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In Defense of Non-Comparative Harm

Taylor-Fergusson, Rachel

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In Defense of Non-Comparative Harm

by

Rachel Taylor-Fergusson

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ABSTRACT: *In Defense of Non-Comparative Harm*

(Rachel Taylor-Fergusson)

The typical account of harm, the Counterfactual Comparative Account of Harm, provides an assessment of harm as causing an individual to be “worse off” than they otherwise would have been. This account fails to correctly identify harm in a variety of cases. Non-Identity Problem cases are procreation cases where an individual is born with a disadvantage or into a poor environment, but this account cannot identify procreative harm, as the individual otherwise would not exist. Preemption Problem cases of overdetermined harm, but this account cannot identify the harm, as a similar harm would otherwise occur. Omission Problem cases outline a failure to benefit, which identifies harm where it should not, as the individual is worse off without the benefit. The Counterfactual Comparative Account of Harm fails to identify or over identifies harm. An alternative account of harm, the Non-Comparative Account, avoids these problems. I advance Elizabeth Harman's account, which assesses harm on the grounds that an individual is caused to be in a "bad state". Harman's list of bad states is: "pain, mental or physical discomfort, disease, deformity, disability, or death" (Harman, 2009, p. 139). Harman's account can overcome the problems facing the Counterfactual Comparative Account. However, Harman's account requires modification to avoid perpetuating an ableist ideology based on an outdated Medical Model of Disability. I suggest, instead, adopting a Social Model of Disability, then modifying Harman's list to include only states that are intrinsically bad (bad by its very nature) and exclude those that are instrumentally bad (bad because of what it brings about). As such, I exclude disease, deformity, and disability from Harman's list.

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CHAPTER 1: Introduction

Harms and benefits are critical components of morality. They help to establish the moral status of actions. Actions have many properties, spatial and temporal properties, as well as relations to other actions or events. Harms and benefits are one type of result of an action.

Philosophically speaking, harms and benefits are normatively salient properties of actions. Harm has a negative moral valence, whereas benefit has a positive one. An action with the property of harm brings badness to an individual, whereas an action that benefits them brings them goodness. As such, harm implies a negative appraisal of an action, which in a normative context links it to shame, responsibility, and impermissibility, among other concepts. Harm provides a moral reason against an action. In a legal context, an action judged to have caused harm is linked with guilt, punishment, liability, and compensation. Harm is important, both conceptually and practically; for this reason, we must have a correct account of harm.

The standard analysis of harm is: Action A harms person P, if and only if action A makes person P worse off.¹ This analysis is essentially comparative; it asks that we compare the agent's state after the action with some other alternative state. If the agent is "worse off" in the actual state, the action harms them.

There are several suggestions for what the correct comparator might be. The Temporal Comparative Account of Harm uses a comparative baseline that references

¹ David Boonin, *The non-identity problem and the ethics of future people*, Oxford University Press, USA, (2014): 54.

the individual prior to the action.² The Moralized Comparative Account of Harm uses a comparative baseline that references how the individual ought to be.³ The most common account is the Counterfactual Comparative Account of Harm, which uses a comparative baseline that references how the individual otherwise would have been.⁴

“If I vandalize your car and you are asked why you think that my act has harmed you, you are likely to reply by pointing to the various ways in which my act has made you worse off than you would have been had I not vandalized your car. If you demand compensation for the harm that my act has caused you and you are asked what you think would be a fair amount, moreover, you are likely to describe a settlement that would leave you no worse off than you would have been had I not done what I did. The goal of compensating you for the harm done to you, that is, seems to erase the harm to the extent that doing so is possible. And if erasing the harm done to you amounts to restoring you to the condition that you would now be enjoying had my act not occurred, then the harm itself seems to amount to my making you worse off than you would have been had my act not occurred in the first place.”⁵

The Counterfactual Comparative Account of Harm is intuitively appealing. In fact, this account produces the correct judgement in many cases. Although it often provides an accurate assessment of harm, this account faces grave problems.

In Chapter 2, I outline the Counterfactual Comparative Account of Harm and provide two types of problems with this account. The first type of problem with this account is a fundamental one, and the second type of problem is a technical one.

The fundamental problem is that this account relies on a comparable understanding of harms and benefits. In this account, harms and benefits are the same

² Boonin, (2014): 57-61.

³ Boonin, (2014): 61-65.

⁴ Boonin, (2014): 52-53.

⁵ Boonin, (2014): 52.

type and are compatible to be compared to one another. An action that simultaneously harms and benefits an individual is assessed as an all-things-considered harm or all-things-considered benefit. This result is then compared to how the individual would otherwise have been, all-things-considered, had the action not occurred.

A second type of problem, technical problems, arise as harm cannot be properly identified in all the cases in which it occurs. The three technical problems are: the Non-Identity Problem, the Preemption Problem, and the Omission Problem. The Non-Identity Problem arises when a procreative action brings about the birth of an individual with a flawed but worthwhile existence. This account is unable to capture the harm that is a result of the procreative action, as the individual is not made worse off than they otherwise would have been because in the relevant counterfactual scenario the child does not exist. The Preemption Problem arises when a harmful event occurs because of one of two actions. The harm is overdetermined; if the first action had not occurred, then the event would have occurred as a result of the second action. This account is unable to capture the harm resulting from the first action, as the harmed individual is not “worse off” than they otherwise would have been. The Omission Problem arises as a failure to benefit is assessed as a harm due to the comparable understanding of harms and benefits. This account captures harm where it should not, as failure to benefit is distinct from harm, but this account is unable to split the two and provides an all-things-considered assessment of harms and benefits.

I argue there is a need for an alternative account of harm. An alternative account of harm is: Action A harms person P, if action A causes person P to be in a bad state.⁶ This analysis is non-comparative. Rather than compare the agent's state after the action with some other, alternative state, it asks that we determine if the agent has suffered an objective harm. If the agent is in “a bad state” as a result of the action, then the agent has objectively suffered a harm and the action harmed them.

The Non-Comparative Account abandons the need for a comparison between states of affairs to explain harm. It does not explain harm as being made worse for someone.⁷ Nor does it identify harm relative to how the agent otherwise would have been. Instead, it offers an alternative analysis, an objective one. On this view, an action harms an agent if it causes that agent to come to be in a “bad state.” The central question for this approach is—what is a “bad state,” objectively speaking?

In Chapter 3, I introduce the Non-Comparative Account of Harm. Boonin writes: “[t]he basic idea underlying this account is intuitively plausible: some states are bad for a person to be in, and an act that causes a person to be in such a state thereby harms that person.”⁸ Harm is identified by causing an individual to be in a bad state, rather than compared to how they otherwise would have been.

⁶ Boonin, (2014): 72. It is important to note that the Non-Comparative Account denies the “worse off” condition of harm is a necessary one. The Non-Comparative Account can accept the Counterfactual Comparative Account of Harm, and “worse off”, as one way of harming someone, but it is not the only way.

⁷ Elizabeth Harman, “Can we harm and benefit in creating?”, *Philosophical Perspectives*, 18, (2004): 96. Harman does not address whether or not notions of good or bad derive from better or worse, but she does argue that the Counterfactual Comparative Account of Harm is mistaken in believing that the only point of comparison is what otherwise would have been.

⁸ Boonin, (2014): 72.

The most viable version of the Non-Comparative Account of Harm is presented by Elizabeth Harman. A bad state, according to Harman, is identified as items on her list: “pain, mental or physical discomfort, disease, deformity, disability, or death.”⁹ Harman’s Non-Comparative Account is a causal account, and she writes: “[o]ne harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability or death.”¹⁰ Although Harman’s account focuses on Non-Comparative Harm, she does make reference to wrongfulness. Unlike the net-harm solution offered by the Counterfactual Comparative Account, the Harman’s account first identifies harm, then requires an additional step to weigh the reasons in favour of the action and the reasons against the action (including the reason provided by the harm), as well as consideration of circumstances that would justify the harm, to assess moral permissibility and moral impermissibility. My focus is on the assessment of harm. Although I later argue, in Chapter 6, that Harman’s list of bad states is problematic, and in need of modification, overall, I believe her account is salvaged and provides a strong foundation for a Non-Comparative Account.

In Chapter 4, I outline the most serious technical problem facing Harman’s Non-Comparative Account of Harm, a problem made plain by the counter example I call Appendix Surgery. In this case, a doctor performs life-saving surgery by removing a swollen appendix, which would have ruptured and killed the patient.¹¹ This technical problem provides a reason to favour the Counterfactual Comparative Account of Harm,

⁹ Elizabeth Harman, “Harming as causing harm” In *Harming future persons*, Springer, Dordrecht, (2009): 139.

¹⁰ Harman, (2009): 139.

¹¹ Harman, (2004): 91, Boonin, (2014): 73

as not performing the surgery makes the patient worse off than they would have been if the doctor had acted.

The Non-Comparative Account of Harm appears to get the wrong result in this case, as the doctor's action results in bodily damage and post-operative pain, either of which are enough to cause the patient to be in a bad state. Harman's account of harm is: "[o]ne harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability or death,"¹² and the doctor's action results in harm on Harman's account. Harman suggests accepting that the surgery is a harm, as it causes significant bodily damage.¹³

In Chapter 4, I also provide an explanation of how Harman's version of the Non-Comparative Account would respond to the problems facing the Counterfactual Comparative Account. The first type of problem, the fundamental problem, facing the Counterfactual Comparative Account, I outlined in Chapter 2, is the assumption of a comparable understanding of harms and benefits. The Non-Comparative Account can distinguish between harms and benefits, identifying both the harm and the benefit an individual receives when they are delivered simultaneously. Harman's account does not rely on a comparable understanding of harms and benefits, as in some cases, even if the individual is provided with an all-things-considered benefit, the action may still have stronger reasons against it. Harman writes: "the reasons to benefit do not outweigh the reasons against the harm, though the benefits themselves outweigh the harm."¹⁴

¹² Harman, (2009): 139.

¹³ Harman, (2004): 91.

¹⁴ Harman, (2004): 100.

Harman's Non-Comparative Account does not assume harms and benefits are comparable.

The second type of problem, the technical problems, facing the Counterfactual Comparative Account, I outlined in Chapter 2, are the Non-Identity Problem, the Preemption Problem, and the Omission Problem. In Chapter 4, I then provide Harman's non-comparative assessment of the three technical problems outlined in Chapter 2, either through her direct reference or supported inference. The Non-Identity Problem arises when a procreative action brings about the birth of an individual with a flawed but worthwhile existence, but the individual is not made worse off than they otherwise would have been. The Counterfactual Comparative Account does not identify the harm, as the child does not exist in the relevant counterfactual scenario. The harm can be identified by Harman's version of the Non-Comparative Account, as it does not rely on a comparative analysis, it simply identifies when an individual is born into a bad state. The Preemption Problem arises when a harmful event is overdetermined. The Counterfactual Comparative Account does not identify the harm, as the harmed individual is not "worse off" than they otherwise would have been. The harm can be identified by Harman's version of the Non-Comparative Account, as it does not rely on a comparative analysis, it simply identifies when an individual is caused to be in a bad state. The Omission Problem arises as a failure to benefit is assessed as a harm due to the comparable understanding of harms and benefits, and the all-things-considered assessment of harm. The Counterfactual Comparative Account identifies harm where it should not, as failure to benefit is distinct from harm, but an all-things-considered assessment averages out the harms and benefits. The harm is not identified in cases of

failure to benefit by Harman's version of the Non-Comparative Account but is identified in cases of a morally relevant harmful omissions.

Many philosophers argue that the Non-Comparative Account of Harm faces problems as serious as those faced by the Counterfactual Comparative Account of Harm. In Chapter 5, I outline the additional technical problems facing Harman's version of the Non-Comparative Account of Harm: the Sub-Threshold Problem, the Sur-Threshold Problem, and the Death Problem.

The Sub-Threshold Problem arises as the Non-Comparative Account of Harm is unable to distinguish between "bad states" and "worse states". If an action improves an individual's state from a worse state to a bad state, better than it was but still below the threshold, then the Non-Comparative Account of Harm identifies the action as causing a harm. Intuitively, one does not cause an individual harm by improving their state, even if they cannot improve it past the threshold. This is not a problem for Harman's account, as it fails to meet the causal condition of her view.

The Sur-Threshold Problem arises as the Non-Comparative Account of Harm is unable to distinguish between "good states" and "better states". If an action worsens an individual's state from a better state to a good state, worse than it was but still above the threshold, then the Non-Comparative Account of Harm does not identify the action as causing a harm. Intuitively, one does cause an individual harm by worsening their state, even if they do not cause it to fall below the threshold. Harman's account can avoid this problem. In some cases, the individual fails to be in a bad state, and does not meet Harman's condition of harming. In other cases, the Sur-Threshold Problem assumes an

all-things-considered assessment of well-being rather than a harm on a specific dimension of well-being.

The Death Problem arises as the Non-Comparative Account of Harm is unable to account for the harm of death. After the event of an individual's death, the individual is not in a state, and therefore not in a bad state. It is important to note that the harm of death is also a problem for the Counterfactual Comparative Account of Harm, and in this chapter, I describe how death is a problem for both. Harman includes death on her list of bad states, and I infer that she takes early death to be a bad state as it is not in the best interest of an individual.¹⁵

Although Harman's account is the most promising version of a Non-Comparative Account of Harm, her version faces a major criticism, which is her inclusion of disability on her list of bad states. Her assumption that disability is a bad state is problematic, and my contribution to advancing a viable account of Non-Comparative Harm is presented in Chapter 6, where I argue for a modification to Harman's account.

In this chapter, I outline the critique of Harman's account made by Elizabeth Barnes: Harman's inclusion of disability on her list of bad states.¹⁶ There are two models of understanding disability: the Social Model, which describes how society causes people to face barriers as a result of their limitations, and the Medical Model, which describes the limitations faced by people as a result of their pathology. Harman's account aligns with the outdated and problematic Medical Model, as she offers a

¹⁵ Harman, (2004): 97., Harman, (2009): 139.

¹⁶ Elizabeth Barnes, *The Minority Body: A Theory of Disability*, Oxford University Press: New York, (2016): 61.

baseline from which one can understand a bad state, which are “worse in some way than the normal healthy state for a member of one’s species.”¹⁷ In this chapter, I also outline Shelly Kagan’s three ways in which something can be bad for a person: intrinsically (bad by its very nature), instrumentally (bad because of what it brings about), and comparatively (bad because of what otherwise could have been).¹⁸

In this thesis I will add to that corpus by offering a novel response to an important contemporary criticism of the dominant non-comparative view, that of Elizabeth Harman. Harman’s account is criticized as being “ableist.” I take the critique on board, and I suggest an amendment to the view to avoid the ableism, one that appeals to the difference between intrinsic and instrumental harms. I propose modifying Harman’s list of bad states, which must be significantly edited in order to avoid capturing instrumental harms. I argue for the following modification to Harman’s account: one harms someone if one causes an intrinsically bad state, such as causing him pain, mental or physical discomfort, or death. I conclude Chapter 6 with the application of my modified version of Harman’s Non-Comparative Account of Harm. This modification to Harman’s view produces the correct results for a complete and cohesive account of harm.

¹⁷ Harman, (2009): 139.

¹⁸ Shelly Kagan, *Death*, Yale University Press, (2012): 211.

CHAPTER 2: the Counterfactual Comparative Account of Harm

The traditional account of harm is comparative. A Comparative Account of Harm draws a comparison between the outcome of an action and some other outcome. An act causes harm if its result is “worse” than the comparator. Boonin writes: “to say that an act harms a person involves identifying two distinct states of affairs and then comparing them in terms of one’s being worse than the other for the person in question.”¹⁹ A harmful action then is one that causes an individual to be worse off in some way than some other possible way they might be. What is the correct baseline for comparison?

The standard approach, called the Counterfactual Comparative Account of Harm, uses a comparative baseline of what would have come about if the action had not occurred. Boonin writes: “The Counterfactual Account employs a particular baseline in making the comparison: it asks whether the state of affairs that results from performing the act is worse for the person in question than the state of affairs that would have resulted had the act not been performed.”²⁰ The typical account of harm is, therefore, “not simply comparative, but counterfactually comparative.”²¹

Some philosophers argue that the problems with the Counterfactual Comparative Account of Harm are fatal, but do not want to abandon the comparative model altogether.²² Suggestions have been put forward for alternative versions of the

¹⁹ Boonin, (2014): 54.

²⁰ Boonin, (2014): 54.

²¹ Boonin, (2014): 54.

²² Boonin, (2014): 57-61.

Comparative Account of Harm, each of which present a different comparative baseline.²³

I argue that the typical comparative view is problematic in two ways: firstly, due to its reliance on a comparable understanding of harms and benefits, a fundamental problem with the comparison method itself, and secondly, the counterfactual comparator is problematic in a number of cases.

The Comparable Understanding of Harms and Benefits

The first type of problem that the Counterfactual Comparative Account faces is a fundamental problem: it relies on an understanding of harms and benefits as “comparable.”²⁴ Comparability, in this sense, is to be able to make judgements about the combination of the harms and benefits in a scenario, thus determining if the individual is “better off” or “worse off” than the other. A comparable understanding of harms and benefits is the process of comparing harms and benefits, and reliably coming to a decision of better or worse. Some philosophers, such as Seana Shiffrin, have a stronger claim about the fundamental problem faced by the Counterfactual Comparative Account; not only are harms and benefits comparable, but they are commensurable. Shiffrin writes:

²³ Boonin, (2014): 57-65. Boonin outlines The Temporal Comparative Account of Harm and the Moralized Account of Harm as two alternatives that do not use a counterfactual baseline for the comparison.

²⁴ Seana Shiffrin, “Wrongful life, procreative responsibility, and the significance of harm”, *LEG*, 5, 117, (1999): 121. Shiffrin uses the phrase “the symmetrical model of harms and benefits”, but I use the phrase “the comparability of harms and benefits” to avoid confusion with another area of work “the asymmetry between harming and benefitting.” The comparability of harms and benefits distinguishes harms as a different type of thing than benefits. The asymmetry between harming and benefitting identified a stronger moral obligation to avoid harming than to provide benefits.

