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Ambiguities and Asymmetries in Consent and Refusal: Reply to Manson

Abstract

John Harris claims that it is 'palpable nonsense' to suggest that 'a child (or anyone) might competently consent to a treatment but not be competent to refuse it'.

In 'Transitional Paternalism: How Shared Normative Powers Give Rise to the Asymmetry of Adolescent Consent and Refusal' Neil Manson aims to explain away the apparent oddness of this asymmetry of consent and refusal, by appealing to the idea of shared normative powers, presenting joint bank accounts as an example.

In this paper, I will argue that Manson's account fails to explain away the oddness. Rather, I will argue that there are ambiguities to which Manson has not paid sufficient attention. In fact, as odd as it may sound, I argue that Manson actually agrees with Harris (at least in relation to the asymmetry of competence). He fails to recognise that he agrees with Harris because he is not careful enough to distinguish between different asymmetries, which I have labelled the asymmetries of choice, permissibility and competence.

Introduction

For some, it seems natural that a greater level of competence should be required in order to refuse treatment, than to consent to treatment, if the refusal of that treatment is likely to result in the patient's death. To others, however, this claim is considered to be hard to justify, or even untenable.

Neil Manson writes:

In many jurisdictions adolescents have a right to consent to their own clinical treatment but not a correlative right to always be able to *refuse* it... To many, this has, rightly, seemed puzzling...¹

John Harris is one of the critics of this asymmetry of consent and refusal. Manson quotes the following claim from Harris:

The idea that a child (or anyone) might competently consent to a treatment but not be competent to refuse it is palpable nonsense.²

In 'Transitional Paternalism: How Shared Normative Powers Give Rise to the Asymmetry of Adolescent Consent and Refusal'³ Neil Manson aims to explain away the apparent oddness of this

¹ Neil Manson, Transitional Paternalism: How Shared Normative Powers Give Rise to the Asymmetry of Adolescent Consent and Refusal. *Bioethics*, 2014; 29 (2), 66.

² J. Harris. Consent and end of life decisions. *J Med Ethics* 2003; 29: 10-15. (And quoted by Manson, *op. cit.* note 1, p. 67.)

³ Manson, *op. cit.* note 1.

asymmetry of consent and refusal, by appealing to the idea of shared normative powers, presenting joint bank accounts as an example. Manson aims to demonstrate that what may – at first – appear to be odd, is actually not odd at all.

In this paper, I will argue that Manson's account fails to explain the oddness. I will argue that there is an ambiguity to which Manson has not paid sufficient attention. Is the asymmetry of consent and refusal an asymmetry *within a single decision* (I can consent to the treatment, but I cannot refuse the very same treatment), or is it an asymmetry *among a plurality of decisions* (I can consent to A, but I can't refuse B)? Once we highlight the ambiguity, we will see that Manson has not explained away the oddness of the asymmetry in cases where the asymmetry is an asymmetry *within a single decision*. Rather, he has introduced a *different* asymmetry. This new asymmetry is not odd, but it is not the asymmetry that Harris dismisses as palpable nonsense.

In addition, I will argue that, in his response to Harris, Manson also fails to distinguish between an asymmetry of *competence* in consent and refusal and an asymmetry of *permissibility* in consent and refusal. As a result, Manson fails to recognise that he actually agrees with Harris, at least regarding the asymmetry of *competence*.

Manson's Response to Harris

As stated above, Manson quotes Harris's claim that 'The idea that a child (or anyone) might competently consent to a treatment but not be competent to refuse it is palpable nonsense.'

Manson quotes a number of people who reject the asymmetry, but I will focus on the Harris quote in particular. Of the quotes in Manson's paper, the Harris quote is the most explicit, making it completely clear that he is concerned with the asymmetry of consent and refusal within a *single* decision. Manson also clearly has Harris in mind when he ends his paper by concluding that, 'the asymmetry between adolescent consent and refusal is not incoherent or "palpable nonsense"'.⁴

I will argue that Manson's paper does not recognise the significance of the fact that Harris is focusing on a single decision. A key idea in Manson's paper is the analogy of the joint bank account. If Mr and Mrs Smith have a joint bank account, Mr Smith can buy a new camera, and Mrs Smith cannot veto this, and Mrs Smith can buy a new guitar, and Mr Smith cannot veto this.

