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The Separate Grounds of Competence

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ARTICLE

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When a person is competent, they can exercise their autonomy rights, including waiving claims against interference by giving consent. Non-competent persons, by contrast, lack these autonomy rights, which means that others are permitted to make certain decisions for them. What grounds this gulf between the rights of competent and non-competent persons? In this paper, we present a novel account of the capacities that underlie competence. Competence comprises two distinct rights: a power to alter claims and a claim against paternalistic interference with one's decisions. While existing accounts appear to assume that the same capacities underlie both features of agential control, we argue that they have separate grounds. The capacity that grounds the power to alter claims is the capacity to value, whereas the capacity that grounds the claim against paternalistic interference is the more substantial capacity to be responsible for one's actions. By separating these normative grounds, we solve a problem that plagues Common Grounds views. Our Separate Grounds account can explain why and in what way the decisions of persons with marginal autonomy should be respected without sacrificing the need to protect them from harm.

I. Introduction

The Rayhons By all accounts, Donna and Henry Rayhons had a loving marriage. The couple met late in life, each previously widowed. Shortly after they married, Donna was diagnosed with Alzheimer's disease. By the time she was moved to a nursing home facility, her dementia was severe. Nonetheless, she was "always pleased to see Henry" and "lit up" when her husband of seven years visited.[1] During those times, Henry said that she would sometimes initiate sexual activity by fondling him and that she enjoyed and occasionally asked for sex. The desire for physical intimacy does not perish with age or dementia—nor, indeed, do the pleasures and benefits

1. Pam Belluck, "Sex, dementia and a husband on trial at age 78," *New York Times*, April 14, 2015, https://www.nytimes.com/2015/04/14/health/sex-dementia-and-a-husband-henry-rayhons-on-trial-at-age-78.html.

of touch—but Donna's daughter was worried that Henry's actions were inappropriate. When she raised these concerns with the nursing home staff, the in-house doctor agreed that Donna was no longer capable of giving consent to sexual relations. The home drew up a care plan, advising Henry against sex with Donna, and recommending that the couple's physical contact be mostly limited to Sunday church service attendance. Later, a fellow resident reported sex between the couple—an allegation that Henry denied. A sexual assault forensic exam was performed on Donna, Henry was charged with third-degree felony sexual abuse, and the case went to trial in their home state of Iowa. When the prosecution could not prove that the alleged sexual activity had taken place, Henry was acquitted.

This case highlights an issue that has long concerned those working in the adult social care sector: whether a person with dementia can consent to sex.[2] But it also serves to illustrate a stark difference between persons who are deemed competent and persons who are not—namely, the degree of control they can exercise over their lives.

Competence is a necessary, although not sufficient, condition for valid consent.[3] When a person is competent to make her own decisions, she can exercise her autonomy rights, including waiving claims against interference by giving consent. Non-competent persons, by contrast, lack these autonomy rights, which means that other people are permitted to make certain decisions about their lives on their behalves. For this reason, most children, persons with severe cognitive disabilities, and persons with moderate or severe dementia have proxy decision-makers who make medical and financial decisions for them. Those who are judged to be non-competent are generally excluded from sexual contact.

Our focus in this paper is what justifies the gulf between the rights of competent and non-competent persons. What capacities must someone have in order to have the right to make these important decisions about their bodies and property for themselves?

Whatever these capacities are, not all rights-holders have them. For example, a toddler has a right against bodily harm, but they cannot waive that right so as to permit acts of bodily trespass; likewise, they might own possessions, but they cannot alienate their property rights in order to give away

2. See Samuel Director, "Dementia and concurrent consent to sexual relations," *Hastings Center Report* 53, no. 3 (2023): 37–45, https://doi.org/10.1002/hast.1489 and Jed Adam Gross and Evelyn M. Tenenbaum, "Dementia, Sex, and Consent: Beyond the Uncomplicated Cases," *Hastings Center Report* 53, no. 3 (2023): 45–47, https://doi.org/10.1002/hast.1490.

3. It is widely agreed that there are *five* necessary and jointly sufficient conditions for valid consent: competence, disclosure, understanding, voluntariness, and a token of consent.

their toys. Our first question, then, is: what capacities ground the power to exercise one's rights?

However, this is not the only question relevant to the gap between the competent and the non-competent. A toddler lacks *two* features of agential control: they lack the power to exercise their rights *and* they lack a claim against paternalistic interference. Other people have the authority to make certain decisions on their behalf, including decisions about their bodies and property. For example, a toddler's parents usually have the authority to give permission for medical care for them. Competent persons, by contrast, not only have the power to waive their rights through consent, they also have the authority to demand that others respect their decisions. It is this authority that grounds a presumption against paternalism. To interfere with a competent individual's autonomous decision *for the sake of that individual* would wrong them.[4] So, our second question is: what capacities ground a claim against paternalistic interference?

To our knowledge, no-one has posed the questions we are seeking to answer as *separate* questions or entertained the possibility that the capacities a rights-holder needs to—say—give consent for themselves might differ from the capacities they need to demand that other people respect their consent decisions.[5] Those who have considered the grounds for competence appear to assume that the power to exercise one's rights and the claim against paternalistic interference have the *same* normative grounds. That is, whatever capacities are necessary for the ability to waive your rights against certain forms of interference are the *very same* capacities necessary for you to have a claim against others from interfering with your decision by paternalistically acting on your behalf. We call this the *Common Grounds* assumption.

In this paper, we argue that the Common Grounds assumption is mistaken. Moreover, we show that because existing theories of competence make the Common Grounds assumption, they struggle with cases involving people with borderline decision-making capacities—ending up with verdicts that are implausibly negligent, restrictive, or ad hoc.

4. This conception of paternalism is intended to be neutral among competing accounts of what paternalism is and how it wrongs individuals. In particular, although most cases of paternalism involve interference in order to promote the other person's interests, the scope of what counts as paternalistic might be broader than that. See Seana Valentine Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29, no. 3 (2000): 205–250, https://doi.org/10.1111/j.1088-4963.2000.00205.x.

5. Daniel Groll is one scholar who recognizes the possibility that there may be more than one reason to take into account what someone wants. Nevertheless, he retains a unified view of competence. Daniel Groll, "Paternalism, Respect, and the Will," *Ethics* 122, no. 4 (2012): 692–720, https://doi.org/10.1086/666500.

We propose a *Separate Grounds* view on which the capacities that ground the power to exercise one's rights are not identical with those that ground a claim against paternalistic interference. The capacity that grounds the power is the capacity to value. This is a relatively minimal condition on competence. People with moderate dementia are often still capable of valuing. Assuming that Donna was still a valuer, she would have been able to exercise her rights, and so, provided that her act met the other necessary conditions for valid consent, she could give valid consent to sexual relations with Henry. By contrast, the capacity that grounds the claim against paternalistic interference is the capacity to be responsible for one's decisions. This requires much greater cognitive abilities. If, as seems plausible, Donna had lost the cognitive abilities that are necessary to be responsible for her actions, she would have no claim against paternalistic interference from her caregivers. Given their caring responsibilities, they would have a duty to determine whether consensual sexual relations with Henry were in her overall interests. By separating these normative grounds, we are able to solve the problem that plagues Common Grounds views concerning how they treat borderline cases—such as the case of Donna Rayhons. Our Separate Grounds view can explain why and in what way the decisions of persons with marginal autonomy should be respected, without sacrificing the need to protect those with questionable decision-making capacity from harm.

II. Common Grounds Views

A philosophical account of the capacities that underlie competence—like any account of a normative phenomenon—should meet at least two desiderata. The first is that it should render the intuitively correct judgment in those cases where there is no doubt about the right answer. For example, an account of competence should rule that most mentally mature adults are competent to consent and that most toddlers are not.[6] Any account that did not have these implications should be immediately rejected. The other desideratum is that the account should be able to explain the verdicts it offers. If it does not provide a plausible explanation of its verdicts, then it will

6. See Jennifer Hawkins & Louis C. Charland, "Decision-Making Capacity," in *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition), ed. Edward N. Zalta, https://plato.stanford.edu/archives/fall2020/entries/decision-capacity/; Jennifer Hawkins, "Affect, Values and Problems Assessing Decision-Making Capacity," *The American Journal of Bioethics* 24, no. 8 (2024): 71–82, https://doi.org/10.1080/15265161.2023.2224273.

not be able to justify them.[7] Focusing on the central case of competence to consent, we now argue that no existing Common Grounds view can fully meet these desiderata.

II.A DEMANDING COMMON GROUNDS VIEWS

Common Grounds views can be divided into those that are more demanding and those that are more liberal.

