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The Space Between Second-Personal Respect and Rational Care in Theory and Mental Health Law*

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In recent years human rights and statutory instruments have extended the right of autonomy to disabled individuals – a group which has been marginalised historically both in liberal theory and politics. The UN Convention of the Rights of Persons with Disabilities (CRPD) recognises the equal moral and legal standing of individuals with disabilities in relation to others – to have the right of self-determination and to demand respect for their dignity as persons. This human rights ideal has been formally realised (albeit imperfectly) in the Mental Capacity Act of 2005 in England and Wales (MCA),¹ of which, amongst its numerous objectives, is to ‘empower people to make decisions for themselves wherever possible’² and ensure that medical professionals, care providers, and family members treat disabled individuals with the presumption of capacity.³ The MCA encourages decisional capacity in two ways: firstly, a greater number of individuals compared to previously will be judged to have capacity through the application of a functional test that is both time- and issue-specific. Secondly, even if best interests decisions are to be made with a finding of incapacity, an individual’s participation, and consideration of their feelings, beliefs, and values, are to be encouraged.⁴ This paper examines the implications of Stephen Darwall’s important discussion of the second-person standpoint and rational care in

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¹ For more on the debate about the contested compliance of the MCA to the CRPD, see Peter Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law’, *Modern Law Review* 75 (2012): 752-76; Genevra Richardson, ‘Mental Capacity in the Shadow of Suicide: What Can the Law Do’, *International Journal of Law in Context* 9 (2013): 87-105.

² Lord Falconer, forward, *Mental Capacity Act 2005 Code of Practice* (London: TSO, 2007).

³ This is only one of a number of other objectives, as what is to be done when a person lacks capacity is a large part of the statute.

⁴ MCA 2005 4(4), (6).

conjunction with developments in mental capacity law. Darwall's distinctive version of Kantian contractualism has already been identified as a viable justification for both moral and standalone legal obligations resulting from second-personal address.⁵ On one hand, the second-person standpoint captures well the normative perspective underlying the legal recognition of persons with disabilities, who are now presumed to have equal standing with non-disabled individuals and therefore possess the second-personal authority to demand certain treatment and respect from others. Deference to their personal choices is required accordingly.

On the other hand, the contractualist underpinning of second-personal respect presupposes both interacting parties have equal psychological capacities to enter into relations of reciprocity and moral responsibility. Darwall's theory arguably provides justification for the differential legal treatment of individuals depending on their mental capacity, whereby third-personal, welfarist considerations determine the good for those lacking psychological competencies under a framework of rational care.⁶ Judicial practice has tended to deploy standards similar to Darwall with some worrying results.

This paper argues that, whilst Darwall's theory rightly stresses the relational framework of moral obligations, difficult theoretical contortions are required to accommodate the moral intuition – of which innovative legal mechanisms increasingly recognise – that second-personal respect is owed to individuals with diminished psychological competencies. Like other contractualists, Darwall's positive account of morality rests on a close conceptual tie between psychological competence and respect for dignity. Whether successful or unsuccessful in their theoretical endeavours to separate these two concepts, the results tend to distort or neglect aspects of our second-personal engagement in conditions of vulnerability, dependence, and impairment.

⁵ Symposium: The Second-Person Standpoint and the Law in *Loyola of Los Angeles Law Review* 40:3 (2007): Stephen Darwall, 'Law and the Second-Person Standpoint', pp. 891-910; Gideon Yaffe, 'Reasonableness in the Law and Second-Personal Address', pp. 939-976; Robin Kar, 'Contract Law and the Second-Person Standpoint', pp. 977-1010. Robin Kar argues that the law is essentially second-personal in, 'Hart's Response to Exclusive Legal Positivism', *Georgetown Law Journal* 92 (2006-7): 393-462.

⁶ Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge: Harvard UP, 2006), p. 128, abbreviated to SPS hereafter.

To meet this challenge, inspiration can be drawn from virtue ethics critiques of the rights- and capacities-based focus in contemporary moral theorising. I argue that respect needs to be understood differently, grounded in broader notions of human flourishing rather than conditions of psychological competence. I forward a notion of competence that (i) embeds second-personal recognition within asymmetrical, non-reciprocal relationships; and (ii) is fuelled by the motivational intersection of rational care and second-personal respect. Thus, second-personal respect is essential even in best interests decision-making on behalf of incapacitous patients. Section I outlines Darwall's account of second-personal respect and rational care. Though his framework can partially capture the phenomena in legal practice, Section II suggests that the overly demanding psychological competence presupposed in respect for dignity may justify unwarranted best interests judgements on behalf of individuals. Further examination of Scanlon's version of Kantian contractualism reveals the philosophical manoeuvring required to resist the differential treatment of individuals based on diminished psychological competence. Section III suggests that the concept of hermeneutic competence can help articulate the second-personal respect owed to individuals even in situations of inequality, asymmetry, and non-reciprocity. The import of this alternative account will then be discussed in relation to the judicial practice of best interest decision-making and the legal concept of mental capacity.

I.