“many regard harms and benefits as though they represent two ends of a scale, like the scale of positive and negative numbers. Benefits are thought to be just like harms, except that harms are bad and benefits are good... if [an individual] has ascended the scale... then he has been benefitted. If he moves down, then he had been harmed. Either way, one arrives at an all-things-considered judgement that either harm or benefit (but not both) has been bestowed.”²⁵

To illustrate the Counterfactual Comparative assessment and the comparable understanding of harms and benefits, consider the following case:

Rescue: Clay is drowning. Andy jumps into the water to rescue Clay. In the process of pulling Clay to shore, and saving his life, Andy inadvertently breaks Clay's arm.²⁶

Andy's act of saving Clay's life is an all-things-considered benefit. Using Shiffrin's analogy of the scale of positive and negative numbers, suppose that breaking an individual's arm moves them down the scale by two units, while saving an individual's life moves them up the scale by four units. The end result would be two units of benefit. Some would argue that in Rescue, Andy's act harmed Clay in one respect, breaking his arm, and benefitted him in a more significant respect, saving his life. Others would argue that in Rescue, a life-or-death scenario, Clay's broken arm is not a harm at all, and Andy simply benefitted Clay by saving his life. The Counterfactual Comparative Account of Harm is only able to provide an all-things-considered assessment of an action, as it relies on a comparable understanding of harms and benefits, which it then compares to an all-things-considered assessment of what otherwise would have

²⁵ Shiffrin, (1999): 121.

²⁶ I have expanded the example that Seana Shiffrin presents, inspired from Joel Feinberg's liability assessing analogy of a rescue case in Shiffrin, (1999): 120. Shiffrin argues that “the symmetrical model of harms and benefits” is mistaken in Shiffrin, (1999): 121.

occurred. Clay is better off than he otherwise would have been, so Andy's action does not result in harm.

The comparable understanding of harms and benefits can be challenged with compelling problem cases. Elizabeth Harman provides two cases, both which produce an all-things-considered benefit, but the subject is clearly harmed.²⁷ Consider the following cases:

“Rape: A woman is raped, becomes pregnant, and ends up raising the child. The woman is remarkably able to separate the trauma of the rape from her attitude to the child, and they have a normal and healthy parent-child relationship. The woman's life is better, due to the value to her of the relationship with her child, than it would have been if she had not been raped, even taking into account the trauma of the rape. This woman loves her child. She does not wish that she had not been raped, because if she had not been raped, then her child would not exist.”²⁸

“Nazi Prisoner: A man was imprisoned in a Nazi concentration camp, where he suffered many harms. But his experience in the camp enriched his character and deepened his understanding of life, such that overall his life was better than it would have been had he not been imprisoned in the camp. He does not wish that the Nazis had not imprisoned him, because he so values what he gained from this experience.”²⁹

²⁷ Harman notes that these cases are highly unlikely, but that they are possible in Harman, (2004): 99.

²⁸ Harman uses this as a counterexample to the No Regret argument, which is that the subject does not regret the action and therefore is not harmed by it in Harman, (2004): 99. I use it here to dispute the comparable understanding of harms and benefits, which is a necessary component of the worse off condition.

²⁹ Harman also uses this as a counterexample to the No Regret argument in Harman, (2004): 99. This case was originally used by James Woodward, “The Non-Identity Problem,” *Ethics*, 96: 804–31, (1986). Woodward writes: “It seems wildly counterintuitive to suggest that it follows from [the overall benefit to the man] that the Nazis did not really wrong [him] or violate his rights.” Woodward, (1986): 809. I use it here to dispute the comparable understanding of harms and benefits, which is presented as a necessary component of the worse off condition.

In both cases, the action is a necessary condition of the subject's improved life. Had the woman not been raped, she would not have received the benefit of the valued relationship with her child. Had the man not been imprisoned, he would not have received the benefits of enriched character and deepened understanding of life. Neither the woman nor the man are worse off than they otherwise would have been. Neither case has met the necessary condition of harm set by the Counterfactual Comparative Account of Harm. Are we to say that they have not been harmed? Certainly not! Rather, I argue that these cases illustrate that harms and benefits are not comparable. These problem cases show that the harm is not removed just because the individual is bestowed a larger benefit. The Counterfactual Comparative Account is unable to capture the mistaken understanding of the comparability between harms and benefits, which is the first type of problem with this account.

Technical Problems With the Counterfactual Comparator

In addition to the fundamental problem regarding comparability between harms and benefits, the Counterfactual Comparative Account of Harm faces another type of problem. It faces a set of technical problems in which it fails to capture the harm or identifies harm where it should not. The set of technical problems are: the Non-Identity Problem, the Preemption Problem, and the Omission Problem.

The Non-Identity Problem

The Non-Identity Problem arises when a procreative action brings about the birth of an individual with a flawed but worthwhile existence. The procreative action does not harm the child, as the child is not worse off than they otherwise would have been, as they otherwise would not exist. In the counterfactual scenario, when the procreative

action does not occur, there is no child, and there is no reference point for comparison.

Consider Parfit's case:

"*The 14-Year-Old Girl*. This girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout this child's life, his life will, predictably, be worth living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life... We cannot claim that this girl's decision was worse for her child. What is the objection to her decision? This question arises because, in the different outcomes, different people would be born. I shall therefore call this *the Non-Identity Problem*."³⁰

The choice of the 14-year-old girl to have a child appears to be bad for the child, as he is given a bad start in life. This particular child would not otherwise exist, and therefore is not worse off than he otherwise would have been. The plausibility of Parfit's case has been critiqued, and Bonnie Steinbock has introduced several unlikely conditions that must be met, such as: the girl is fully responsible for the conception of the child as she has chosen not to use contraception, was not a victim of an imposed sexual relationship, and is aware that she will make a better mother if she waits.³¹ Steinbock implies that Parfit's example misses the social inequity that leads to most unplanned pregnancies of 14-year-old girls but suggests accepting the thought experiment.

Typically, Non-Identity Problem cases involve the creation of an individual with a flawed existence, often a with significant impairment or into a bad situation, but their life is overall a net benefit. What if a child is born with a life that is not a net benefit? What if the life is not worth living? Consider the following case:

"The Wretched Child: Some woman knows that, if she has a child, he will be so multiply diseased that his life will be worse

³⁰ Derek Parfit, *Reasons and Persons*, Oxford: Clarendon Press, (1984): 358-359.

³¹ Steinbock, "Wrongful Life and Procreative Decisions," in M. Roberts and D. Wasserman (eds.), (2009): 167-168.

than nothing. He will never develop, will live for only a few years, and will suffer pain that cannot be wholly relieved.”³²

This case, unlike typical Non-Identity Problem cases, illustrates the creation of a child with a life not worth living. I take procreative action resulting in the creation of a life which falls below the threshold of “a life worth living” to be indisputably harmful procreation. The Wretched Child is an example of such a case. This illustrates a problem with the Counterfactual Comparative Account of Harm, as it implies that, even in a case where the child’s life is not worth living, the procreative action does not harm the child, as the child is not worse off than he otherwise would have been. This example cannot be assessed by the Counterfactual Comparative Account, because in the relevant counterfactual scenario the child does not exist. A child with a life not worth living cannot be coherently said to be worse off than he otherwise would have been when the counterfactual scenario is non-existence.

Typical examples of the Non-Identity Problem focus on unlikely cases, which can be thought to be a philosopher’s puzzle. It is important to recognize that although the Non-Identity Problem is philosophical interesting, it also had significant moral implications, particularly in our treatment of non-human animals.

The philosopher’s puzzle of the Non-Identity Problem is made clear in extreme thought experiments such as Kavka’s Slave Child and Harman’s Temporary Condition. The example Kavka presents of the Slave Child is: a couple is offered \$50,000 to produce a child for a wealthy man who will keep the child as a slave, and the child

³² Parfit, (1984): 391. Parfit does not use this example to illustrate a problem with the Counterfactual Comparative Account of Harm, but rather as an example of “the alleged asymmetry.” I use it here as a Non-Identity Problem case that demonstrates a terrible life, which some would say is harm to a child.

otherwise would not have been born.³³ The example Harman presents of the Temporary Condition is: a woman wants to have a child, but she has a temporary condition and if she conceives now, the condition will cause her baby to be born deaf. If she waits, she will conceive a different baby who will be born hearing, but she does not wait and conceives now.³⁴

The Non-Identity Problem is more than a philosopher's puzzle when it occurs in non-human animal cases. While a wide range of literature has been developed exploring the Non-Identity Problem in human cases,³⁵ including direct cases and population ethics cases,³⁶ little has been developed in cases involving animals.³⁷ I intentionally include non-human cases of the Non-Identity Problem because these cases demonstrate how frequently this problem occurs. While the philosopher's puzzle of the human cases is intellectually interesting, the non-human cases demonstrates that this problem is an applied ethics problem. Even the most counterintuitive case non-human animal cases seem unable to overcome the Non-Identity Problem. Consider the following selective animal breeding cases:

³³ Gregory S. Kavka, "The Paradox of Future Individuals," *Philosophy & Public Affairs*, 11, (1981): 100-101.

³⁴ Harman, (2004): 94.

³⁵ Melinda A. Roberts, "The Nonidentity Problem", *The Stanford Encyclopedia of Philosophy* (Summer 2019 Edition).

³⁶ Boonin distinguishes between "Bad Condition" and "Bad Event" cases, which roughly correlate with direct and indirect (population ethics) Non-Identity Problem cases respectively in Boonin, (2014): 8. The cases I focus on are the direct version cases, which is when a child is born into a bad condition (of a 14-year-old girl, as a slave, deaf, etc.).

³⁷ Clare Palmer, "Does Breeding a Bulldog Harm it? Breeding, Ethics and Harm to Animals." *Animal Welfare-The UFAW Journal*, 21(2), (2012): 157.

The Brachycephalic Dog: Brachycephalic (flat-faced) dogs are bred to have short muzzles and noses. These breeds include English bulldog,³⁸ French bulldog, Pug, Pekingese and Boston terrier, and are likely to have difficulty breathing.³⁹ Some of these dogs require airway opening surgeries

The Sphynx Cat: The sphynx (hairless) cat is bred to have a hairless body. This breed is likely to have skin problems and is sensitive to cold weather and sun.⁴⁰

Breeding practices in these cases are not accidental; the animal is intentionally selected for the disenhanced feature, which, I would argue, is attributed to human partiality. The Brachycephalic Dog is bred specifically to appeal to the owner's preference for an adorable, expressive flat-faced dog. Likewise, the Sphynx Cat, falsely believed to be hypoallergenic,⁴¹ is bred for enamoured owners. Given the increased likelihood of poor health outcomes for the individual animals, arguments have been made against these breeding practices.⁴² Similar disenhancements are present in breeding practices in factory farming. Consider the following case:

The Blind Chicken: The blind chicken is accidentally produced, but proves to reduce suffering in industrial livestock production, as blind chickens are more tolerant to overcrowded pens in comparison to sighted chickens.⁴³

The blind chicken is disenhanced, and like the brachycephalic (flat-faced) dog and the sphynx (hairless) cat, the intentional procreative choice to produce disenhanced animals is intuitively bad for the particular animal. However, the Non-Identity Problem

³⁸ This case is modified from Palmer's case of the bulldog in Palmer, (2012): 157, focusing on one specific breeding outcome, which is shared by other breeds.

³⁹ American College of Veterinary Surgeons, Brachycephalic Syndrome, (2019).

⁴⁰ Kate Huges, "What You Need to Know Before Bringing Home a Sphynx Cat," PetMD, (2019).

⁴¹ Huges, (2019).

⁴² Nicola Rooney, "The Welfare of Pedigree Dogs: Cause for Concern." *Journal of Veterinary Behavior: Clinical Applications and Research*, 5(4), (2009): 180.

⁴³ Paul Banks Thompson, "The opposite of human enhancement: nanotechnology and the blind chicken problem." *NanoEthics*, 2(3), (2008): 306.

arises, as the procreative act does not make any particular individual worse off than they otherwise would have been. Palmer writes: “Blind Chicken “A” does not have an alternative life as “Seeing Chicken A”. The alternative is a different individual altogether, “Seeing Chicken B””.⁴⁴ Brachycephalic Dog A and Sphynx Cat A also do not have alternative lives as healthy animals; the alternative is healthy alternative individuals Dog B and Cat B. Given the relevant contrast class, the procreative act does not make any of the animals worse off than they otherwise would have been. In fact, if bringing into existence is a benefit (or at the least, maximizing), then the intentional procreative choice to produce disenanced animals is a benefit to the animal.

However, The companion animal Non-Identity Problem cases of the Brachycephalic Dog and the Sphynx Cat differ from the factory farming Blind Chicken case in one key respect: unlike the blind chicken, which is bred to reduce animal suffering in an intensive agricultural system, the only clear benefit of disenancement of the companion animals is to satisfy the owners’ preferences. And yet, while the companion animal cases appear to be unjustified, the Counterfactual Comparative Account is unable to identify harm in even the most extreme cases. Consider an additional case:

The Short-Lived Dog: a dog breeder has begun selective breeding of a dog who will live to about two years, produced to fulfill a demand of children pestering their parents for a pet. Around the age of two, the dog will develop an untreatable disease and die in a couple of weeks, preventing parents from having the long commitment of a dog well after the novelty has worn off for their children.⁴⁵

⁴⁴ Clare Palmer, “Animal Disenancement and the Non-Identity Problem: a Response to Thompson,” *NanoEthics*, 5(1), (2011): 47.

⁴⁵ Palmer, (2012): 160.

Much like the Wretched Child, the Short-Lived Dog illustrates a case that is arguably not worth living. Also, this case cannot be assessed by the Counterfactual Comparative Account because a life not worth living cannot coherently be said to be worse than non-existence.

The companion animal breeding practices are not accidental, in fact they appear to be morally significant; the animal is intentionally selected for the disenhanced feature, which is only due to human partiality. The disenhanced feature has no benefit to the animal itself, and given the increased likelihood of poor health outcomes for the particular animals, arguments can easily be made against these practices. It seems that poor health outcomes should be captured by a viable account of harm. However, the Counterfactual Comparative Account is unable to assess harm in cases such as the Blind Chicken, the Brachycephalic Dog, the Sphinx Cat, and the Short-Lived Dog.

I believe that Non-Identity Problem cases demonstrate a larger problem: the failure of the typical account of harm. The Non-Identity Problem shows a technical problem with the Counterfactual Comparative Account of Harm: an assessment of harm as causing an individual to be “worse off” than they otherwise would have been is problematic. While many Non-Identity Problem cases involving humans are unrealistic, Non-Identity Problem cases involving non-human animals occur frequently. A viable account of harm must be able to capture procreative non-human animal cases, as how we treat animals is a significant moral issue. I argue that the Non-Identity Problem reveals a larger problem with the typical account of harm.

The Preemption Problem

The Preemption Problem also shows that the Counterfactual Comparative Account fails to accurately capture harm. The Preemption Problem arises when a harm is overdetermined. The harmful event occurs as a result of two potential and independent actions.⁴⁶ The event occurs as a result of the first action, but if the first action had not occurred, then the event would have occurred as a result of the second action. The Preemption Problem shows that the Counterfactual Comparative Account fails to capture harm, since the harmed individual is not made worse off than they otherwise would have been. Consider the following case:

Shooting Match: Victor has made two enemies, Adam and Barney, both of whom intend to kill him. Barney is just about to shoot and kill Victor, but Adam pulls the trigger on his gun and kills Victor before Barney can.⁴⁷

Victor dies as a result of Adam's action. If Adam had not fired his gun, then the event of Victor's death would have occurred as a result of Barney's action. Fiona Woollard stipulates in her original case that Barney's gun is more powerful, and would travel faster, ensuring that Victor would otherwise die at the exact same time. This case illustrates a technical problem with the Counterfactual Comparative Account, as it implies that Adam's action does not harm Victor, since the harm to Victor is overdetermined, and therefore Victor is not worse off than he otherwise would have been. Victor would otherwise have been killed if Adam had not acted. Shooting Match

⁴⁶ Anna Folland, *The Dual Nature of Harm-In Defence of the Disjunctive View*, (2017): 12. Anna Folland uses the phrase "potential and independent" to describe the causes of an effect in the preemption problem. It is important to recognize both the potentiality and the independence of the two actions that would result in the harm, so I borrow this phrase from her.

⁴⁷ This is a simplification of Fiona Woollard's example in Fiona Woollard, "Have we solved the non-identity problem?" *Ethical theory and moral practice*, 15(5), (2012): 684.

presents two possible actions, Adam's action or Barney's action, both of which result in morally relevant harm to Victor.

The Omission Problem

The Omission Problem is the third technical problem with the Counterfactual Comparative Account of Harm but unlike the other two, it shows that this account finds harm in too many cases. The Omission Problem arises in cases where an individual fails to benefit another individual. The Omission Problem is a compelling problem as it demonstrates that failing to benefit is distinct from causing harm, challenging the understanding of harms and benefits as comparable units. As an essential component of the Counterfactual Comparative Account of Harm, the comparable understanding of harms and benefits equates causing harm with reducing benefit and equates mitigating harm with causing benefit. The Omission Problem shows that failing to provide a benefit causes an individual to be made worse off than they otherwise would have been.

Consider the following:

Batman Buys Golf Clubs: Batman buys a set of golf clubs, intending to give them to Robin, which would have benefitted Robin. Batman shares his intention with Joker, who replies "why not keep them for yourself?" Batman is persuaded, and he keeps the golf clubs.⁴⁸

Batman does not give the golf clubs to Robin, thereby failing to benefit Robin. Robin would have been benefitted by receiving the gift, and by failing to provide the gift, Batman causes Robin to be worse off than he otherwise would have been. Intuitively, the Counterfactual Comparative Account of Harm seems to produce the wrong result. If

⁴⁸ I have paraphrased the example that Ben Bradley presents in Ben Bradley, "Doing Away with Harm", *Philosophy and Phenomenological Research*, 85(2), (2012): 397. This example is also used and discussed by Anna Folland in Folland, (2017): 12.