Most writers on competence to consent in the medical field adopt a relatively demanding view. Take, for example, the "four abilities" model that is widely accepted in the United States and operationalized for capacity assessments through instruments like the MacArthur Competence Assessment Tool-Treatment (MacCAT-T).[8] Following this model, someone is competent to consent if and only if they have: (i) the capacity to communicate a choice; (ii) the capacity to understand relevant information; (iii) the capacity to appreciate their situation and the consequences for them of different choices; and (iv) the capacity to reason about their options.

In the context of medical care and clinical research, the four abilities model implies that many cognitively impaired individuals cannot decide for themselves. To illustrate, consider Medhi, a man with moderate dementia. Medhi has problems holding new information in his short-term memory, he sometimes fails to recognize familiar people, and he has trouble following through on decisions if they involve multiple steps. Medhi has recently been diagnosed with leukaemia, and among the options now available to him is a phase 1 chemotherapy trial, which would provide him with standard of care treatment but add on an experimental drug that is being evaluated for toxicity. Medhi takes great pride in helping others, but he cannot grasp several important aspects of the clinical trial. For example, despite repeated explanations, he does not understand that the primary purpose of the trial is to explore what this experimental drug does to the human body; he is convinced that it will cure his illness. He is also unable to recall the risks and the potential benefits of the options of trying further standard care versus enrolling in this trial. The four abilities model would find Medhi incapable of consenting

7. See David DeGrazia and Joseph Millum, *A Theory of Bioethics* (Cambridge University Press, 2021), 18–20, https://doi.org/10.1017/9781009026710.

8. Thomas Grisso et al., "The MacCAT-T: a clinical tool to assess patients' capacities to make treatment decisions," *Psychiatric Services* 48, no. 11 (1997): 1415–1419, https://doi.org/10.1176/ps.48.11.1415. This model was originally developed by Paul Appelbaum, Thomas Grisso, and colleagues and is based on reviews of US statutory and case law, as well as clinical experience and ethical analysis. See, e.g., Thomas Grisso and Paul S. Appelbaum, *Assessing Competence to Consent to Treatment: A Guide for Physicians and Other Health Professionals* (Oxford University Press, 1998), https://doi.org/10.1093/oso/9780195103724.001.0001.

to a risky Phase 1 clinical trial as he does not have the capacity to understand or appreciate the reasons for or against participating in the study.

It seems quite reasonable that Medhi should not be allowed to decide for himself about trial participation. But in other contexts this model appears overly demanding. Suppose that Medhi wants to donate blood. He has been a blood donor for many years, and he understands that the procedure involves inserting a needle into his arm and taking out blood to give to other patients. His local blood donation center now collects plasma, so Medhi is invited to donate plasma instead, if he prefers. His nurse explains what plasma is, what it is used for, how the procedures differ, and how blood donations still involve giving plasma but not as much as this new procedure. The explanation is clear, but Medhi cannot retain the difference between blood and plasma donations for long enough to compare the relative value of doing one versus the other. He just wants to give blood, but he is no longer capable of engaging in the kind of complex comparative assessment of alternatives that would be required to meet the appreciation or reasoning conditions. The four abilities model would therefore imply that Medhi is not capable of giving or refusing consent to blood donation; someone else would need to authorize the procedure on his behalf. This is counterintuitive.

This verdict reflects a general problem with demanding Common Grounds views: they often fail to meet the first desideratum of rendering the intuitively correct judgement in cases in which few would disagree about the right answer. This can be seen even more starkly if we consider some cases outside of medicine, such as how we treat decisions made by children. Consider the acts of purchasing a toy or agreeing to a request for a hug. Both involve exercising rights and so require competence. A baby cannot do either while—we think—a typical eight-year-old can do both. Yet that eight-year-old does not have the capacities needed to make most decisions according to the four abilities model.[9]

II.B LIBERAL COMMON GROUNDS VIEWS

In response to the counterintuitive implications of demanding Common Grounds views, one might be tempted by a more liberal approach to competence.

9. Unsurprisingly, studies of pediatric decision-making focus on more weighty decisions, so we do not have data to support this claim in all domains. For one study of competence in the context of clinical research, see Irma M. Hein et al., "Accuracy of the MacArthur Competence Assessment Tool for Clinical Research (MacCAT-CR) for Measuring Children's Competence to Consent to Clinical Research," *JAMA pediatrics* 168, no. 12 (2014): 1147–1153, https://doi.org/10.1001/jamapediatrics.2014.1694. The authors found that in "children younger than 9.6 years, competence was unlikely." Ibid, 1147.

One such approach is suggested by Agnieszka Jaworska.[10] She writes:

> The capacity for autonomy [which Jaworska regards as the capacity underlying the right to make one's own decisions] is best understood not as the ability to lead one's life by one's lights when one is left to one's own devices, not as a full capacity to make a decision from the beginning to end, but as the capacity to value.[11]

Jaworska thinks that the cognitive requirements for someone to have the capacity to value are relatively minimal, which means that someone can have normative standards for themselves despite substantial cognitive impairments. She identifies three marks of valuing:

> the person thinks she is correct in wanting what she wants; achieving what she wants is tied up with her sense of self-worth; and the importance of achieving what she wants is, for her, independent of her own experience.[12]

Jaworska thinks that many persons with dementia retain the capacity to value even when they have lost other important cognitive capacities, such as a grasp of their life's narrative, or the ability to recognize previously familiar people. She provides extensive empirical evidence to support this claim. Since valuing underlies autonomy, she concludes that we often have reason to respect the decisions of those with moderate dementia, even if they sometimes need help in carrying them out:

> the essence of the capacity for autonomy consists in the ability to lay down the principles that will govern one's actions, and not in the ability to devise and carry out the means and plans for following these principles.[13]

Liberal Common Grounds views can render intuitively correct verdicts in one set of cases—those in which we judge that the individual is clearly competent. For example, Jaworska's view will find most mentally mature adults competent

10. Agnieszka Jaworska, "Respecting the margins of agency: Alzheimer's Patients and the Capacity to Value," *Philosophy & Public Affairs* 28, no. 2 (1999): 105–138, https://doi.org/10.1111/j.1088-4963.1999.00105.x. We say "suggested" here because Jaworska's paper might be read in different ways, but our argument does not turn on the correct interpretation. We engage with her view here because it is one of the few that takes marginal autonomy seriously. For another liberal view, see Seana Shiffrin, "Autonomy, Beneficence, and the Permanently Demented," in *Ronald Dworkin and His Critics*, ed. Justine Burley (Blackwell Publishing, 2004), 193–217, https://doi.org/10.1002/9780470996386.ch11.

11. Jaworska, "Respecting the Margins of Agency," 134.

12. Ibid, 116.

13. Ibid, 128–129.

to consent. Further, it can explain *why*: most mentally mature adults are valuers. Furthermore, in some cases of borderline competence, a liberal view will give the intuitively correct result. For example, it will judge that Medhi can give consent to donate blood and—outside the medical field—that an eight-year-old can trade pocket money for a toy or agree to a hug.

The challenge for liberal Common Grounds views is that they appear inclusive to the point of negligence. For example, since Medhi is a valuer, it seems as though Jaworska's view would imply that he should be allowed to decide for himself about phase 1 clinical trial participation (albeit perhaps with considerable outside help in his decision-making). This, as we have noted, is implausible. Liberal Common Grounds views fall at the same hurdle as their more demanding counterparts: they fail to meet the desideratum of rendering the correct verdict in cases where it is intuitively clear.

We can derive a critical insight from the forgoing analysis. More liberal Common Grounds views focus on protecting the exercise of autonomy when it is present. They prioritize the power to consent, but at the cost of allowing people with impaired decision-making capacity to make potentially dangerous decisions. More demanding Common Grounds views protect people who lack decision-making capacity from harm, but at the cost of not allowing individuals to exercise the limited autonomy that they have. Common Grounds views struggle to balance these goals when dealing with individuals who have marginal autonomy—leading to verdicts that are counterintuitive in one direction or the other.

II.C RISK-ADAPTED COMMON GROUNDS VIEWS

One might object that the counterintuitive implications we describe arise only because we treat the threshold for competence determinations as fixed. It is natural to think instead that judgments of competence should be sensitive to the level of risk that a decision involves. This is the strategy followed by Allen Buchanan and Dan Brock. They write:

> No single standard for competence is adequate for all decisions. The standard depends in large part on the risk involved, and varies along a range from low/minimal to high/maximal. The more serious the expected harm to the patient from acting on a choice, the higher should be the standard of decision-making capacity, and the greater should be the certainty that the standard is satisfied.[14]

14. Allen Buchanan and Dan Brock, *Deciding for Others: The Ethics of Surrogate Decision Making*, (Cambridge University Press, 1990), 85, https://doi.org/10.1017/cbo9781139171946.