Darwall grounds obligations of right in the second-personal standpoint in order to provide a contractualist answer to sceptical questions surrounding moral normativity. Morality has a second-personal structure, in that moral norms and principles are generated through second-personal address. The second-person standpoint expresses a moral perspective and relation between individuals which is obtained once an explicit claim is issued from one to another: one can hold another accountable for her conduct due to the fact that she holds herself to have authoritative reasons which another ought to adhere to and respect. Darwall uses the example of the demand to stop stepping on someone's foot: welfarist reasons might provide reasons for me to take my foot off yours (to stop the physical pain), but these cannot ground an authoritative

demand. Rather, the normativity of the demand stems from the second-personal, ‘right type of reason’ demanding my compliance (to respect your claim to have your foot free of mine). Second-personal address presupposes additional normative concepts, such as second-personal competence, mutual reciprocity, and equal accountability. Heteronomous considerations (i.e. subjective preferences to observe or disregard another’s demand) cannot dictate second-personal reasons, nor motivate relations of mutual accountability. Authoritative second-personal address requires hypothetical endorsement from the idealised standpoint of mutually accountable, free and equal agents.

Recognition of authoritative second-personal address therefore presumes the possession of psychological or second-personal competence. This requires an autonomous will in the Kantian sense which expresses itself through the capacity for ‘some form of moral reasoning like the categorical imperative’.⁷ Maxims are motivated by normative principles that can be hypothetically agreed upon under ideal contractualist conditions rather than a particular outcome or state. When you make a demand or claim on me, you assume I am second-personally competent – that I am able to undergo the process of normative ‘uptake’ so that I autonomously recognise the force of your reasons from the perspective of a free and rational person, within a community of mutually accountable equals. Without this uptake, these demands would violate the freedom of the addressee and veer towards coercion; respect for the autonomy of the addressee is thus embedded in the condition of second-personal competence.

Darwall’s contractualist framework demands that the competency condition be applicable to both addresser and addressee, partly to sidestep worries that individuals will excuse themselves from taking responsibility.⁸ Second-personal authority is therefore a derivative of second-personal competence. Issuing a second-personal demand assumes the ‘free agency of addresser and addressee’ – both have equal law-giving and law-executing powers in a moral community, and thereby the equal ability to act on second-personal reasons.⁹ Our mutual accountability to shared

⁷ Ibid., p. 154.

⁸ A point Stephen Darwall has emphasised in response to my paper.

⁹ Ibid., p. 256.

moral norms is further implied when the addressee is held responsible and blamed for her for non-compliance. By ‘demanding compliance’ the legitimate authority to relate to the addressee as such is presumed.¹⁰ Darwall states, ‘[o]nly because we can assume that we each can take up the standpoint of one among others, determine what demands it makes sense to hold one another to from this perspective, and then to address these demands to one another and to ourselves can be sensibly actually hold each other to these demands’.¹¹ For second-personal address to be authoritative, therefore, requires both addressee and addresser to possess second-personal competence.¹²

Whether the voluntary normative uptake that is necessary for respecting a second-personal demand is also necessary to respect an individual’s dignity is ambiguous. On one hand, Darwall implies that respect for dignity is a non-voluntary and necessary condition for all second-personal interaction – namely dignity as a presuppositional and non-relational thesis:

D1: Respect for the equal and inviolable dignity of persons is presupposed in any second-personal address to demand certain treatment.

On this reading, all individuals possess the dignity of persons; it cannot be disrupted by psychological incapacities which impede an individual’s second-personal competence and authority. Equal dignity of persons entails recognition respect for one’s capacity for moral and autonomous rational agency, and is a non-contingent moral obligation. By contrast, dignity that is based on appraisal respect is conferred to a person due to her character, conduct, or achievements,¹³ and is contingent on another’s voluntary recognition. Darwall’s critique of Fichte’s assumption that recognition of persons’ dignity results from voluntary choice supports the

¹⁰ Ibid., p. 259.

¹¹ Darwall, ‘The Value of Autonomy and Autonomy of the Will’ *Ethics* 116 (2006): 284.

¹² SPS, p. 119.

¹³ Ibid., p. 123.

D1 reading.¹⁴ He claims, ‘respect for one’s dignity is something anyone can demand’¹⁵ and ‘[e]qual dignity is nothing anyone can bestow, so neither is it anything any person or group can remove through disrespect’.¹⁶ On D1, respect for dignity can be demanded irrespective of whether an individual’s capacity for moral agency is fully realised, although the second-personal response to the demand need not be coextensive with respect for subjective choice.

Yet, other textual passages imply dignity as a conditional and relational thesis:

D2: Respect for the equal and inviolable dignity of persons is necessary in authoritative second-personal address issued by second-personally competent agents.

On this interpretation, second-personal competence confers the authority to demand respect for one’s dignity, mainly because such respect is coextensive with respect for autonomy. Respect for autonomy rests on recognising persons as ‘self-authenticating sources of valid claims’¹⁷ – or for their standing to demand that others act on principles that can be collectively legislated from a free and reasonable standpoint. Respect for a person’s dignity thus requires ‘responsiveness to what someone can claim by virtue of being an agent with second-personal competence’¹⁸, and implies the overriding authority of another’s second-personal claims, expressed usually through deference to their subjective preferences and values. The condition of equal psychological competence is therefore embedded in respect for one’s dignity, as ‘[t]he dignity of persons [...] is the second-personal authority of an equal: the standing to make claims and demands of one another as equal and rational agents, including as a member of a community of mutually accountable equals’.¹⁹ Conversely, when an individual is said to lack second-personal competence, their inability to issue

¹⁴ Darwall, ‘Fichte and the Second-Person Standpoint’, *International Yearbook for German Idealism* 3 (2005): 91-113; Owen Ware, ‘Fichte’s Voluntarism’, *European Journal of Philosophy* 18 (2009): 262-82.