Batman had stolen Robin's golf clubs, thereby causing Robin to be worse off than he otherwise would have been, then Robin would be harmed. Failing to benefit is not the same as causing harm, but the comparable understanding of harms and benefits cannot distinguish between the two.⁴⁹ If Robin was at two units on Shiffrin's scalar model, and Batman's gift would have moved him up the scale by two units, then causing Robin to remain at two units harms him, as he is worse off than he otherwise would have been. It is likely that Robin would be better off with the gifted golf clubs, but quite another thing to equate causing harm with reducing benefit.

The Omission Problem also calls for a distinction between a simple failure to benefit and a morally relevant harmful omission. Intuitively, there are cases where an individual does not owe a benefit to another, such as Batman's gift to Robin. However, there are also cases where omissions can be harmful. Consider the following:

Fire in the Building: Pamela sees that a fire has started in an office in her building. The door is closed and she see that smoke is coming out from under the door. She heads for the nearest exit, failing to pull the fire alarm on her way out. If she had pulled the alarm, she would have seen that they were malfunctioning. The building remains full of people.⁵⁰

Pamela fails to benefit the people in the burning building by pulling the fire alarm. Unlike Batman Buys Golf Clubs, a case of a simple failure to benefit, Pamela's omission seems to be a morally relevant harmful omission. In Fire in the Building, it is not only that Pamela can benefit the people in her office building through mitigating the harm caused by the fire, as the Counterfactual Comparative Account seems to suggest, but

⁴⁹ Neil Feit provides a structurally parallel example of seeing a friend on the street and failing to give them \$100 in Neil Feit, "Harming by failing to benefit," *Ethical theory and moral practice*, 22(4), (2019): 822.

⁵⁰ I have paraphrased the example that Ben Bradley presents in Bradley, (2012): 397.

also illustrates a non-comparable relationship between harming and benefitting. It seems that a viable account of harm should not capture harm in choosing to not give a gift but should capture harm in choosing not to pull a fire alarm.

An Alternative Account of Harm is Required

The Counterfactual Comparative Account of Harm is the typical account of harm. This account has a major fundamental problem: the understanding of harms and benefits as essentially comparable. The structure of this account assumes that harms and benefits are a similar type of thing and can be weighed against each other. The all-things-considered assessment of an action erases harm when it simultaneously produces a larger benefit.

This account is also faced with compelling technical problems. The three serious problems are the Non-Identity Problem, the Preemption Problem, and the Omission Problem. Firstly, this account is unable to identify harm in the Non-Identity Problem cases. A procreative action which brings about the birth of an individual with a significant disadvantage cannot be assessed as an action that produces harm, as the individual is not “worse off” than they otherwise would have been, for they otherwise would not have existed, and therefore are not harmed on a Counterfactual Comparative Account. Secondly, this account is also unable to identify harm in the Preemption Problem cases. A harm that is overdetermined cannot be identified by the Counterfactual Comparative Account. An action which brings about a harm to an individual, whereby a second unrelated action would have brought about a similar harm, cannot be assessed as an action that produces harm, as the individual is not “worse off” than they otherwise would have been, for they otherwise would have suffered a similar harm, and therefore are not harmed on this account. Thirdly, this account identifies

harm where it should not in Omission Problem cases. The structure of this account has a comparable understanding of harms and benefits, which causes it to capture harm where it should not. This account provides an all-things-considered assessment of harms and benefits, equating failure to benefit with causing harm. A failure to benefit an individual is assessed as a harm, as the individual is made “worse off” than they otherwise would have been, for they otherwise would have been bestowed with a benefit, and therefore are harmed on a Counterfactual Comparative Account.

As the Counterfactual Comparative Account fails to capture harm where it should, and captures harm where it should not, I argue there is a need for an alternative account of harm. The necessary “worse off” condition of the Counterfactual Comparative Account presents an insurmountable problem. An alternative account of harm that can account for the mistaken understanding of the comparability between harming and benefitting is required. An alternative account of harm must also be able to capture harms in the Non-Identity Problem, the Preemption Problem, and the Omission Problem cases. If our assessment of harm is considered in a larger assessment of moral permissibility or impermissibility, then we must ensure we have a viable account of harm, and the Counterfactual Comparative Account is not it.

CHAPTER 3: The Non-Comparative Account of Harm

Unlike the Counterfactual Comparative Account, which identified relative badness and required a necessary “worse off” condition must be satisfied, such that the action causes the individual to be made worse off than he otherwise would have been, the Non-Comparative Account of Harm identifies harm as being caused to be in a “bad state”, where “bad state” is defined objectively. As such, the Non-Comparative Account can avoid all of the comparison-based difficulties we saw for the traditional view in Chapter 2. Of course, the central question such a view must answer is: “What is an objectively bad state?”

Several versions of the Non-Comparative Account of Harm have been presented, and two of the most noteworthy are presented by Seana Shiffrin and Elizabeth Harman. Shiffrin’s version of Non-Comparative Harm identifies a bad state as a state that the individual would rationally not want to be in.⁵¹ Harman’s version of Non-Comparative Harm identifies a bad state as “mental or physical discomfort, disease, deformity, disability, or death”.⁵² Most accounts agree that to be harmed is to be caused to be in an intrinsically bad state (a state that is bad by its very nature) though each account may have different definitions of what states are intrinsically bad.

Seana Shiffrin describes harm as “involv[ing] conditions that generate a significant chasm or conflict between one’s will and one’s experience, one’s life more broadly understood, or one’s circumstance”.⁵³ Shiffrin further outlines being harmed as “primarily involv[ing] the imposition of conditions from which the person undergoing

⁵¹ Shiffrin, (1999): 124.

⁵² Harman, (2009): 139.

⁵³ Shiffrin, (1999): 124.

them is reasonably alienated or which are strongly at odds with the conditions she would rationally will”.⁵⁴ Shiffrin’s version of a bad state is any state that the individual would rationally not want to be in. Molly Gardner objects to Shiffrin’s version of a bad state, as it requires the individual to be capable of rational will in order to be harmed which suggests that non-human animals cannot be harmed as they don’t have a rational will.⁵⁵ Shiffrin’s account does allow for non-human animals to be harmed but creates a hierarchy in which harm caused to animals is less morally significant than harm caused to humans.⁵⁶ Shiffrin’s hierarchy is problematic, as it implies that harm in cases involving people with cognitive disabilities and young children is less morally significant than harm caused to adults with typical cognitive functioning.

Elizabeth Harman advances a condition for harming as: “one harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death”,⁵⁷ which she also describes generally as “to be in a bad state”⁵⁸ whereby the comparison is made to a “normal healthy state”.⁵⁹ Harman’s version of a bad state has a built-in comparative element, the norm.⁶⁰ Elizabeth Barnes objects to Harman’s version of a bad state since Harman outlines “disability” as “bad state,” implying that disabilities are bad by their very nature.⁶¹ This is problematic, as it is ableist, giving undue privilege to non-disabled individuals over disabled individuals. However,

⁵⁴ Shiffrin, (1999): 124.

⁵⁵ Molly Gardner, “A Harm-Based Solution to the Non-Identity Problem,” *Ergo*, 2(17), (2015): 432.

⁵⁶ Shiffrin, (1999): 124, Footnote 20.

⁵⁷ Harman, (2009): 139.

⁵⁸ Harman, (2009): 139.

⁵⁹ Harman, (2009): 139.

⁶⁰ Harman, (2009): 139.

⁶¹ Barnes, (2016): 61-62.

Harman's account is preferable to Shiffrin's, as the ableist concern can be addressed through modification to the account.

Shiffrin's Account of Non-Comparative Harm

Shiffrin's definition of a bad state is any state that the individual would rationally not want to be in. Although Shiffrin's work includes many helpful elements, which I rely upon heavily in this paper, her account requires the individual to be capable of rational will in order to be harmed, which I believe is fundamentally problematic. Shiffrin writes:

"Typically, harm involves the imposition of a state or condition that directly or indirectly obstructs, prevents, or undoes an agent's cognizant interaction with her circumstances and her efforts to fashion a life within them that is distinctively and authentically hers – as more than merely that which must be watched, marked, endured or undergone. To be harmed primarily involves the imposition of conditions from which the person undergoing them is reasonably alienated or which are strongly at odds with the conditions she would rationally will."⁶²

Molly Gardner critiques Shiffrin's account, suggesting that non-human animals cannot be harmed as they don't have a rational will. Gardner writes:

"Shiffrin... suggests that a state is a harm when it conflicts with an individual's will. However, such a criterion conjoined with the non-comparative account of harming would imply that nonhuman animals cannot be harmed unless they have a will. And even if some animals have a will, a dog whose sense of smell is damaged may not be aware of the damage, in such a way that she would will it away. But if you damage a dog's nose, you still harm her".⁶³

Shiffrin has anticipated this variety of criticism, and argues that some creatures, such as insects, can endure bodily damage, but this "does not represent the sort of harm that

⁶² Shiffrin, (1999): 123-124.

⁶³ Gardner, (2015): 432.

tends to carry heightened moral significance and regarding which there is a special moral priority”.⁶⁴ Other creatures, Shiffrin writes, “in some sense... have wills that conflict with pain and broken limbs”,⁶⁵ such as cats and dogs, “[b]ut because they have fewer capacities, animals may not be subject to certain harms... Possibly, their harms are less morally significant than the harms suffered by beings with more sophisticated wills”.⁶⁶ However, the requirement of the harmed individual’s “cognizant interaction with her circumstances”⁶⁷ or “conditions she would rationally will”⁶⁸ are extremely problematic. Although Shiffrin’s work has many helpful elements, and I rely heavily upon her analysis of the non-comparability of harms and benefits, which she calls a “comparative, symmetrical model of harms and benefits”,⁶⁹ her account is fundamentally problematic, as it assigns “moral significance” and “special moral priority”⁷⁰ to individuals with “more sophisticated wills”.⁷¹

Many would think the hierarchy implied by Shiffrin’s account is acceptable. Harming an animal has less moral significance than harming a human. Perhaps this is true. Perhaps an animal, such as a dog, has less moral status than a human. However, is the moral significance assigned to harming the human in virtue of their more sophisticated will? I argue that it is not, for this leads to problematic hierarchies of moral significance within a species.

⁶⁴ Shiffrin, (1999): 124, Footnote 20.

⁶⁵ Shiffrin, (1999): 124, Footnote 20.

⁶⁶ Shiffrin, (1999): 124, Footnote 20.

⁶⁷ Shiffrin, (1999): 123-124.

⁶⁸ Shiffrin, (1999): 123-124.

⁶⁹ Shiffrin, (1999): 121.

⁷⁰ Shiffrin, (1999): 124, Footnote 20.

⁷¹ Shiffrin, (1999): 124, Footnote 20.

Let's reconsider Gardner critiques Shiffrin's account, and her example of "a dog whose sense of smell is damaged".⁷² Gardner suggests that Shiffrin's account is unable to capture this harm, as the dog "may not be aware of the damage, in such a way that she would will it away".⁷³ I argue that the damage to the dog's sense of smell, on Shiffrin's account, is even more problematic than Gardner suggests. Suppose that two dogs have their sense of smell damaged, one is a highly intelligent working breed (such as a German Sheppard) and the other is unintelligent (such as a pug). A working breed would actively use its sense of smell to complete complex tasks, such as aiding police work, but the other would simply investigate the neighbourhood. While the working breed "may not be aware of the damage"⁷⁴ they certainly have been impeded from continuing to perform complex tasks. Does this imply that the harm to the working breed has "moral significance" and "special moral priority"⁷⁵ in comparison to the harm to the pug? It seems to me that Shiffrin's account would have to make this claim.

If a species, such as dogs, can be subdivided in this way, then it seems to follow that any species can be subdivided in this way. Shiffrin claims that harms suffered by individuals "are less morally significant than the harms suffered by beings with more sophisticated wills".⁷⁶ While she creates a hierarchical structure between species, her view implies that the same would be true within a species. This clearly has problematic implications when applied to humans. If one were to break the arms of a child and an adult, we would not think that the harm to the child is less morally significant than the

⁷² Gardner, (2015): 432.

⁷³ Gardner, (2015): 432.

⁷⁴ Gardner, (2015): 432.

⁷⁵ Shiffrin, (1999): 124, Footnote 20.

⁷⁶ Shiffrin, (1999): 124, Footnote 20.

harm to the adult, simply because the adult has a more sophisticated will. There may be additional harms that the adult endures, that the child cannot, such as “the frustration of long-term projects”.⁷⁷ Suppose that the adult was training for a triathlon, and breaking her arm imposed an additional harm. Yet, even with an additional harm, that does not seem to imply that the harm to the child is less morally significant.

I object to Shiffrin’s account for two reasons: firstly, it is promoting speciesism and ableism, giving undue privilege to human individuals over non-human individuals as well as giving undue privilege to non-disabled individuals over disabled individuals, and secondly, it intertwines the concepts of “moral significance” and “moral priority” with the concept of harm, rather than first identifying the harm and then asking if it is morally significant in the overall assessment of permissibility or impermissibility. For these reasons, Shiffrin’s account is unable to provide a promising foundation for a Non-Comparative Account of Harm.

Harman’s Account of Non-Comparative Harm

Harman writes “harming is causing harm”,⁷⁸ and presents a condition of harming as: “One harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability or death”.⁷⁹ She outlines her view as follows:

“An action is a harming action if it causes an effect of harm... More generally, the view is that an action harms someone if it causes the person to be in a bad state. Bad states are understood as states that are in themselves bad, not bad because they are worse than the state the person would otherwise have been in. (If one wants a further account of a bad state, I am willing to offer one: bad states

⁷⁷ Shiffrin, (1999): 124, Footnote 20.

⁷⁸ Harman, (2009): 139.

⁷⁹ Harman, (2009): 139.

are those states that are worse in some way than the normal healthy state for a member of one's species)".⁸⁰

According to Harman, her condition of harming is a sufficient condition;⁸¹ one way to harm someone is to make her worse off than she otherwise would have been, and another way to harm her is to cause her "to be in a bad state".⁸² The Counterfactual Comparative view, is, according to Harman, mistaken, as it identifies an action as harming "only if it makes the person worse off than she otherwise would have been if the action had not been performed".⁸³ Harman writes: it "is mistaken to assume that the only available point of comparison is what things would have been like if an action had not been performed".⁸⁴ Harman advocates an alternative condition to identify an action as harming, one that defines a sufficient condition of harm which does not rely upon the "worse off" condition.⁸⁵

On Harman's Non-Comparative view, the bad state is "understood as states that are in themselves bad", or intrinsically bad. Bad states are not necessarily worse than the state that the individual would otherwise have been in, that is, they are not

⁸⁰ Harman, (2009): 139.

⁸¹ Harman rejects the "worse off" condition, and clearly proposes a "bad state" condition as a sufficient condition of harming. In 2004, she writes: "I deny a purported *necessary* condition for harm: Worse-Off: An action harms a person only if it makes the person worse off than she would otherwise have been if the action had not been performed. I endorse a *sufficient* condition for harm: An action harms a person if the action causes pain, early death, bodily damage, or deformity to her, even if she would not have existed if the action had not been performed". Harman, (2004): 107. In 2009, she writes: "The view I will offer, which provides a solution to the non-identity problem, begins with three claims about harm. The first is a sufficient condition on harming: (1) One harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death". Harman, (2009): 139. Harman does not offer any suggestion of what other sufficient conditions of harm might be, only that the "worse off" condition is not a necessary condition of harming.

⁸² Harman, (2009): 139.

⁸³ Harman, (2004): 93.

⁸⁴ Harman, (2004): 93.

⁸⁵ Harman, (2004): 107., Harman, (2009): 139.

comparatively bad states. Harman offers a baseline from which one can understand a bad state, which she writes is “worse in some way than the normal healthy state for a member of one’s species”.⁸⁶ Harman’s account of Non-Comparative Harm identifies harm as a state that is below the threshold of a “normal healthy state”,⁸⁷ rather than the state that she would otherwise have been in. Harman’s account uses “a healthy bodily state”⁸⁸ as the baseline, and she writes:

“An action harms someone if it causes the person to be in a state, or to endure an event, that is worse than life with a healthy bodily state. A healthy bodily state involves no *damage*: no cuts or burns or diseases... it also involves no deformity: it is the normal healthy state of an organism of the species in question... Furthermore, life with a healthy bodily state involves a normal human lifespan; so it does not involve *early death*”.⁸⁹

Harman’s account is an alternative to the “worse off” condition and it can address the concerns that arise in the Non-Identity Problem, the Preemption Problem, and the Omission Problem. Her account, unlike Shiffrin’s, which relies on rationality, can capture harm in cases involving people with cognitive disabilities, children, and non-human animal species. Harman also attempts to deal with one of the most challenging cases of harm, capturing cases of early death or killing. It is because of these reasons that I believe Harman’s account is the most promising. I will be using Harman’s version of the Non-Comparative Account of Harm as a viable alternative to the Counterfactual Comparative Account of Harm.

⁸⁶ Harman, (2009): 139.

⁸⁷ Harman, (2009): 139.

⁸⁸ Harman, (2004): 97.

⁸⁹ Harman, (2004): 96-97.

The Non-Comparative Account of Harm is a Viable Alternative

Harman's version of the Non-Comparative Account of Harm identifies objective badness and a sufficient "bad state" condition of harm. On this account, the "worse off" condition is one way that an individual can be harmed, and a "bad state" condition is an alternative way that an individual can be harmed. An alternative account of harm is needed in order to identify harm in a variety of cases that the Counterfactual Comparative Account could not. The comparative nature of this account was problematic, as it naturally invites problem cases: cases without a comparator, cases of overdetermined harm, and cases where the comparator is worse but not a harm. An alternative account can help identify harm in these problem cases and provide a viable alternative to the singular necessary condition presented by the "worse off" condition.