Thus, both have the right to consent to transactions,⁵ but not the right to refuse – that is, neither of them is given the opportunity to block transactions made by the other person. Thus, Manson concludes, there is no incoherence in an asymmetry of consent and refusal. But this case is not analogous to Harris's, and therefore the

⁴ Manson, *op. cit.* note 1, p. 73.

⁵ Mr Smith consents to a transaction with Bailey's Cameras, and Mrs Smith consents to a transaction with Ely's Music Store.

fact that joint bank accounts are not incoherent does not demonstrate that there is no incoherence in the case that Harris considers. Harris is focused on a single decision, while Manson is focused on a plurality of decisions. When we talk of an asymmetry of consent and refusal, are we talking about a single case – as Harris is – or about a plurality of decisions, as in the joint bank account?

To put it another way, is there an asymmetry of consent and refusal *within* a single decision, or *between* a number of different decisions? The Harris quote is concerned with the former, and, likewise, the example of an individual making a decision about a single treatment is also an example of the former. In contrast, Manson's example of a married couple having a joint bank account is an example of the latter.⁶

To present a case that is analogous to Harris's, consider another example from Manson's paper, but with some more details. In Manson's version of the example, a mother and a child have a joint bank account. Unlike the earlier example of the married couple with

⁶ An anonymous referee for this journal also added that there is another problem with this analogy. The referee emphasises that 'the bank account is both consensual at a prior stage and contractual. It is not about rights except as they arise from contract.' In contrast though, the issue of consent and refusal is about the right 'of autonomy with respect to decisions we are competent to make.' (Note, however, that this objection doesn't apply to the example of the mother and the child, where their financial relationship – presumably – may not be based on a prior contract between the mother and the child.)

a joint bank account, however, this example doesn't involve equal powers. Manson explains:

The adolescent has the power to authorise a transaction of any value, but above a certain threshold the mother also has the power to do so. So, if the adolescent *refuses* to authorise a payment at that level, the mother has the power to do so, even against a child's wishes.⁷

So far, this still looks like the joint bank account example from before. There are a number of transactions that the adolescent can make, and a number of transactions that the mother can make. But now consider one individual decision. I will call the adolescent Lisa, and the mother Mrs Jones. Imagine that Mrs Jones intends to pay Lisa's rent whether Lisa intends to or not. However, she doesn't want her daughter to think she is interfering, so she tells her, 'I'll leave it up to you. You can choose whether or not to pay your rent.' (Of course, even as Mrs Jones says this, she knows perfectly well that if Lisa decides not to pay, she will authorise the transaction herself.)

Does Lisa have the choice to consent, but not to refuse, to pay the rent?

Lisa does *not* have a choice. If you have only two choices: x or not-x, and if not-x isn't an option after all, then you have no choice: you get x, whether you like it or not. This is the situation Lisa is in. If she thinks she has a choice – because she doesn't realise that her

⁷ Manson, *op. cit.* note 1, p. 71.

mother will authorise the transaction if she doesn't – she has been deceived.

This fact also highlights a difference between the asymmetry of choice and the asymmetry of permissibility. This, however, requires explanation.

If we say that there is an asymmetry *of permissibility*, between consent and refusal, this suggests that a person should be permitted to consent, but should not (or may not) be permitted to refuse treatment. In contrast, if we say that there is an asymmetry of *choice*, between consent and refusal, we are suggesting that it makes sense to say that an individual has a choice, when we offer them the option to consent or to refuse, even if we know that we will not permit them to *refuse* treatment.

In the case of Lisa and her mother, the asymmetry of choice focuses on Lisa, while the asymmetry of permissibility focuses on her mother.

The asymmetry of choice is not defensible. It is simply incoherent. If I say that you can choose x or not-x, but then also say that you cannot choose not-x, you clearly do not have a choice. The asymmetry of *permissibility*, however, focuses on what others should do. In this case, it focuses on what Lisa's mother should do. Asking if there can, legitimately, be an asymmetry of permissibility is essentially to ask if it is okay to trick people, telling them they have a choice when they don't. In saying this, I don't mean to rule it out. It may be justifiable, all-things-considered, but clearly it will be

controversial, given the deception involved. Unlike the asymmetry of choice, however, it is not incoherent.