¹⁵ SPS, p. 128.

¹⁶ *Ibid.*, p. 144.

¹⁷ John Rawls, *Political Liberalism* (New York: Columbia UP, 2005) p. 32.

¹⁸ SPS, p. 127.

¹⁹ *Ibid.*, p. 121.

an authoritative demand means they cannot demand respect for their right of autonomy. On D2, respecting another's dignity is conditional on parties possessing equal psychological competence and will entail respecting one's autonomy and constitutive choices.

These two readings clearly pull in different directions. On D1, dignity is part and parcel of being a person. On D2, dignity presupposes the presence of certain psychological capacities so that conditions of mutual and reciprocal accountability are met. Darwall's discussion of the role of trustees might initially lend further support for D1. Though he is 'bound to insist that moral obligation, like the concept of a right, cannot be understood independently of authoritative demands', he suggests that those lacking second-personal competence can demand certain treatment, rights, or compensation through trustees.²⁰ Second-personal authority can therefore be separated from second-personal competence, so those with deficient capacities still have the authority to make a second-personal claim, even if it is outsourced to trustees.

Yet whether Darwall is entitled to make this philosophical move is dubious given how second-personal competence is embedded within the interdefinable circle of normative concepts, such as second-personal authority, equality, and autonomy.²¹ Textual evidence points to a conceptual link between respecting a person's autonomy and respect for dignity, thus committing Darwall to a version of D2. If equal dignity demands respect for one's autonomy and constitutive choices, this can apply only in the presence of second-personal competence to issue such demands. Darwall would deny the claim that the right to 'lead one's own life' can be exercised without moral responsibility, irrespective of its effect on others. Certain rational and moral capacities are needed in order to regulate our conduct in accordance with principles that reflect the common agreement of free and reasonable persons. On balance, Darwall's account of dignity amounts to a 'voluntaristic account of what it is for human beings to be ends in themselves'.²² This

²⁰ Ibid., p. 29.

²¹ Darwall, 'Why Kant Needs the Second-person Standpoint', in Thomas Hill Jr., *The Blackwell Guide to Kant's Ethics* (Oxford: Wiley-Blackwell, 2009), p. 144.

²² Michael Rosen, *Dignity; Its History and Meaning* (Cambridge: Harvard UP, 2012), p. 89.

voluntarism manifests itself, not in that choice (however arbitrary or subjective) is valued writ large, but in that human beings can make principled, norm-responsive choices.²³

Paternalistic welfarist judgements can be made on behalf of those lacking these psychological competencies, as parallel to respect is a moral framework of rational care. Whereas agent-regarding and agent-relative reasons ground respect and ‘regulate our conduct in relation to her – to do what is called for by her dignity’, rational care is grounded on ‘third-personal, welfare-regarding, and agent neutral’ reasons, subject to the perspective of ‘sympathetic concern’.²⁴ Care involves promoting certain states, namely ‘what (one believes) would really benefit her’ and is in her good.²⁵ These judgements and an agent’s preferences may overlap incidentally, as the latter are ‘features of the object of concern, rather than partially defining the perspective of practical judgment itself’.²⁶ An agent’s preferences are considered but are not determinative; an agent-neutral deliberative standpoint takes precedence.²⁷ Different phases of a parent-child relationship illustrate the difference between respect and care. A toddler’s aversion to broccoli and preference for candy carries no normative weight for a caring parent, insofar as she believes eating vegetables would be more beneficial for her toddler. By contrast, the child’s preferences have independent weight once she develops as a competent individual; the parent can no longer subject her to the paternalistic treatment that was appropriate previously.²⁸ This suggests that the transition from care to respect is contingent on individuals meeting a certain competency threshold before respect for their inherent dignity demands respect for their subjective choices within certain limits. By default, Darwall is not entitled to make the opposite claim – that persons who lack second-personal competence still have inherent dignity given that best interests judgements can legitimately override their choices.

²³ Ibid.

²⁴ SPS, p.128.

²⁵ Stephen Darwall, *Welfare and Rational Care* (Princeton: Princeton UP, 2002); SPS, p.127.

²⁶ Ibid.

²⁷ Darwall, ‘Reply to Griffin, Raz, and Wolf’, *Utilitas* 18 (2006): 444.

²⁸ Darwall, *Welfare and Rational Care*, p. 15.

One might argue that there is no ‘either-or’ dynamic between respect and care. Darwall recognises that these two tracks of respect and care may bleed into one another, particularly in reciprocal friendships and intimate love relations. Yet such intersections seem to apply only when both parties possess the second-personal competence needed to enter into relations of mutual accountability.²⁹ Even then, one particular way of valuing an individual tends to win out over the other. Imagine a wife sees her husband engaging in increasingly extreme sports and he demands she respect his choice. Second-personal claims and third-personal reasons both motivate her request for him to stop: she might be fed up with how much time and money he devotes to these extreme sports, but equally, she might be worried about the risk to his body and life. His second-personal competence, however, third-personal rational concern is subsumed under her second-personal claims, meaning that she cannot choose a course of action for him against his will, forcing him to stop these freely-chosen activities. Special normative status must be given to his voluntary choices. But imagine this scenario with her 15-year old son. The same conflicting motivations are present, but unlike before, she could choose a course of action for him against his choices primarily because her son’s second-personal competence to enter into relations of mutual accountability is likely not the same level as her husband’s. Even where intersections between respect and care exist, the simultaneous adoption of second- and third-personal standpoints is conceptually impossible, particularly since Darwall’s second-personal standpoint orientates one’s conduct solely around the demands of another. The competency levels of the individual will ultimately dictate which standpoint is morally appropriate.