On this view, Medhi probably does have the capacities necessary to give valid consent to the low-risk blood donation, but not the capacities to refuse medically indicated, life-sustaining treatment in favor of a risky and potentially life-threatening experiment. It seems that if we allow the threshold for competence to vary depending on the stakes of the decision, then we can avoid the counterintuitive implications described above, and yet the right to consent for oneself and the right to demand that other people respect one's consent decisions can still have the same basis.

But risk-adapted Common Grounds views also face serious challenges. Where non-risk adapted views fail to meet the first desideratum, risk-adapted ones fail to meet the second. They cannot offer plausible explanations of their verdicts because their analysis has little to do with competence itself.

Competence is about one's ability to do something. Since some things are harder to do than others, it is plausible that competence is task-specific. Someone can be competent to juggle three balls but not four, or competent to juggle but not to somersault. But one's ability to do a task does not seem to vary with how risky the task is. It is not that juggling four balls is more dangerous, but that our juggler keeps dropping the balls, which makes her unable to juggle four even though she can juggle three.

The point generalizes to one's ability to make decisions. Some decisions are more difficult to make than others, but they are not more difficult in virtue of the harms associated with them, but in virtue of how complex the considerations are on either side.[15] Moreover, there are many examples of decisions with high-risk options that are simple and examples of decisions with low-risk options that are complicated.[16]

Consider a young woman with mild cognitive impairment who has been diagnosed with acute appendicitis. Immediate appendectomy is recommended. For simplicity, assume that her options are to agree to or refuse the surgery. Agreeing is a low-risk choice; declining is a very high-risk choice. Suppose further that her cognitive impairment is such that she is judged incompetent to consent to the life-saving operation due to the great harm associated with refusal. Nevertheless, she is judged competent to make low-risk medical decisions for herself, such as whether to undergo an additional X-ray to confirm her diagnosis. The decision about surgery is straightforward. Whenever asked, she affirms that she wants to receive the surgery because

15. Compare Carl Elliott, "Competence as Accountability," *The Journal of Clinical Ethics* 2, no. 3 (1991): 167–171, https://doi.org/10.1086/jce199102310.

16. Danielle Bromwich and Annette Rid, "Can informed consent to research be adapted to risk?," *Journal of Medical Ethics* 41, no. 7 (2015): 521–528, https://doi.org/10.1136/medethics-2013-101912.

she thinks it will save her life. The X-ray decision is complicated, since it involves weighing the small chance of catching a misdiagnosis and then the risks and benefits associated with that result against the very small long-term increase in cancer risk and the co-pay her health insurance will require. In fact, despite lengthy discussions, she is unable to understand the long-term risks or make comparative assessments of the options available to her. When asked though, she says that she wants to do the X-ray too, because it sounds like a good idea. In fact, let us suppose, given her values and given the very low probability that the X-ray will provide extra information that changes the course of clinical care, it would be a prudential mistake for her to undergo the X-ray.

This patient is able to understand what is at stake in the high-risk decision, but not in the low-risk decision. Further, she makes the prudentially correct decision for the right reasons in the high-risk case, but not in the low-risk case. In what sense, then, is she *able* to make the latter decision but not the former? It is because risk-adapted views do not give us a plausible analysis of what competence is that they cannot *explain* the difference our intuitions track here: namely, that some decisions with high-risk options are simple, whereas other low-risk decisions are complex.

A proponent of a risk-adapted view might deny their analysis renders an ad hoc verdict here. They might suggest that the reason why the patient is able to make the high stakes decision is because this is a choice with asymmetric risks.[17] Agreeing to the surgery is a low-risk choice; declining is a very high-risk choice. On a risk-adapted view, it therefore seems as though the threshold for the patient to be competent to refuse the surgery should be higher than the threshold for her to be competent to agree to it.[18] Some patients will therefore be judged competent to agree but not competent to decline. For example, perhaps someone who is very poor at taking long-term

17. Dan Brock, "Decisionmaking Competence and Risk," *Bioethics* 5, no. 2 (1991): 105–112, https://doi.org/10.1111/j.1467-8519.1991.tb00151.x; Gita Cale, "Continuing the Debate over Risk-related Standards of Competence," *Bioethics* 13, no. 2 (1999): 131–148, https://doi.org/10.1111/1467-8519.00137; Rob Lawlor, "Cake or death? Ending confusions about asymmetries between consent and refusal," *Journal of Medical Ethics* 42, no. 11 (2016): 748–754, https://doi.org/10.1136/medethics-2016-103647; Neil John Pickering et al., "Risk-Related standards of competence are a nonsense," *Journal of Medical Ethics* 48, no. 11 (2022): 893–898, https://doi.org/10.1136/medethics-2021-108107; Mark Wicclair, "Patient decision-making capacity and risk," *Bioethics* 5, no. 2 (1991): 91–104, https://doi.org/10.1111/j.1467-8519.1991.tb00150.x; Ian Wilks, "The debate over risk-related standards of competence," *Bioethics* 11, no. 5 (1997): 413–426, https://doi.org/10.1111/1467-8519.00081.

18. Buchanan and Brock endorse this implication of their view. See, e.g., Buchanan and Brock, *Deciding for Others*, 51–52.

harms into account might be judged competent to agree but incompetent to refuse surgery.

This is also a counterintuitive result. It seems odd to say that a patient is capable of agreeing but not capable of refusing the surgery. If she is capable only of agreeing, then in what sense does she have the *ability* to make a decision? And, in the context of consent, in what sense would her ability to make a decision ground a right to make that decision, given that there is only one choice she can make that merits being respected by others?[19]

No plausible answers are forthcoming from risk-adapted accounts. They *would* be able to explain this counterintuitive verdict if the high risks associated with refusal were generally harder to comprehend, appreciate, or reason with than the low risks of acceptance. However, as we have shown, risk no more tracks complexity than complexity tracks risk. Since there is no reason to think that the threshold for *competence* should rise as risks increase, risk-adapted Common Grounds views are ad hoc.

II.D SUMMARY

We have argued that liberal Common Grounds views are too liberal, that demanding Common Grounds views are too demanding, and that risk-adapted Common Grounds views fail to capture what competence is. A natural response to this critique might be to say that we have merely demonstrated the need to develop a non-risk-adapted, moderate Common Grounds view. This would be a view that is not quite as liberal as the one suggested by Jaworska nor quite as demanding as Grisso and Appelbaum's.

This is a reasonable response. We have argued that the component rights that comprise the kind of competence implicated in consent transactions require justification. There is either *one* justification from which the right to waive rights through consent *and* the right against paternalistic interference can be derived or each has a separate justification. We have argued that existing views that attempt to derive both rights from a single ground fail to meet at least one desideratum of a plausible account of competence. In addition, we think there are compelling and independent reasons to believe that these component rights have separate normative foundations. We therefore leave articulating a more compelling moderate Common Grounds view to its proponents, and turn now to those reasons. Once a Separate Grounds view is outlined, it should be clear why this alternative is preferable to an imagined non-risk-adapted, moderate Common Grounds view.

19. Compare Wicclair, "Patient decision-making capacity and risk," 103.

III. Separate Grounds for Competence

In discussions of competence, the normative power most discussed in the literature is the power to waive a right by giving consent. In developing our positive view of competence, we focus on that power and on the associated claim against paternalistic interference with one's consent decisions.

In this section, we argue that the power to waive one's rights and thereby give consent can be grounded in the prudential value of making one's own decisions. The capacities needed for someone to have that power are derived from those capacities an individual would need for it to be valuable *to them* to make their own decisions. However, we argue, those same capacities could not also ground a claim against paternalism. We argue that the claim against paternalism is instead plausibly grounded in the capacities an individual would need to voluntarily assume a risk of harm, which are the same as those needed to be responsible for one's actions. By analysing the value of being able to waive one's rights separately from the conditions that must be met to silence the paternalist, we open up conceptual space for a principled Separate Grounds view—one from which we can derive intuitively plausible verdicts about uncontested cases and justified guidance about contested ones.

III.A What Capacities Ground the Power to Waive a Right through Consent?

In answering this question, it helps to consider why being able to give (and refuse) consent is valuable to beings like us. A natural answer lies in how it facilitates autonomous action: an individual who can give consent is thereby able to direct their own life by changing their normative relationships to others. Moreover, directing one's life in this way is often very valuable. It allows us to pursue important human goals, including those related to intimate relationships, personal property, and medical care. In brief, being able to direct one's own life by giving or withholding consent is prudentially good. Each of us therefore has an interest in realizing this good. We think that the strength of that interest is sufficient to ground the power that allows individuals to realize that good.

