Chapter 1
Five Concepts of Competence

That commentators use 'competence' frequently within moral philosophy, psychiatry and legal theory is reason enough not to doubt its multi-disciplinary credentials.[29] It would be mistaken, though, to suppose that the insights of each discipline are either uncontested or incontestable. Moral philosophy, psychiatry and legal theory operate according to different discourses and utilise esoteric bodies of knowledge. For the uninitiated, these can often be highly abstruse. They typically rest upon disparate theoretical and empirical premises and reach different conclusions, sometimes from different perspectives within the same discipline. In particular, the way in which competence has been conceptualised previously has led to insights from some disciplines to be given more prominence than others, and for other disciplines to be neglected altogether. A fusion of these insights into an integrated theory of decisional competence to consent to biomedical research is no easy task. We must begin, therefore, by drawing distinctions.

Although there has been much debate about how to assess competence, relatively little attention has been paid to defining it.[30] Competence (or 'competency'[31]) is a normative ethical quality, cognitive-psychological trait and legal property and takes several forms. For the sake of clarity, I arrange these into a lexical ordering:

1. Agency competence
2. Task competence
3. Decisional competence
4. Societal competence
5. Legal competence (also known as 'legal capacity')

In the ordering, agency competence is ontologically the most fundamental whereas legal competence is the most contingent. However, all these elements are constitutive of the broader meaning of competence insofar as to negate one element would be to impoverish our explanation of another.

[29] See for two notable examples, Landry (1999) and Pepper-Smith et al. (1996).

[30] White (1994: 55).

[31] As it is often known in North America.

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Agency Competence

Common to each form of competence is a measure of successful generic or specific human function or capability. Beauchamp describes this as:

> a single, basic, skeletal meaning that underlies various criteria of competence: '*X* is competent to do *Y*' always means '*X* has the ability to perform task *Y*' 'Competence' thus *means* 'the ability to perform a task'. This is the term's simple definition (and its logically necessary and sufficient condition).[32]

Beauchamp's description expresses competence as an ability. This is true of all human competences, as its logical presupposition is that the individual concerned possesses the appropriate qualities to perform or participate in *X*. However, competence at its definitional level does not entail that *X* should be a *task*. Task competence is a type of competence which presupposes the existence of antecedent capabilities. These antecedent capabilities are necessary for human action *at all*, namely consciousness, perception, ratiocination and volition. They are qualities common to all conatively functional human beings who we may consider competent in the most basic sense. I will call this type of competence *agency competence*. Agency competence is the necessary and sufficient condition of the development or possession of any other competence. Without this basic competence, individuals lack the qualities necessary for minimally independent human life.

Agency competence entails an ability to generate freely chosen purposes and categorically instrumentally value the necessary means to those purposes (irrespective of what those purposes might be).[33] At the most fundamental level, the pursuit of any purpose requires freedom and well-being, by which I refer both to the ability to deliberate and make choices that are expressive of one's intentions and to the possession of fundamental goods that are presupposed by and needed to sustain this, such as life, sustenance and basic knowledge.[34] This current or prospective ability for action is a necessary and sufficient condition of being an agent.[35]

Shoemaker describes agency as the "close cousin" of personhood.[36] Indeed, Carruthers has defined personhood in terms of agency.[37] However, I use agency in preference to personhood, for two reasons. Agency is the least restrictive criterion to denote the purposiveness ascribed to persons, as it denotes the capacity for freely chosen action construed as broadly as possible. On this account, all the agent is committed to valuing are its purposes and the means to attain those purposes,

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[32] Beauchamp (1991: 50).

[33] Gewirth (1978: 22, 25–27, 44), Beyleveld (1991: xxxvi) and Beyleveld and Brownsword (2001: 73).

[34] Gewirth (1978: 30–47), see also Beyleveld (1991: 18–21).

[35] Gewirth (1978: 46 and 119–127).

[36] Shoemaker (2007).

[37] Carruthers (1986: 234), although Carruthers does so with reference to 'rational' rather than 'moral' agency (*ibid.*: 228, 232).

whatever those may be. By comparison, Harris, for example, connects personhood with the capacity to value *existence* rather than the capacity to value particular purposes.[38] Although Harris makes clear that his conception of personhood does allow a person to cease valuing their life,[39] agency tied to unspecified ends stands less in need of such qualification, as a purpose could conceivably refer to an intention to die in a context where existence is, or never has been, of value to the agent.

Second, the use of agency (at least in its Gewirthian sense) avoids semantic correspondence with being human. Correspondence usage occurs where personhood is conceived as a 'subclass' of human agency[40] or where agency is understood as partially constitutive of human personhood. Rom Harré employs this later usage, defining personhood (or 'personal being') as comprising consciousness, agency and autobiography (personal identity).[41] Insofar as human agents (the subject of this book) are conscious and capable of forming an identity, they fulfil Harré's definition of personhood. Despite this, one could infer from such an account that human beings exhaust the range of agents that exist. Such an inference would overlook the wider reach of agency. An agent theoretically could be any entity that acts for freely chosen purposes, which includes (potentially) forms of artificial intelligence and higher-order non-human animals. Agents thus comprise a very expansive natural kind. This does not mean that it is impossible to define a person in similarly broad terms, as Harris does.[42] However, the meaning of agency is less ambiguous, as it lacks the ordinary language use associated with personhood. This ordinary language use of personhood is synonymous with being human.[43] Agency is, in this sense at least, not bound up with being human in the way that personhood is.

Agency competence is not equivalent to, and nor does it require the level of cognitive function required for the exercise of advanced abilities, such as academic or emotional intelligence, abstract reasoning or practical knowledge. The possession of these specialised abilities may affect the scope of the agent's specific task and decisional competences, but not the competence of the agent *qua* agent. The threshold of agency competence is low, and as such, most human beings will appear to meet it. Human beings who appear to lack agency competence include, for example, foetuses and neonates, those in a coma or persistent vegetative state and those in the most advanced stages of dementia.[44] Their apparent lack of agency

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[38] Harris (1985, 1999).

[39] Harris (2005b: 388–389).

[40] See Taylor (1985a, b) and Heinimaa (2000). Carruthers also identifies "distinctive human emotions and affective ties" as conditions of personhood (1986: 234), although concedes that on this account some human beings may not be persons (*ibid.*) and that it may be possible in the future to create artificial persons that are not humans (*ibid.*: 248). Such artificial entities would, according to Carruthers, have to display these distinctively human qualities to qualify as persons, however.

[41] Harré (1984). Erde (1999) offers a lucid distillation of Harré's conception of personhood.

[42] Harris (1985).

[43] Ford (2005: 80–81).

[44] See Chapter 5 for a discussion.

competence prevents any development of task or decisional competences, even though the prospective emergence or return of agency competence, and thus the potential for developing task or decisional competences, may be possible.[45] At this stage, however, I wish to emphasize that I do not see these human beings (or, for that matter, non-human animals) as being unentitled to intrinsic moral consideration. I will justify this claim when I return to the issue in Chapter 4.[46]

Task Competence

Task competence is a descriptive *and* evaluative measure that includes generic activities, such as speech or physical mobility, and highly specialised activities, such as mountaineering or performing neurosurgery. Fundamentally, a judgment of task competence serves to *describe* a level of ability shown by an individual in respect of a given task, i.e.: *A* is competent at task *B* to degree *C*. Task competence is thus a scalar quality. As the judgment of competence is task specific, it can describe a person's ability to perform or participate in an activity *P* or a range of activities P_n at the same time she is incompetent to perform or participate in other activity *Q* or range of activities Q_n. So, for example, a person may be competent to cook a meal or to speak German fluently whilst at the same time she is incompetent to play the cello or to fly a plane.

The following example illustrates the distinction between task competence and agency competence. Suppose I wish to drive from Sheffield to Leeds in order to perform in a music festival when I arrive. The mere fact that I am evincing a purpose that I wish to pursue is enough proof of my agency competence. Beyond, this, I am dependent on an array of task competences to allow me to fulfil my purposes. First, I would need to have demonstrated the competence of driving a car safely and responsibly to the satisfaction of the relevant authority. Second, I would need to have the aptitude to perform a particular musical piece on my chosen instrument(s). Third, I would probably also need to successfully engage in incidental tasks such as setting up and packing away my musical equipment at the venue, filling my car with fuel before the journey and following a map of road directions (or the guidance of my car's satellite navigation system) between the two cities. None of these task competences has any bearing on my agency; with or without them, I am still an agent.

We can also use a judgment of task competence in three comparative ways. First, a judgment of competence can have a comparative dimension in respect of the same individual over time. Here, the function of the judgment is to evaluate the current

[45] In the case of foetuses and neonates who survive to reach more advanced developmental stages or human beings who recover from a coma.