In conclusion, rather than comparatively identifying relative badness, this account identifies badness objectively. The "bad state" condition identifies when the agent has objectively suffered a harm. Seana Shiffrin and Elizabeth Harman each present a version of the Non-Comparative Account of Harm. Shiffrin's version of a bad state is any state that the individual would rationally not want to be in.⁹⁰ Harman's version of Non-Comparative Harm identifies a bad state as items on her list.⁹¹ To be harmed is to be caused to be in an intrinsically bad state, a state that is bad by its very nature, though each account has different explanations of what states are objectively bad.

Harman's version is the superior view, as the problem with including disability in her list of bad states is not central to her view. Shiffrin's view, on the other hand, has a

⁹⁰ Shiffrin, (1999): 124.

⁹¹ Harman, (2009): 139.

rational will requirement making it fundamentally problematic, as it is ableist, giving undue privilege to non-disabled individuals over disabled individuals. Harman's view, also ableist, can be saved from this problem, as the ableist concern can be addressed through modification to the account. Harman's view is the version of Non-Comparative Account of Harm that I will be presenting as a viable alternative account of harm.

CHAPTER 4: Advancing Harman's Account of Non-Comparative Harm

As we saw above, Elizabeth Harman's version of the Non-Comparative Account of Harm is the most promising account. Unlike Shiffrin's account, which presents rationality as a central feature,⁹² Harman's account presents a bad state.⁹³ A major blind spot in the literature is the ability to authentically capture harm universally, such as harm to people with cognitive disabilities, young children, and non-human animals. Shiffrin's account is problematic as it implies that harm in cases involving people with cognitive disabilities and young children is less morally significant than harm caused to adults with typical cognitive functioning. Shiffrin's was not considered viable as the rationality requirement is problematic for identifying harm universally. Harman's account is problematic as well, specifically in its assumption that disability is necessarily a harm, a concern that has been raised before.⁹⁴ However, unlike Shiffrin's account, Harman's account provides a promising foundation for a Non-Comparative Account of Harm as it can be modified to exclude disability from the list of bad states.

Harman advances a condition for harming as: "one harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death",⁹⁵ which she also describes generally as "to be in a bad state".⁹⁶ Harman's account is not without critique, including counterexamples and objections to her list of bad states. According to Harman's account, an action is a harm if it causes an individual to be in a bad state.

⁹² Shiffrin, (1999): 124.

⁹³ Harman, (2009): 139.

⁹⁴ Barnes, (2016): 61-62.

⁹⁵ Harman, (2009): 139.

⁹⁶ Harman, (2009): 139.

While Harman's account is able to deal with the mistaken understanding of the comparability of harms and benefits, several technical problems have been presented as objections to the Non-Comparative Account of Harm in general. These problems attempt to provide a reason to prefer the Counterfactual Comparative Account over the Non-Comparative Account. First, I present the most compelling technical problem with Harman's account, Appendix Surgery,⁹⁷ which challenges Harman's account by claiming that a surgeon who performs a lifesaving operation, preventing future harm, does not harm the patient by performing the surgery. Harman's response is that the act is a harm as it causes the patient to be in a bad state.⁹⁸ An essential component of the Counterfactual Comparative Account of Harm is the comparable understanding of harms and benefits. The Non-Comparative Account of Harm can accommodate the non-comparability between harming and benefitting; the surgeon can both harm and benefit the patient.

Harman's account is also able to overcome the technical problems facing the Counterfactual Comparative Account of Harm that we saw in Chapter 2: Non-Identity Problem cases, Preemption Problem cases, and Omission Problem cases.

In what follows, I consider the Appendix Surgery problem first, as Harman's analysis of this case clearly shows how her Non-Comparative Account of Harm

⁹⁷ Additional problems with a similar structure can be provided, such as a lifeguard who breaks a drowning person's arm in the process of rescuing him as presented in Shiffrin, (1999): 120., a dentist who removes a broken tooth and a first-aider who breaks a rib performing CPR when a defibrillator was available (dentist and first-aider were discussed with my supervisor, Allen Habib).

⁹⁸ Harman, (2004): 91. Harman's account of harm is followed by Harman's account of wrongfulness, which assesses the reasons in favour of an action and the reasons against an action to determine the role harm plays in the overall moral assessment of the action. In order to remain focused on the topic of harm, I will provide reference to Harman's account of wrongfulness here.

identifies objective harm. While Harman only directly addresses the first technical problem with the Counterfactual Comparative Account, the Non-Identity Problem, I infer how she might respond in the second and third technical problems based upon her assessment of Appendix Surgery.

The Appendix Surgery Problem

The most compelling problem with Harman's account of Non-Comparative Harm is cases where an individual is simultaneously bestowed a harm along with a larger benefit. Consider the following case:

Appendix Surgery: "A doctor cuts a hole in my abdomen in order to remove my swollen appendix. Cutting open my abdomen causes me pain (as I recover); but if the operation had not been performed, I would have suffered worse pain and died very soon".⁹⁹

The doctor's action is assessed by the Counterfactual Comparative Account, using a comparable understanding of harms and benefits, as a net benefit. Since the harm is a result of the same action that benefits the individual, an advocate of the Counterfactual Comparative Account can argue it is not a harm, but simply a cost.

Harm in the Appendix Surgery case is determined by comparison between the doctor's action of performing the surgery and the result of not performing the surgery, in which she suffers worse pain and dies. Suppose that the action results in a suffering factor of 10 units, 5 units for the cutting and 5 units for the post-operative pain. Now suppose that the alternative, in which the doctor does not perform the surgery, results in a suffering factor of 20 units, 10 units for worse pain and 10 units for the unnecessarily shortened lifespan. The numerical value assigned to each part is arbitrary and is simply

⁹⁹ Harman, (2004): 91.

meant to demonstrate that the actions in the surgery case are divisible, and that the worse pain (by definition) is a larger amount of suffering. According to the Counterfactual Comparative Account of Harm, the action of surgery has not caused the individual to be worse off and the individual has not been harmed. Boonin writes: “the doctor’s act of operating on you does not harm you. If anything, her act clearly benefits you by saving your life and reducing the amount of pain you will suffer when you wake up”.¹⁰⁰ His argument supports the analysis of surgery cases as a problem for the Non-Comparative Account of Harm.¹⁰¹

Boonin argues the Non-Comparative Account of Harm produces the wrong results in cases like Appendix Surgery because it produces the result that the doctor’s action to perform the surgery is a harm. According to the Non-Comparative Account, the doctor causes the patient to have their abdomen cut open and to experience post-operative pain, either of which is sufficient to cause the patient to be in a bad state. Harman defends the Non-Comparative Account of Harm and claims that surgery is a harm.

“While it might appear to be intuitively obvious that the doctor does not harm me, what is really clear is that what the doctor does is permissible. Saying the doctor does not harm me is one way of establishing the permissibility of his action; but it is not the only way. Suppose that instead we say, as I think we should, that the doctor does harm me. He harms me because he causes significant damage to my body.”¹⁰²

Harman’s solution to the Appendix Surgery problem is to provide an alternative account of how surgery is both a harm and morally permissible. On Harman’s account, surgery

¹⁰⁰ Boonin, (2014): 73.

¹⁰¹ Boonin, (2014): 76-77.

¹⁰² Harman, (2004): 91.

results in harm, even though it is not all-things-considered harm. Harman also appeals to the moral permissibility of the doctors actions, suggesting that a harmful action is not necessarily a wrongful action. She claims: “[a]n action that harms someone thereby has a strong moral reason against it”.¹⁰³ The agent has a strong moral reason to refrain from acting in a way that will result in harm to another individual. Wrongfulness, on Harman’s account, is the result of a moral calculus that considers reasons in favour of the action, reasons against the action (including the reason provided by the harm), and the circumstances that could make the harms permissible.¹⁰⁴

The harm of significant bodily damage, according to Harman, is a reason against performing the surgery. She begins by supposing that surgery is a harm, then claims that “there is a reason against performing the surgery in virtue of the harm to me”.¹⁰⁵ It is reasonable to believe that there is a strong reason to avoid performing an action that is harmful, in virtue of the harm. Harman continues with her approach by establishing that there is also a reason for performing the surgery, or as she puts it “against *not performing* the surgery”,¹⁰⁶ which she expands upon as: “there is a reason against not performing the surgery in virtue of the fact that I would suffer more severely and die if the surgery is not performed”.¹⁰⁷ Ultimately, Harman argues that the surgery is a harm, the harm is justified, and the doctor’s actions are morally permissible.

¹⁰³ Harman, (2009): 139.

¹⁰⁴ Harman, (2004): 91.

¹⁰⁵ Harman, (2004): 91.

¹⁰⁶ Harman, (2004): 91.

¹⁰⁷ Harman, (2004): 91.

Do Linguistic Intuitions of ‘Harm’ Matter?

Harman’s response to Appendix Surgery, and her account of harm more generally, has been challenged by Kirsten Meyer, who suggests that Harman’s account fails to fit cohesively with how we typically use the term ‘harm’. Like Boonin, Meyer suggests that “it appears to be intuitively obvious that the doctor does *not* harm the patient”.¹⁰⁸ She argues that Harman’s Non-Comparative assessment of surgery relies on a “concept of harm [that] does not match our linguistic intuitions”.¹⁰⁹ Meyer does not continue to expand upon her argument, but I suspect she means that we do not typically use the term ‘harm’ to describe the necessary side effects of bringing about a good result for the patient. Boonin seems to capture this linguistic intuition when he writes: “the doctor’s act of operating on you does not harm you. If anything, her act clearly benefits you”.¹¹⁰ Neither Boonin nor Meyer are suggesting that the patient does not have post-operative pain or damage to their body, they are simply arguing that the end result of the surgery is typically a benefit. Meyer seems to suggest that how we speak about the overall act of surgery is as a benefit to the patient, rather than a harm or justifiable harm. Harman has anticipated this concern and addresses it as follows:

“I do not deny that we sometimes use the word “harm” to mean “all-things-considered harm.” Indeed, the phrase “First, do no harm” – commonly attributed to the doctors’ Hippocratic Oath – uses the word in this way. The important point is that there can be harm even when there is not all-things-considered harm, and there can be a reason against an action in virtue of harm even when there is not all-things-considered harm”.¹¹¹

¹⁰⁸ Kirsten Meyer, “The claims of future persons”, *Erkenntnis*, 83(1), (2018): 47.

¹⁰⁹ Meyer, (2018): 47.

¹¹⁰ Boonin, (2014): 73.

¹¹¹ Harman, (2004): 109. Footnote 12.

Linguistically, we might speak about surgery as a benefit to the patient, rather than a harm. We may even typically speak about harm to describe an overall burden to a person. However, there is no reason to think that our linguistic representations of the world are entirely accurate.

Sometimes our linguistic representations are inaccurate. Let us reconsider the Rape case, in which a woman is bestowed the benefit of a child as a result of an act of sexual violence, and the Nazi Prisoner case, in which a man experiences enriched character and deepened understanding of life as a result of imprisonment. In the Rape and Nazi Prisoner cases, similar to the Appendix Surgery case, we might speak about the end result as a benefit to the person. However, these cases bring to light something that Appendix Surgery is unable to; cases in which we do use the term 'harm' to mean "harm in one respect" rather than "all-things-considered harm". These cases help to further illustrate that our intuitions about harm, and the way we use the word 'harm', often do not align with the final assessment provided by overall outcome of the action.

The Counterfactual Comparative Account of Harm uses the term 'harm' to describe the end result, or the all-things-considered final assessment. Harman's account uses the term 'harm' to describe a bad state, or the assessment of a bad state in one respect. The fundamental problem with the Counterfactual Comparative Account is further illustrated in the linguistic understanding of how we use the word 'harm', as it is unable to account for the mistaken understanding of the comparability of harms and benefits. The problems of the Rape and Nazi Prisoner cases suggest that our linguistic representations are inaccurate, for wouldn't we say that the woman was harmed by the

rape and the man was harmed by the imprisonment, even though both are better off than they otherwise would have been?

The Non-Comparability Between Harms and Benefits

The Counterfactual Comparative Account of Harm contains a fundamental problem, the comparable understanding of harms and benefits. Unlike the Counterfactual Comparative Account, the Non-Comparative Account of Harm allows for a more nuanced understanding of harms and benefits, which captures the non-comparability between the two. While Harman's Non-Comparative assessment of cases like Appendix Surgery appears to be clunky and include a redundant step, it is useful in identifying the non-comparability between harms and benefits in a variety of cases. Recall the Rescue case, in which a man is saved from drowning but suffers a broken arm as a result.

Harman's account can provide an assessment of Rescue similar to her assessment of Appendix Surgery. The broken arm is a harm, but drowning is a more serious harm. Similar to Harman's assessment of Appendix Surgery, one can infer that she would argue there is a reason against causing harm to the drowning man and another reason against allowing serious harm to befall him.¹¹² Weighing the reasons in favour of the action and the reasons against the action (including the harm), one can infer that Harman would argue that rescue is permissible.¹¹³ The Non-Comparative Account of Harm can capture the non-comparability between harms and benefits,

¹¹² Harman writes: "we have a reason against causing a harm to me, and another reasons against allowing serious harm to befall me" in response to Appendix Surgery in Harman, (2004): 109. Footnote 8.

¹¹³ Harman's position is that "performing the surgery is permissible", although surgery is a harm, in Harman, (2004): 109. Footnote 8.

accounting for both the harm and the benefit of an action in cases such as Appendix Surgery and Rescue.

The need to account for the mistaken understanding of the comparability between harms and benefits may not be readily apparent in Appendix Surgery and Rescue as these cases demonstrate a justifiable harm. However, cases such as Rape or Nazi Prisoner clearly show the need to independently assess harms and independently assess benefits prior to determining if the action is permissible or impermissible. Rape or Nazi Prisoner show that the Counterfactual Comparative Account of Harm's comparable understanding of harms and benefits is mistaken. Assessed by the Counterfactual Comparative Account, the rapist's act is an all-things-considered benefit to the woman, and the Nazi's act is also an all-things-considered benefit to the man. If the woman is made better off as a result of the rape, then the rapist's act is permissible, and if the man is made better off as a result of the imprisonment, then the Nazi's act is permissible. This is clearly the wrong conclusion. The Counterfactual Comparative Account has a fundamental problem making this account unable to capture the harm of rape or the harm of imprisonment. I do not believe this fundamental problem can be overcome, and Harman's account can make sense of the mistaken understanding of the comparability between harms and benefits.

Harman's Non-Comparative Assessment of the Non-Identity Problem, Preemption and Omission

Harman's Non-Comparative Account of Harm is able to capture the mistaken understanding of the comparability between harms and benefits. In addition to the fundamental problem, the Counterfactual Comparative Account of Harm also faced the following technical problems: the Non-Identity Problem, the Preemption Problem, and

the Omission Problem. How does Harman's Non-Comparative Account of Harm assess these cases, and does it provide the correct result of harm?

The Non-Identity Problem

The Non-Identity Problem arose as a result of an identity-affecting act which brought a child into a flawed but worthwhile existence. The Counterfactual Comparative Account of Harm is unable to assess the harm, even in cases such as the Wretched Child, as the individual is not made worse off than they otherwise would have been because in the relevant counterfactual scenario the child does not exist. If the child is born into a bad state, then a Non-Comparative Account should be able to identify the harm in Non-Identity Problem cases, such as the Wretched Child. On Harman's view, the Non-Identity Problem cases are harmful, as they meet her Non-Comparative Account of Harm. Harman writes:

"First, an action harms a person if the action causes pain, early death, bodily damage, or deformity to her, even if she would not have existed if the action had not been performed. Second, reasons against harm are so morally serious that the mere presence of greater benefits to those harmed is not in itself sufficient to render the harms permissible" ¹¹⁴

The Non-Identity Problem cases, on Harman's account, are acts of harmful procreation. Harman's account considers the reasons in favour of the action (including the reasons provided by the benefits to the child), the reasons against the action (including the reasons provided by the harm to the child), and the circumstances that could make the harm permissible. In some circumstances, the harm could be justified, such as having a child with a learning disability. In other circumstances, the harmful procreative action

¹¹⁴ Harman, (2004): 93.

cannot be justified. A fine-grained threshold is not required within the scope of this paper, as there will undoubtedly be midrange cases.

Harman denies that the “worse off” condition is a necessary condition of harm and provides an alternative account of harm better equipped to deal with the Non-Identity Problem cases. Harman’s account of harm relies on a reference to a threshold of “a normal healthy state”,¹¹⁵ rather than the state that otherwise would have been. Harman’s use of a normal healthy state is, in itself, problematic, as it assumes that a state that is non-typical is bad, which I will further outline in Chapter 6.

A better threshold to determine harmful procreation would be Bonnie Steinbock’s concept of a “decent minimum standard”.¹¹⁶ Steinbock argues “[a] decent minimum is reached only if life holds a reasonable promise of containing the things that make human lives good: an ability to experience pleasure, to learn, to have relationships with others”.¹¹⁷ According to this argument, the problem in these procreative cases is that the child fails to meet the “decent minimum standard”. This alternative baseline seems to better identify an objectively bad state (in opposition to an objectively good state). Steinbock’s decent minimum standard presents a threshold of a good life, and like Harman’s account of harm, further describes the concept of a good life with a list, much like Harman’s list of bad states.

My primary interest is whether Harman’s Non-Comparative Account of Harm can successfully replace the Counterfactual Comparative Account of Harm. I think the suboptimal condition or event experienced by the child can be explained by harm

¹¹⁵ Harman, (2004): 97.

¹¹⁶ Steinbock, (2009): 163.