Before we can derive the capacities that ground the power to waive a right from this insight, a clarification is in order.[20] There is a *specific* good of direct-

20. This insight is neither novel nor contentious. Philosophers who engage with the ontology of consent are frequently interested in identifying the underlying values that the ability to give and refuse consent serves. They typically identify values relating to autonomous action. We endorse this common view that the value of consent lies in the prudential value of autonomous action. See, e.g., Tom Dougherty, "*Yes Means Yes*: Consent as Communication," *Philosophy & Public Affairs* 43,

ing one's own life through autonomous action. It is distinct from the good of directing one's own life in the sense of simply getting what one wants. Having one's desires frustrated is, along at least one dimension of wellbeing, typically bad for one. For example, it is probably somewhat bad for a toddler who is prevented from making a noise with an annoying drum that she is frustrated in doing what she wants. The good that we are describing is different. Directing one's life *on the basis of reasons derived from one's values* is a distinctive good, and it is *that* good that the power to consent facilitates.[21] So, to realise the good of directing one's own life through autonomous action, one must be capable of valuing some interest, project, relationship, or end in the sense that it is a source of reasons for action.

What is this capacity to value? Perhaps the most thorough and influential analysis is offered by Samuel Scheffler. On his view, valuing some X involves:

1. A belief that X is good or valuable or worthy,
2. A susceptibility to experience a range of context-dependent emotions regarding X,
3. A disposition to experience these emotions as being merited or appropriate, and
4. A disposition to treat certain kinds of X-related considerations as reasons for action in relevant deliberative contexts.[22]

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no. 3 (2015): 244f, https://doi.org/10.1111/papa.12059; Kimberly Kessler Ferzan, "Consent, Culpability, and the Law of Rape," *Ohio St. J. Crim. L.* 13 (2016): 404–406, https://scholarship.law.upenn.edu/faculty_scholarship/2329/; David Owens, *Shaping the Normative Landscape* (Oxford University Press, 2012), 172–176, https://doi.org/10.1093/acprof:oso/9780199691500.001.0001; Massimo Renzo, "Defective Normative Powers: The Case of Consent," *Journal of Practical Ethics* 10, no. 1 (2022), 50–54, https://doi.org/10.3998/jpe.2382; Seana Valentine Shiffrin, "Promising, Intimate Relationships, and Conventionalism," *Philosophical Review* 117, no. 4 (2008): 500–502, https://doi.org/10.1215/00318108-2008-014; Victor Tadros, *Wrongs and Crimes* (Oxford University Press, 2016): 219–222, https://doi.org/10.1093/acprof:oso/9780199571376.001.0001; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003): 124–127, https://doi.org/10.1017/cbo9780511610011. For a dissenting view, see Richard Healey, "Consent, Interaction, and the Value of Shared Understanding," *Legal Theory* 28, no. 1 (2022), 35–58, https://doi.org/10.1017/s1352325222000015.

21. The prudential value of directing your own life is one way to ground the power to consent, but it is not the only way. The power could also be grounded in our interests in non-inferiority or independence. See, for example, Niko Kolodny, *The Pecking Order: Social Hierarchy as a Philosophical Problem* (Harvard University Press, 2023) https://doi.org/10.2307/jj.890692. Different views about the prudential value of autonomy will generate distinct *conceptions* of a Separate Grounds view of competence. We thank an anonymous reviewer for suggesting this alternative ground.

22. Samuel Scheffler, "Valuing," in *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford University Press, 2010), 29. We, like Scheffler, agree that valuing cannot be reduced to desiring. Ibid, 15–20.

Building on Scheffler's analysis, Nandi Theunissen distinguishes *simple valuing* from *final ends valuing*. The former can be intermittent and unsystematic, while the values that form the normative principles upon which we direct our lives—our final ends—are typically stable and enduring.[23]

Though the details of their views differ, the implications of the Scheffler/Theunissen account are similar to Jaworska's: a valuer is someone capable of having rational attitudes (condition 1) and capable of being (stably) disposed to treat those attitudes as reason-giving and fitting of certain emotions (conditions 2, 3, and 4).

Only persons who possess these capacities could realise the distinctive good of directing their own lives. Unlike the toddler, the valuer can distance themselves from their immediate motivations, can occupy a reflective standpoint, and can judge that some interest, project, relationship, or end is worthwhile. It is generally agreed—no matter what your specific account of autonomy—that autonomous agency requires the ability to direct one's life on the basis of reasons in just the way described.[24] Moreover, the person capable of valuing is stably disposed to believe and feel that what they value is worthwhile, and their emotional and behavioural responses are merited by its worth.

These marks of valuing explain why restricting Donna's intimacy with Henry seems normatively different from restricting the toddler's access to the drum. Before her cognitive decline, Donna was a valuer. She loved Henry and valued their relationship. As her disease progressed, her affection and behaviour towards him remained stable across time and context. Unlike the toddler's mercurial whims, unintelligible desires, and sometimes irrationally strong or inappropriate emotional reactions, Donna was reliably delighted by Henry's visits, always affectionate towards him in public, and frequently desirous of intimate relations in private. Had she wavered unpredictably, there would be few marks of agency to attend to, and managing her well-being would be more akin to managing the toddler's.[25] And yet, her dispositions were not only stable, but fitting—she responded to Henry in the way in which one is often disposed to when one loves one's spouse. Her behavior was contextually appropriate too: she held Henry's hand in public and only sought sexual relations in private. Her stable and fitting emotional and

23. L. Nandi Theunissen, *The Value of Humanity* (Oxford University Press, 2020), 95, https://doi.org/10.1093/oso/9780198832645.001.0001.

24. John Christman, "Autonomy in Moral and Political Philosophy," in *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edition), ed. Edward N. Zalta, https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/.

25. Compare Jaworska, "Respecting the Margins of Agency," 127.

behavioural dispositions are marks of valuing, and if these were motivated by the worth she placed in that relationship, then restricting her access to Henry did not just frustrate her desires; it prevented her from directing her life in accordance with her values.

The central question, then, is: was Donna still a valuer? In answering this question, the capacities *not* identified by standard analyses of valuing are just as relevant as those that are. Nothing in the views outlined implies that a valuer must have a coherent sense of their life as a narrative whole, the ability to describe their values eloquently, or the capacity for detailed means-ends reasoning, complex risk-benefit calculations, or even comparative assessments of different deliberative options. The fact that Donna has deliberative or cognitive frailties—impairments that make it difficult for her to *implement* principles derived from her values without her caregivers' assistance—does not reveal her inability to direct her own life on the basis of reasons. She may still "know how she wants her life to be governed"[26] and her values could still constitute her normative principles of action.[27] Of course, we have too little information about this actual case to make a definitive judgement, but the suggestion that she might still be capable of valuing is also consistent with the neuropathology of Alzheimer's disease. The path of neurological destruction in regions of the hippocampus responsible for language, memory, and abstract thought is "always several steps ahead of the pathologies in the areas most likely to affect the capacity to value."[28]

A valuer is able to direct their life on the basis of reasons and this means they can realize a very important prudential good.[29] Changing one's normative relationships to others through consent is one form this good can take. This is why we think that the capacity to value is the central capacity that underlies the power to waive rights through consent. Standard analyses of valuing imply that this capacity might be quite minimal. Of course, we accept that those with more developed or sophisticated capacities are likely

26. Jaworska, "Respecting the Margins of Agency," 128.

27. Even on more demanding accounts of valuing—like Theunissen's—these more sophisticated capacities are not necessary to have final ends that guide long-range deliberation. Theunissen is careful to distinguish between *setting* and simply *having* final ends. After all, "it seems possible to have an end without knowing that we have it as an end—our ends might reveal themselves in our behavior, rather than in our willed decisions and claims." Theunissen, *Value of Humanity*, 94.

28. Jaworska, "Respecting the Margins of Agency," 123.

29. When we say that X *grounds* Y, then, we mean both that X is sufficient for Y (on its own or jointly with other conditions) and that X in some way *explains* Y. As the discussion in this paper suggests, we also think that the capacity to value is necessary for the power to waive one's rights, but that is not part of the concept of *grounding*.

to get more good out of directing their lives in accordance with their values. But the question here is *not*: how much good can one achieve by directing one's own life? The question is: at what point is one capable of achieving to some degree the good of directing one's own life? It is at *that* point that the threshold ought to be set.

III.B WHAT CAPACITIES GROUND THE CLAIM AGAINST PATERNALISTIC INTERFERENCE?

We have argued that the power to waive one's rights by giving consent is grounded in the capacity to value. The reason for this is the contribution to individual flourishing made by directing one's own life according to one's values. This component of competence is therefore ultimately grounded in considerations of the agent's own well-being. Could the claim against paternalistic interference be justified in the same way? Just as it is good to autonomously direct one's own life, it is widely thought to be bad for someone capable of autonomous decision-making to have their life directed by others.[30] Perhaps this setback to the individual's interests is what makes it wrong for others to interfere.