[46] The reason for my use of the qualifying term 'apparent' will, I hope, also become clear.

level of ability demonstrated by an individual, *A*, in terms of previous levels of ability that she has shown at that task under different circumstances in the past. This takes the form:

A is competent at task *B* to degree *C* in circumstances *X* at $time_2$ which is greater/lesser than the degree to which *A* previously displayed competence at task *B* at $time_1$ in different circumstances *Y*.

Second, a judgment of competence can also have a comparative dimension in respect of different persons at the same time. In this case, the judgment functions to evaluate the ability shown in terms of the level of ability at that task which another individual or group of individuals shows or has shown relative to *A*. This takes the form:

A is competent at task *B* to degree *C* which is greater/lesser than the degree to which another individual *D* is or other individuals D_n are competent at *B*.[47]

Third, a judgment of task competence may function to evaluate the task competences possessed by an individual in terms of the *probability* of the individual possessing those task competences in different circumstances. That is to say, from the fact that *A* has task competences *M* and *N* in circumstances *X*, it is possible to infer the probability of *A* having task competences *M* and *N* in different circumstances *Y*. We can also re-frame this in terms of the *probable* range of task competences that another individual or individuals possess relative to *A*. So, from the fact that *A* has task competences *M* and *N* in circumstances *X*, it is possible to infer the probability of another individual *D* or other individuals D_n having task competences *M* and *N*.

White identifies capacities and knowledge as providing the basis of task competence:

> A person is competent to perform a task, the actions of which are specified, if he knows what actions are required, knows how to perform those actions, possesses the capacities necessary to perform those actions, and, given his position, can reasonably be expected to possess both that knowledge and those capacities.[48]

White's definition is plausible insofar as she defines capacities as being physical and mental[49] and knowledge as being specific as well as generic, thus not excluding any possible task competences from consideration.[50] However, the definition appears to leave aside the meaning and significance of one's 'position' on the types of competence that one may develop. If one's 'position' is taken to denote one's level of learning or professional responsibilities rather than one's ontological position

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[47] It would also be possible for a judgment of competence to have a comparative dimension in respect of different persons at the different times.

[48] White (1994: 47).

[49] Although the volitional component of competence means that the cognitive aspects are logically prior. See further, Culver and Gert (1982: 53–54).

[50] White (1994: 45).

as an agent, this would negate the prior question of how the competence is developed and its relative importance for fundamental human action.

Tasks at which it is possible to demonstrate competence can be categorised according to their usefulness and importance for fundamental human action. In so doing, we can observe where the absence of a task competence may seriously impinge on a person's everyday life and where it may not. For instance, the skills required for speech (e.g. co-ordination of the brain with bodily vocal articulators, enunciation) and physical mobility (e.g. walking, and bodily co-ordination) are required for many human activities for most of the time, thereby enhancing personal independence and autonomy.[51] It is empirically verifiable that the majority of adult human beings are capable of exercising the skills required for speech and mobility. Those who do not or who are no longer capable of exercising them are in clear need of additional support or assistance commensurate with the debilitating impact on their lives.[52] This debilitating impact may, of course, result from a pre-existing failing of the social environment to meet the needs of such individuals.

By contrast, fewer individuals are (or ever will be) competent to go mountaineering and fewer still to perform neurosurgery. However, it is less important for the independence and well being of those concerned that such competences are developed. Because of their application to specialist fields of activity, to lack competence to perform or undertake either activity is not going to have a detrimental impact upon the everyday life of the person who is unable to develop the competence, apart, perhaps, from the thwarting of an ambition.

Acknowledging that more individuals are task competent in respect of speech than neurosurgery may seem trite, but it is important to explain. First, the degree of understanding and skill required by speech and physical mobility is lower than that required for mountaineering or neurosurgery. Given basic knowledge about typical levels of human intelligence and motivation, it is more probable that a larger number of people are capable of speech or mobility than performing neurosurgery. Second, a precondition of possessing a task or decisional competence is that an individual should have the developable potential for exercising that competence. To be competent to go mountaineering or perform neurosurgery requires higher-level cognitive abilities, such as sophisticated judgment and critical thinking, developed later in life through a combination of prior learning and experience. Even then, they are not developed by everyone to a degree that would allow them to be deemed competent to undertake those activities supervised, unsupervised or at all. To become competent to go mountaineering or perform neurosurgery respectively requires a long and intensive process of education, training and practice. Conversely, an individual can acquire the abilities for speech or physical mobility without any formal education and with only basic levels of cognitive processing.[53]

[51] This is true even if we conceive of independence and autonomy separately from the more perfectionist notion of human flourishing.

[52] This claim requires a normative argument, which I develop between Chapters 3 and 5.

[53] See further Piaget (1950, repr. 2001, Chapters 4 and 5).

The latency or developable quality of task competences captures a significant part of what it means to possess them. It is not difficult to think of examples to illustrate this. One could describe an individual as having a latent task competence if he or she possessed a pitch-perfect singing voice without ever having had singing lessons, or could interpret historical events without having ever studied history. In most cases, latent task competences need development and assessment against predefined criteria before they become formally recognised, but in some cases, an informal recognition is all that is required to identify a latent competence, such as the recognition of one's singing proficiency by one's fellow members of an amateur dramatics society.

To fully flourish, developable task competences require formal or systematic training which enhances the embryonic competence. So, in the last example, the informal recognition of latent competence could incline one to develop one's competence so as to have it assessed and formally recognised, such as by taking singing lessons followed by assessment. The presence of variables that suggest a possibility, if not a certainty, that one could become competent in a certain respect indicate developable competences. For instance, not all individuals will have the competence to perform neurosurgery, but some will have a developable competence in learning science at school of such a standard that would allow them to progress to study medicine if they wished, equipping them to learn about how to perform neurosurgery if they demonstrated sufficient competence at medicine. Likewise, we can ascribe developable competences to mundane activities such as cooking. Many individuals who cannot cook have the developable potential to be able to cook following appropriate instruction. This means that we cannot presently describe such individuals as having this task competence, but that they have the *potential* to develop it should they so wish.

The potential to develop specific task competences implies a possible *prospective* exercising of those competences although they may not be possessed currently. It also suggests that an individual could develop competence at a particular activity if reasonable modifications were made to the immediate environment. For example, a severely physically disabled individual may have the cognitive abilities to learn how to cook but would not be able to develop the competence to cook in an unmodified kitchen environment. Similarly, a cognitively able adult of restricted height may not be able to develop the competence to learn how to drive a car, unless she has access to a modified vehicle.[54]

Let us return to the specialised examples of task competence given initially – mountaineering and neurosurgery – in order to draw a further distinction. The way in which we conceive of the relationships and consequences involved in

[54] Modifications to the immediate environment in order to allow as many people as possible to develop task competences is a matter of social justice that rests upon the value attached to equality of opportunity within any given society and the types of activities that justify the provision of extra support and from which the person with disabilities can benefit (e.g. the provision of learning aids for dyslexic students by a local education authority).

mountaineering compared with neurosurgery gives rise to separate moral implications. Mountaineering is an activity that has implications only for the individual who has chosen to engage in that activity. Irrespective of whether duties exist to interfere with the decision of an individual who is ostensibly incompetent to go mountaineering, achievement or failure at that activity or the risk of harm caused by the activity is directly borne only by the participant.[55] Neurosurgery, on the other hand, involves an action performed on another human being, the possible outcomes of which range from the preservation or restoration of the patient's health, serious brain damage or death. They therefore impinge upon important interests that the patient has in her psychological and bodily integrity and, indeed, life. Notwithstanding a free and informed consent of the patient to the operation, it is at least grossly negligent and at worst morally abhorrent for an individual lacking task competence in neurosurgery to be permitted to perform the intervention, irrespective of the outcome for the patient. In other words, the risk of harmful consequences generated by one individual performing an activity that has direct implications for the basic interests of other individual provides *prima facie* grounds for ensuring that individuals *incompetent* at that activity be prevented from performing or participating in it.[56] A higher threshold of competence and clear prior demonstration of proficiency is thus presupposed for activities that are (i) more complex and (ii) have a risk of direct harm to others attached.

Decisional Competence

Decisional competence follows the same conceptual structure as task competence. Common to both task competence and decisional competence is that one can possess both types of competence by degree. Just as there can be degrees of competence that fall short of the minimally acceptable standard, there can be degrees of competence that exceed this. As such, one may demonstrate it to a degree which exceeds the minimum level required to be judged competent to make the decision in question, typically expressed as a 'benchmark'.