To salvage the D1 reading, Darwall could claim that equal dignity subsumes both third-personal rational care and second-personal respect for autonomy. But with this move, the concept of dignity becomes more ambiguous in Darwall’s picture. For Kantian constructivists, dignity is associated with the capacity to engage in autonomous agency, characteristic of persons who

²⁹ ‘[R]elationships of mutual concern, at least between those with second-personal competence [...] also involve an element of respect of part of what it is to relate to the other in that distinctive caring way.’ SPS, p. 126, n. 11, emphasis added.

constrain themselves in accordance with mutually agreed upon principles.³⁰ By contrast, D1 weakens the conceptual link between autonomy and dignity, and demands a concept of the latter that is broad and abstract enough to encompass situations where autonomy need not be respected. A status-based view, for example, posits that dignity is an inviolable core one possesses by virtue of species membership. Depending on how ‘humanity’ is defined, the ability to engage in a type of autonomous rational agency need not be a condition for equal dignity, as seen in Catholic arguments surrounding the status of embryos and foetuses. Dignity as defined by the capacity for moral autonomy therefore reflects only one contested view. Even so, textual support for a status-based account of dignity is absent in Darwall, and it is unlikely that he would endorse separating the normative concept of dignity from capacities for moral responsibility and autonomous agency.

II.

Darwall’s contractualist theory can provide a useful interpretive lens for understanding the normative perspective underlying legal demands for the equal treatment of and respect for persons with disabilities. First, legal instruments are increasingly recognising the ‘second-personal authority’ of persons with disabilities, particularly as expressed in the presumption of their capacity to make independent decisions about their care, treatment, and living arrangements. Under the CRPD, ‘persons with disabilities enjoy equal legal capacity vis-à-vis others in all aspects of life’ which means that their ‘rights, will, and preferences’ are to be fundamentally respected.³¹ Disabled individuals accordingly have ‘the standing to demand compliance’ – to demand respect for their right to self-determination and dignity, as well as hold others accountable for the treatment they receive.³²

Second, Darwall’s division between ‘respect’ and ‘care’ provides plausible justification for the differential treatment of individuals in legal practice. The MCA states that should one fail the test of capacity third parties can make a best interest decision on another’s behalf. Like in

³⁰ Cf, Oliver Sensen, ‘Kant’s Conception of Human Dignity’, *Kant-Studien* 100 (2009): 309-31.

³¹ CRPD Art. 12(4).

³² SPS, p. 14.

Darwall's account of rational care, legal applications of the best interests standard demonstrate that the wishes and values of the individual can be outweighed by circumstantial or objective considerations, and therefore have no special intrinsic weight from a pre-MCA, or indeed, post-MCA perspective.³³ Respect for one's autonomy is the default value with a finding of capacity; if otherwise, welfare as determined from an agent-neutral perspective takes precedence.³⁴

Third, even as the criteria of mental capacity and second-personal competence are not directly coextensive, Darwall's theory provides unique insight into the normative state of play in those legal judgements which appreciate how the realisation of individual rights turns on the second-personal recognition of one's authoritative address.³⁵ At times the courts have sought to negate the protective impulses of care providers who have failed to recognise a care recipient's second-personal authority and right to autonomy. For example, the case *KK v. STCC* [2012]³⁶ concerned the mental capacity of an 82-year old woman with Parkinson's disease, vascular dementia, and hemiplegia to make decisions regarding her living arrangements and care. A finding of mental incapacity led to her residency at a care home, but the patient wished to return to her own home and challenged the mental capacity assessment.³⁷ Baker J stated that there was 'a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interest analysis' and he reiterated 'the cardinal rule, enshrined in statute, that person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one.'³⁸ He concluded that the presumption of capacity had not been overturned. Quoting Munby LJ, he argued that well-intentioned state intervention 'can itself end up being abusive of

³³ This ambiguity is embedded within the MCA Code of Practice paras. 5.37-55. *ITW v Z* [2009] EWHC 2525 (Fam); *A NHS Trust v DE* [2013] EWHC 2562 (Fam).

³⁴ *Re A (Male Sterilisation)* [2000] 1 FLR 549: '[b]est interests encompasses medical, emotional and all other welfare issues'.

³⁵ i.e. *A, B & C v X & Z* [2012] EWHC 2400 (COP).

³⁶ *KK v STCC* [2012] EWHC 2136.

³⁷ The MCA assess capacity in two steps: (1) the diagnostic threshold which determines whether an individual has a disturbance of the brain's functioning; (2) the functional test based on whether the individual can: (i) understand, (ii) retain, (iii) use and weigh the information relevant to the decision, and (iv) communicate the decision.

³⁸ Para. 65.

her dignity, her happiness and indeed of her human rights.’³⁹ The local authority may have had good welfarist reasons for overriding KK’s wishes. Yet she was owed respect for her decision, however unwise, risky, or potentially harmful, given her psychological competence to enter into a mutually accountable relationship. This case provides a concrete illustration of the moral wrong which results from disregard for a patient’s legitimate second-personal authority.