The claim against paternalistic interference cannot be justified in the same way. While there is prudential value in directing your own life and disvalue in having your own life directed by others, these are just components of well-being. This means that while the value to the valuer of directing their own life will count *against* paternalistic interference, other components of well-being could count in *favor* of it, and sometimes these will be more weighty when all things are considered. Someone can exercise control in ways that are very self-destructive, making the overall impact of autonomous decision-making on their well-being negative. If the prudential value of consent and disvalue of heteronomy were the *only* grounds for a claim against paternalism, then the paternalist would be permitted to interfere with someone's consent decision as soon as they had good reason to think that the net effect on the individual's well-being of respecting those decisions would be negative. Appealing to the value of making one's own decisions without interference would then be futile: the paternalist would have already factored that in.[31]

30. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997), https://doi.org/10.1093/0198296428.001.0001.

31. One might respond that we should look at the prudential value of possessing the power overall for an individual, not at whether individual exercises of that power are in their interests. If it is on balance better for someone to have the power to consent than not, then they both have that power and have a claim against others interfering. The challenge for this view is that it cannot be simply grounded in the agent's wellbeing (since we are considering what to

If considerations of well-being are not sufficient to ground the claim against paternalistic interference, then what is its basis? The natural answer is, again, autonomy. But this time it is not the value of autonomy in the sense of the contribution to well-being made by someone acting autonomously; it is the value of autonomy as grounding a demand to respect the autonomous agent as the author of their own life.[32] While we think this answer is correct, as far as it goes, it does not help with cases in which someone's agency is in question. As we have seen, there are different accounts of the capacities that constitute autonomy and these capacities can be possessed to differing degrees. At what point does someone move from being unable to demand respect for their agency to being able to demand it?

We suggest that this threshold lies at the point where someone has the capacity to be responsible for their actions.[33] At the point where someone can be responsible, they can be blamed for harms to others—that is, be "held responsible." But they can also "take responsibility" for harms to themselves.[34] By doing so, they can make it so that these harms do not count in the moral calculus of the would-be paternalist (or at least not to anything like the same degree).[35]

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do in cases were acting on a consent token would be contrary to their wellbeing). It might be grounded—in an act-consequentialist spirit—on the overall better consequences of following a rule of never interfering with the consent decisions of persons who can value. Or, it might be grounded in epistemic considerations about the difficulty of knowing when paternalism would be better for someone. We are skeptical of both options. There just seem to be too many cases where it is very clear that someone is making a prudentially bad decision, even taking into account the value of letting them make their own decisions. Our thanks to Tom Dougherty for pressing us on this point.

32. See Stephen Darwall, "The Value of Autonomy and Autonomy of the Will," *Ethics* 116, no. 2 (2006): 263–284, https://doi.org/10.1086/498461; Groll, "Paternalism, Respect, and the Will"; and, Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation."

33. Compare Elliott, "Competence as Accountability," 114.

34. We therefore mean responsibility-as-accountability, not just responsibility-as-attributability. Gary Watson, "Two Faces of Responsibility," *Philosophical Topics* 24, no. 2 (1996): 227–248, https://doi.org/10.5840/philtopics199624222.

35. Compare Joel Feinberg's discussion of the nature of consent in Chapter 22 of *Harm to Self*. Feinberg writes: "Whatever else consent may do, it transfers at least part of the responsibility for one person's act to the shoulders of the consenter." Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 3: Harm to Self* (Oxford University Press, 1989), 176, https://doi.org/10.1093/0195059239.001.0001. The parenthetic qualification—"or at least not to anything like the same degree"—is important here, since many people, ourselves included, think that most rights have thresholds. This includes the right against paternalistic interference. Thus, where the paternalistic rights infringement would be relatively minor and the harm prevented particularly grave, interference with a fully competent adult might still be permissible. While this threshold view of rights is common among thinkers in the liberal tradition, it is not universally held. For a more radical view, see Jonathan Parry, "Defensive Harm, Consent, and Intervention," *Philosophy & Public Affairs* 45, no. 4 (2017): 356–396, https://doi.org/10.1111/papa.12099. We thank an anonymous reviewer for urging us to clarify this point.

To see this, consider that sometimes the fact that an agent performed a self-harming act means that it is permissible to allow them to suffer the associated harms. We take no view on what other conditions must be met for this to be the case, except to note that it is *only* true when the person is responsible for the action. If they were not responsible—for example, because the action was involuntary—then other parties should treat preventing or rectifying the harm just the same as if it resulted from natural causes. Now, most people do not think that being responsible for a self-harming act is always *sufficient* to permit others not to assist. For example, a struggling swimmer still deserves help from a lifeguard, even when they knew about the risks. But being responsible can be sufficient in conjunction with other conditions. In particular, it can be sufficient when the agent knowingly and voluntarily refuses assistance. By refusing assistance, they accept the consequences. And if they accept the consequences, we think that those harms should normally be bracketed off in the moral calculus of the would-be paternalist.

In such circumstances, the harm is not sufficient to provide legitimate grounds for interference when the agent has refused assistance. The agent can say, in effect, "I'll take responsibility for my own well-being."[36]

This concludes our positive argument. We have argued that competence comprises two rights: a *power* to alter one's rights—in the cases we have discussed, by waiving them through granting consent—and a *claim* against paternalistic interference with one's self-regarding decisions. These component rights have separate grounds. The power is grounded in the value for the consent-giver of controlling their own life. This value can be realized by those individuals who have the capacity to value. The claim against paternalistic interference is grounded in the capacity to be responsible for one's own actions. Since it is plausible that someone can have the capacity to value but lack the capacity to be responsible, it is plausible that someone can have the power to consent but not have a claim against paternalistic interference. We now show how this entails some intuitive verdicts and makes sense of some otherwise puzzling phenomena.

III.C APPLICATIONS

To show the potential practical payoffs of a Separate Grounds view, we must make some assumptions. Thus far, we have argued that the component rights implicated in consent transactions have separate grounds, but we have not

36. We would emphasize here that this does not commit us to any view on what acts one can and cannot consent to. Our argument applies only within the scope of what rights it is possible to waive.

argued for a *specific* Separate Grounds view. As we have already noted, competence is a necessary but not a sufficient condition for valid consent. Different conceptions of valuing and responsibility—together with different views of the other necessary and internal conditions for valid consent—will result in distinct accounts of competence.[37] In order to illustrate the important implications our analysis could have for consent cases involving persons with marginal autonomy, we now adopt some substantive positions on each of these.

A fleshed-out account of what internal capacities are needed to give valid consent will need to specify not just the criteria for being a *valuer*, but also what must be *understood* to give valid consent, and what *act* constitutes a token of consent. For the purpose of illustration, we accept Scheffler's analysis of valuing. We adopt a minimal account of the understanding requirement, according to which the person giving consent must understand only that they are giving consent, how to token consent, and to what they are giving consent (that is, what rights they are waiving).[38] Competence therefore requires that someone be *able to understand* these facts. Finally, we assume that to give valid consent one must be capable of communicating one's will.[39] To emphasize: these specific views are not essential to holding a Separate Grounds view. They matter, though, because they affect what a Separate Grounds view will imply for practice.

37. Indeed, someone could accept our argument in favor of a Separate Grounds view while rejecting our accounts of both of those grounds. They could deny that being a valuer grounds the power to consent and deny that the capacity to be responsible for one's actions grounds the claim against paternalistic interference. Provided that their alternative conception still entails that the capacities underlying the power are more minimal than those underlying the claim, they could address the problems we have diagnosed as arising from Common Grounds views.

38. The nature of the understanding requirement is a matter of debate. For defenses of minimal views, like the one we are assuming here, see Joseph Millum and Danielle Bromwich, "Understanding, Communication, and Consent," *Ergo* 5, no. 2 (2018): 45–68, https://doi.org/10.3998/ergo.12405314.0005.002; Gopal Sreenivasan, "Does Informed Consent to Research Require Comprehension?" *The Lancet* 362, no. 9400 (2003): 2016–2018, https://doi.org/10.1016/S0140-6736(03)15025-8; For maximalist views, ones in which scholars argue that the person giving consent must know much more about the act to which they consent, see Ruth R. Faden and Tom L. Beauchamp (with Nancy M. P. King), *A History and Theory of Informed Consent* (Oxford University Press, 1986): 298–329; and David Wendler and Christine Grady, "What Should Research Participants Understand to Understand They Are Participants in Research?" *Bioethics* 22, no. 4 (2008): 203–208, https://doi.org/10.1111/j.1467-8519.2008.00632.x.