Consider, for example, the assessment of an individual to establish whether she can be legally deemed task competent to drive a car. This requires that, at the point of assessment, all candidates have reached the same benchmark standard in that particular task. However, within that group of individuals, large disparities of ability will exist. Some will have passed the test with fewer errors than others. Some may only be able to drive a car in the situations upon which they were examined,

[55] Of course it might be possible to argue that indirect harm could be caused to the family or friends of an injured or killed mountaineer or that society is harmed through the burden placed upon health care resources if the mountaineer was to become injured, although these indirect harms are more difficult to quantify and do not seem an adequate basis for restricting human action in this way. For a discussion of the rationale of prohibiting self-inflicted harm, see Feinberg (1986).

[56] This could also be taken to mean an individual not yet proven competent at that activity.

whereas others will have the competence to drive on a motorway, off-road or on a racing track. These factors are constitutive of the competence of the individual driver. Nonetheless, the fact that all have passed the assessment shows that all have been judged to reach the sufficient and necessary standard of task competence to be legally allowed to drive. This sufficient and necessary standard can be surpassed but it cannot be fallen short of if the individual is to be considered to have reached the benchmark standard.

The same principle applies to decisional competence. Recruitment practices, for instance, commonly employ benchmark standards for decisional competence. At interview, candidates often will be given a series of activities designed to assess decision-making skills relevant to the position for which they are being considered. In these circumstances, there usually will be factors other than a demonstration of adequate decisional competence that determine the candidate's suitability for the job. Nonetheless, demonstrations of decisional competence are still operating a 'gate-keeping' function here, if only to identify those candidates who would be competent to make decisions required by the post, if they were appointed. The difference between the driving test and the decision-making assessment, however, is that the degree to which the candidate surpasses the minimal standard of competence required to meet the benchmark will usually be taken into account, especially if there are more candidates than positions available. This is because it is an indication of how well the candidate is likely to perform in the post, and thus of interest to the employer, whereas it is irrelevant to passing the driving test.[57]

Therefore, we can say of all tasks and decisions that involve a single determination of competence that they employ a minimal criterion of competence. This operates as a benchmark at which level the necessary skills and abilities must *at least* be possessed. We can express benchmark measures of assessing decisional competence in the following terms:

In order for person *A* to be deemed competent to make decisions of type *X*, abilities *E* must be possessed to a necessary and sufficient level. Abilities *E* will depend upon the nature of *X*, and may well be possessed to such a degree that exceeds the requirements for *X*. The relevance of the degree to which *A* may exceed the necessary and sufficient level required to be deemed competent to make decisions of type *X* will depend upon the purpose of the test and may well be irrelevant to the judgment of competence.

Two observations can be made of the relationship between decisional competence and benchmarks tests. First, the description of how tests for decision-making operate as a benchmark is separate from the evaluation of the correctness of the normative premises upon which those tests are based (e.g. whether the benchmark of decisional competence for recruitment to a social work position is set at a high

[57] At least in the UK. However, for all drivers that pass, there will be a record of the number of faults that were observed during the test, although these make no material difference to passing the test – one cannot pass by degree.

enough level).[58] Second, the relationship between decisional competence and benchmarks tests questions the belief that a definition of competence and the grounds on which it is tested are distinct.[59] Indeed, we have seen that in defining decisional competence as a quality that may be displayed by degree, an individual could display decisional competence that exceeds any benchmark standard that a test designed to assess that competence may employ.

Approaches to conceptualising decisional competence have tended to follow one of two dominant theoretical perspectives. The distinction between these perspectives turns upon the definitional aspects of a decision and the position that risk assumes within the decision-making context.

Risk-Relative (Asymmetrical) Competence

Common to risk-relative theories of competence is that the *degree of risk* attached to the consequence of each choice for the decision-maker within a given decision-making situation determines the level of decisional competence required.[60] Risk-relative theories of competence have been formulated principally in relation to decision-making about medical treatment, and as such, the nature of the risk discussed is one which is posed to the decision-maker only and not to others (e.g. the kind of risks involved in deciding whether or not to have chemotherapy rather than those involved in a police officer deciding whether or not to drive fast down a busy city street in response to an emergency call).[61]

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[58] It is apt to explain this in light of Beauchamp's view that: "[Competence] is inherently normative in the way it is used to establish the abilities and level of abilities … [t]hus it is a mistake to infer that empirical judgments of psychological competence are free of prior evaluative commitments. The reverse is true: they are inescapably value-laden" (1991: 53). I agree with Beauchamp that the basis of competence judgments is intrinsically normative. However, it is possible to state the mode of operation of a competence benchmark descriptively (e.g. insofar as it functions to establish whether person A has reached benchmark H for decisional competence W), in order to serve as an analytical tool to deepen the normative critique of the values expressed by the benchmark.

[59] A belief endorsed by Becky Cox White: "A definition serves a theoretical function – it tells us what we mean by competence. The capacities that define competence specify the criteria for being a competent person. To be competent is to have the relevant capacities. … Tests serve a practical function – they are tools that identify the presence or absence of capacities, and determine whether particular persons have the appropriate abilities" (1994: 54–55).

[60] Robertson's interesting analogy reflects aspects of this approach: "Competency is a filter or screen that channels our thinking by limiting the alternatives and factors to be considered. Like a command function of a computer, it opens up new issues, although unlike a computer, it is not totally neutral about the decisions and questions that follow. The final question can be reached only after leaving the narrow domain of competency and confronting the value choices between a patient-centred or other-directed approach that are presented" (1991: 144).

[61] It would be perfectly probable in theory, however, to accommodate within a risk-related theory of decisional competence risks posed to others as well as the decision-maker. However, it is less clear whether one should assume the decision-maker to be incompetent to make a choice if the risk it posed to others is disputable.

In *Deciding for Others*, Allen Buchanan and Dan Brock claim, "just because a patient is competent to consent to a treatment, it does *not* follow that the patient is competent to refuse it, and vice-versa".[62] They illustrate this by observing that a "lumbar puncture for presumed meningitis" requires a "low/minimal" level of competence, whereas refusing "surgery for simple appendectomy" requires a "high/maximal" level.[63] In other words, the greater the risk posed to the decision-maker by the choice made, the higher the standard of decisional competence should be.

For Buchanan and Brock, balancing self-determination and the welfare of the decision maker lies at the core of their own theory of competence.[64] In their view, the choice of a decision-maker may be legitimately overridden in circumstances where a relevant authority – such as a physician or researcher – believes that the choice (i) impinges on the decision-maker's well-being and (ii) the choice reached is one that the decision maker would be unlikely to make when fully mindful of her values, irrespective of whether the decision-maker actually believes her welfare to be most satisfactorily secured by this decision. In a rejoinder to a critique of their theory, Brock restates this point succinctly:

> Persons have a self-determination interest in making significant decisions about their lives, including important medical treatment decisions, for themselves and according to their own values. But they also have an interest in having their well-being protected from serious harms that would result from their choices when their decisionmaking is substantially impaired.[65]

The validity of this claim rests upon agreement as to the sufficiency of decisional impairment such as to justify overriding the outcome of a decision or making a determination of decisional incompetence. If one understands 'substantially impaired' decision-making to refer to persons who are almost certainly incapable of making their own decisions in relation to a particular matter, then there can be no disputing Brock's claim. However, this does not capture the nature of the ethical issue at stake here. The ethical issue arises where the choice itself may precipitate a reappraisal of the person's decisional competence – where competence is *questionable* rather than palpably absent. For the choice to trigger a competence reassessment, it must either run contrary to the person's well-being or be at odds with their established values. Under Buchanan and Brock's account, substantially impaired decision-making amounts to a failure to account for these two variables by the decision-maker, rather than a complete inability to decide at all. The difficulty here is drawing a distinction between instances where the decision-maker's 'true' values are distorted and may be legitimately substituted by a surrogate and where the individual's values have undergone a genuine transformation in the

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[62] Buchanan and Brock (1990: 51–52).

[63] Buchanan and Brock (1990: 53).

[64] Buchanan and Brock (1990: 29). They describe this as a decision-relative theory in *Deciding for Others*. However, in a paper published shortly afterwards, Brock (1991) concedes its risk-related quality.

[65] Brock (1991: 106).

recent past that might be speciously attributed to the effects of the condition which she is experiencing.

James Drane, another exponent of a risk-related approach, considers that a standard of decisional competence should vary in accordance with the dangerousness and irrationality of the choice:

> [F]or those … decisions that are very dangerous, and run counter to both professional and public rationality … competence … requires an ability on the part of the decision maker to appreciate what he or she is doing. Appreciation requires the highest degree of understanding … To be competent to make apparently irrational and very dangerous choices, the patient must appreciate the implications of the medical information for his or her life.[66]

Invoking a notion of 'professional and public rationality' is tendentious in the absence of an explanation of what such rationality is and why it is to be preferred over other forms of rationality or modes of understanding.[67] It is unclear whether a contravention of this rationality would occur at any time when the relevant authority (in this case the doctor) has her view challenged or rejected by the decision-maker (the patient), regardless of how dangerous the decision-maker perceived the decision to be. Following Drane's risk-related theory of competence could therefore allow a form of strong paternalism to enter into the process of competence assessment, negating the decisional competence that the decision-maker may actually possess. The permissibility or otherwise of such strong paternalism can only be resolved by expressly grounding a theory of competence in moral philosophy.