¹¹⁷ Steinbock, (2009): 163.

according to Harman's account, but the objective baseline could be better explained by Steinbock's decent minimum standard.

The Preemption Problem

The Preemption Problem arises when a harm is overdetermined, as the harmful event results from two potential and independent actions, such as in Shooting Match. The Counterfactual Comparative Account of Harm is unable to assess the harm, as the harmed individual is not made worse off than they otherwise would have been, as any of the independent actions are sufficient to cause the harm. If the victim is shot, then he is caused to be in a bad state and a Non-Comparative Account should be able to identify the harm. However, one can argue that death is not a state of being and therefore cannot be understood as a bad state. If the victim is shot and killed as a result, then, it can be argued, he is not caused to be in a bad state and a Non-Comparative Account cannot identify the harm. For this reason, I have modified the Shooting Match example, changing Victor's death to Victor's injury. For the purpose of illustrating Harman's Non-Comparative assessment of the Preemption Problem, this difference does not matter, as I will further explore the problem of death and killing at a later point in this paper.

Harman's version of the Non-Comparative Account is applicable in the modified Shooting Match case. On Harman's view, the shootings in the Preemption Problem case cause harm, regardless of whether Adam or Barney pull the trigger. Although the harm is overdetermined, each action is assessed independently (should it occur) for its resulting harm. If Adam pulls the trigger, then Victor is harmed as a result. Similarly, if Barney pulls the trigger, then Victor is harmed as a result. This account can achieve the

correct result, Victor's bad states is determined as a result of the action, not what otherwise would have been.

The Omission Problem

The Omission Problem arose as a result of an individual who fails to provide a positive benefit to another, such as the case of Batman buying Robin a set of golf clubs. As an essential component of the Counterfactual Comparative Account of Harm, the comparable understanding of harms and benefits ensure that this account is unable to make a distinction between harming and failing to benefit. The Counterfactual Comparative Account captures harm where it should not, as the individual who fails to receive a benefit is not necessarily harmed but is made worse off than they otherwise would have been. If Batman buys Robin golf clubs and keeps them for himself, then he does not cause Robin to be in a bad state, and a Non-Comparative Account should not assess the omission as a harm. There are, however, cases in which an omission is a harm, such as when Pamela does not pull the fire alarm in the burning building. A Non-Comparative Account should assess the omission as a harm, as Pamela's failure to pull the fire alarm in the burning building causes individuals in the building to be in a bad state.

Harman's version of the Non-Comparative Account is applicable in both cases. On Harman's view, some Omission Problem cases are not harmful, while others are morally relevant harmful omissions. Batman's omission does not cause Robin to be in a bad state and is therefore not harmful. Pamela's omission does cause individuals in the building to be in a bad state, so it is a harm on Harman's account. Harman's account

achieves the correct result, as her assessment considers whether the individual is caused to be in a bad state.

Advancing Harman's Non-Comparative Account of Harm

Harman's Non-Comparative Account provides a strong foundation for a Non-Comparative Account. Unlike Shriffrin's account, which poses problems due to its rational will condition, Harman writes: "one harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death",¹¹⁸ which has a scope that is large enough to include people with cognitive impairments, young children, and non-human animals. Harman's Non-Comparative Account can avoid the fundamental problem facing the Counterfactual Comparative Account: the mistaken understanding of the comparability of harms and benefits. Harman's account provides a more nuanced and non-comparable analysis of harms and benefits, as she argues that the reasons for (and against) an action should first be assessed based on type and then assessed based on strength. To Harman the reasons must first be identified as compatible in order to be compared to one another.

Harman's account is also able to provide the correct results in the technical problems facing the Counterfactual Comparative Account, such as the Non-Identity Problem, the Preemption Problem and the Omission Problem. Her account can handle procreative harms, overdetermined harms, and distinguish between omissions and morally relevant harmful omissions. Although Harman's account can address the technical problems facing the Counterfactual Comparative Account, it must be able to overcome the technical problems facing the Non-Comparative Account.

¹¹⁸ Harman, (2009): 139.

CHAPTER 5: Problems with the Non-Comparative Account of Harm

Harman's Non-Comparative Account can account for the mistaken understanding of the comparability between harms and benefits, and produces the correct results to the Non-Identity Problem, the Preemption Problem, and the Omission Problem. Any Non-Comparative Account, however, faces a set of technical problems it must overcome to be a viable alternative to the Counterfactual Comparative Account. The first technical problem is causing someone's state to improve from a very bad state to a bad state, demonstrated in the Sub-Threshold Problem.¹¹⁹ Similarly, the second technical problem is causing someone's state to decrease from a very good state to a good state, demonstrated in the Sur-Threshold Problem.¹²⁰ It has been argued that the Non-Comparative Account of Harm is unable to distinguish between "bad states" and "worse states", and between "good states" and "better states". The third technical problem, and the most serious problem facing the Non-Comparative Account of Harm, is demonstrated in the Death Problem. It is important to note that the harm of death is also a problem for the Counterfactual Comparative Account of Harm. The Death Problem, a problem for both the Counterfactual Comparative Account and the Non-Comparative Account, causes an individual to not be in any state, neither bad nor good.

Harman's account can avoid the Sub-Threshold Problem, as the action does not meet the causal condition of her view, since the individual was already in a bad state. Harman's account can avoid the Sur-Threshold Problem by appealing to the "worse off" condition as a sufficient condition of harming, which is left possible in her version of

¹¹⁹ Anna Folland introduces the term "sub-threshold" in Folland, (2017): 16-18.

¹²⁰ Anna Folland introduces the term "sur-threshold" in Folland, (2017): 16-18.

Non-Comparative Harm. I argue that a better response to the Sur-Threshold Problem is to provide different thresholds covering different aspects of well-being, each of which can identify various dimensions of functioning. The Death Problem is a problem for any account that identifies a state of being, as there is no one in a state after the event of death. Harman avoids this problem by including “death” on her list of bad states, but an argument also can be inferred for how death is a non-comparative harm according to Harman’s account. Harman argues that an individual has an interest in getting to live a full life, and a bad states is any state that is worse than life with a healthy bodily state. Harman’s account can provide useful responses to the technical problems facing the Non-Comparative Harm.

The Sub-Threshold Problem

Another compelling problem with Harman’s account of Non-Comparative Harm is when an action causes an individual to experience an improvement of their state, but they remain in a bad state. These cases, Sub-Threshold Problem cases, involve an action that causes an improvement of the individual’s state, but it does not put them in a good state. Suppose that the individual begins in a very bad state, and an action causes them to be brought up to a bad state. The Counterfactual Comparative Account avoids capturing harm in these cases, as the individual is better off than he previously had been, and therefore not harmed. In fact, most people would have the intuition that he was benefitted rather than harmed. He does, however, remain in a bad state, which according to the Non-Comparative Account determines that the action has harmed him. Consider the following:

Poor Man: Jim is destitute. Seeing his severe state of need, Ben gives him five hundred dollars a month for a year. By the end of the year, Ben has provided six thousand dollars, and Jim is no longer destitute. Jim's situation has improved, and he is now poor.¹²¹

The Sub-Threshold Problem is not a problem for Harman's version of the Non-Comparative Account, as being caused to be in a bad state is a sufficient, not necessary, condition of harming.¹²² One of the ways that Jim can be harmed is by causing him to be in a bad state, but another way is causing him to be worse off than he otherwise would have been. Jim is not worse off than he otherwise would have been. In fact, Jim is better off than he otherwise would have been. Poor Man can be assessed by the Counterfactual Comparative Account, in which case Jim is not harmed at all; he is benefitted.

Now consider the following:

Poor Vision: "Jones has been blind for many years as a result of retinal damage. Recently, Dr. Smith has developed a surgical operation that can repair some but not all of the damage. Dr. Smith operates on Jones and improves his vision from a state of blindness to a state in which Jones can see, but not very well: Jones now has what we will call dim vision."¹²³

¹²¹ This was brought up in discussion with my supervisor Allen Habib. I have aimed to provide a symmetrical example to the Sur-Threshold Problem, in a case involving financial change.

¹²² Harman does not outline what she envisions as other sufficient conditions for harming, but she does leave open the possibility that the "worse off" condition may be a sufficient condition of harming. Harman rejects the "worse off" condition as a necessary condition of harming in Harman, (2004): 107. She also outlines the "bad state" condition as a sufficient condition of harming in Harman, (2004): 107 and Harman, (2009): 139.

¹²³ This example is Molly Gardner's Dim Vision in Gardner, (2015): 431. I have renamed it here to provide a symmetrical name to "Poor Man" and a symmetrical example to the Sur-Threshold Problem, in a case involving bodily change. The Dim Vision example is also found in: Harman, (2004): 91., Boonin, (2014): 100 and Hanser, "Harming and Procreating" *Harming Future Persons: Ethics, Genetics and the Non-identity Problem*. M. Roberts and D. Wasserman (eds.) Springer, (2009): 188. For this case we will assume blindness is a harm, although I later argue that disabilities are not intrinsic harms.

An advocate of Harman's Non-Comparative Account can argue that one of the ways Jones can be harmed is by causing him to be in a bad state, but another way is causing him to be worse off than he otherwise would have been. Jones is not worse off than he otherwise would have been. In fact, Jones is better off with poor vision than he otherwise would have been blind. Poor Vision, like Poor Man, when assessed by the Counterfactual Comparative Account, determines Jones is not harmed at all; he is benefitted. However, if one is skeptical of Harman's possible inclusion of an alternative condition of harming, perhaps a "worse off" condition, then one must admit that Jones has dim vision as a result of Dr. Smith's surgery, causing Jones to remain in a bad state. If Jones is in a bad state, and Dr. Smith has caused Jones to be in a bad state, then the advocate must say that Dr. Smith has harmed Jones. However, an advocate can reply to the problem by arguing that Dr. Smith has caused Jones to *remain* in a bad state, not to be in the initial bad state.

An advocate of the Non-Comparative Account of Harm can argue that the Sub-Threshold Problem is not a problem for their view because mitigating a harm is distinct from causing the initial harm. This argument references the true cause of the initial bad state, rather than the resulting state. In Poor Man, while Ben did cause Jim to *remain* in a bad state, (being poor), he did not cause Jim to be in the initial bad state, (being destitute). Similarly, in Poor Vision, while Dr. Smith did cause Jones to *remain* in a bad state (poor vision), he did not cause Jones to be in the initial bad state (blindness). It does not seem that causing someone, who had previously been in a very bad state, to be in a bad state is *causing* them that harm. Simply put, the Sub-Threshold Problem is

not a problem for the Non-Comparative Account, as mitigating harm is not a cause of harm.

Harman's account, which she presents as a sufficient condition of harm, appears to suggest that she is open to an alternative condition of harming, perhaps even the Counterfactual Comparative Account.¹²⁴ However, Harman's account appears to singularly align with the Non-Comparative Account in response to the Sub-Threshold cases due to the argument she presents. Each ability (for example sight, hearing, mobility, learning, attention, or cognition) has a range from a complete lack of functioning, to a normal range of functioning, to an excellent range of functioning. Harman describes the range of functioning in her response to the Poor Vision case by naming 'state S' and 'state M', whereby 'state S' represents a severe visual impairment and 'state M' represents a milder visual impairment.¹²⁵ In the Poor Vision case, the doctor performs a surgery on the patient who is in state S, and after the surgery the patient is in state M. Harman could claim that the doctor does cause harm, but that the harm is justified. If this is Harman's response, then the Poor Vision case is simply a variation of the Appendix Surgery case. However, there is a relevant difference between the Appendix Surgery and the Poor Vision cases.¹²⁶ In the first case the harm of the surgery is along more than one dimension of functioning (the ability to move about

¹²⁴ Although Harman's version of Non-Comparative Harm is capable of drawing from another sufficient conditions for harming, and she does leave open the possibility that the "worse off" condition may be a sufficient condition of harming, she does not employ this line of argument in response to Poor Vision. Harman, (2009): 188.

¹²⁵ Hanser provides an example of degrees of shortsightedness, in Hanser, (2009): 188., including specific eye assessments such as 20/30, 20/40, but Harman's approach was selected as it directly provides the same result. Harman's approach is in Harman, (2009): 148.

¹²⁶ Hanser uses a variation of the surgery case to make this point, in which a doctor can cure a disease that will cause paralysis, but it will cause shortsightedness (or Dim Vision), in Hanser, (2009): 188.

freely, without pain or wound, and the ability to live a full lifespan),¹²⁷ whereas in the second case the harm of surgery is along one dimension of functioning (the ability to discriminate detail visually at a distance).¹²⁸ This distinction, though a slight one, is important because rather than justifying a harm, as in the Appendix Surgery case, the doctor is increasing the patient's ability level along the dimension of sight from a complete lack of functioning to poor functioning. Matthew Hanser writes: "the doctor *simply* benefits his patient; he does not harm him *at all*".¹²⁹ The patient's result is poor vision, as measured on "a spectrum of ability levels, ranging from fully normal functioning (or even better than normal functioning) to a complete lack of functioning",¹³⁰ but he has good vision compared to his previous state of blindness.

Harman outlines the objection as: "sometimes one causes someone to be in a particular bad state, but one does not harm the person, because one causes the bad state simply by *improving* a worse state. Improving a bad state, the objector claims, is not a way of harming someone".¹³¹ The improvement of the patient's vision in the Poor Vision example, according to Hanser, is a benefit since it involves only one dimension of functioning. "That he was unable to eliminate the [visual impairment] completely - that he was unable to improve his patient's vision all the way to 20/20 - is not a "cost" or unfortunate side effect of the operation, to be weighed against the benefit. In this example the doctor *simply* benefits his patient; he does not harm him *at all*."¹³² Harman outlines the objection in similar way to Hanser, stating, "the objector's claim has force: it

¹²⁷ Hanser, (2009): 188.

¹²⁸ Hanser, (2009): 188.

¹²⁹ Hanser, (2009): 188.

¹³⁰ Hanser, (2009): 188.

¹³¹ Harman, (2009): 148.

¹³² Hanser, (2009): 188.

is natural to say that the doctor has not *harmed* the patient at all, but has simply lessened an existing harm. But the doctor does cause the patient to be in state M, a bad state. Thus the objector maintains that, on my view, the doctor harms the patient”.¹³³

Harman’s reply to the objection is that the details are relevant to the Poor Vision case. If state M is a side effect of the cure of state S, that is, state M is causally distinct from state S, such as a laser reshaping the retina would cause distorted nerves, then “the case is properly understood as one in which some harm is caused but that is justified because a greater harm is alleviated”.¹³⁴ Harman, in fact, responds to the Poor Vision case that the doctor *has not* harmed the patient, “because the doctor does not cause the patient to be disabled”.¹³⁵ Harman’s response to the objection is to modify her account. Initially, Harman wrote: “one harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death”.¹³⁶ The Poor Vision case, where the doctor has improved the patient’s vision by lessening an existing harm, does cause the patient to have a disability (state M), although the patient had a worse disability (state S) prior to the operation. Harman presents the modified account and writes: “one harms someone if one causes him *to be in* pain, *to be in* mental discomfort, *to be in* physical discomfort, *to have a* disease, *to be* deformed, *to be* disabled, or *to die*”.¹³⁷ The Sub-Threshold Problem is not a problem for Harman’s account, as it fails to meet the causal condition of her view. As the doctor’s action did not cause the initial bad state, it is unable to be considered a harm.

¹³³ Harman, (2009): 149.

¹³⁴ Harman, (2009): 149.

¹³⁵ Harman, (2009): 149.

¹³⁶ Harman, (2009): 139.

¹³⁷ Harman, (2009): 149. Italics added to emphasize Harman’s modifications.

The Sur-Threshold Problem

Another compelling problem with Harman's account of Non-Comparative Harm is when an action causes an individual to experience a worsening of their state, but they remain in a good state. These cases, Sur-Threshold Problem cases, involve an action that causes worsening of the individual's state, but it does not put them in a bad state. Suppose that the individual begins in a very good state, and an action causes them to be brought down to a good state. The Counterfactual Comparative Account captures harm in these cases, as the individual is worse off than he previously had been and therefore harmed. Many people would have the intuition that he was harmed. However, he does remain in a good state, which according to the Non-Comparative Account, determines that the action has not harmed him. Consider the following:

A Thousand Dollar Loss: A billionaire accidentally loses a thousand dollars.¹³⁸

An advocate of the Non-Comparative Account of Harm can argue that the Sur-Threshold Problem is not a problem for their view because the case A Thousand Dollar Loss is not a case of harm. The billionaire is not harmed by the loss, as it has such a minimal impact on his life and well-being. Seana Shiffrin presents the case of a billionaire's accidental loss of a thousand dollars as a problem with the typical account of harm.¹³⁹ Shiffrin claims:

"Comparative accounts overidentify conditions as harm that do not merit the label. [A comparative] account will, under a suitable description of states of affairs, identify as harm cases in which one merely loses or fails to receive a tremendous benefit. A billionaire's accidental loss of a thousand dollars will be said to be a harm to

¹³⁸ This example is presented by Shiffrin, (2012): 371, and commented on by Michael Rabenberg, "Harm", *J. Ethics & Soc. Phil.*, 8, viii, (2014): 5.

¹³⁹ Shiffrin uses this as a counterexample to the Counterfactual Comparative Account of Harm and the Historical Comparative Account of Harm in Shiffrin, (2012): 371-372.

him, assuming he has a stake in his stockpile, as many billionaires do. On counterfactual accounts, a missed opportunity (not even a loss) to rake in another thousand will also count as a harm. This seems implausible and makes it puzzling why harm per se should attract any special moral notice.”¹⁴⁰

According to the Counterfactual Comparative Account of Harm, the failure to benefit, as Shiffrin demonstrates with the example of a billionaire’s missed opportunity, also counts as a harm. One may respond that the missed opportunity, or even the accidental loss of a thousand dollars may not be a harm to a billionaire. However, most people would have the intuition that an intentional theft of a thousand dollars is a harm. If a theft of thousand dollars is a harm, then is theft of one dollar a harm? Consider a variation of the case:

Theft from a Billionaire: David steals a dollar from a billionaire.¹⁴¹

It seems to be the case that theft is wrong. Therefore, one might believe that the billionaire must be harmed by the theft. That would be mistaken. Harm is not a result of wrongfulness; wrongfulness may be a result of harm, but it may be a result of something else. It does not seem that David did, in fact, harm the billionaire. Even stealing a dollar from someone who has a middle-income salary does not seem to merit the label of ‘harm’. It certainly does not seem that stealing a dollar from a billionaire would be a harm to him.