Darwall’s contractualist theory therefore provides justification for the legal practice of linking certain psychological competencies to the second-personal authority to make overriding claims within certain limits. However, problems emerge once we probe the close conceptual link between second-personal competence, binding second-personal address, and respect for one’s dignity. Consider the case of a severely anorexic woman, E, who was forced to undergo life-sustaining treatment against her wishes.⁴⁰ This judgement was controversial because: (i) it overturned two advance decisions against force-feeding and life support; (ii) the treatment itself posed high risks of physical trauma and potential death, and the possibility of recovery was very small; (iii) the treatment of force-feeding recreated the trauma of sexual abuse; (iv) the judgement overruled the views of those treating her who had concluded her autonomy should be respected. A finding of mental incapacity overturned both advance and present decisions against treatment, subsequently initiating a best interests decision-making framework.

This case poses difficult questions about the theoretical contortions contractualism has to undergo in order to accommodate the moral intuition that individuals with cognitive impairments could make authoritative claims on others. The questionable rational capabilities of individuals with anorexia nervosa are already a source of contentious debate.⁴¹ The judge in this case concurs

³⁹ ‘Safeguarding and Dignity: Protecting Liberties – When is Safeguarding Abuse?’, Brunswick Mental Health Care Review 2012, 7:18, para. 66

⁴⁰ *A Local Authority v E and Ors* [2012] EWHC 1639 (COP). For a full case commentary, see Camillia Kong, ‘Beyond the Balancing Scales: The Importance of Prejudice and Dialogue in *A Local Authority v E and Ors*’, *Child and Family Law Quarterly* 26:2 (2014).

⁴¹ J Tan et al, ‘Competence to Refuse Treatment in Anorexia Nervosa’, *International Journal of Law and Psychiatry* 26 (2003): 697-707; Heather Draper, ‘Anorexia Nervosa and Respecting a Refusal of Life-Prolonging Therapy: A Limited Justification’, *Bioethics* 14 (2000): 120-33; Margery Gans and Willam Gunn

with legal precedent which clearly characterises the disorder as a compulsion rather than expressive of free or rational deliberation.⁴² Yet rationality and reasonableness need not imply the same thing: perhaps the debate about the decisional capacity of E focuses more on her instrumental rationality, whilst for Darwall, her second-personal competence might remain intact because of her reasonableness. Although there are arguments that the decision-making characteristic of eating disorders has its own internal principled logic, consistency, and rationality, this is not what I understand Darwall to mean with the ideal of ‘reasonableness’. This standard implies, rather, the moral ability to practically reason in accordance with a second-personal version of the categorical imperative. The ‘constraint of reasonableness’ subjects demands to a test of reasonable rejection for ‘[the addresser] must be able to expect their addressees to accept, or not reasonably to reject, their demands as free and rational persons, in light of their interest as independent, mutually accountable, (second-personally competent) agents.’⁴³

The pressing question then is whether E’s second-personal claim expresses moral rather than mere rational competency. Through her advance decisions, E could be understood as making the second-personal demand, ‘Respect my freedom to be compulsively guided’. Her own accountability under this particular normative demand might not be the problem, but rather whether her addressee can (i) accept the content of such a principle as a free and rational person, and (ii) assume that the demand issues from an equally responsible agent. On the face of it, Darwall might argue that deference to E’s demand is justified so long as the maxim reflects her evaluation of the different factors and psychological harms surrounding treatment. However, if the decision derives directly from her compulsion – the more common medico-juridical interpretation of treatment refusals by eating disorder patients – Darwall’s position becomes more complicated. The single-minded and compulsive nature of E’s second-personal demand makes it unlikely that the treatment decisions of someone in the grips of severe anorexia reflects full

Jr, ‘End stage anorexia: Criteria for competence to refuse treatment’, *International Journal of Law and Psychiatry* 26 (2003): 677–695

⁴² *A Local Authority v E and Ors*, para. 29; *Re W (A Minor) (Medical Treatment: Court’s Jurisdiction)* [1992] 3 WLR 758

⁴³ SPS, p. 320.

accountability, or satisfies the conditions of freedom and reasonableness in Darwall's sense. Darwall might agree that the legal finding of E's incapacity and move to best interests decision-making was invalid, yet to render a dissimilar conclusion according to his contractualist framework would require some difficult philosophical manoeuvring, given that his basic starting points likewise sanction the differential treatment of individuals depending on their psychological capacities.

We might infer from the fact that rational capacity and second-personal competence can come apart in this way that the moral failings of the severely anorexic individual are essentially the same as that of a psychopath. This conclusion, however, is inattentive to the complex phenomenology of moral incompetence in such circumstances. Rational capacity often implies nominal standards of transitivity and consistency. As most patients with eating disorders score highly on competency tests that are based on these standards, it is plausible that refusals of treatment demonstrate rational capacity.⁴⁴ Equally possible is a simultaneous lack of moral, second-personal competence, in the sense that such a patient can hear and receive, yet cannot actively respond to another person's second-personal demands in relation to the interpersonal harms caused by her compulsive disorder. Her second-personal competence may be intact when other sorts of demands are issued to her, though the all-encompassing nature of anorexia nervosa as a disorder makes it likely that responsiveness to these claims is similarly compromised. Second-personal competence by its very definition refers to a kind of moral standpoint which enables one to subject and control oneself in the face of another's demand – to put aside our own heteronomous motivation and respond to the normative force of second-personal reasons. It requires, not a superficial moral awareness that may or may not move an individual depending on their subjective whims, but a deeper kind of recognition that has categorical normative and motivational force. Different causes instigate the recognitional failure in these two examples: the psychopathic individual does not care about or acknowledge the normative force of second-personal reasons. The person with severe anorexia nervosa may emotionally care but the

⁴⁴ Kong, 'Beyond the Balancing Scales'; Tan, 'Competence to Refuse Treatment'.

compulsiveness of the disorder means these reasons lack motivational grip. That recognitional failure occurs in both the psychopath and the severely anorexic individual; therefore they need not imply that both their moral failings and second-personal incompetence are coextensive, and by implication, that both should be held responsible in the same way for such shortcomings.