More recently, Ian Wilks has proposed a more extensive risk-related theory of competence, known as "asymmetrical competence".[68] This shares affinities with Buchanan and Brock's account but it employs a more clearly delineated scale of risk. Wilks suggests that an individual may be competent to choose one option but not another in a particular instance of decision-making. To illustrate, Wilks draws an analogy between asymmetrical competence and Pascal's Wager[69]:

> Just as, according to the proponents of the risk standard, what you are competent to do/not to do can depend upon the risked consequences of doing it/not doing it, so, according to Pascal, what you ought to affirm/deny can depend upon the risked consequences of affirming/denying it. Hence … competence is not independent of the consequences under risk, but rather must be determined in part according to those consequences.[70]

[66] Drane (1985: 20).

[67] On the problems involved in appealing to reasons to justify the superiority of one moral theory over another, see Boylan (2000, Chapter 8).

[68] Wilks (1997 and 1999).

[69] An argument proposed by the seventeenth-century French philosopher Blaise Pascal (1670) which suggests belief in God is rational, in the absence of any contrary evidence. Pascal argues given the anticipated benefit of belief in God is considerably greater than disbelief, if one believes and this transpires to be correct, then one enjoys eternity in Heaven. Accordingly, if one believes and this belief ultimately is disproved, one has lost comparatively little, other than the pleasure that may have resulted from living a hedonistic life. However, if one disbelieves and this disbelief is false, eternal damnation awaits. Therefore, if we are to value our purposes and fate, rationality dictates that we ought to subscribe to belief in God. For a critique of this argument, see Beyleveld and Brownsword (2007b).

[70] Wilks (1997: 423–424).

Wilks' theory rests upon two contentious assumptions. First, to what are we to have appeal in order to judge the value of risk to the decision-maker, when the decision-maker will – if competent – be better placed than anyone to make that decision herself? Take, as a well-known example, the choice of the decisionally competent terminally ill person to refuse a proposed life-sustaining course of medical treatment. Desire for an end to life does not constitute irrationality on the part of the patient simply because of the magnitude and irreversibility of what would be lost if the patient refuses treatment. Of course, there remain good grounds for ensuring that the patient's reasoning is informed, internally coherent, consistent and not subject to external pressure.[71] However, if there are no grounds to question the patient's competence to decide, it is hard to see any persuasive grounds for declaring that the patient is decisionally incompetent for the reason that the choice they reached is not the least or less risky option available.

Second, Wilks uses the analogy with Pascal's Wager somewhat loosely. Wilks's theory of asymmetrical competence presupposes that individuals are competent at a particular decision if they choose in some ways but not in others. Pascal's exhortation is supposedly a reason for individuals of their own free will to believe in God and not a licence for someone else to deem one incapable of making a decision about atheism or agnosticism if one chooses not to believe in God. In Wilks's theory, a judgment of competence to decide is made by someone else other than the individual. Thus, someone else's standards of rationality are being imputed upon the decision-maker. In Pascal's Wager, the competence of an individual to decide is not an issue. In suggesting that belief in God is more rational than disbelief, Pascal was not suggesting that disbelief disqualifies one from making the decision *at all*. Therefore, the analogy Wilks draws is erroneous.

An external standard of rationality is imputed upon the decision-maker in risk-relative and asymmetrical theories of competence through the standard of the 'reasonable decision-maker'. The relevant authority is likely to deem the decision-maker incompetent to decide if she fails to satisfy this standard.[72] Two consequences follow from this. First, such a standard entrenches power relationships between the decision-maker and assessor, with the freedom of the decision-maker to choose being to some extent subject to control by the assessor. Such control may indeed be warranted if the patient is incapable of reaching *any* choice in respect of that decision,

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[71] Beauchamp and Childress argue that there are circumstances where is it permissible to pressure patients or research participants to "change their beliefs or process information differently" (2001: 91). Such pressure amounts to persuasion rather than coercion, however, and does not *necessarily* mean that patients or research participants *should* be judged incompetent if they refuse to change their beliefs or process information differently. It also does not mean that we should reach a judgment of decisional incompetence if a patient or research participant decides one way rather than another.

[72] Roth et al. similarly argue, "The patient who fails to make a decision that is roughly congruent with the decision that a 'reasonable' person in like circumstances would make is viewed as incompetent. This test is probably used more often than might be admitted by both physicians and courts" (1977: 281).

but it is far more difficult to justify where it could lead to an individual being considered perfectly capable of making a choice if deciding one way, but incapable of making the choice if deciding the other.

This gives rise to the second consequence. Risk-relative theories of competence contend that the consequences of one option of a single decision may be graver or more severe than another option, which fits well with intuitive knowledge about the array of options that any given decision scenario can pose. Nevertheless, it is not clear why this risk should attach to the consequence of a particular *choice* resulting from a decision and not be inherent to the nature of the decision-making *scenario* itself. Using an example of consent to treatment, Wilks argues that to be competent to say yes but be incompetent to say no is "as if someone says, 'You can either say yes or no. If you say yes we will immediately comply. If you say no we will have to discuss the matter further, and we may comply or we may not' ".[73]

Here lies the problem. Not to comply with an individual's choice (particularly where that person's choice only has consequences for herself) implies that the individual is not sufficiently informed or informable to *deliberate* between options and reach a choice. However, the presence of options is necessary if we are to conceive of the situation as a involving a decision *at all*. The *Oxford Dictionary of Psychology* defines decision-making as "The act or process of choosing a preferred option or course of action *from a set of alternatives* [emphasis added]. It precedes and underpins almost all deliberate or voluntary behaviour."[74] For a theory of decisional competence to postulate that an individual is competent to say yes, but incompetent to say no in respect of a single decision thus incurs a contradiction that strikes at the very heart of what the decision-making process involves.[75] It suggests that the individual cannot weigh the benefits and burdens of possible outcomes necessary even for a competent 'yes' response. The 'yes' issued in the absence of such evaluative mental processes is mere acquiescence and not the product of choice. Such an individual is therefore *in*competent to make this decision *at all*, rather than competent to decide one way but not the other.[76] Asymmetrical decisional competence thus commits the same error of "confusing compliance with competence" that Wilks levels at unjustified paternalism.[77]

By way of illustration, consider the following hypothetical scenario. A young man with learning difficulties suffering from mild schizophrenia is admitted to

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[73] Wilks (1999: 158).

[74] Colman (2001: 187).

[75] This is particularly problematic for asymmetrical competence theory if we recall Buchanan and Brock's argument that "an adequate standard of competence will focus not on the content of the patient's decision but on the *process* of the reasoning that leads up to that decision" (1990: 50), an argument which Wilks cites approvingly (1997: 414).

[76] Culver and Gert (1990: 620) also share this view.

[77] Wilks (1997: 414). Cale's response to Wilks is broadly sympathetic to the critique presented here: "While the risks related to a decision might be grounds for taking more care in assessing a person's competence, they should not provide grounds for increasing the standards by which a person's competence is assessed" (1999: 148).

hospital after a minor episode of self-harm. Whilst recovering, and in a mentally lucid state, he is approached by a clinical researcher, who informs him of a research project being currently undertaken in the hospital to determine genetic propensity of the condition. The researcher informs him that participation in the research project incorporates two stages, each of which requires consent. The first involves the taking of blood and saliva samples for subsequent analysis. The second involves CT scanning of the brain, which contains a minimal risk of an allergic reaction to the iodine-based contrast dye. After being presented with this information, the patient orally agrees to participation in both stages of the research and signs a consent form for the first stage with the assurance that a consent form in relation to the second stage will be offered to him shortly afterwards.

In the intervening period, the researcher consults the patient's medical notes to understand more about the nature and extent of the patient's learning difficulties. The researcher reflects upon this knowledge and reappraises her view of the decisional competence of the patient to consent. She accepts the consent of the patient to the first stage of the research project, but does not accept the consent of the patient to the second on the belief that whilst the patient may have the appropriate standard of decisional competence to refuse this research, he does not have the competence to consent to it. From the perspective of a risk-relative theory of competence, this is an entirely appropriate action to take. The researcher, mindful of the condition and recent behaviour of the patient, is inclined to view the patient as capable of consenting to research activity that poses no or negligible risk, but incapable of providing consent to research activity that involves a minimal level of risk. This is as a direct result, in the judgment of the researcher, of the patient not being fully able to comprehend the nature, purpose and effect of the brain scan.[78]

However, unanswered questions remain. Did the researcher take the lucidity of the patient satisfactorily into account? After all, the patient displayed ostensible signs of comprehension of the proposed research. Should this have inclined the researcher to maintain her initial judgment of decisional competence in this case? In retracting her previous judgment, it would seem that that the researcher is doubting the patient's ability to make a decision about the second stage of the research at all, rather than doubting his ability to consent to it. Now, it may well be that there is something particular to biomedical research, especially that which involves participants with mental illness or intellectual disabilities that generates wariness about supposing a threshold of decisional competence to consent that is no higher than for refusal within a single decisional scenario. However, such wariness derives from separate normative factors about a wish to ensure protection for vulnerable groups, rather than deriving from the logical structure of the decision itself. The proper place for consideration of risk in making judgments of

[78] Adopting the criteria devised by Thorpe J in the English legal case of *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819 at p. 824 to determine the decisional competence of a patient to consent to medical treatment.

decisional competence is at the level of the decision-making scenario, in knowledge of all the choice options it offers, rather than at the level of the particular choice made.