One reply to this problem is that it refers to how much his condition is worsened as a result of the action. The stolen amount ought to be a significant percent of the billionaire’s wealth to warrant a harm, such as a certain percent of his overall net

¹⁴⁰ Shiffrin, (2012): 371-372.

¹⁴¹ This is a variation of Shiffrin’s example in Shiffrin, (2012): 371-372., in which the money is not lost but stolen by an agent, which is an expansion of a similar example presented by in Boonin, (2014): 72. and in Folland, (2017): 16.

value.¹⁴² Another reply refers to his final state in relation to the threshold between “good states” and “bad states”. His final state ought to be within close proximity to the threshold to warrant a harm.¹⁴³ An alternative reply is to deny that the billionaire is harmed but acknowledge that he is wronged (without being harmed) through a violation of his property rights.¹⁴⁴ Shiffrin also denies that the billionaire is harmed, but she identifies a further problem with referring to his final state in relation to the threshold:

“One might modify the comparative accounts by appealing to thresholds in which only conditions that fall under a threshold of minimal overall interest satisfaction should count as harm. Such accounts may evade cases like the billionaire’s monetary loss, but the price for evasion is too high. For it will then be difficult to acknowledge that the billionaire’s broken leg is a harm to him should he remain above the minimal welfare threshold. One might then suggest that different thresholds cover differently aspects of well-being. Ascents up the financial ladder do not compensate for physical harm.”¹⁴⁵

It seems intuitive that breaking an individual’s arms will harm him, regardless of his unrelated financial status. It may be the case “that different thresholds will cover differently aspects of well-being”, as Shiffrin suggests.¹⁴⁶ Suppose that David steals a dollar from a billionaire and breaks his arm. It does not seem that David did harm the billionaire by stealing one dollar. However, it does seem that he harmed the billionaire

¹⁴² Discussion with my supervisor, Allen Habib.

¹⁴³ Interestingly enough, this response appears to be the challenge faced by the non-identity problem cases.

¹⁴⁴ A wronging without harming response, based on rights violation, has also been provided as a solution to the Non-Identity Problem. Roberts, (2019).

¹⁴⁵ Shiffrin makes reference to Stephen Perry who has done work to show that a Historical Comparative Condition is a necessary but not sufficient condition of harm. Shiffrin worries that “the significant criteria that infuse the necessary conditionals will implicitly incorporate noncomparative considerations that do the fundamental work. Where to set the threshold reopens the question of what harm is that the standard account lacks the internal resources to answer” in Shiffrin, (2012): 371, Footnote 32.

¹⁴⁶ Shiffrin, (2012): 371, Footnote 32.

by breaking his arm. Yet, the billionaire, even with a broken arm, will be well-above the threshold, indicating that David has not caused him to be in a bad state (all-things-considered).

A response to this worry could be that instead of one, all-things-considered, threshold of well-being, we ought to have a more fine-grained understanding of well-being. The fundamental problem of the comparability of harms and benefits was one of the main problems with the Counterfactual Comparative Account, which led to the alternative account. The Non-Comparative Account can deal with the mistaken understanding of the comparability of harms and benefits. Therefore, according to the Non-Comparative Account, David has not harmed the billionaire by stealing his money but has harmed him by breaking his arm.

An advocate of the Non-Comparative Account can advance an argument for assessing harm through different aspects of one's well-being, perhaps by identifying a variety of "dimensions of functioning".¹⁴⁷ "There are many dimensions along which someone can be disabled, each corresponding to an aspect of proper functioning; and along each dimension there are a spectrum of ability levels, ranging from fully normal functioning (or even better than normal functioning) to a complete lack of functioning".¹⁴⁸ Hanser's framework can better be understood through the use of examples, such as: one could have a physical disability (blindness, deafness, or limited mobility issues) or a mental disability (a learning disability, ADHD, or limited cognitive abilities) that could affect their ability to experience full normal functioning. Hanser provides the example of

¹⁴⁷ Hanser uses the term "dimensions of functioning" to outline his Poor Vision objection to Harman's bad state in Hanser, (2009): 188.

¹⁴⁸ Hanser, (2009): 188.

full normal functioning as “the ability to discriminate detail visually at a distance”,¹⁴⁹ which can be used to assess an individual’s ability to see.

If it is the case that different thresholds cover different aspects of well-being, and those thresholds can be identified as various dimensions of functioning, then the Sur-Threshold Problem does not appear to be a problem for the Non-Comparative Account. Suppose that an individual experiences a worsening of their state, limited to one aspect of well-being, as a result of an event, but they remain in a good state all-things-considered. If the billionaire’s wealth is assessed along one dimension of functioning and his ability to use his arm along another, then David has harmed him by causing him to be in a bad state in one respect but not the other.

A critic can argue that a decrease in well-being along one dimension of functioning is a harm, but the Non-Comparative Account fails to capture the harm as the individual is not in a bad state. Suppose that the individual begins in a very good state, and as a result of an event, he is brought down to a good state. Consider the following:

Genius Suffering Brain Damage: Jeeves is a genius and a world-renowned physicist. He has a stroke, resulting in brain damage, which causes him to have cognitive functioning that is slightly above the statistical average.¹⁵⁰

Jeeves’ cognitive functioning is well above the statistical average prior to the stroke.

Jeeves, a genius, is in a very good state. Many people would think that the stroke harms Jeeves, and the Non-Comparative Account of Harm is unsuccessful in identifying

¹⁴⁹ Hanser, (2009): 188.

¹⁵⁰ This example is a combination of the relevant features of similar examples presented in Hanser, (2008): 432., Rabenberg, (2014): 5., Gardner, (2015): 431., and Folland, (2017):16.

the harm in this case.¹⁵¹ Jeeve's post-stroke state can be considered a harm if one were to defend Shrifin's version of the Non-Comparative Account. On Shiffrin's view, "harm involves conditions that generate a significant chasm or conflict between one's will and one's experience, one's life more broadly understood, or one's circumstances".¹⁵² Jeeves is harmed, according to Shrifin's view, even though he is not in a bad state, as his will is interfered with by his post-stroke state. This view is objected to by Hanser, who suggests that "certain losses can be bad for people even if they don't object to them",¹⁵³ by Ravenberg, who suggests that the brain injury has also given Jeeves "average *volitions*, with the result that [he] does not occupy a will-usurping state",¹⁵⁴ and Gardner, who suggests that this "would imply that nonhuman animals cannot be harmed unless they have a will".¹⁵⁵

As an advocate of the Non-Comparative Account of Harm, I offer a new solution in which Jeeves is harmed, by being in a bad state, but not in virtue of the decline in his cognitive functioning. Jeeve is in a good state relative to his cognitive functioning, but he is in a bad state relative to his identity as a world-renowned physicist. What matters is not his cognitive functioning, but how it was utilized by him to create his lived experience. In a later piece, Shiffrin expands upon her view, suggesting that harm is

¹⁵¹ Hanser and Ravenberg argue that the stroke is a harm in Hanser, (2008): 432., and Rabenberg, (2014): 5. Hanser argues that "the magnitude of the subject's loss" is an argument against a non-comparative account, while "the absolute value of his resulting state" is an argument against a comparative account in Hanser, (2008): 432-433. Gardner and Folland suggest that intuitively, the stroke is a harm in Gardner, (2015): 431., and Folland, (2017): 16.

¹⁵² Shiffrin expands upon "one's life more broadly understood" in a footnote, which she states that she means "the content of one's life may well exceed the boundaries of one's conscious knowledge or even one's conscious experience" in Shiffrin, (1999): 123.

¹⁵³ Hanser, (2008): 432. Footnote 13.

¹⁵⁴ Rabenberg, (2014): 6.

¹⁵⁵ Gardner, (2015): 432.

closely connected to one's autonomy. Jeeves is harmed, as "the state [he] is in constitutes an obstruction or impediment of [his] control over substantial elements of [his] experience".¹⁵⁶ The stroke does cause him a harm, but not in the cognitive functioning aspect of his well-being. In regard to his cognitive functioning, he was in a very good state. Jeeves experienced a worsening of his very good state as a result of his stroke, but he remained in a good state with slightly above average cognitive functioning. The worsening of his state does not put him in a bad state, at least not in regard to his cognitive functioning. He is harmed because he is not a genius anymore. He is harmed because his career as a world-renowned physicist is over. Having the mental capacity to sustain his career is a substantial element of his lived experience, and the loss of his cognitive functioning impedes his ability to have control over these substantial elements of his experience. It is a mistake to identify the harm as the brain damage (resulting in slightly above average cognitive functioning). The harm Jeeves suffers is that the stroke has caused him to no longer be a world-renowned physicist.

One might argue that this is a cheat. One might suggest that Jeeves is harmed due to the worsening of his cognitive functioning. An advocate of the Counterfactual Comparative Account of Harm would argue that it is not that Jeeve's cognitive functioning is necessary for continued success in his career, but rather that he is worse off than he would have been had he not had the stroke. Such a person may also argue that worsening of his cognitive functioning would be a harm to Jeeves regardless of what his career was. This, to me, seems unlikely. Consider the modified case:

¹⁵⁶ Shiffrin, (2012): 383.

Genius Suffering Brain Damage': Jeeves is a genius and a successful electrician. He has a stroke, resulting in brain damage, which causes him to have cognitive functioning that is slightly above the statistical average. He has been working for the same company for several years and finds that the speed with which he performs on the tools is comparable to before his stroke.

Jeeves' cognitive functioning is well above the statistical average prior to the stroke, and he was in a very good state. After the stroke, he was in a good state. Unlike Jeeves the physicist in Genius Suffering Brain Damage, Jeeves the electrician in Genius Suffering Brain Damage' does not utilize his cognitive functioning to create his lived experience. The harm is not in virtue of the decline in his cognitive functioning, but rather in virtue of his identity as a world-renowned physicist. Jeeves the electrician is harmed only if his loss of genius is a bad state for him to be in. Perhaps it seems strange to think of a loss in cognitive functioning as not being bad for a person. Consider this analogous case:

"Cave Dweller: George is a member of a cave-dwelling society. The members of the society live a life of complete darkness. They go about their lives using heightened senses of hearing, touch, and smell. Though eyesight is useless to them, most of them nonetheless have the power of eyesight. George, on the other hand, has developed a rare degenerative disorder that has slowly made him blind. He never notices it, of course, since he has always lived, and will always live, in complete darkness."¹⁵⁷

It is conceivable that blindness, a sub-threshold condition, is not bad for George. In most situations, blindness would be a bad state for an individual. It may be the case that in certain situations, a worsened condition would be mitigated by its occurrence in a specific extreme context. For example, George's worsened eyesight is mitigated by

¹⁵⁷ Duncan Purves uses this example to show a worry he has with Harman's description of bad states as "bad in themselves" or "intrinsically bad" in Purves, *Who Should Exist: A Welfare-based Solution to the Non-identity Problem*, (2013): 89. I agree that disabilities are not intrinsically bad states to be in, though they can be bad states in virtue of the context.

occurring in a cave. If blindness is not bad for George, so long as he lives in the cave, then one could suppose that the loss of cognitive functioning to Jeeves the electrician is not bad for Jeeves, so long as he lives a life in which he never notices his genius.

The Death Problem

The most serious problem facing the Non-Comparative Account of Harm, some argue, is its inability to account for the harm of death. The Death Problem arises when an individual dies or is killed, as ceasing to exist is not a state that one can be in, and therefore is not a bad state. The Death Problem is a problem with the Non-Comparative Account of Harm, as it fails to capture harm, since the individual is thought to be harmed but not caused to be in a bad state. If death is bad for a person, and many have the intuition that it is, but the individual isn't in a bad state, then how is death bad?

An advocate of the Non-Comparative Account can respond to the problem by claiming: if death is a state of nonexistence, then the Counterfactual Comparative Account faces the same problem. If death is not a state one can be in, and both accounts require an individual to be in a state for an assessment of harm, then neither account is preferable. The Death Problem is equally a problem for both the Counterfactual Comparative Account and the Non-Comparative Account. A nonexistent individual cannot be "worse off" nor in a "bad state".

The death of an individual is typically thought to be comparatively bad for him,¹⁵⁸ Shelly Kagan writes: "it's bad because while you're doing this, you're not getting something better".¹⁵⁹ Death is bad for the individual who dies because of what he is not

¹⁵⁸ Kagan, (2012): 212.

¹⁵⁹ Kagan, (2012): 211.

getting when he is alive. This is commonly understood as the Deprivation Account.

“Death is bad because it deprives me of the good things in life”.¹⁶⁰ The Death Problem arises, as it appears to be the case that death, as the deprivation of the good things in life, is essentially a counterfactual comparative concept.¹⁶¹

Many philosophers believe that the Deprivation Account fits cohesively with the Counterfactual Comparative Account of Harm. If an individual dies, then he is deprived of the things he could have been doing had he not died at that time. I disagree.

Consider the following cases:

Died in his Sleep: John is 79. He had travel plans to see his grandchildren. His flight was booked for the next morning, but he died painlessly in his sleep.

Missed Flight: John is 79. He had travel plans to see his grandchildren. His flight was booked for the next morning, but the power went out overnight and he overslept, missing his flight.

John would be better off had he taken the trip, and worse off having been unable to.

However, the point of comparison, in which he is worse off, is only identifiable in Missed Flight. If nonexistence is not a state that John can be in, then neither the Counterfactual Comparative Account nor the Non-Comparative Account are able to respond to the Death Problem. If death is nonexistence, then the Counterfactual Comparative Account cannot use the time after death as a point of comparison because there is no individual subject that could be in that state, which is required for a subject to be “worse off” or “better off” than he otherwise would have been. Existence is a necessary condition for a

¹⁶⁰ Kagan, (2012): 212.

¹⁶¹ Thomas Nagel presents this view using phrases such as “death deprives” in Nagle, *Death. Noûs*, (1970): 73, 80., “loss of life” in Nagle, (1970): 74., “life is a good and death is the corresponding deprivation or loss” in Nagle, (1970): 75., and uses an example of a brain injury that he states is a “deprivation whose severity approaches that of death” in Nagle, (1970): 77.

Counterfactual Comparative assessment of harm. Given that nonexistence is not a state that an individual can be in, the Non-Comparative Account cannot argue the time after death is a bad state. Matthew Hanser writes: “[t]he dead fare neither well nor badly. They fare neither better nor worse than they fared before they died, or than they would have fared had they not died when they did. They don’t ‘fare’ at all”.¹⁶² The time after death cannot be good nor bad, better nor worse, for the individual.

The Deprivation Account opens the Counterfactual Comparative Account to additional problems that the Non-Comparative Account does not face, including explaining how death is a special case of deprivation not requiring existence at the time of badness¹⁶³ and the asymmetry of why deprivation of goods after death matters more than deprivation before birth.¹⁶⁴

Harman’s Non-Comparative Account of Harm includes death on her list of bad states, (“one harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death”),¹⁶⁵ but she does not provide additional argumentation for how death is a bad state. When Harman modified her account to differentiate between being in an initial bad state and improving a bad state, her response to the Sub-Threshold Problem, she claimed that causing someone to die is a

¹⁶² Hanser, Still more on the metaphysics of harm. *Philosophy and Phenomenological Research*, 82(2), (2011): 463.

¹⁶³ This is the Epicurus problem. It also brings into view that the Counterfactual Comparative Account would need to explain why nonexistence is bad for an individual who dies, but not bad for a possible person who would never be born (as they are also deprived of the goods of life). The Epicurus problem is outlined in Kagan, (2012): 213-224.

¹⁶⁴ This is the Lucretius problem. The Counterfactual Comparative Account would need to explain why nonexistence is bad for an individual after they die, but not bad for an individual before they are born (as they are also deprived of the goods of life). The Lucretius problem is outlined in Kagan, (2012): 224-233 and Nagel, (1970): 78-79.

¹⁶⁵ Harman, (2009): 139.

harm. Harman writes: “one harms someone if one causes him *to be in pain, to be in mental discomfort, to be in physical discomfort, to have a disease, to be deformed, to be disabled, or to die*”.¹⁶⁶ While it is clear that Harman believes death to be a harm, it is hard to see how she can advance this view as it is clearly not a state that an individual can be in.

I am led to believe that Harman accepts the Deprivation Account of Death, as she writes an individual “has an interest in getting to live a full life”,¹⁶⁷ further explaining “that what a being “has an interest in” is a matter of what is *in the being’s interests*, not a matter of what the being desires or wants”.¹⁶⁸ According to Harman, living a full life is in the best interests of an individual. Harman does not only describe harm to be causing someone to be in a bad state, but also includes “enduring an event”,¹⁶⁹ which I believe could be the event of an individual’s death. She writes: “An action harms someone if it causes the person to be in a state, or to endure an event, that is worse than life with a healthy bodily state... [and] life with a healthy bodily state involves a normal human lifespan¹⁷⁰; so it does not involve *early death*”.¹⁷¹ The Death Problem is not a problem for Harman’s account, as she is able to account for the harm of early death in reference to what is in the best interests of an individual.

¹⁶⁶ Harman, (2009): 149. Italics added to emphasize Harman’s modifications.

¹⁶⁷ Harman, The moral significance of animal pain and animal death. *The Oxford handbook of animal ethics*, (2011): 735.

¹⁶⁸ Harman, (2011): 737.

¹⁶⁹ Harman, (2004): 97.