Ultimately, the example of Mr and Mrs Smith buying cameras and guitars and the example of Lisa's rent are *not* comparable. The first focuses on two people having the right to consent to any transaction they want, in a plurality of different cases, but not having a right to refuse the other person's transactions. If you are particularly rich, such that you don't need to worry about running out of money, or if both partners are sensible, and also fair, such that neither is worried that the other will spend irresponsibly, this asymmetry between being able to consent to a transaction but not being able to refuse transactions, is a perfectly sensible way to manage your finances. It certainly is not incoherent. However, it isn't the sort of case that Harris and others are worried about.

The second case focuses on a single choice, where there are only two options: to consent or to refuse, and the claim is that Lisa should have the choice to consent, but not to refuse. This, then, is the asymmetry of choice. I have argued that this is incoherent. She could legitimately complain to her mother, 'You lied to me. You said *I* could choose whether or not I pay my rent. And the idea that I can choose to pay, but that I am not allowed to choose *not* to pay, is clearly nonsense.'

Manson could claim – legitimately – that he was defending the asymmetry of permissibility, not the asymmetry of choice.⁸ The claim, therefore, is that we should *give* adolescents the right to consent, but not to refuse. On this interpretation, Manson is talking about what the law should permit, and what it should not. He is arguing that adolescents should be permitted to consent to treatment, but should not be permitted to refuse treatment. On this interpretation, Manson avoids the incoherence of the asymmetry of choice, but, if this is the position he wants to endorse, he must recognise that the approach he is endorsing relies on deception, letting adolescents believe they have a choice when, in reality, they do not.

Allies

⁸ The paper starts with a statement about what rights adolescents have in ‘many jurisdictions’, and, throughout the paper, the focus does seem to be on what rights we should *give* to adolescents – or, to put it another way, there is a focus on asking what decisions we should permit adolescents to make for themselves, and which we shouldn’t. (Plausibly, one could also make a distinction between an asymmetry of rights, and an asymmetry of permissibility. Here though, I have not made this distinction, and I simply refer to the asymmetry of permissibility, as the focus is on legal rights. The asymmetry of permissibility simply puts the emphasis on those doing the permitting.)

Above, I focused on the difference between an asymmetry of permissibility and an asymmetry of choice (in addition to the difference between cases involving a single decision, and cases involving a plurality of decisions.) Finally, we should also be careful to recognise that both of the asymmetries discussed above (of choice and of permissibility) are quite different from an asymmetry of *competence*. If we claim that there is an asymmetry of *competence*, between consent and refusal, we are claiming that someone can be *competent* to consent to treatment, but not competent to *refuse* treatment.

In this section, I will argue that Manson is mistaken if he thinks that his view conflicts with the Harris claim quoted early in the paper. In concluding his paper, Manson writes:

Contrary to initial appearances, the asymmetry between adolescent consent and refusal is not incoherent or ‘palpable nonsense’...⁹

But Manson does not distinguish between the different asymmetries, as I do, and this quote (above) does not make it clear which asymmetry he has in mind. Given the reference to ‘palpable nonsense’ here, I take it that Manson believes that he is denying Harris’s claim it is ‘palpable nonsense’ to suggest that ‘a child (or anyone) might competently consent to treatment but not be competent to refuse it’.

⁹ Manson, *op. cit.* note 1, p. 73.

Notice what Harris says though, in this quote. The quote is *specifically* about *competence*. The claim is that it is nonsense to think that someone can be *competent* to consent to a treatment, but not competent to refuse the very same treatment. Harris is clearly denying the asymmetry of *competence*.

But Manson actually agrees with Harris, when it comes to competence. Manson is explicit in stating that his defence of the asymmetry between consent and refusal is *not* based on considerations of competence. He states that ‘we have explained the asymmetry without making appeal to competence’¹⁰ and the asymmetry need not ‘be directly bound up with considerations of competence.’¹¹ But if he doesn’t appeal to competence, then presumably the asymmetry he is focused on is not the asymmetry of *competence*.

Furthermore, when he does focus on competence, elsewhere in the paper, he agrees with Harris. Consider the following passage, in which Manson claims that the capabilities necessary for competence (such as comprehension) *must be symmetrical*:

[A]s Culver and Gert note, the task of comprehending, and deciding for or against treatment, is *symmetrical* with regard to consent or refusal. In order to make a rational decision about a course of

¹⁰ Manson, *op. cit.* note 1, p. 71.