Decision-Relative Competence

Decision-relative theories of decisional competence hinge upon the notion of 'decision-specificity', which means that they are conceptually closer to task competence than risk-relative theories of decisional competence.[79] Common to decision-relative theories of decisional competence are two claims. The first is that an individual can be competent in respect of some decisions and not others at the same time. The second is that if an individual is competent in respect of a particular decision, it follows that she must be competent to make any choice which that decision allows, on the grounds that the presence of options is required for a decision-making scenario to exist, and that to deliberate between options is a necessary condition of possessing decisional competence. Let us consider the implications of decision-relative theories of decisional competence in more detail.

Mark Wicclair, a proponent of the decision-relative approach, argues that any given instance of decision-making will typically require a different level of skills and abilities from another unrelated instance:

> The relative skills and abilities vary according to the specific decision, and a standard of decision-making capacity therefore should be decision-or-task related. It is likely, for example, that there are significant differences between the cognitive skills and capacities that are required to make a reasoned decision concerning life-extending medical treatment, on the one hand, and the cognitive skills and capacities that are required to make sound financial investments, on the other hand.[80]

To claim that significant differences exist between the skills and capacities required to make a decision about life-sustaining medical treatment and those required to make financial decisions is not to deny areas of overlap between these skills and capacities but to deny that decisional competence in one entails decisional competence in the other. It is perfectly possible that a person in possession of the requisite skills to make such a decision about life-sustaining treatment (either currently or prospectively) will not possess adequate numerical, predictive or economic skills to make decisions about financial investments.

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[79] Culver and Gert explain this in the following way: "Specific-task competence is distinguished from risk-related theories of competence in so far as they collectively define competence as a measure of the *internal* abilities of a person. Decision-relative competence is an application of task specific competence in the decision-making sphere. The two most compelling definitions of decision-relative competence to have emerged in the last fifteen years both emphasise foremost the abilities and capacities of a person to make a decision. Competence, therefore, is considered to be an attribute of personhood" (1990: 638).

[80] Wicclair (1993: 11).

Although decision-making about life-sustaining treatment and financial investments both require informed rational deliberation, the first decision clearly involves something that is far more fundamental to one's existence and basic interests than the second. Thus, the level of understanding and appreciation required in order to be competent to decide about life-sustaining treatment is commensurate with the specific demands of the decision. These include understanding the nature of the disease, appreciating the medical prognosis and weighing up the risks and benefits of having a burdensome course of medical treatment against the consequences of not having this treatment.

We can express the decision specificity of decisional competence in the following terms:

Individual *A* is competent to make decisions of type *X* but not of type *Y* due to some property in type *X* decisions that the individual can satisfy and some property in type *Y* decisions that the individual cannot satisfy.

Where the general properties of a decision to be made comprise:

1. The content of the available options
2. The relative ease or complexity with which deliberative reasoning can lead to the selection of one particular option and
3. The impact of the available options on oneself and/or others

In addition to Wicclair, Thomas Grisso and Paul Appelbaum propose decision specific criteria for decisional competence, based upon constitutive elements of decision-making common to psychiatry, bioethics and medical law.[81] When we draw together the criteria of Wicclair as well as that of Grisso and Appelbaum, the result is a five-fold 'ideal-type' definition of decisional competence:

(i) The capacity of the person to understand
(ii) The capacity of the person to reason and deliberate
(iii) The ability of the person to communicate
(iv) The capacity of the person to possess values and goals
(v) The ability of the person to recognise options, and to appreciate the significance and meaning of different options[82]

(i) and (v) differ, as understanding in (i) refers to the nature of what is proposed (e.g. catheterisation, taking of a blood sample for research) whereas (v) refers to the

[81] Grisso and Appelbaum (1998: 31–32).

[82] Grisso and Appelbaum (1998: 31–32), Wicclair (1991: 91). These criteria are also similar in nature and scope to Beauchamp's definition, who argues that decisional competence requires: (i) understanding and communication of the relevant information; (ii) the weighing of risks and benefits; and (iii) making a decision in the light of such knowledge and of relatively stable values (1991: 58–59). One might be inclined to view the presence of similarities between definitions of decisional competence as evidence of an emerging consensus towards a core of settled meaning. However, such a conclusion could be a hasty one to reach given that it is not merely a case of specifying the requirements for decisional competence but also specifying how we should be interpret those requirements.

options that follow from deciding in a certain way (e.g. consenting to/refusing the proposed intervention and recognising what may follow from selecting either one of those options). The third requirement, communication, is necessary in order to operationalize any theory of decisional competence. It is of course theoretically possible that an individual could be competent to decide in the absence of the ability to communicate, although in such circumstances, it would be impossible to ascertain her decisional competence. The provision of reliable evidence to support an ascription of decisional competence lies at the core of its moral and legal credibility, and the medium through which one collects this evidence is communication. As such, provided one construes communication as widely as possible, it has a legitimate place in a definition of decisional competence.[83] Taken together, then, this 'ideal-type' concept of decisional competence has five general constitutive abilities: understanding, reasoning, deliberation, communication and capacity to form voluntary purposes that are of value to the agent.[84]

Whether an individual is competent to make a *particular* decision depends upon the level of understanding required by that decision and the extent to which an individual can reason and deliberate in order to reach a choice about that decision. This explains why some individuals are competent to make basic practical decisions (such as whether or not to see a doctor if one has a pain in one's back) but not competent to make more abstract decisions (such as whether evolutionary psychology offers a plausible account of human nature). The five general constitutive abilities of decisional competence are common to both types of decision, but they are expressed and applied relative to the specific decision in question. On a decision-relative account, the substance of the entire decisional context determines whether the individual is competent to make *any choice it allows* given the risks presented by this context, unlike risk-relative theories, which determine competence with regard to the level of risk which attaches to *the specific choice made*. As such, every decisional scenario – rather than each choice – requires a different level of the five general constitutive abilities of decisional competence, depending on how innately complex, risky or demanding it is.[85] We can express this in the following way:

The *necessary* and *sufficient* reason for being competent to make decisions of type X but not of type Y is the level of possession of abilities E. The extent to which abilities E are required is determined by the nature of decision X, but at the most

[83] See further, Beyleveld and Brownsword (2007a: 96, 100–101).

[84] Here I broadly agree with the analysis offered by Welie and Welie (2001).

[85] It should be apparent from this that decision-relative theories of competence do take risk as seriously as risk-relative theories. What is distinctive is that, on a decision-relative account, the relevance of risk is engaged at the level of the decision, not at the level of the choice made. Since both risk-relative and decision-relative approaches to decisional competence acknowledge risk equally, risk-relative theories could be more accurately conceived of as 'choice risk-relative' theories whereas decision-relative theories alternatively could be described as 'decisional risk-relative' theories. I will continue to employ the terms 'risk-relative' and 'decision-relative' in this book, however, to minimize any terminological confusion.

basic level are those powers of understanding, reasoning, deliberation, communication and voluntary purpose formation that constitute the basis of *any* competent decision-making.

In this decision-specific formulation of decision-relative competence (as in the ideal-type definition), there is a separation of the notions "competence to" and "competence in"[86]. Wicclair concentrates upon qualities inherent to the individual when engaging in the process of decision-making, rather than invoking external variables relative to the environment in which the individual reaches a decision, or the values of the relevant authority making a judgment of decisional competence. Whilst these environmental variables do matter, they are relevant only in the sense that the decision-maker can comprehend and appreciate them. If she cannot, then she is not competent to make the decision *at all*, rather than competent to make one choice offered by that decision but not another. This avoids conflating an external judgment of environmental risk (irrelevant to the existence of decisional competence) with the decision-maker's understanding and assessment of that risk (relevant to the existence of decisional competence).