¹⁷⁰ Harman, (2009): 139. Harman replaces the term used in her 2004 paper “normal human lifespan” with “normal healthy state for a member of one’s species”. This is an advantage, as it allows the death of animals to be captured in her account. However, it is also problematic to use “the normal healthy state” for a baseline, as it reinforces ableist ideology.

¹⁷¹ Harman, (2004): 97.

Harman's Non-Comparative Alternative to the Typical Account of Harm

The typical account of harm, the Counterfactual Comparative Account, was challenged by compelling technical problems, including the Non-Identity Problem, the Preemption Problem, and the Omission Problem. The Non-Comparative Account was able to correctly identify harm in these cases, which I argue makes it a viable alternative to the Counterfactual Comparative Account.

Elizabeth Harman's version of the Non-Comparative Account of Harm is the most promising account. Unlike Shiffrin's problematic use of rationality as a requirement, Harman's account identifies causing harm as causing someone to be in a bad state, making it a preferable foundation for a viable Non-Comparative Account.

The Non-Comparative Account, generally, and Harman's account, specifically, is faced with compelling technical problems, including the Sub-Threshold Problem, the Sur-Threshold Problem, and the Death Problem. I argue that Non-Comparative Account can overcome these problems. The Sub-Threshold Problem arises when an individual causes another's state to improve from a very bad state to a bad state. Similarly, the Sur-Threshold Problem arises when an individual causes another's state to decrease from a very good state to a good state. It has been argued that the Non-Comparative Account of Harm is unable to distinguish between "bad states" and "worse states", and between "good states" and "better states". I argue that the Sub-Threshold Problems do not meet the causal requirement needed to cause an individual to be in a bad state, as the individual was already in the bad state prior to having their situation improved. I also argue that the Sur-Threshold Problems are not in fact harms, as the individual is not brought below the threshold. If the individual is brought below the threshold in some

respect, then they have been harmed on that dimension, which is the Non-Comparative Account's advantage of having a non-comparable understanding of harms and benefits. Although I do not believe that the Death Problem requires an argument, as the problem is a challenge for both the Non-Comparative Account and the Counterfactual Comparative Account, I do provide Harman's solution. Harman argues that an individual has an interest in getting to live a full life, and a bad states is any state that is worse than life with a healthy bodily state.

CHAPTER 6: Advancing a Modified Non-Comparative Account of Harm

Harman's account of harm relies on causing an individual to be in a bad state and can provide a solid foundation for a viable Non-Comparative Account. This account can capture harm in cases that the Counterfactual Comparative Account of Harm could not. However, Harman's account still requires significant modification. The modification I propose is reducing the items on Harman's list of bad states, beginning with disabilities. Harman's account relies on an outdated model of understanding disability as pathology; she assumes that a disability is nothing more than the biological deficiency of an organism. First, I present an alternative understanding of disability, the Social Model of Disability, which is advanced by people with disabilities, disability activists, and disability studies academics. According to this model, disability is an environmental limitation, rather than a physiological one. Next, I outline the Medical Model of Disability and demonstrate how Harman's view aligns with this model. This modification is motivated by Elizabeth Barnes' objection of Harman's inclusion of disability on her list of bad states. Harman assumes disabilities are intrinsically bad states, and Barnes proposes an alternative view of disabilities: when they are bad, they are bad because of the environmental factors rather than the physiological ones. Harman's account is criticized as being ableist. This objection, which I take to be convincing, calls for a modification to Harman's list of bad states.

To better assess why disabilities should be removed from Harman's list of bad states, I argue that Harman's list should be reduced to only those states which are intrinsically bad and exclude those which are instrumentally bad. I use Shelly Kagan's distinction between intrinsically bad, instrumentally bad, and comparatively bad states to

support my argument. Kagan describes intrinsically bad states as those “bad by virtue of their very nature”,¹⁷² instrumentally bad states as “bad by virtue of what it causes or *leads to*”,¹⁷³ and comparatively bad states as “bad because of what you’re not getting”.¹⁷⁴ This analysis helps to illustrate that Harman’s list of bad states must be significantly edited if it is to avoid capturing instrumental harms.

I conclude the argument for the modification by applying the Social Model and Kagan’s distinction between intrinsically bad and instrumentally bad states to the remaining items on Harman’s list. Ultimately, I argue to remove disability, disease, and deformity from Harman’s list of bad states. I argue for the following modification to Harman’s account: one harms someone if one causes an individual to be in an intrinsically bad state, such as causing pain, mental or physical discomfort, or death.

Motivation For the Modification: Questioning Disability as a Harm

Harman clearly identifies disability as a bad state on her list: “pain, mental or physical discomfort, disease, deformity, disability, or death”.¹⁷⁵ Harman’s account of a bad state is a state which is worse than the relevant baseline of “the normal healthy state of an organism”¹⁷⁶ and “a healthy bodily state”.¹⁷⁷ Harman’s account of causing harm outright claims: “one harms someone if one causes him... to be disabled”.¹⁷⁸ In Matthew Hanser’s response to the Dim Vision case, he writes that he assumes, “along

¹⁷² Kagan, (2012): 211.

¹⁷³ Kagan, (2012): 211.

¹⁷⁴ Kagan, (2012): 211.

¹⁷⁵ Harman, (2004): 93.

¹⁷⁶ Harman, (2004): 97.

¹⁷⁷ Harman, (2004): 97.

¹⁷⁸ Harman, (2009): 149.

with Harman, that states of less than proper functioning are harms”.¹⁷⁹ Harman, Hanser, and many others assume that having a disability is bad for a person as it decreases one’s well-being. Many people, including people with disabilities, disability activists, and academics in disability studies, adamantly disagree that disability is a harm. Harman’s view of disability is discriminatory by contemporary standards. An account of harm that discriminates against a group of people should be objected to on this point alone. Harman’s account faces such objection. However, I argue that by adopting an alternative view of disability and modifying Harman’s list of bad states, Harman’s version of the Non-Comparative Account of Harm can avoid this objection.

Models of Disability

Elizabeth Barnes introduces two opposing models of disability:

“There is a massive disconnect between the way disability is understood in the disability rights and disability pride movements and the way disability is understood within analytic philosophy. The former see being disabled as primarily a social phenomenon - a way of facing social oppression, but not a way of being inherently or intrinsically worse off. But while this view of disability has been widely incorporated into academic disability studies, it remains at the margins of analytic philosophy. The idea that disability is not inherently bad or suboptimal is one that many philosophers treat with open skepticism, and sometimes even with scorn”.¹⁸⁰

Barnes briefly outlines the Social Model of Disability and the Medical Model of Disability, which she then links with negative well-being. Disability is often viewed as a characteristic that has a negative impact on an individual’s well-being. “Until the past decade, most philosophical discussions of well-being simply treated disability as

¹⁷⁹ Hanser, (2009): 198, Footnotes 28.

¹⁸⁰ Barnes, (2016): 1.

conditions that reduced it”.¹⁸¹ The models of disability appear to be incompatible with the view “that disabilities are “neutral” characteristics or “mere differences”, with no average or generally adverse impact on well-being”.¹⁸² However, if we assume that disability is a characteristic with a neutral impact on an individual’s well-being, then models of disability can be used to outline the “possible relationships between bodily difference and functional limitations”.¹⁸³ Separation of the models of disability from the impact disability has on well-being allows for critical examination of whether or not the bodily difference is the cause of the limitations experienced by the person with a disability. The Social Model of Disability denies that the bodily difference is the cause of the limitations, while the Medical Model of Disability accepts that the bodily difference is the cause of the limitations.

The Social Model of Disability

The Social Model of Disability identifies the way society is structured as the cause of an individual’s limitations. This model “explains the characteristic feature of disability in terms of a relation between an individual and her social environment: the exclusion of people with certain physical and mental characteristics, or “impairments”, from major domains of social life”.¹⁸⁴ On this view, disability is a social justice problem.¹⁸⁵ Sunaura Taylor, a disabled person, a disability activist, and an academic, writes: “Disabled people are supposed to find the courage to overcome their own

¹⁸¹ Wasserman, et. al., "Disability: Health, Well-Being, and Personal Relationships", *The Stanford Encyclopedia of Philosophy* (2022): 1.

¹⁸² Wasserman, et. al., (2022): 7.

¹⁸³ Wasserman, and Aas, "Disability: Definitions and Models", *The Stanford Encyclopedia of Philosophy*, (2022): 2.

¹⁸⁴ Wasserman, and Aas, (2022): 2.

¹⁸⁵ Sunaura Taylor, *Beasts of Burden*, the New Press, (2017): 13.

personal limitations through strength of character rather than by overcoming discrimination and oppression”.¹⁸⁶

Disability is distinct from lack of functioning or impairment, according to the Social Model of Disability. The Union of the Physically Impaired against Segregation (UPIAS) wrote: “[w]hat we are interested in, are ways of changing our conditions of life, and thus overcoming the disabilities which are imposed on top our physical impairments by the way this society is organized to exclude us. In our view, it is only the actual impairments which we must accept; the additional and totally unnecessary problems caused by the way we are treated are essentially to be overcome and not accepted”.¹⁸⁷ Barnes’ example of “not being able to roll your tongue”¹⁸⁸ illustrates this point, though she uses it as a counterexample to the argument that disability is a lack of ability that most people have. Not being able to roll one’s tongue is a physical impairment, as the individual does have a lack of ability that most people have. However, it is not a disability, arguably because society is not organized to exclude these individuals. Alternatively, not being able to walk is a physical impairment, as the individual does have a lack of ability that most people have. It is a disability, arguably because society is organized to exclude these individuals, and the ways in which society is organized to exclude those that can not walk are imposed on top of their physical impairments. Taylor writes: “[c]onsider the simple example of our daily movements through our cities and towns, entering and exiting buildings, stepping over curbs, getting on buses. If someone cannot step up onto a curbside, is that marginalizing fact the fault of the

¹⁸⁶ Taylor, (2017): 11.

¹⁸⁷ UPIAS, *Fundamental Principles of Disability*, London: Union of the Physically Impaired Against Segregation, (1976): sec. 15.

¹⁸⁸ Barnes, (2016): 16.

person's body? What about a bus that is equipped with stairs but not a ramp or lift?...Ableism encourages us to understand one technology as normal and another as specialized".¹⁸⁹ If society was organized in an accessible manner, then, according to the Social Model of Disability, an individual without the ability to walk needs only to accept "the actual impairment", not "the additional and totally unnecessary problems caused by the way [they] are treated".¹⁹⁰ If all curbs contained curb cuts, and all buses were equipped with a ramp or lift, then an individual without the ability to walk would have an impairment but would not be limited by it.

The Medical Model of Disability

The Medical Model of Disability identifies bodily difference as the cause of an individual's limitations. This model "explains disability disadvantage in terms of pathological states of the body and mind themselves".¹⁹¹ On this view, disability is a departure from typical normal functioning or the species norm. Barnes writes: "the basic idea here is that there is a standard of normal functioning for humans, and that deviations from that norm are disabilities (or diseases). The normally functioning human can see, the blind person cannot—so the blind person is disabled. The normally functioning human can hear, the Deaf person cannot—so the Deaf person is disabled".¹⁹²

Matthew Hanser uses the Medical Model of Disability in discussion of the Poor Vision case. Hanser writes: "There are many dimensions along which someone can be disabled, each corresponding to an aspect of proper functioning; and along each

¹⁸⁹ Taylor, (2017): 13.

¹⁹⁰ UPIAS, (1976): sec. 15.

¹⁹¹ Wasserman, and Aas, (2022): 2.

¹⁹² Barnes, (2016): 13-14.

dimension there are a spectrum of ability levels, ranging from fully normal functioning (or even better than normal functioning) to a complete lack of functioning”.¹⁹³ Hanser’s framework can better be understood using examples: one could have a physical disability (blindness, deafness, or limited mobility issues) or a mental disability (a learning disability, ADHD, or limited cognitive abilities) that could affect their ability to experience full normal functioning. Hanser provides the example of full normal functioning as “the ability to discriminate detail visually at a distance”.¹⁹⁴ The Medical Model of Disability understands physical and mental disabilities as deficiencies proven by an assessment of atypical functioning.

Harman’s inclusion of disability on her list of bad states is founded upon the Medical Model of Disability: “pain, mental or physical discomfort, disease, deformity, disability or death”.¹⁹⁵ According to Harman, harm is causing an individual to be in a bad state. Harman offers a baseline from which one can understand a bad state, which she writes is “worse in some way than the normal healthy state for a member of one’s species”.¹⁹⁶ To Harman, a bad state is in reference to the threshold of a “normal healthy state”,¹⁹⁷ rather than the state that she would otherwise have been in. She writes:

“An action harms someone if it causes the person to be in a state, or to endure an event, that is worse than life with a healthy bodily state. A healthy bodily state involves no *damage*: no cuts or burns or diseases... it also involves no deformity: it is the normal healthy state of an organism of the species in question”.¹⁹⁸

¹⁹³ Hanser, (2009): 188.

¹⁹⁴ Hanser, (2009): 188.

¹⁹⁵ Harman, (2009): 139.

¹⁹⁶ Harman, (2009): 139.

¹⁹⁷ Harman, (2009): 139.

¹⁹⁸ Harman, (2004): 96-97.

On Harman's account, disability is a negative departure from typical normal functioning or the species norm. Harman's account appears to deny, like the Medical Model of Disability, that a disabled bodily state can also be a healthy bodily state.

The Medical Model of Disability has been criticized by disability activists and disability scholars for "position[ing] the disabled body as working incorrectly, as being unhealthy and abnormal, as needing a cure".¹⁹⁹ Sunaura Taylor, activist, academic, and individual with lived experience, writes: "The medical model of disability locates a disabled person's struggles solely within their own body: something is wrong with the disabled person, which makes them unable to fully function in the world".²⁰⁰ Due to the identification of bodily difference as the cause of an individual's limitations, the Medical Model of Disability has been criticized for ignoring or underestimating other factors contributing to the limitations of an individual with a disability.²⁰¹

I argue that Harman locates the bad state of disability on the Medical Model of Disability. Furthermore, I believe that Harman's would also locate the other items on list of bad states ("pain, mental or physical discomfort, disease, deformity, disability or death")²⁰² on a medical model. Bad states are relative to the physiological norm: "bad states are worse in some way than the normal healthy state for a member of one's species".²⁰³ The items on her list of bad states are located on a medical model. Pain and physical discomfort can be assessed by pathophysiology, as a bodily process associated with disease or injury. Mental discomfort can be assessed by psychiatry, in

¹⁹⁹ Taylor, (2017): 13.

²⁰⁰ Taylor, (2017): 13.

²⁰¹ Wasserman, and Aas, (2022): 2.

²⁰² Harman, (2009): 139.

²⁰³ Harman, (2009): 139.

some cases leading to a formal mental health diagnosis through the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). Deformity can also be located on a medical model, as an individual having anatomy different from other members of their species. Death, on a medical model, is understood as the end of physiological processes. Harman's understanding of bad states (as located on a medical model) is problematic, as it fails to recognize other factors contributing to the limitations associated with some of these bad states. We must further analyze Harman's list of bad states to determine which items, like disability, identify other factors as the cause of an individual's limitations.

An Objection to Disability as a “Bad State”

Elizabeth Barnes challenges the assumption that disabilities are harms. Barnes makes a relevant distinction between two philosophical accounts of disability: the Bad-Difference View and the Mere-Difference View. She outlines the distinction as “options for how disability interacts with well-being: either disability (by itself or intrinsically) makes you worse off, or it simply makes you different”.²⁰⁴ The Bad-Difference View is supported by the following beliefs about disability: it has a negative effect on well-being, one would likely have a lower level of well-being in virtue of their disability, and a disabled individual's well-being would be improved if nothing else changed except the removal of their disability.²⁰⁵ The Mere-Difference View is supported by multiple beliefs about disability: disability is a characteristic like gender or sexual orientation, disability is not a defect or a departure from the norm, and the principal cause of the badness of disability is not the disability itself but rather the societal prejudice and lack of

²⁰⁴ Barnes, (2016): 55.

²⁰⁵ Barnes, (2016): 60-61.

accommodations.²⁰⁶ The Bad-Difference View is to assume a Medical Model of Disability, a relationship between disability and diminished well-being, which is present in the biology of an organism. The Mere-Difference View is to deny a connection between disability and diminished well-being. The Mere-Difference View, like the Social Model of Disability, suggests that when this connection is present, diminished well-being is a result of the treatment of the disability within an environmental context. Barnes raises some important philosophical questions about disability that ought to be answered prior to accepting Harman's assumption that disability is a bad state.

To illustrate Barnes' distinction, consider Harman's threshold dependent concept of harm in relation to the Non-Identity Problem. If we accept Barnes' distinction, and assume The Mere-Difference View is correct, then there would be no reason to think that bringing a disabled child into existence is any worse than bringing a non-disabled child into existence.²⁰⁷ This view can, analogously, be argued to apply to gender; there would be no reason to think that bringing a female child into existence is any worse than bringing a male child into existence. The same analogy can be drawn for sexual orientation or any number of other characteristics. The inclusion of disability on Harman's list of bad states assumes that individuals with impairments will have lower levels of well-being in virtue of their disabilities. Barnes argues that there is reason to challenge this assumption.

Duncan Purves is also concerned with Harman's description of disability as a bad state. Purves has constructed the following illustrative example:

²⁰⁶ Barnes, (2016): 69-70.

²⁰⁷ Barnes, (2016): 159.

“Cave Dweller: George is a member of a cave-dwelling society. The members of the society live a life of complete darkness. They go about their lives using heightened senses of hearing, touch, and smell. Though eyesight is useless to them, most of them nonetheless have the power of eyesight. George, on the other hand, has developed a rare degenerative disorder that has slowly made him blind. He never notices it, of course, since he has always lived, and will always live, in complete darkness.”²⁰⁸

It is conceivable that blindness is not bad for George, nor for anyone living within this context. If George were to experience his loss of vision while living in a typical environment, then one could say that his loss of vision was bad for him and a harm. However, Cave Dweller illustrates that the harm is a result of the environmental context in which he lives rather than his pathological state.