To avoid the conclusion that a best interests judgement could be sanctioned in this case, we might suggest that the competency conditions have more to do with whether or not we can hold an individual responsible for responding appropriately to our reactive attitudes. The addresser's own second-personal incompetence would not bear on her second-personal authority to demand respect for her choices. But I discussed above why this more minimal claim is unsupported without considerable philosophical manoeuvring on Darwall's part. He argues: 'in the reciprocal recognition of the second-person standpoint, addresser and addressee are committed alike to their mutual accountability. [...] It commits them both to imposing not demands on others that they would not also be prepared to impose upon themselves from a common standpoint they share as free and rational.'⁴⁵ To make moral demands, we 'hold ourselves and one another accountable' and 'function as equal law-executing or law-enforcing members of the moral community.'⁴⁶ In other words, asserting second-personal demands within a moral community presupposes both can engage in a form of second-personal, practical deliberation that is characteristic of free and reasonable persons. These conditions of freedom and reasonableness are closely intertwined with the presuppositions of reciprocity and mutually accountability, where the addresser must likewise possess 'the psychological capacities necessary to hold herself responsible and enter into relations of mutual accountability'.⁴⁷ Both, not just one, must satisfy the conditions of free and rational agency. At least from an ideal contractualist standpoint, the competency conditions cannot be applied unilaterally, given that reciprocity is a necessary feature of membership within the type of moral community which situates valid second-personal demands.

⁴⁵ SPS, p. 320, emphases added.

⁴⁶ *Ibid.*, p. 307, emphasis added.

⁴⁷ Quoted in Matthew Smith, 'Interview with Darwall', *The Yale Philosophy Review* 4 (2008): 71.

One might contend that Darwall's normative-philosophical justification for the second-personal source of moral obligations precludes criticisms based on empirical phenomena, like psychological incapacities caused by mental disorder. Darwall states, '[t]he thesis of morality as equal accountability is moral-philosophical, not psychological', thus implying that the link between second-personal competence and respect for a person's dignity represents idealised contractualist conditions.⁴⁸ Using this tack, Darwall's empirical examination of psychological mechanisms illustrates how respect for dignity functions independently of issues surrounding second-personal competency. It thus supports D1 even if the normative account of equal dignity gestures towards D2. How far this gets us is questionable, however. Theories of moral obligation must have traction with the messy world of practical deliberation, conflict, and choice, for 'part of what is involved in having a better theory is being able more effectively to cope with the world.'⁴⁹ Also doubtful is whether Darwall would be happy to accept the incoherence between empirical psychology and his normative-philosophical account of authoritative second-person address in order to rescue the D1 thesis. In fact, Darwall's examination of the empirical psychology behind the second-person points to the other direction: 'to the extent that human behavior can be shown to involve capacities in which second-personal moral notions are psychologically realized, so also can these ideas be seen to fit with our psychology, or at least not to be in conflict with it'.⁵⁰ The empathetic mechanisms and psychological conflict experienced by participants within the famous Milgram experiments demonstrate widespread human capacities for accepting norms – specifically 'principle-dependent'⁵¹ second-personal reasons. The closer the learner was in proximity, the more subjects of the experiments became increasingly discomfited with inflicting shocks, thus revealing how empathy and norm acceptance work in tandem in the psychology behind second-personal competence. The victim's remonstrances and blame triggered second-personal

⁴⁸ SPS, p. 151.

⁴⁹ Charles Taylor, 'Social Theory as Practice', in *Philosophy and the Human Sciences* (Cambridge: CUP, 1985) p. 92.

⁵⁰ SPS, p. 152.

⁵¹ *Ibid.*, 162.

empathetic identification with the feelings tied to such norms.⁵² Empathetic identification with another's reactive attitudes instigated the addressee to adopt a second-personal perspective on herself, to become 'vulnerable' and 'susceptible to appearances as from the other's standpoint', and to subsequently blame or hold herself in light of this standpoint.⁵³ For Darwall, such empathetic identification also signalled reciprocal respect and cooperation in Prisoner's Dilemma scenarios, whereby conversation was crucial in making explicit the implicit mutual recognition of each person's authority. Individuals 'recognize one another as a source of claims on their respective wills and conduct and not just on their beliefs, even about what would be sensible action for either or both'.⁵⁴ Common psychological mechanisms borne out in the experimental context therefore seem to reveal the instinctive mechanisms involved in holding oneself accountable to another's demand, lending further support for the normative-philosophical account of D1.