To illustrate this, let us return to the earlier example of the schizophrenic patient. We cannot treat the probability of the CT scan giving rise to an allergic reaction to the contrast dye as integral to the competence of the patient to decide whether he wishes to participate in the research process. It is a risk external to the patient, about which he will need to demonstrate understanding and appreciation in order to be judged competent. In this example, of course, it would be difficult to make changes to the procedure in order to minimize the risks involved. Where, in different cases, changes to the level of environmental risk are possible, they may alter the nature of the decision to be made, but will not affect the individual's pre-existing level of decisional competence. In other words, the risks involved in the research activity do not determine the decision-maker's competence to consent to participation, but instead constitute the nature of the decision to be made at which the individual may or may not be competent to decide.

Additionally, a decision-maker may display aberrant incompetence in reaching a choice without warranting a judgment of decisional incompetence. Beauchamp observes that a person may happen to perform an act incompetently, even if she possesses the competence not to do so.[87] We can apply this to particular instances of decision-making. For example, a person may be competent to manage her financial affairs, yet on one particular occasion invests a significant amount of money in shares in a company about which there is speculation it may be on the verge of collapse.[88] Assuming that the investment decision was a 'one-off' and affected no one other than herself, then irrespective of her reasons for doing this (she may not, of course, have any reasons), we cannot say that on the basis of this decision alone the individual has ceased to remain competent to manage her financial affairs (although we might question their decisional competence to invest on the stock market). In removing choice risk sensitivity from the decisional competence determination,

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[86] See Beauchamp (1991: 56–59) for discussion of this distinction.

[87] Beauchamp (1991: 57).

[88] Beauchamp (1991: 57–58) also uses a related example.

and instead applying a notion of decisional risk sensitivity, decision-relative theories more readily accept occasional mistakes and lapses of reasoning. As such, they do not reach judgments of decisional incompetence lightly.

From a decision-relative perspective, there is also an affinity between *developable* decisional competence and *potential* decisional competence. An individual could be currently unable to make a decision due to lack of information but may be perfectly competent to make the decision once the information has been supplied to her. For example, an individual considering what subject to study at university may be incompetent to take the decision before having gleaned any information on the topic or critically reflected on her preferences, yet become competent when having considered what subjects are available at which institutions and what skills and abilities they require. The provision of information does not make a difference to the person's reasoning skills but it gives these skills something with which to reason – much the same way that an engine is incapable of powering a car in the absence of fuel. Just as the fuel serves to ignite the engine, so in the same way, the information 'ignites' the competence. In biomedical research, for example, a potential participant may possess sufficient powers of reasoning as to make a competent decision as to whether or not to participate, but is not able to make a decision about participation until such time as she is provided with the information needed to exercise those powers in respect of the decision to be made.[89]

In summary, theories of decision-relative decisional competence offer a more conceptually convincing account of decisional competence than do risk-relative or asymmetrical theories of decisional competence. Decision-relative theories are no less concerned with risk, but the risk-sensitivity of decision-relative theories operates at the level of the entire decisional scenario rather than at the level of a particular choice. This maintains logical coherence with what is meant by making a decision. In determining the level of competence required to make a decision by reference to the chosen outcome, risk-relative theories of decisional competence confuse what is needed to be able to make the decision *at all* with what is necessary to be competent to decide one way or the other. In doing so, they offer a problematic view of decision-making that decision-relative theories of competence, with their emphasis upon the abilities required to make a specific decision (and not to select one options over others), do not share.

Societal Competence

Societal competence refers to the display of a sufficient range of task and decisional competences for an individual to interact independently within that society or community in such a way that does not jeopardize her own or others well-being.[90]

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[89]Beauchamp refers to this as an instance of "a perfectly competent person who cannot competently decide in the circumstances" (1991: 57).

[90]This draws upon the definition offered by Beyleveld and Brownsword (2007a: 110).

An individual's approach to societal competence is a matter of degree (for example, an older child will display more of the task and decisional competences required for societal competence than an infant), and there will usually exist a threshold standard which individuals must satisfy in order to be officially recognised as societally competent within a given society.[91]

In one sense, a judgment of an agent's societal competence will be relative to the variables which her socio-economic environment presents. It follows that the threshold at which an authority will deem an agent to possess enough relevant task and decisional competences to be judged societally competent will vary between societies.[92] In another sense, there is a common factor underlying all judgments of this type. Any form of successful interaction entails a minimally adequate level of core knowledge, communicative and inter-personal skills that living as part of a society presupposes. Whether an individual can feed, clothe and care for herself and refrain from behaviours that would violate the physical and psychological integrity of others will typically inform a judgment of societal competence. To claim that 'X is societally competent', therefore, is to recognise that the individual concerned is dispositionally equipped to successfully and independently engage with other human beings within her immediate environment. This judgment alone generally cannot account for how societally competent an individual is above this minimally adequate level, for which the language of specific task or decisional competences is more appropriate. Similarly, a judgment of societal competence cannot rest upon putative measures of social status, such popularity or wealth, as these do not bear upon the dispositional elements of successful engagement with others.

A judgment of societal incompetence, on the other hand, usually follows from display of an insufficient range of task and decisional competences for successful social interaction, or is ascribed to an individual in the absence of the potential to develop these competences. Societal incompetence in this sense is a descriptive explanation of the ways in which an individual lacks relevant task and decisional competences for successful independent interaction and, like a judgment of societal competence, is predicated upon the contingent organisation of a particular society. It is important to remember, though, that individuals who are deemed to be societally incompetent in whatever society should not be assumed to lack agency competence. As the approach to societal competence is a matter of degree, such individuals are almost always capable of valuing purposes and, furthermore, are usually capable of developing a limited range of task and decisional competences. These are often rudimentary, but in some cases may be highly specialised and developed, such as arithmetical or artistic skills.[93] Nonetheless, the effect of a

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[91] For example, by being of a certain age or displaying certain task or decisional competences to the satisfaction of an assessor.

[92] Beyleveld and Brownsword (2007a: 110).

[93] Examples of societally incompetent individuals who may exhibit sophisticated task or decisional competences include some persons suffering from autism or schizophrenia.

judgment of societal incompetence can be highly stigmatizing.[94] It may also give rise to a self-fulfilling prophecy in that once a judgment of societal incompetence attaches to an individual, others who interact with her may (wrongly) have difficulty appreciating that the individual is still capable of forming her own plans, values and preferences.

Reaching a judgment of societal competence or incompetence is not a straightforward process. Indeed, it can often be highly problematic. Even in societies with a broad consensus over what constitutes successful interaction, it is extremely difficult to propose a calculus of skills or traits whose absence would definitively inform such a judgment. For reasons of administrative expedience, authorities will often acknowledge societal competence by reference to a legally derived age threshold of adulthood rather than based on case-by-case judgments. Under such arrangements, many individuals will display societal competence in advance of reaching this age and other individuals will fall short of societal competence after reaching this age. Consequently, some societally competent individuals will not have this status legally conferred on them as they have not yet reached the threshold age, whereas others who have surpassed this threshold but whose difficulties in everyday living have gone unnoticed (or been dismissed) by the relevant authorities may be legally assumed to be societally competent yet in fact lack this ability. The value-laden dimension of 'independent interaction' is also a source of tension, particularly when those with the power to ascribe judgments of societal competence to individuals (irrespective of whether this is on a threshold or case-by-case basis) may operate with clandestine value judgments which serve to perpetuate the disempowerment and social exclusion of certain groups.

To identify what follows from a judgment of societal competence or incompetence is not tantamount to an endorsement of the organisation of any particular society. Nor is it to endorse a value judgment about the individual concerned. We can make judgments of societal competence or incompetence in both substantively just and unjust societies, and in many cases, these judgments will differ markedly between the two. Echoing Daniel Wikler, how inclusive our societal organisation is amounts to an issue of distributive justice.[95] It is perfectly possible that the grounds on which a judgment of societal incompetence is made serve to indicate that the society is organised along substantively unjust lines. This would occur, for instance, where a judgment of societal incompetence reveals that the nature of the social organisation fails to accommodate the needs of people with physical or intellectual disabilities, unduly medicalizes psychological suffering or privileges the interests of persons with exceptionally high intelligence. Therefore, one should not infer from the fact that an individual is judged to be societally incompetent in one society that the individual could not be societally competent in *any* society, or that the individual is societally incompetent in a morally relevant way. Indeed, the conferral

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[94] Spicker (1990) and Thornicroft (2006) explore this idea in relation to adults with intellectual disabilities and mental disorder respectively.

[95] Wikler (1979: 377).

of a judgment of societal incompetence in a particular case may be illustrative of a moral failing of that society.