¹¹ Manson, *op. cit.* note 1, p. 73.

action we need to be able to comprehend both the course of action (and its implications) and the implications of inaction.¹²

Admittedly, it may be natural for many to think that the asymmetry of competence and the asymmetries of permissibility and choice will all stand or fall together. However, *Manson* cannot think this. If he has presented an argument that – he believes – justifies the asymmetry of permissibility between consent and refusal, and if he does not appeal to competence to defend this claim, and if he agrees with Culver and Gert, it seems that his claim should be that he has shown that it *is* possible to defend the asymmetry of permissibility, while rejecting the asymmetry of competence.

Of course, we would still have to recognise that Manson's argument is based on a case involving a plurality of decisions, which I have argued is not analogous to the cases we are concerned with, and, given the incoherence of the asymmetry of choice, we also need to recognise the deception that would be involved.

Have I misinterpreted Manson?

When discussing an earlier draft of this paper with Neil Manson, Manson suggested that I had misinterpreted him. He insisted that it was not the case that the bank account analogy was meant to apply to a plurality of decisions, not particular decisions, and it was not the

¹² Manson, *op. cit.* note 1, p. 68.

case that he and Harris were talking about different types of cases.¹³ Manson did concede that the married couple's shared bank account case may be an example involving a plurality of decisions, but insisted that this was not why it was introduced.

My concern is that, regardless of Manson's intentions, a lot of the intuitive force of the paper comes from this example. This was more apparent in a version of the paper which Manson presented shortly before the paper was published.¹⁴ When a number of those present complained that we cannot say that an individual really has a choice if they are not allowed to refuse, Manson replied with the rhetorical question, 'Do you think that joint bank accounts are a sham?' While Manson does not say anything as explicit as this in the published version, much of the intuitive force of the paper comes from the idea that, in a joint bank account, we do have the right to consent, but not the right to refuse. Manson writes:

Whilst it may *appear* that the adolescent lacks power if her refusals might be overridden, this is no more paradoxical than other examples of shared normative powers where one party has the power to permit an action, but one or more parties lack the power to veto the other's permission.¹⁵

¹³ Neil Manson, personal correspondence. (At this point, I hadn't made the distinction between the various asymmetries. Therefore, I was focusing on the difference between asymmetries *within* a single decision, and asymmetries across a plurality of decisions.)

¹⁴ Ilkley Colloquium on Health Care Ethics, January 2014.

¹⁵ Manson, *op. cit.* note 1, p. 73. (Manson's emphasis.)

But this claim is simply false. Saying that Mr Smith can buy a camera, and Mrs Smith cannot refuse that transaction, and that Mrs Smith can buy a guitar, and Mr Smith cannot refuse that transaction, is not nearly as paradoxical as saying both 1) Lisa can choose between x and not-x, and 2) Lisa cannot choose not-x. Lisa has no choice here. She is getting x whether she likes it or not. If her mother had not lied to her, she would know that she had no choice.¹⁶

If we are talking about a plurality of choices, and if Lisa has two decisions to make, one between x and not-x, and one between y and not-y, then it may be reasonable to say that Lisa should be able to consent to x, but should not be able to refuse y. If this is the case, however, we should note two things. First, if y and not-y are the only options (in that decision), then we should not tell Lisa that she can choose between y and not-y (unless we are willing to deceive her). Second, this is not an asymmetry between consent and refusal, but just a difference between two different decisions. Lisa can choose in one case, but she cannot choose in the other.

Conclusion

In this paper, I have argued that Manson has not provided a convincing argument in favour of an asymmetry between consent and

¹⁶ Or, if someone does have a choice in this sort of case, the choice is something like, 'You can come quietly, or we can do this the hard way.'

refusal, and has not given us good reason to reject Harris's claim that an asymmetry of competence between consent and refusal is palpable nonsense. Indeed, I have argued that Manson actually agrees with Harris, at least in relation to the asymmetry of *competence*, but he fails to recognise this because he is not careful enough to distinguish between different asymmetries, which I have labelled the asymmetries of choice, permissibility and competence.

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