg *Harm to Others (The Moral Limits of the Criminal Law Volume I)* (Oxford: Oxford University Press, 1984). [↑](#footnote-ref-4)
5. For the most recent restatement of this theory of harm see Nicola Williams and John Harris, ‘What is the Harm in Harmful Conception? On Threshold Harms in Non-Identity Cases’ (2014) 35 *Theoretical Medicine and Bioethics* 337. [↑](#footnote-ref-5)
6. John Harris, *Clones, Genes and Immortality* (Oxford: Oxford University Press, 1998) 110. [↑](#footnote-ref-6)
7. Guy Kahane and Julian Savulescu, ‘The Concept of Harm and the Significance of Normality’ (2012) 29 *Journal of Applied Philosophy* 318. [↑](#footnote-ref-7)
8. Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984) 359. [↑](#footnote-ref-8)
9. Rebecca Bennett, ‘When Intuition Is Not Enough. Why the Principle of Procreative Beneficence Must Work Harder to Justify its Eugenic Vision’ (2013) 28 *Bioethics* 447. [↑](#footnote-ref-9)
10. It is worth mentioning that Harris, Kahane and Savulescu all support an obligation for parents to avoid selecting congenitally disabled children. See Julian Savulescu and Guy Kahane, ‘The Moral Obligation to Create Children with the Best Chance of the Best Life’ (2009) 23 *Bioethics* 274 and Harris, *Clones, Genes and Immortality* 110. [↑](#footnote-ref-10)
11. This paper is not directly concerned with issues of what constitutes causation or causing harm entails. Though for an excellent recent discussion see Sarah Green, *Causation in Negligence* (Oxford: Hart Publishing, 2015). [↑](#footnote-ref-11)
12. Feinberg, *Harm to Others* 105. [↑](#footnote-ref-12)
13. Joel Feinberg, ‘Wrongful Life and the Counterfactual Element in Harming’ (1986) 4 *Social Philosophy and Policy* 145, 153. [↑](#footnote-ref-13)
14. Ibid., 149. [↑](#footnote-ref-14)
15. Ibid., 151. [↑](#footnote-ref-15)
16. For example, if one lived in a society, Ruritania, where everyone was much more intelligent than the people of, say, Manchester then an averagely intelligent person in Manchester could be harmed by living in that condition in Ruritania, even if they would not be considered harmed with that condition in Manchester. See Tuija Takala, ‘Gender, Disability and Personal Identity’ in Kristjana Kristiansen, Simo Vehmas and Tom Shakespeare (Eds.), *Arguing about Disability: Philosophical Perspectives* (Abingdon: Routledge, 2008). [↑](#footnote-ref-16)
17. Feinberg, ‘Wrongful Life’ 149. [↑](#footnote-ref-17)
18. Joel Feinberg, ‘Harm and Offense’ in L.C. Becker and C.B. Becker (Eds.), *Encyclopaedia of Ethics Volume II* (London: Routledge, 2001) 652. [↑](#footnote-ref-18)
19. R. M. Hare, *Essays on the Moral Concepts* (London: The Macmillan Press Ltd., 1972) 97. [↑](#footnote-ref-19)
20. Ibid. 98. [↑](#footnote-ref-20)
21. Although his ‘harmed state’ account has been criticised before, these critiques have not centred on its failure to displace the account of harm given by Feinberg. See Robert Sparrow, ‘Harris, Harmed States, and Sexed Bodies’ (2011) 37 *Journal of Medical Ethics* 276 and Bennett, ‘When Intuition is Not Enough’. [↑](#footnote-ref-21)
22. Harris, *Clones, Genes and Immortality* 109. [↑](#footnote-ref-22)
23. Rebecca Bennett and John Harris, ‘Are There Lives Not Worth Living? When is it Morally Wrong to Reproduce?’ in Donna Dickenson (Ed.), *Ethical Issues in Maternal-Foetal Medicine* (Cambridge: Cambridge University Press, 2002) 325. [↑](#footnote-ref-23)