Legal Competence

Legal competence – or legal capacity – is in its essential form the exercise of a legally recognised power.[96] Legal competence is *permissive* – it serves to empower a person to be legally authorised to perform or participate in a given activity.[97] The premise of legal competence is either *presumptive* (such as reaching eighteen years of age in respect of being legally competent to vote in the UK) or *demonstrable* (such as driving a car unsupervised after having passed a test) that signifies the individual is capable at that activity or in making a specific decision. The possible types of legal competence are wide. They extend to include duties assumed by virtue of one's occupation or responsibilities (e.g. doctor, teacher, parent, carer) or vested in an inanimate body, such as an institution (e.g. Parliament) or other body (e.g. a corporation).[98]

The legal presumption of competence is heavily value laden. As Eastman observes, "the law most obviously defines models of man in relation to mental capacity and responsibility".[99] In essence, legal competence upholds the value of individual self-determination such that to enshrine the power to express a choice is to protect the power to express a choice. This value epitomises contemporary rights-based liberal political and legal thought.[100] It follows that an individual must display compelling evidence for task or decisional incompetence to trigger a reassessment of competence. An example of this is where a legal rule requires a driver convicted of dangerous driving to take the driving test again. This is also true when one declares an individual incompetent to perform a task or to make a decision. An illustration of this is an adult's loss of the right to make decisions about medical treatment of a certain type on her own behalf, where she fails to display decisional competence or displays it unsatisfactorily.

Conventional understanding views legal competence as a single concept, yet within this there are three distinct meanings that are qualitatively different. These manifestations do not alter the essence of legal competence as a legal power but

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[96] I will use the terms 'legal competence' and 'legal capacity' interchangeably.

[97] With the exception of Hohfeld's concept of a legal power (1919), there is no evidence of academic discussion of legal competence until the 1940s. The earliest known such discussion is Green (1941).

[98] For a discussion, see Spaak (1994).

[99] Eastman (1992: 161).

[100] Evidenced in different ways in the works of (amongst others): Rawls (1972, rev. ed. 1999), Nozick (1974), Dworkin (1978), Gewirth (1978), Feinberg (1980), Thompson (1990) and Waldron (1993). See Plant (1991) for an excellent general discussion. For a specific discussion in relation to bioethical issues, see Charlesworth (1993, Chapter 2).

distinguish what factors inform the power and who is the exerciser of that power. The first sense of legal competence defines competence in terms of a power vested in an individual by law to *make decisions affecting herself* in respect of a specific activity. We can express this as follows:

First Sense of Legal Competence

Person *A* has legal competence in relation to activity *B* by virtue of having attained legal threshold *C*.

Here, being person *A* and having attained legal threshold *C* are together the necessary and sufficient condition for having legal competence in relation to *B*. The legal threshold could be presumptive or demonstrative. For example, in English law, one gains legal capacity to marry and to consent to sexual intercourse by virtue of reaching a threshold age, which is presumptive. These activities require legal competence to be held *and* exercised by the participating individuals involved, as opposed to a third party. In other words, if I wish to marry or consent to sexual intercourse (presuming the consent of the other party), I must (i) have legal capacity to do this (by being of or above the requisite age) and (ii) exercise this capacity myself at the time I wish to make the decision. I call this 'first-person contemporaneous legal competence' (FPCLC). The presumption of legal competence, or its conferral following successful demonstration of the relevant activity is not absolute and the presence of manifest decisional incompetence can rebut this.

There is no necessary conceptual connection between legal competence and decisional competence, however.[101] Standards of legal competence may reflect insights from definitions of decisional and task competence to provide grounds for FPCLC. However, legal competence can be held by individuals who are themselves decisionally incompetent to make the decision or perform the task at the time the decision needs to be made or the task performed, but who have previously delegated the decision-making authority to another person. This person has the legal power to make decisions or perform tasks of a specified nature on their behalf. Legal competence therefore extends beyond denoting the decisional abilities of an individual at the

[101] In the US, medical professionals commonly define *mental* capacity as an expression of decisional competence while competence is a "legal construct" (Berg et al., 2001: 95–96; Schneider and Bramstedt, 2006). The reverse is true in England and Wales, where not only does the dualist terminology exist but also capacity is often used in an unqualified form, which leads to inconsistency and a lack of clarity over which sense of legal capacity (or whether legal or mental capacity) is being invoked. Alternatively, in parts of continental Europe, legal competence is distinguished from decisional competence. Elsewhere, I argue (Bielby, 2005b) that this terminological complexity has given rise to frequent occasions where academic commentators and judges have conflated legal capacity and decisional competence.

time the decision is to be made.[102] The effect of this is to draw a conceptual distinction at least in part between decisional/task competence and legal competence. Beauchamp notes:

> Legal competence, by contrast to psychological competence, has to do with legal capacity … as a category distinct from psychological capacity. Some persons, such as precocious minors, may have psychological ability, but not legal 'capacity'. Some persons may have legal capacity without psychological capacity. Despite the contrast, however, legal competence generally builds on psychological competence, and adds an explicit, new evaluative dimension different from the evaluation involved in selecting abilities or tests of psychological incompetence. To say that someone is legally competent is to say that no-one is justified in authorising interventions in … the person's affairs or in acting on the person's behalf.[103]

Beauchamp is right to claim that legal competence can exist in the absence of decisional competence and the presence of psychological evidence for decisional competence is no guarantee that it will be recognised officially through an ascription of legal competence. This is different from saying that not all instances of legal competence depend upon a prior assessment of decisional competence – presumptive legal competence illustrates this. In all cases, legal competence serves an enabling function when the law allows person *A* to make decisions of type *X* or participate in activities of type *Y*.

It is not necessary, however, that the person for whom the legal authorisation is designed to benefit must always exercise legal competence herself. Legal competence or capacity can take the form of a *delegable* power exercised by a third party nominated by the beneficiary to act in the interests of the beneficiary after the loss of decisional competence. This comprises the second sense of legal competence.

The transferability of legal competence is possible provided the following conditions are satisfied:

1. The beneficiary can nominate a willing surrogate.
2. The decision or task must be able to be made or performed by another under the authority of the beneficiary.
3. The decision to be taken or action to be to performed must be something that is still of relevance to the beneficiary after the onset of decisional or task incompetence.
4. The surrogate is competent to make any decisions or perform any tasks such as may be required.

Typically, this will require:

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[102] Legal decisional competence could feasibly allow the waiver of decision-making responsibility in relation to a particular decision altogether. Decision-making of that type may be manifest through a "conscious decision not to be involved in making … implicit and deliberate decisions" (Dekkers, 2001: 185). This would be captured by a patient's exhortation to her doctor, "I trust you to make any further decisions about this course of treatment as you see fit without discussing them with me". It is unlikely that in offering such a waiver the doctor would question the patient's decisional competence, however.

[103] Beauchamp (1991: 68).

1. A legal rule which permits a surrogate appointed by a person *before* the onset of her decisional incompetence to make decisions on behalf of the person *after* the onset of her decisional incompetence and specifies the spheres of activity in which surrogate decision-making is possible.
2. Legal authorization made by a person before the onset of her decisional incompetence consenting to a particular individual assuming the role of surrogate in respect of these types of decision-making scenarios.

We can understand legal competence in this sense as a prospectively delegable legal power. Here, the person for whom the decision-making is to benefit does not exercise the legal competence to make decisions of the type specified by the legal rule, as any grounds for presuming or demonstrating decisional competence that could inform FPCLC dissipate after the onset of decisional incompetence. Instead, the legal competence to make these decisions is *exercised* by the surrogate *on behalf of* the person for whom the decision-making is to benefit, once the person concerned no longer has the decisional competence to make decisions of this type for herself.

Delegable legal competence has parallels with other forms of legal authorisation. For example, it would be perfectly possible to authorise a willing individual to drive one's car on one's behalf, provided that the surrogate driver was competent to drive cars in general and was insured to drive this particular car. Where legal competence to make a decision also involves a task, and the individual is still competent to make the decision and not perform the task, the decision may still be taken by the individual but the task may be vested in a proxy where the task is not connected to the decision, such as voting on someone else's behalf. This is because the decision-making element only – not the task element – is the *necessary and sufficient condition* of the legal competence. This explains why, on reaching the age of majority, an individual with severe physical disabilities would nevertheless be competent to vote and why individuals are not declared competent to vote as soon as they are physically old enough to be able to visit a voting booth.

We can draw a further distinction between an individual's decision to appoint a surrogate before the onset of decisional incompetence, which requires FPCLC in order to authorise the prospective powers of the surrogate, and the surrogate's decisions taken on behalf of the individual after the onset of her decisional incompetence, the legal validity of which derives from the delegated legal competence which becomes operative once the beneficiary ceases to be decisionally competent. The operation of the delegated legal competence means that the beneficiary has not lost legal competence altogether. Legal competence continues to *reside* in the individual who is decisionally incompetent at the time the decision must be made in respect of that task, except she no longer makes it contemporaneously in the first-person. This is because, as we observed, the surrogate is exercising legal competence on behalf of the beneficiary, and because the surrogate has been vested with this power as a result of a decision made by the individual whilst she still had FPCLC to do so. We can express this as follows.