Barnes and Purves provide reason to believe that disabilities are not always bad states to be in, though they can be bad states in virtue of the context. The inclusion of disability on Harman’s list of bad states assumes that individuals with impairments will have a lower level of well-being in virtue of their disabilities. Barnes argues, and I agree, that there is a reason to challenge this assumption. Purves provides a counterexample which supports Barnes’ argument.

Types of Badness: Intrinsic, Instrumental, and Comparative Badness

Harman’s list of bad states—“pain, mental or physical discomfort, disease, deformity, disability or death”²⁰⁹—describes specific bad states that an individual could be in. Harman begins with these specifics, then writes: “[m]ore generally, the view is that an action harms someone if it causes the person to be in a bad state”.²¹⁰ What type

²⁰⁸ Purves, (2013): 89.

²⁰⁹ Harman, (2009): 139.

²¹⁰ Harman, (2009): 139.

of badness is Harman attempting to capture in her “bad state”? Harman claims: “[b]ad states are understood as states that are in themselves bad”.²¹¹ This view, according to Shelly Kagan, is a state that is intrinsically bad.

Kagan draws a distinction between three ways in which something can be bad: intrinsically bad, instrumentally bad, or comparatively bad.²¹² Things which are intrinsically bad, he writes: are “bad by virtue of their very nature”, such as a pain: a headache, stubbing your toe, being stabbed or tortured.²¹³ Something instrumentally bad, he writes: “may not be bad in itself, but bad by virtue of what it causes or *leads* to”, such as losing a job, which can be instrumentally bad as it can lead to poverty and debt.²¹⁴ Another way something can be bad for someone is that it can be comparatively bad. Kagan writes: “[s]omething could be bad because of what you’re not getting while you get this bad thing... It’s not that it’s intrinsically bad, nor even that it’s instrumentally bad; it’s bad because while you’re doing this, you’re not getting something better”.²¹⁵ This analysis helps to illustrate that Harman’s list of bad states must be significantly edited if it is to only identify, as she claims “states that are in themselves bad”.²¹⁶

Harman outlines her list of bad states as intrinsically bad. However, Kagan’s distinction identified only pain and mental discomfort and physical discomfort as intrinsically bad. Disease, by Kagan’s distinction, is instrumentally bad, as it is not bad by its very nature, but rather by what it causes or leads to. Similarly, deformity and disability are instrumentally bad, by Kagan’s distinction, as the badness is what they

²¹¹ Harman, (2009): 139.

²¹² Kagan, (2012): 210-211.

²¹³ Kagan, (2012): 211.

²¹⁴ Kagan, (2012): 211.

²¹⁵ Kagan, (2012): 211.

²¹⁶ Harman, (2009): 139.

cause or lead to, rather than their very nature. Death, Kagan argues is neither intrinsically nor instrumentally bad, but rather comparatively bad.

If one is not convinced by the Social Model of Disability that disability is not an intrinsic bad, then Kagan's description of an intrinsic bad as "bad by virtue of their very nature"²¹⁷ ought to be convincing. Ultimately, if a bad state is, as Harman claims "states that are in themselves bad,"²¹⁸ then disability ought to be removed from her list of bad states.

Excluding Instrumental Harm from Harman's List of Bad States

Harman's list of bad states are meant to be states that are intrinsically bad. Harman's inclusion of disability on her list of bad states is based on the outdated Medical Model of Disability, where emphasis is put on the pathology of disability. To avoid ableist assumptions about disability, I suggest reexamining Harman's list of bad states through a Social Model of Disability. I also suggest using Shelly Kagan's explicit distinction of types of badness as the foundation for the understanding of intrinsically, instrumentally, and comparatively bad states. The second modification I suggest is to remove instrumentally bad states from Harman's list, starting with disability.

The spirit of the argument made by Barnes and Purves is that disability is not an intrinsic harm, but rather instrumental harm. The argument I advance, first to accept a Social Model, then to use Kagan's distinction of types of badness, can be applied to include other items on Harman's list, namely disease and deformity. Disease may also be an instrumental harm, as it can be the cause of pain or discomfort, but a disease in and of itself often is not intrinsically bad. If the disease does cause pain or discomfort,

²¹⁷ Kagan, (2012): 211.

²¹⁸ Harman, (2009): 139.

then the harm is captured by the intrinsic badness of the pain or the discomfort.

However, in the right context, symptoms of many diseases can be managed. Deformity may also be an instrumental harm, if not appropriately accommodated, as it can be, but is not necessarily, the cause of mental discomfort. If the deformity does cause mental discomfort, then the harm is captured by the intrinsic badness of the discomfort.

However, in the right context (a society free from prejudice and with appropriate accommodations in place) deformity does not seem to be an intrinsic harm. The modification I propose is to exclude disease, deformity, and disability from Harman's list, as these are instrumental bads, not intrinsic bads. I suggest the following modification to Harman's view: one harms someone if one is the cause of an intrinsically bad state.

Applying the Modification

The modification is introduced to avoid socially constructed environments that privilege certain traits and abilities over others. I believe environments that disadvantage traits or abilities, where appropriate accommodations could be implemented to produce equitable outcomes, are the cause of these harms. While it is the case that individuals suffer harms because of socially constructed environments, some harms are mitigated or diminished entirely by providing appropriate accommodations. Other harms are intrinsically bad, such that they cause pain or discomfort regardless of the environment.

To avoid unexamined biases, I have selected non-human animal cases to illustrate the application of the modified account of harm. I avoid using human cases, as intuitions differ on what is and is not a bad state as far as limitations are concerned. I

assume that animals are beings that can be harmed and are worthy of moral consideration. Consider the following selective breeding cases:

The Sphynx Cat: The sphynx (hairless) cat is bred to have a hairless body. This breed is likely to have skin problems and is sensitive to cold weather and sun.²¹⁹

The Brachycephalic Dog: Brachycephalic (flat-faced) dogs are bred to have short muzzles and noses. These breeds include English bulldog²²⁰, French bulldog, Pug, Pekingese and Boston terrier, and are likely to have difficulty breathing.²²¹ Some of these dogs require airway opening surgeries.

In these cases, which are animal versions of the Non-Identity Problem, the animal is intentionally bred for the disenanced feature attributed to human partiality. The Sphynx Cat is bred for a hairless look and feel. The Brachycephalic Dog is bred for its flat face. Given the increased likelihood of poor health outcomes for the individual animals, arguments have been made against these breeding practices.²²²

Is the individual animal harmed? The Non-Identity Problem arises due to the assumption that the Counterfactual Comparative Account of Harm is correct. The Non-Comparative Account of Harm can avoid the Non-Identity Problem and identify harm in these cases. I argue that according to Harman's version, the Sphynx Cat and the Brachycephalic Dog are both harmed. I assume that the skin problems experienced by the Sphynx Cat are not life-threatening and can be avoided through proper care. While it is a bad state to have problem-prone skin that is sensitive to the elements, the trait of hairlessness can be mitigated by providing appropriate accommodations, such as

²¹⁹ Hughes, (2019).

²²⁰ This case is modified from Palmer's case of the bulldog, focusing on one specific breeding outcome, which is shared by other breeds, in Palmer, (2012): 159.

²²¹ American College of Veterinary Surgeons, (2019).

²²² Rooney, (2009): 180.

proper pet bathing and dressing. The Brachycephalic Dog, on the other hand, may experience difficulty breathing that can be life-threatening. Difficulty breathing, which can be akin to sucking air through a straw, is a bad state, but the trait of a particular shape of head, muzzle, and throat cannot be mitigated by providing appropriate accommodations. The outcome of difficulty breathing can be mitigated through airway opening surgery targeting tissue reduction in up to three areas.²²³ Unlike the accommodation that could be provided to the Sphynx Cat, producing equitable outcomes for the Brachycephalic Dog requires surgical modification.

According to the Non-Comparative Account of Harm, the animals are harmed as they are bred to be in a bad state. If the animals are harmed, then is the harm intrinsically bad or instrumentally bad?

I would argue that in the case of the Sphynx Cat, the harm is instrumentally bad. Given that the animal is domesticated, and the environment allows for accommodation of the animal's trait, the hairlessness of the Sphynx Cat is a harm which is instrumentally bad, as it can be the cause of pain and suffering if not properly accommodated. However, it can also be argued that the harm is intrinsically bad, for without proper care the animal suffers pain and discomfort. If the trait of hairlessness was in a different environment, such as a hairless tiger living in the wild, then it could be argued that the harm is intrinsically bad, as the environment would not allow for accommodation.

²²³ American College of Veterinary Surgeons, (2019).

In the case of the Brachycephalic Dog, I argue the harm is intrinsically bad. Struggling to breathe is a bad state, certainly causing physical discomfort. While the physical traits can be modified to improve the breathing, it cannot be easily accommodated in a way that does not also cause harm to the animal.

Conclusion and Areas of Future Work

The Non-Identity Problem cases demonstrate a larger problem, which I argue is the failure of the typical account of harm. The problem arises when a procreative action brings about the birth of an individual with a significant disadvantage, which is also a necessary condition of their worthwhile existence. This shows that an assessment of harm, as causing an individual to be “worse off” than they otherwise would have been, is problematic. This problem motivated my inquiry into the nature of harm and called for an alternative account of harm capable of identifying harm in these cases.

The typical account of harm, the Counterfactual Comparative Account of Harm, assesses harm with a “worse off” condition, whereby an action causes harm to an individual if and only if the individual is made worse off than they otherwise would have been. I argue that the structure of the Counterfactual Comparative Account, which assumes that harms and benefits are comparable, allowing for an all-things-considered assessment of an action, is problematic. Furthermore, this account faces three serious technical problems: the Non-Identity Problem, the Preemption Problem, and the Omission Problem. In each of these cases, harm is improperly identified or not captured.

The Non-Comparative Account of Harm is a viable alternative to the Counterfactual Comparative Account. This account has the advantage of accounting for

the mistaken understanding of the comparability between harms and benefits, such as in the Rescue case, the Rape case, and the Nazi Prisoner case. These cases show that although the action results in a net benefit, the individual has endured a simultaneous harm along with it. Furthermore, the Non-Comparative Account of Harm is able to produce the correct results in the problems with the Counterfactual Comparative Account of Harm, such as the Non-Identity Problem, the Preemption Problem, and the Omission Problem.

Harman's version of Non-Comparative Account of Harm is a preferable foundation for a viable alternative to the Counterfactual Comparative Account. Harman advances a sufficient condition for harming as: "one harms someone if one causes him pain, mental or physical discomfort, disease, deformity, disability, or death",²²⁴ which she also describes generally as "to be in a bad state".²²⁵

The Non-Comparative Account of Harm is also faced with three problems: the Sub-Threshold Problem, the Sur-Threshold Problem, and the Death Problem. I argue that the Sub-Threshold Problem demonstrates there is a challenge identifying the cause of the harm, an area worthy of future inquiry and research. I suggest developing a method of identifying the principal causes of the harm, as some causes appear to simply be links in the causal chain of events.²²⁶ I believe one can advance another modification to Harman's view to deal with the causal problem.

²²⁴ Harman, (2009): 139.

²²⁵ Harman, (2009): 139.

²²⁶ Meyer presents a critique of Harman's work, suggesting that her account identifies too many actions as harming. Meyer uses Parfit's Risky Policy case to split the action of causing radioactive waste and the procreative action. Meyer writes: "In general, I think [Harman's] account of causing harm classifies too many actions as harming... If the radioactive waste would cause future persons to be in a 'bad state', Harman would have to say that even if we did not

In response to the Sur-Threshold Problem, I argue that this demonstrates a need to identify different thresholds that can cover different aspects of well-being, such as various dimensions of functioning rather than an all-things-considered assessment, which is reason to avoid the net harm or net benefit analysis of the Counterfactual Comparative Account of Harm. While the harm of death finds the Non-Comparative Account of Harm and the Counterfactual Comparative Account of Harm at a stalemate, as both accounts face this problem, Harman provides an argument for how death is a non-comparative harm. Harman argues that an individual has an interest in getting to live a full life, and a bad states is any state that is worse than life with a healthy bodily state.

Harman's account of harm can provide a solid foundation for a viable Non-Comparative Account. This account can capture harm in cases that the Counterfactual Comparative Account of Harm could not. This account is also preferable to alternative Non-Comparative Accounts, such as Seana Shiffrin's. However, Harman's account still requires significant modification to avoid perpetuating ableist ideology. Harman's account relies on an outdated model of understanding disability as pathology, and the modification I propose is reducing the items on Harman's list of bad states, beginning with disabilities. Harman's view on causing harm, based on the Medical Model, fails to differentiate between harms that are intrinsically bad and instrumentally bad. As such, I exclude harms that are instrumentally bad (disease, deformity, and disability) from Harman's list of bad states.

produce the radioactive waste, we *harm* future persons simply by giving birth to them" in Meyer, (2018): 48.

BIBLIOGRAPHY:

American College of Veterinary Surgeons. (2019). Brachycephalic syndrome. Retrieved:

<https://www.acvs.org/small-animal/brachycephalic-syndrome>.

Barnes, E. (2016). *The minority body: a theory of disability*. Oxford University Press:

New York.

Boonin, D. (2014). *The non-identity problem and the ethics of future people*. Oxford

University Press, USA.

Bradley, B. (2012). Doing away with harm. *Philosophy and Phenomenological*

Research, 85(2): 390-412.

Feit, N. (2019). Harming by failing to benefit. *Ethical theory and moral practice*, 22(4):

809-823.

Folland, A. (2017). The dual nature of harm in defence of the disjunctive view. (Master

thesis, Department of Philosophy, Linguistics and Theory of Science, University of Gothenburg).

Gardner, M. 2015. A harm-based solution to the non-identity problem. *Ergo*, 2(17).

Hanser, M. (2009). Harming and procreating. *Harming Future Persons: Ethics, Genetics*

and the Non-identity Problem. M. Roberts and D. Wasserman (eds.) Springer:

179-200.

Hanser, M. (2011). Still more on the metaphysics of harm. *Philosophy and*

Phenomenological Research, 82(2): 459-469.

Harman, E. (2004). Can we harm and benefit in creating? *Philosophical*

Perspectives, 18: 89-113.

- Harman, E. (2009). Harming as causing harm. *Harming Future Persons: Ethics, Genetics and the Non-identity Problem*. M. Roberts and D. Wasserman (eds.) Springer: 137-154.
- Harman, E. (2011). The moral significance of animal pain and animal death. *The Oxford handbook of animal ethics*, 727.
- Huges, K. (2019). What you need to know before bringing home a sphynx cat. *PetMD*. Retrieved: <https://www.petmd.com/cat/care/what-you-need-know-bringing-home-sphynx-cat#>
- Kagan, S. (2012). *Death*. Yale University Press.
- Kavka, G. (1981). The paradox of future individuals. *Philosophy & Public Affairs*, 11: 93–112.
- Meyer, K. (2018). The claims of future persons. *Erkenntnis*, 83(1): 43-59.
- Nagel, T. (1970). Death. *Noûs*: 73-80.
- Palmer, C. (2011). Animal disenchantment and the non-identity problem: a response to Thompson. *NanoEthics*, 5(1): 43-48.
- Palmer, C. (2012). Does breeding a bulldog harm it? Breeding, ethics and harm to animals. *Animal Welfare-The UFAW Journal*, 21(2): 157.
- Parfit, D. (1984). *Reasons and persons*, Oxford: Clarendon Press.
- Purves, D. (2013). *Who should exist: a welfare-based solution to the non-identity problem* (Doctoral dissertation, Ph. D. dissertation, Department of Philosophy, University of Colorado).
- Rabenberg, M. (2014). Harm. *J. Ethics & Soc. Phil.*, 8, viii.

- Roberts, M. A. (Summer 2019 Edition) The nonidentity problem. *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = [<https://plato.stanford.edu/archives/sum2019/entries/nonidentity-problem/>](https://plato.stanford.edu/archives/sum2019/entries/nonidentity-problem/).
- Rooney, N. J. (2009). The welfare of pedigree dogs: cause for concern. *Journal of Veterinary Behavior: Clinical Applications and Research*, 5(4): 180-186.
- Shiffrin, S. (2012). Harm and its moral significance. *Legal Theory*, 18(3): 357-398.
doi:10.1017/S1352325212000080
- Shiffrin, S. V. (1999). Wrongful life, procreative responsibility, and the significance of harm. *LEG*, 5, 117.
- Steinbock, B. (2009). Wrongful life and procreative decisions. *Harming Future Persons: Ethics, Genetics and the Non-identity Problem*. M. Roberts and D. Wasserman (eds.) Springer: 155–178.
- Taylor, S. (2017). *Beasts of burden: animal and disability liberation*. The New Press.
- Thompson, P. B. (2008). The opposite of human enhancement: nanotechnology and the blind chicken problem. *NanoEthics*, 2(3): 305-316.
- UPIAS, 1976, Fundamental Principles of Disability. *London: Union of the Physically Impaired Against Segregation*.
- Wasserman, D. and Aas, S. (Summer 2022 Edition). Disability: definitions and models. *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), URL = [<https://plato.stanford.edu/archives/sum2022/entries/disability/>](https://plato.stanford.edu/archives/sum2022/entries/disability/).
- Wasserman, D., Asch, A., Blustein, J. and Putnam, D. (Summer 2022 Edition). Disability: health, well-being, and personal relationships. *The Stanford*

Encyclopedia of Philosophy, Edward N. Zalta (ed.), forthcoming URL =
<<https://plato.stanford.edu/archives/sum2022/entries/disability-health/>>.

Woodward, J. (1986). The non-identity problem. *Ethics*, 96: 804–31.

Woollard, F. (2012). Have we solved the non-identity problem? *Ethical theory and moral practice*, 15(5): 677-690.