39. In essence, we assume a performative view of consent. For philosophical arguments in favor of such views, see Dougherty, "*Yes Means Yes*," 224–253; Richard Healey, "The Ontology of Consent: A Reply to Alexander," *Analytic Philosophy* 56, no. 4 (2015): 354–363, https://doi.org/10.1111/phib.12070; Millum and Bromwich, "Understanding, Communication, and Consent," 61–63. A few philosophers of law defend the contrary view—that valid consent requires only a mental state. See, e.g., Larry Alexander et al., "Consent Does Not Require Communication: A Reply to Dougherty," *Law and Philosophy* 35, no. 6 (2016): 655–660, https://doi.org/10.1007/s10982-016-9267-z; and Ferzan, "Consent, Culpability, and the Law of Rape," 397–439.

To arrive at a specific view of what grounds the claim against paternalistic interference we need one more assumption—this time about responsibility. It is commonly held that *responsibility as accountability*, which is the type of responsibility relevant to our discussion, comprises two necessary and jointly sufficient conditions—a control condition and an epistemic condition.[40] The control condition says that to be responsible for an act the agent must have acted voluntarily. The epistemic condition says that to be responsible for an act the agent must have been aware of certain facts (since ignorance is sometimes an excuse). Common components of this epistemic condition are that the agent knows (or should know) what she is doing, what the likely consequences are, that there are alternatives to performing the act, and the normative status of the act.[41] Assume that the epistemic condition does indeed have something like this set of components.

Consider now what capacities are needed in order to work out the normative status of an act, e.g., whether it is prudentially warranted or morally permissible. To work out the normative status of an act, it is necessary to be able to reason about what to do—that is, to apply one's values to the available facts and decide on that basis which alternative to pick. If you could not come to the right decision for the right reasons, then you cannot be held responsible for not doing the right thing. But to do this, an agent must be able to: understand the information relevant to the decision (or the implications of their ignorance), appreciate how that information applies to their situation, reason in the light of their values, and come to a decision on the basis of reasoning. This entails, as seems plausible to us, that the capacities

40. Fernando Rudy-Hiller, "The Epistemic Condition for Moral Responsibility," in *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), Edward N. Zalta & Uri Nodelman, eds., https://plato.stanford.edu/archives/fall2025/entries/moral-responsibility-epistemic. Consent must be voluntary to be valid. But sometimes consent is proffered voluntarily, and yet the consenter fails to meet the epistemic condition on responsibility, and so they could not be held responsible for their consent decision. We are particularly interested in cases in which this failure is the result of the consenter's lack of cognitive capacity to be responsible. These are the cases in which a person with borderline autonomy can give valid consent but lacks a claim against paternalism.

41. Of course, views vary about exactly what the component parts are. For example, among other issues, it is debated whether the agent must have knowledge, mere true belief, or something else. See, e.g., Ishtiyaque Haji, "An Epistemic Dimension of Blameworthiness," *Philosophy and Phenomenological Research* 57, no. 3 (1997): 523–544, https://doi.org/10.2307/2953747; Gideon Rosen, "Kleinbart the Oblivious and Other Tales of Ignorance and Responsibility," *The Journal of Philosophy* 105, no. 10 (2008): 591–610, https://doi.org/10.5840/jphil20081051023. It is also debated exactly how we should make sense of culpable ignorance. See, e.g., Holly Smith, "Culpable Ignorance," *The Philosophical Review* 92, no. 4 (1983): 543–571, https://doi.org/10.2307/2184880; Michael J. Zimmerman, "Moral Responsibility and Ignorance," *Ethics* 107, no. 3 (1997): 410–426, https://doi.org/10.1086/233742.

needed to be responsible for one's actions—and so to possess a claim against paternalistic interference—are more substantial than those that ground the power to waive one's rights against interference.

Having sketched a possible Separate Grounds view, we can now show some of its implications for cases. In the blood donation case, a Separate Grounds view of this sort implies that Medhi has the capacities necessary to waive his rights and give valid consent. However, he does not have the more complex cognitive capacities necessary to be responsible for his actions. There is no paternalistic reason to prevent Medhi from donating blood, and so there is nothing in this case that could justify another person overriding his rights waiver. Our view implies that he ought to be permitted to make this decision without interference. Indeed, even if donating blood were slightly contrary to Medhi's interests, the value to him of making his own decisions on the basis of his values could tip the scales against paternalistic interference. While Medhi also has the capacity to give valid consent to study participation, in that case there are clear paternalistic reasons to interfere. Since he is not capable of being responsible for his actions, he is not immune from interference. Given the complexity of the decision and the serious risks involved, someone else ought to help make the decision about whether trial participation is a good option for him.

Similar points apply to Donna Rayhons who, on the basis of the media reports, may well have retained the ability to value. If so, she would have been able to waive her rights through consent and so it is possible that her husband could permissibly have sexual contact with her. However, she, like Medhi, likely lacked the capacities grounding a claim against paternalistic interference. Whether sexual contact that she welcomed was permissible would therefore depend on what was in her interests. She might need help to make a decision that took her preferences seriously and balanced the benefits to her of intimacy with someone she loved against the potential harms of engaging in sexual relations.[42] For example, if she welcomed the sexual contact and it made her happy, she should probably be allowed to agree to it. However, if sex was initially welcomed, but left Donna distressed, then Henry should decline her future invitations to sex.[43] And, were he to

42. For discussion of how consent partners and third parties might do this, see Quill R. Kukla, "A Nonideal Theory of Sexual Consent," *Ethics* 131, no. 2 (2021): 270–292, https://doi.org/10.1086/711209.

43. Are Henry's actions paternalistic here? Not in the sense with which we have been concerned in this paper. When valid, Donna's consent *releases* Henry from the duty not to have sex with her. That is all it does. It does not also make a *claim* on him that he has sex with her. Because her consent is not also a valid demand, he does not violate a claim when he declines her

continue to accept them, her caregivers might be obligated to intervene in the couple's meetings to prevent harmful, albeit *consensual*, sexual activity.[44]

These cases illustrate the value of consent to persons with marginal autonomy, even when they lack a claim against paternalism. The ability to give and refuse consent allows Medhi and Donna to achieve a good that those who lack autonomy cannot realize. The value of consent does not just reside in an interest in non-interference. It also resides in an interest in allowing other people to interact with us in specific ways—whether that be allowing a medical professional to draw our blood or a spouse to be physically intimate with us. Even if the only consent decisions that were verdictive for persons with marginal autonomy were those that were also in their interests, the degree of control this affords is likely to be *especially* valuable to persons like Medhi and Donna who often have very little control over their own lives.

Consider now a second set of cases, applying our view to the developing capacities of children. In buying and selling goods, one needs to exercise autonomy rights to alter one's claims. Intuitively, some children can engage in some of these commercial transactions, and some cannot. If a two-year-old offers a shopkeeper money, the shopkeeper probably ought to do nothing, except look around for the toddler's parents. The toddler cannot buy anything from her themself. On the other hand, a typical eight-year-old can transact. If they come into her shop to buy a $10.99 toy, then, normally, she can sell them the toy just as she would with an adult. Now, consider the same

invitation of sex. Declining—*even if* it is solely motivated by concern for her wellbeing—cannot be a rights-violating form of paternalism. In this way, Henry's actions are different from Donna's caregivers when they interfere to prevent sex between the couple. When Henry chooses to decline Donna's invitation, there is no bad sexual activity to prevent. However, if he does accept Donna's (valid) invitation, then there is the prospect of bad (consensual) sexual activity to interfere with. Moreover, since this is consensual sexual activity, interfering with it is paternalistic in that it prevents two persons from exercising rights that they have the capacity to exercise. Although paternalistic, it could be justified because one party does not have a claim against paternalistic interference, and so certain third parties—like Donna's caregivers—ought to be attending to whether sexual activity with Henry is all-things-considered bad for her. We thank an anonymous reviewer for encouraging us to clarify this part of our analysis.

44. For example, the nursing home staff might notice that when the couple's physical intimacy is restricted, Donna's mood remains relatively stable. However, when the couple engage in more intimate acts, they might notice that Donna becomes inconsolable when Henry leaves, despondent for hours after his departure, and frantic about his whereabouts. We think that in such a scenario, the staff would be justified in intervening to prevent the couple's *consensual* sexual activity to protect Donna from the psychological torment, emotional distress, and confusion that seems to follow on from sex with Henry. It goes beyond the scope of the analysis to explore what legal interventions are consistent with this verdict, but the consensual nature of the sexual encounter is likely to be relevant to whether such interventions are justified. We thank an anonymous reviewer for encouraging us to say more about what would justify Donna's caregivers' intervention.

eight-year-old who attempts to buy a $8,000 state-of-the-art gaming system. Presuming the shopkeeper does not know the child already, she should not sell them the system. She should not sell them the system, even if they show her the receipt indicating that they just emptied their own savings account for the $8,000 and so the money is definitely theirs. Selling them the gaming system would not violate their rights, but it would be unscrupulous—it would take unfair advantage of the child. The shopkeeper, like everyone else, has a duty not to exploit persons with marginal autonomy.