Second Sense of Legal Competence

Person *A* has legal competence in relation to activity *B* after the onset of *A*'s decisional incompetence by virtue of having transferred legal competence to make decisions in relation to *B* to person *R* before the onset of *A*'s decisional incompetence (where the transfer becomes effective as soon as possible after the onset of *A*'s decisional incompetence).

Here, being person *A*, who has transferred legal competence to *R* in respect of *B* (where *B* is a matter over which *A* previously had FPCLC and over which *A* is, in the event of decisional incompetence, legally entitled to delegate the legal competence to a surrogate), is the sufficient and necessary condition of legal competence.

It is important to note the crucial difference between '*has* legal competence' in the first sense of legal competence and '*can exercise* legal competence' in the second sense of legal competence.[104] In the first case, legal competence is both possessed and exercised by and on behalf of the same person. In the second case, legal competence is possessed by the incompetent person but exercised through her nominated surrogate.

There is, of course, a time in our lives where we cannot yet exercise FPCLC but the state still vests us with legal rights. In these cases where the beneficiary is too young to be able to exercise legal competence on her own behalf, legal competence is also exercisable by individuals deemed in law to be an appropriate surrogate to exercise the power, such as the parents or legal carer of an infant or young child. I call this 'fiduciary' legal competence. We can express this form of legal competence in the following way.

Third Sense of Legal Competence

Person *A* has legal competence in relation to activity *B* due to it being exercised by *R* during the period of life before *A* becomes legally competent in the first sense (i.e. before *A* is ascribed FPCLC) in relation to *B*.

This form of legal competence is similar to the second sense insofar as it involves a surrogate exercising legal competence on behalf of the beneficiary. However, it

[104] Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (2006) appears to distinguish between the possession and exercise of legal capacity in a different way. This defines the possession of legal capacity as the ascription of legal personhood (i.e. recognition as a legal person) and the exercise of legal capacity as the benefit conferred by the fundamental rights which attach to legal personhood. Spaak (1994, 2003) also draws a distinction but uses it in another way to describe the hypothetical possibility of changing a legal relationship (having competence) and the actual performance of the act which changes the legal relationship (exercising competence).

differs in two ways. First, the beneficiary could not have previously expressed a wish that the surrogate decision-maker have the power they do due to the beneficiary's immaturity. In this sense, it cannot emanate from FPCLC. Second, the function of surrogate decision-making here is to hold in trust the legal competence for the child with a view to the child assuming FPCLC by such time when she is either presumed in law to have FPCLC or when she has demonstrated sufficient intelligence and maturity to make decisions in relation to such matters. As such, the stewardship rationale of fiduciary legal competence differs from that of many cases of surrogate decision-making for decisionally incompetent adults, where the need for surrogate decision-making will persist throughout the rest of beneficiary's life due to the irrevocable cause of her decisional incompetence, such as dementia or coma.

White believes that the adoption of any legal standard of competence is inherently problematic. In a section of her monograph on competence headed 'Why the Law is No Help', she argues that a definition of legal competence cannot and should not proceed without the involvement of specialists in the field in which such a definition is required:

> Suppose, however, that the law decided to construct a definition of competence to resolve future hard cases. Legal scholars would still quite likely consult the experts, that is, the health professionals. In fact, if the law failed to consult medicine, medicine would – and should – insist on being involved. Any attempt to construct a definition without information from the group who knows the most about it and will be largely responsible for its implementation would be ill advised.[105]

Nevertheless, White concludes that law ultimately cannot provide such a definition,[106] largely because there is no settled view amongst health care professionals about the criteria for an operational definition of decisional competence.[107] But even if we accept that criteria for competence are contested, this does not mean that law cannot enshrine a coherent and ethically defensible definition. Given the inherent multi-disciplinary nature of competence, White is correct that any attempt to develop a legal definition of competence without appropriate consultation would be doomed to failure. However, as White appears to be referring to a legislative definition here (especially in light of the references to 'construct' and 'consult'),[108] the possibility of this is diminished. Not only medical, but psychological and philosophical correlates are more likely to inform a legislative definition of competence than they are a judicial definition, since there will be greater scope and time available for consultation of academic and professional expertise along with other interested parties, such as support and advocacy groups.[109] Moreover, this process of

[105] White (1994: 11).

[106] White (1994: 12).

[107] White (1994: 11).

[108] Additionally, White appears to dismiss the role of the courts in determining competence earlier in this section (1994: 10).

[109] It is also probable that a judicial definition of competence (in common law) would be liable to unpredictable modification or even repeal in subsequent case law.

consultation would, if undertaken properly, give rise to a definition that would seek to integrate and reconcile the insights of various disciplinary and professional perspectives.[110] As Vanderpool observes, the "competency of definitions of competency" requires a comprehensiveness that is dependent upon different disciplinary perspectives informing and, to some extent, transforming each other.[111] Whilst a legislative definition may not be able to systematise fully the intricate definitional elements of different types of competence or incompetence, this does not imply that a legislative definition cannot endorse a skeletal task or decision-relative definition. On these grounds, I believe that a legal definition of competence is possible, but its ambitions should be to give regulatory shape to the concept rather than to define it exhaustively.

A second controversy attaches to legal definitions of competence. In order to maintain certainty and consistency, definitions of legal competence that apply to FPCLC usually require a threshold or 'cut-off point'. This is often achieved through a presumptive standard determined by age. Individuals above this age are presumed legally competent to make decisions of type *X* on their own behalf[112]; individuals below this age are not. Beauchamp and Childress argue that these pragmatic guidelines which determine legal competence are distinct from criteria for decisional competence:

> We also need to distinguish two senses of *standard of competence*. In one sense, *criteria* of competence are at stake - that is, the conditions under which a person is competent. In a second sense, *standard of competence* refers to the *pragmatic guidelines* we use to determine competence. For example, a mature teenager could be competent to decide about a kidney transplant (satisfying criteria of competence) but could also be legally incompetent by virtue of age (failing pragmatic guidelines).[113]

In principle, it may seem fairer to suggest that where some individuals appear to develop the necessary decisional competence at an age below the legal threshold of presumptive competence for making decisions of that type, they should be assessed on a case-by-case basis. The realism of this argument depends upon the nature of the decision to be assessed and the number of individuals who would be subject to assessment. For instance, it is more difficult to assess each mature and intelligent fifteen year-old to determine whether she should be given the vote before reaching eighteen, than it is to assess whether each of these fifteen year-olds has developed a sufficient understanding and intelligence as to know what is involved in her medical treatment.[114] This is because having the vote involves making decisions that have direct implications for others in society whereas consent to medical treatment

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[110] See n. 16 above.

[111] Vanderpool (1991: 209).

[112] Although this is usually a rebuttable presumption.

[113] Beauchamp and Childress (2001: 107, n. 37).

[114] The test devised by Lord Scarman in the English case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

only has direct implications for the person consenting.[115] For this reason, assessing voting decisional competence would almost certainly require more time and effort than assessing medical treatment decisional competence.

To formulate a legal definition of competence that is framed in a sufficiently intelligible way for use in legal reasoning yet at the same time is also informed by criteria of competence that are capable of interpretation by competence assessors – doctors, psychiatrists and psychologists – requires semantic clarity.[116] However, the application of any kind of rule (legal or otherwise) risks giving rise to a substantive injustice if the values of certainty and consistency are pursued at the expense of fairness.[117] To avoid the possibility of such injustice, a normative ethical theory is required to explain the conditions under which we should make a judgment of decisional competence and incompetence, and the circumstances in which it is ethically justifiable to deny someone the legal power to make decisions of a specific type on their own behalf.[118] On this basis, an attempt to provide a legal standard of decisional competence is more likely to remain faithful to criteria for decisional competence relative to a particular decision-making context (such as biomedical research), whilst simultaneously recognising the need to retain some kind of threshold to avoid administrative unworkability.[119]

[115] This should be not taken to underestimate the effect that medical decision-making by young people can have on those who love and care for them, particularly where the young person's health may be adversely affected if their decision to refuse important treatment was to be respected.

[116] Beauchamp and Childress attempt to minimize semantic confusion resulting from a *standard of competence* possessing two concurrent meanings by using the term "only to mean a criterion for determining competence" (2001: 107, n. 37). Culver and Gert (1982: 55–56) similarly seek to distinguish between the two although they do so in relation to decisional incompetence and legal incompetence. They are a little optimistic, perhaps, in claiming that a judgment of legal incompetence always depends upon a prior assessment of decisional competence.

[117] Which could otherwise be expressed as a tension between substantive and formal justice. For a discussion see, Lyons (1993).

[118] I use the term 'power' in a Hohfeldian sense.

[119] Even if decisional competence could in some cases be determined on a case-by-case basis