Even if we find convincing Darwall's claims that his normative-philosophical argument is bolstered by findings in empirical psychology, this cannot resolve the issue surrounding the normative status of second-personal claims issued by those who lack second-personal competence. Much like his normative-philosophical account, psychological mechanisms of empathy and recognition still rely on a notion of desert – of whether second-personal demands are justified or not. In cases where the addressee recognises that the addresser lacks the same psychological mechanisms, reciprocity could degenerate into mean-spiritedness (fuelled by resentment and returning like with like)⁵⁵ or complete non-recognition. Darwall's discussion of Fehr and Rockenbach's Prisoner's Dilemma experiments illustrates my point. Apparently, cooperation diminishes in circumstances where sanctions are thought to be applied out of self-interest rather than valid demands to hold another accountable, suggesting that 'people are willing to forego

⁵² Ibid., 169-70.

⁵³ Ibid., 168.

⁵⁴ Ibid., 177.

⁵⁵ Michael Barber, 'Autonomy, Reciprocity, and Responsibility: Darwall and Levinas on the Second Person', *International Journal of Philosophical Studies* 15 (2008): 639.

benefits or incur costs not only to address justified demands but also to defy unjustified ones'.⁵⁶ On one hand (and as is Darwall's intention) this illustrates how equity and fairness matters in the psychology of the second-personal stance, as well as the empathetic process of normative uptake on behalf of the addressee. On the other hand, it also reveals how addressees will excuse themselves from compliance if they cannot detect the same psychological mechanisms in the addresser. Anchoring legitimate and authoritative second-personal address within conditions of reciprocity therefore has its dangers: if the addresser lacks empathy and recognitional psychological mechanisms, the addressee has neither the motivation nor reasons to treat their demand as meriting compliance. Indeed, if notions of reciprocity, equity, and fairness help prompt those psychological mechanisms which distinguish between justified and unjustified demands, we return to where we started: rather than lend support for the D1 thesis, Darwall's consideration of the empirical psychology behind the second-person standpoint falls by the same hurdle as his normative-philosophical account.

By Darwall's lights, then, E's demand to have her choice respected need not be adhered to. He might disagree with the content, yet the form of his theory suggests that a best interests judgement from a third-party perspective of rational care is indeed appropriate in this case. But is this outcome a consequence of Darwall's overly strict conceptual link between second-personal competence and respect for dignity, or endemic to contractualism more generally? Much has been written on this debate, of which to delve into would detract from my primary focus.⁵⁷ However, briefly considering whether a Scanlonian brand of moral contractualism is similarly afflicted would be worthwhile. There are two key differences between Darwall and Scanlon. First, in Scanlon, the three conditions which must be met by co-deliberates appear to be highly inclusive. Each must have i) a good; ii) comparative notions of what is reasonable and unreasonable to reject;

⁵⁶ SPS, pp. 174-5.

⁵⁷ Cf. Eva Feder Kittay, *Love's Labor* (New York: Routledge, 1999); Christie Hartley, 'Disability and Justice', *Philosophy Compass* 6 (2011): 120-32; Cynthia Stark., 'How to Include the Severely Disabled in Contractarian Theory of Justice', *The Journal of Political Philosophy* 15 (2007): 127-45; Anita Silvers and Leslie Pickering Francis, 'Justice through Trust: Disability and the "Outlier Problem" in Social Contract Theory', *Ethics* 116 (2005): 40-76.

and most crucially, iii) a point of view.⁵⁸ The third condition rules out trustees of plants or inanimate objects, but is expansive enough in theory so as to include the views and claims of individuals who lack second-personal competence in Darwall's sense. To be a being with a point of view means that 'there be such a thing as what it is like to be that being, such a thing as what the world seems like to it.'⁵⁹

Second, Scanlon's account of moral responsibility has no competency criteria. Agents can reasonably make claims against another regardless of their level of moral psychological capabilities. The scope for moral appraisal is likewise broadened: individuals who are unable to understand, appreciate, and reassess their 'judgement-sensitive attitudes' can be criticised for this failure.⁶⁰ Judgement-sensitive attitudes are comprised of beliefs, evaluative attitudes, and dispositions that are sensitive to certain kinds of judgements, and can manifest themselves in a propensity towards patterns of unreflective thought.⁶¹ The contractualist circle becomes widened to include individuals with mental impairments as both co-deliberators and to whom moral responsibility can be attributed.

Initially, this seems a promising route to ensure that even individuals who lack certain psychological capacities can claim the right to be treated with respect, thus correcting Darwall's overly restrictive account of competency without relinquishing the contractualist framework. But it remains doubtful whether these differences mean Scanlon's contractualism leads to a substantively different conclusion in the E case, or captures easily all aspects of second-personal respect owed to individuals with mental impairments. The crux of the problem, ironically enough, lies in Scanlon's more catholic approach to competence. On Scanlon's account, an individual who is rationally capable (she can make judgements about reasons), yet is morally incompetent (she

⁵⁸ T. M. Scanlon, 'Contractualism and Utilitarianism', in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: CUP, 1982), pp. 113-4.

⁵⁹ *Ibid.*, p. 114.

⁶⁰ T. M. Scanlon, *What We Owe to Each Other* (Cambridge: Belknap, 2000), p. 289.

⁶¹ *Ibid.*, pp. 20-1.

cannot understand, recognise, or respond to moral reasons) should be subject to moral criticism.⁶² Holding a particular judgement-sensitive attitude presupposes that it can be rationally modified. Her attitudes are still attributable to her, even if she cannot understand or be persuaded by the force of moral reasons opposing them.⁶³ Such an individual ignores the standing and values of others, and thus violates the mutual recognition at the heart of contractualism.