All these verdicts seem very intuitive to us. They are also neatly explained by a Separate Grounds view, like the one we have described, that posits a substantial gap between what is needed to be a valuer and what is needed to be responsible for one's actions. A typical eight-year-old, unlike a toddler, is competent to engage in some financial transactions—they have values, they know what it means to exchange money for goods, and so on. Like Medhi and Donna, they can achieve the good of altering their normative relationships with others—a good that could not be realised without the capacity to consent. They are not, however, able to take responsibility for their decisions. Exchanging a small amount of money for a toy is unlikely to substantially impact the child's welfare one way or another (despite what they might think!). Even if they make a prudential mistake, the importance for them of making their own decision is likely to be great enough that paternalistic interference would not be warranted. It is *these* consent decisions—the ones that range from the prudent to the slightly imprudent—that showcase the role and value of consent even when there is no claim against paternalism. When the would-be paternalist's calculus does not support interference, the *ability* to consent affords a person with marginal autonomy decision-making authority that is akin to a fully competent person's. But when the calculus supports interference, consent (or refusal) is not verdictive. In this instance, emptying their savings account is something that might have a large effect on their well-being. Paternalistic interference is warranted and policies and practices that prevent children from engaging in large financial transactions without supervision are justified.

Similar judgements are reflected in medical law and practice. Mature-minor laws recognise a child's right to consent to treatment that is in their best interests when they meet understanding and voluntariness conditions for valid consent.[45] For example, in England and Wales this is reflected in

45. Mature-minor laws are common in many jurisdictions, including Australia, Canada, and the United States. Details vary, but the mature-minor doctrine states that when a treatment is in a child's best interests, and when that child possesses sufficient maturity, and capacities for

"Gillick" competence assessments, which evaluate a child's maturity, understanding, and appreciation, and in the Fraser guidelines, which govern the sexual healthcare of minors.[46] For example, children under the age of sixteen who are Gillick-competent can consent to receive contraception and abortion services without parental knowledge or involvement.

And yet, were a Gillick-competent fourteen-year-old to refuse an appendectomy after suffering a ruptured appendix, doctors in England and Wales would be permitted to override their decision to prevent them from dying from a life-threatening infection.[47] Here, again, our Separate Grounds view can make sense of phenomena that Common Grounds views struggle with—namely, laws that treat young persons' consent and refusal asymmetrically when the risk-benefit profile of these options differ. As a valuer, a fourteen-year-old might be capable of consent and refusal, and if they consent to life-saving treatment that is in their interests there is no paternalistic reason to interfere with their decision. However, a fourteen-year-old is not capable of being held responsible for their decisions. This is what explains why their refusal of the very same life-saving care can be overridden if the harms of non-interference outweigh those of paternalistically forcing treatment. Of course, the decision to interfere needs to take seriously the benefit to this valuer of making their own decisions, and much of the time this will count against overruling them. But not in this case—not when a valuer who is incapable of being responsible for their actions refuses surgery that is required to prevent peritonitis and potentially life-threatening sepsis.

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understanding, appreciation, and reasoning, they can consent to that treatment regardless of age and without parental involvement. See Joseph Millum and Danielle Bromwich, *The Ethics of Consent: An Introduction* (Routledge, 2026), 89–106, https://doi.org/10.4324/9781003287391.

46. "Gillick" competence and the Fraser guidelines are set out in case law: Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112. They are also upheld in Axon v Secretary of State for Health [2006] EWHC 37. For a guide to consent and refusal for children and young people in clinical care in England and Wales, see: "Reference Guide to Consent for Examination and Treatment," UK Department of Health and Social Care, August 4, 2009, https://www.gov.uk/government/publications/reference-guide-to-consent-for-examination-or-treatment-second-edition.

47. In England and Wales, even a sixteen- and seventeen-year old's refusal can be overridden by the Court of Protection. For extended discussion of possible underpinnings of the law regarding young person's decision-making in this jurisdiction, including the challenges this law poses for existing (that is, Common Grounds) views of competence, see Neil C. Manson, "Transitional Paternalism: How Shared Normative Powers Give Rise to the Asymmetry of Adolescent Consent and Refusal," *Bioethics* 29, no. 2 (2015): 66–73, https://doi.org/10.1111/bioe.12086; Millum and Bromwich, *The Ethics of Consent*; Anthony Skelton et al., "Overriding Adolescent Refusals of Treatment," *Journal of Ethics & Social Philosophy* 20, no. 3 (2021): 221–247, https://doi.org/10.26556/jesp.v20i3.965.

IV. Objections and Replies

IV.A THE VIEW SEEMS TO IMPLY THAT SOME CHILDREN CAN GIVE VALID CONSENT TO SEX

Many older but preadolescent children have the capacity to value. Many can surely understand what would be needed to permit sexual acts, at least on a minimal account of the understanding requirement. Since valid consent is often thought to be a right-making feature of permissible sexual activity, it might appear that our view would permit adults to have sex with older children if the children consent. This would be troubling.

However, the Separate Grounds view does not have this implication. Competence—as we have emphasized throughout the paper—is a necessary, not a sufficient, condition for valid consent.

Adult-child sexual relations are profoundly wrong. There are two, often mutually reinforcing, explanations for why: the consent explanation and the harmful exploitation explanation. In every case of adult-child sexual relations, the Separate Grounds view can avail itself of the correct explanation of why they are wrong.

Take the consent explanation: Even a child who met both the competence and understanding conditions for valid consent would only succeed in waiving a right against sexual trespass if their consent were also sufficiently voluntary. This condition is not met in actual cases of adult-child sexual relations. These abusive relationships are built and maintained with the kind of coercion and deceptive emotional manipulation that constitutes sexual grooming. As we have argued elsewhere, control of this sort undermines the voluntariness of consent.[48]

Of course, one might object that even if it is very unlikely that a child could give valid consent to sex with an adult in any actual cases, it is not impossible. However, we ought to be extremely wary of such thought experiments. They ask us to imagine a case in which a child *voluntarily* agrees to and proceeds with sexual contact with an adult after *no* grooming, *no* deceptive manipulation, and *no* coercion. This case bears so little resemblance to any actual case that we doubt that intuitions about it can render trustworthy moral verdicts.

Another way to see the problem with these sorts of imagined cases is to recognize that they can also be raised against Common Grounds views. It is *conceptually possible* that a child could meet the competence, understanding,

48. See Danielle Bromwich and Joseph Millum, "Disclosure and Consent to Medical Research Participation," *Journal of Moral Philosophy* 12, no. 2 (2015): 195–219, https://doi.org/10.1163/17455243-4681027 and Millum and Bromwich, *The Ethics of Consent*.

and voluntariness conditions on *any* theory of consent. After all, we can simply stipulate hypotheticals in which a child could meet, say, the four abilities for competence. Of course, such thought experiments are never raised because once the stipulated hypotheticals are this divorced from reality, many agree that our moral intuitions would be so unreliable that they could not play an adequate role in our moral theorizing. However, if reality posed no constraint on such theorizing, then we quickly see that the implications of such outlandish thought experiments are far worse for Common Grounds views. After all, *only* on those views does valid consent entail a claim against paternalism. Incredibly, this implies that were a child competent to consent and were they to meet the other conditions for validity, it would be a *wrongful* rights violation to interfere with their valid consent to sex with an adult.

This brings us to the harmful exploitation explanation of the wrongfulness of adult-child sexual relations. We, like a number of others working on sexual ethics, think that valid consent is not sufficient for morally permissible sex.[49] We also think that consensual sex can be wrongful when it is exploitative. In any realistic situation in which a competent adult has sex with a child, the adult will be taking advantage of the child and thereby exploiting them. Moreover, these acts are deeply harmful and the child does not stand to benefit from them. The validity of consent is far from the only moral issue.[50]

Our Separate Grounds view also allows us to make sense of some sensible legal distinctions relating to the age of consent. Many consent laws governing sexual relations have close-in-age exceptions. For example, in Italy exceptions are granted for consensual sexual activities between minors if (i) neither is under the age of 13 and (ii) the age gap between the sexual partners does not exceed three years.[51] It is not obvious that mutually desired sexual relations between two 13-year-olds involves bodily rights violations. Sexual relations might be ill advised—and there might well be all-things-considered paternalistic reasons to interfere with some of it—but it is not obviously wrongful. Many 13-year-olds are valuers, can understand enough to

49. See Ann J. Cahill, "Unjust Sex vs. Rape," *Hypatia* 31, no. 4 (2016): 746–761, https://doi.org/10.1111/hypa.12294; Elise Woodard, "Bad Sex and Consent," in *The Palgrave Handbook of Sexual Ethics*, (Springer International Publishing, 2022), 301–324, https://doi.org/10.1007/978-3-030-87786-6_18; and Melissa Rees and Jonathan Ichikawa, "Sexual Agency and Sexual Wrongs: A Dilemma for Consent Theory," *Philosophers' Imprint* 24 (2024): 1–23, https://doi.org/10.3998/phimp.2530.