24. John Harris, *Enhancing Evolution: The Ethical Case for Making People Better* (New Jersey: Princeton University Press, 2007) 91. [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. Harris, *Clones, Genes and Immortality* 109. [↑](#footnote-ref-26)
27. David Benatar, ‘Why it is Better Never to Come into Existence’ (1997) 34 *American Philosophy Quarterly* 345. [↑](#footnote-ref-27)
28. Harris, *Enhancing Evolution* 94. [↑](#footnote-ref-28)
29. Iain Brassington, ‘Enhancing Evolution and *Enhancing Evolution*’ (2010) 24 *Bioethics* 395, 399. [↑](#footnote-ref-29)
30. Harris, *Clones, Genes and Immortality* 113-114. [↑](#footnote-ref-30)
31. It may be the case, however, that Harris is equivocating with his use of the word ‘harm’. In certain scenarios where Harris describes someone as not being *harmed*, he conceded that they may be *wronged* (see *Clones, Genes and Immortality* 116-117). However, he provides us with no convincing reasons for why his terminology should be used. Indeed, his definition of harm removes all negative connotations that most people usually associate with the concept. [↑](#footnote-ref-31)
32. Kahane and Savulescu, ‘The Concept of Harm’ 318. [↑](#footnote-ref-32)
33. Ibid., 319. [↑](#footnote-ref-33)
34. Ibid. [↑](#footnote-ref-34)
35. Ibid. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Feinberg. ‘Wrongful Life’ 153. [↑](#footnote-ref-37)
38. Kahane and Savulescu, ‘The Concept of Harm’ 319. [↑](#footnote-ref-38)
39. Ibid. 320. [↑](#footnote-ref-39)
40. B.A. Bates et al, ‘Warranted Concerns, Warranted Outlooks: A Focus Group Study of Public Understandings of Genetic Research’ (2005) 60 *Social Science and Medicine* 331, 333. [↑](#footnote-ref-40)
41. Julian Savulescu, ‘Should we Clone Human Beings? Cloning as a Source of Tissue for Transplantation’ (1999) 25 *Journal of Medical Ethics* 87, 93. [↑](#footnote-ref-41)
42. Peter Singer, ‘Ethics and Intuitions’ (2009) 9 *The Journal of Ethics* 331, 342. [↑](#footnote-ref-42)
43. Alternatively, we may simply be that we have been educated to see list (1) as harms whereas, given alternatives to the things in list (2) are not something any of us will have encountered growing up, we have not been taught to see the latter as harms. [↑](#footnote-ref-43)
44. Kahane and Savulescu, ‘The Concept of Harm’ 320. [↑](#footnote-ref-44)
45. Kahane and Savulescu’s theory appears to support a world similar to that outlined in Kurt Vonnegut’s dystopian satire ‘Harrison Bergeron’, which imagines a society where the Handicapper General enforces the state’s equality laws by handicapping people to ensure that no one is allowed to be smarter, better-looking, or more physically able than anyone else. See Kurt Vonnegut, *Welcome to the Monkey House* (London: Vintage Books, 1994) 7. [↑](#footnote-ref-45)
46. Joshua Greene and Jonathan Baron, ‘Intuitions about Declining Marginal Utility’ (2001) 14 *Journal of Behavioural Decision Making* 243. [↑](#footnote-ref-46)
47. Ibid., 244. [↑](#footnote-ref-47)
48. Nigel Simmonds, *Central Issues in Jurisprudence* 4th Edn. (London: Sweet and Maxwell, 2014) 30-31. [↑](#footnote-ref-48)
49. Greene and Baron, ‘Intuitions about Declining Marginal Utility’ 248. [↑](#footnote-ref-49)
50. Kahane and Savulescu, ‘The Concept of Harm’ 321. [↑](#footnote-ref-50)
51. Gregory Keating, ‘When is Emotional Distress Harm?’ in Stephen Pitel, Jason Neyers and Erika Chamberlain (Eds.), *Tort Law: Challenging Orthodoxy* (London: Hart Publishing, 2013) 276. [↑](#footnote-ref-51)