50. In this way, a child's consent to sex with a competent adult is quite unlike Donna's consent to sex with Henry. The evidence of love in the Rayhons's relationship, the benefits of intimacy to both, and the apparent absence of exploitation makes the validity of Donna's consent the primary moral question. There is no analogous case in adult-child sexual relations.

51. Article 609-quater of the Italian Penal Code.

waive their rights, and do so voluntarily. Contrast this with sexual relations between a 13-year-old and a 40-year-old. This will be wrongful, but the explanation of why does not need to refer to the 13-year-old lacking the power to consent. The wrong will be explained in virtue of likely impediments to voluntariness—due to grooming, coercion, and deceptive manipulation—and the 40-year-old's harmful exploitation of the minor.

IV.B THE VIEW DILUTES THE VALUE OF CONSENT

A central tenet of the Separate Grounds view is that the power to waive a right through consent does not include a claim against paternalistic interference. But without this claim one might wonder what the value of consent is. Many would say that its value lies in protecting us from unwanted interference. However, Separate Grounds views imply that consent cannot secure this good alone. Its achievement requires a *separate* right: a claim against paternalistic interference. This might leave one thinking that what does the work we tend to associate with the value of consent is a risk-benefit calculation by a third party. The worry, in short, is that Separate Grounds views dilute the value of consent.

Were the value of consent to lie exclusively in our interest in non-interference, this worry would have force. When a valuer lacks a claim against paternalistic interference, they cannot secure independence. In fact, those valuers who have just passed the threshold are likely to have such weak prudential interests in directing their own lives that their decisions may frequently be overridden. Fortunately, the value of consent is not exhausted by this interest. Its value also lies in our interest in redrawing rights and duties in ways that advance our goals—such as by allowing another to cut our hair, invest our retirement funds, or even operate on us. When a person lacks the capacity that grounds the power to waive their rights, they cannot permit or refuse these interactions. Even if the 4-year-old wants their ears pierced or does not want to go to the dentist, they are not a valuer. They lack the capacities necessary to achieve this value of consent. It makes no sense to factor in their interest in directing their own lives into this decision-making. The same cannot be said of the 14-year-old. Even if we are *just* considering prudential consent decisions, the 14-year-old can achieve this good without needing a claim against paternalism.

Not only is this degree of control likely to be valuable to the 14-year-old, their control does not just extend to prudent decisions. Lacking a claim against paternalistic interference does not license all and any interference by third parties (and, likewise, having that claim right does not forbid all

interference). It is important not to conflate "no claim against *paternalistic* interference" with "no claim against interference." For anyone, including those who lack both of the component rights of competence, some justification must be given for stopping them from doing what they prefer. For those who are valuers, the justificatory threshold is higher, since it must take into account the value to them of directing their own life. This applies to both consent and refusals. Insofar as making their own decisions is in their interests and no other moral justifications for interference apply, they should be left alone.[52] This leaves valuers who are not yet responsible protected from much unwanted interference. Since they have the capacity to consent they can redraw the normative landscape to achieve goods that further their interests, preferences, and values.

IV.C THE RELATIONSHIP BETWEEN THE GOOD OF MAKING ONE'S OWN DECISIONS AND THE POWER TO CONSENT IS AMBIGUOUS

We have claimed that there is a distinctive prudential good that is realized when someone directs their life on the basis of reasons derived from their values. It is this good that is facilitated by the power to consent and so grounds the power. However, the relationship between the good and the power could be interpreted in two ways, both of which might seem problematic.[53] On a strong interpretation, a valuer's consent is only valid if their consent decision is *in fact* in line with their values. That interpretation appears inconsistent with how consent works, since it would seem to rule out weak-willed or foolish decisions. On a weak interpretation, a valuer's consent can be valid even if it is not in line with their values, but then it is not clear how the consenter achieves the good of directing their life based on reasons derived from their values.

52. Harm to others is one commonly cited moral consideration that could license interference with someone's chosen action, no matter their level of decision-making capacity. Another consideration, less often noted in this context, is the fair balancing of the interests of others. For example, we might think that within a family, parents have some license to make rules that restrict the freedom of a child for the sake of other children or the parents themselves. Joseph Millum, *The Moral Foundations of Parenthood* (Oxford University Press, 2018): 128–153, https://doi.org/10.1093/oso/9780190695439.001.0001. They may, for instance, insist on specific mealtimes and bedtimes in order to make their lives easier. Likewise, within institutional settings, some restrictions on free action might be justified because of interests of other residents and staff with limited time and resources. Note that while this consideration might commonly apply to contexts in which persons with borderline autonomy find themselves, its application is not restricted to such persons. In a caregiving relationship where someone has significant needs and is fully competent it would also be permissible for the caregiver to give weight to their own interests. Our thanks to Hallie Liberto for prompting us to address this point.

53. We thank two anonymous referees for raising this worry.

In response, we would emphasize again the central insight of our analysis: that there are two separate rights implicated in consent transactions—not one. *This* is the constitutive claim of a Separate Grounds view and it stands independent of our further views about what a valuer is and exactly how the capacity to value relates to the prudential value of making one's own decisions. However, we also happen to have a view on this question which, again, can help illustrate the payoffs of a Separate Grounds view. We think that having and applying values to your life is a distinctive good even if, on occasion, flaws in reasoning result in a consent decision that is, in fact, not in line with your values. In addition, we think that a valuer achieves *more* good if they direct their life based on reasons that successfully reflect their values.

If our substantive assumptions here are correct, then a Separate Grounds view that makes them could explain the value of scaffolded decision-making. If it is better that a valuer directs their life based on reasons that *reflect* their values, supported decision-making can help people like Donna and Medhi achieve this greater good by helping them identify, implement, and achieve their goals. It would also explain why it is worse to paternalistically interfere with a consent decision that is closely aligned with the valuer's values than it is to interfere with one that is not.

Moreover, if this specific Separate Grounds view were correct, it would give us the benefits of both threshold and scalar approaches to competence. Given the functional role capacity assessments must play in practice, our goal is to provide the best account of a threshold view. This is a goal we share with Common Grounds theorists. However, the response we just gave implies that *when the threshold is met*, some valuers can get more good from the capacity to direct their lives in accordance with their values. The threshold is set at the lowest point at which a valuer can get *some* good from directing their own life based on reasons derived from their values. But the more good the valuer can achieve, the higher the bar for justified paternalism, especially when *autonomy-enhancing* interference could scaffold good decision-making instead.

V. Conclusion

This paper identifies a unifying assumption at the heart of existing views of competence: whatever capacities are necessary to exercise your autonomy rights are the very same as those necessary to have a claim against others' interfering with your decisions. This is the Common Grounds assumption, and it accounts for the explanatory inadequacy of existing views of competence.

It is also false. In fact, full competence comprises two separate rights: a power and a claim against interference. For example, the competence implicated in consent transactions is constituted by the power to waive a right and thereby grant consent *and* the claim against paternalistic interference. The central insight of our analysis is that these are *separate* rights. As such, the capacities that ground one need not ground the other. We have argued that the power to consent is grounded in the capacity to value, while the claim against paternalistic interference is grounded in the capacity to be responsible for your actions. Given the long-standing frustration with the explanatory inadequacy of existing views of competence, the analysis in this paper represents a breakthrough: it provides us with a view that not only entails intuitive verdicts, but explains those verdicts.

When plausible assumptions are made about valuing, responsibility, and the other internal conditions for valid consent, a Separate Grounds view has important practical implications for those with marginal autonomy, their caregivers, and social care regulators. Common Grounds views leave practitioners, like those working in adult social care home settings, with little choice but to enforce their rigidity and accept the devastating consequences that follow—as happened in the Rayhons case—or attempt to avoid these consequences by devising ad hoc frameworks that balance well-being and autonomy. By contrast, our analysis promises a view fit for purpose: a Separate Grounds view that provides intuitively correct verdicts in uncontested cases, offers principled guidance in contested ones, and enables caregivers to keep respect for marginal autonomy separate from the duty to protect those with questionable decision-making capacity from harm.

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