But Scanlon's argument contradicts a common intuition that moral competence is a precondition for moral accountability: blame is warranted only if a person is able to grasp the moral principles that she is thought to have violated.⁶⁴ The claim that judgement-sensitive attitudes belong to a specific category of attitudes which are in theory sensitive to normative judgements, fails to establish our responsibility for them, particularly if they fall outside our full control.⁶⁵ Indeed, the division between rational and moral competence is key to understanding certain disorders like anorexia nervosa. Research has clearly shown that individuals with severe anorexia score well on rational measures of competence, demonstrating high levels of focus, rational control, attitudinal consistency, and goal directedness. In one study, relatives commented, 'I don't think [anorexia] takes away their mental capacity at all to decide. I think that, probably, their mental capacity to decide is heightened'. Another remarked, 'she's very focused, she knows the damage she's doing [and] knows what the illness does to you'.⁶⁶ Yet what is clearly lacking is effective responsiveness to moral reasons that conflict with her disorder: whilst a patient might have judgement-sensitive attitudes which respond to reasons which support her goal of thinness, there is a failure to recognise the moral reasons which would lead her to modify these attitudes. The interpersonal impact of the disorder is devastating and profound, leading to experiences of high emotional strain, feelings of 'concern, despair, frustration, anger, confusion, and guilt', where

⁶² See R. Jay Wallace, 'Scanlon's Contractualism', *Ethics* 112 (2002): 429-70; Susan Wolf, *Freedom within Reason* (New York: OUP, 1990).

⁶³ Scanlon, *What We Owe to Each Other*, p. 289.

⁶⁴ Wolf, *Freedom with Reason*; Wallace, *Responsibility and the Moral Sentiments* (Cambridge: Harvard UP, 1994).

⁶⁵ Wallace, 'Scanlon's Contractualism', p. 444.

⁶⁶ J. Tan et al 'Competence to make treatment decisions in anorexia nervosa: thinking processes and values', *Philosophy, Psychiatry, & Psychology* 13 (2006): 267-82.

difficulties in coping can cause nervous and physical breakdown.⁶⁷ Holding the individual with an eating disorder culpable for her insensitivity to moral reasons seems wrong, both from a phenomenological and normative perspective. Not only do family members almost always excuse such a person from moral criticism, such a response strikes one as appropriate.⁶⁸

In recent works, Scanlon admits that the conclusions of his contractualism are counterintuitive. He argues in response for a notion of blame that is relationally bound and conceptually removed from punitive feelings, reflecting instead the expectations, intentions, and attitudes constitutive of one's relationships. Blame implies blameworthiness, and sanctions the modification of our relationships to another 'in a way that this judgment of impaired relations holds to be appropriate.'⁶⁹ Scanlon seeks to capture how relationships consist of internal normative standards which warrant treatment of each other in certain ways, and precipitate differential responses of blame when these standards are violated. The added benefit of rendering personal control as irrelevant to blame is that metaphysical debates about compatibilism and incompatibilism are neatly avoided.⁷⁰ Thus blame can be attributed to the severely anorexic individual for violating standards within a particular relationship; modifying the relationship is warranted, though certain non-punitive attitudes – like 'sympathy, and a special readiness to help [her] in some ways'⁷¹ – are also appropriate. Scanlon's account of blame might not absolve those individuals who lack control, yet arguably reflects the intuition that personal circumstances and the relational context should bear on the nature and intensity of our blaming responses.

⁶⁷ J. Ball and R. Ball, *Eating Disorders; A Survival Guide for Family and Friends* (Sydney: Doubleday, 1995), p. xiii; S. Hillage et al, 'Impact of eating disorders on family life: individual parents' stories', *Journal of Clinical Nursing* 15 (2006): 1019.

⁶⁸ Tan, 'Competence to make treatment decisions': 'It's awful to admit, but in general it's [the anorexia nervosa] the most important thing in my life.... In comparison with relationships, [...] with university and work [...]'.

⁶⁹ T. M. Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Belknap, 2010) pp. 128-9.

⁷⁰ Allan Gibbard, 'Shoulds and Shouldn'ts', *London Review of Books* 31:10 (2009): 26-28.

⁷¹ Scanlon, *Moral Dimensions*, p. 198.

Scanlon thus appears to succeed where Darwall could not: his account of blame seems to strike a balance between the non-differential treatment of individuals with impairments whilst recognising how personal and relational factors mediate issues of moral accountability. Yet whether Scanlon can fully sever the contractualist link between competency and respect for dignity is questionable, as his discussion of psychopathy illustrates. As mentioned earlier, the disorders of anorexia nervosa and psychopathy are non-equivalent, though certain parallels are noteworthy, such as the high degrees of procedural means-end reasoning, the negative impact of these conditions on relationships and friendships, and impaired responsiveness to moral reasons. Scanlon states that because the psychopath ‘lack[s] the capacity to understand and respond to moral requirements it is questionable whether they can be participants in the moral relationship.’ He likens them to ‘young children’ in that ‘both are and are not members of the moral community’ and are owed ‘some kinds of moral concern and care.’ Crucially, ‘they are not candidates for relations of cooperation or trust, so withholding these relationships is not a modification of a status they would have had, were it not for certain particular instances of behavior and attitude.’⁷² This sounds noticeably similar to Darwall’s justification for differential treatment of individuals based on their psychological capacities. If the psychopath were ineligible to enter into relationships of cooperation and trust, the same fate would likely apply to the severely anorexic individual given their overlapping characteristics. Modification of an impaired relationship already presupposes the existence of mutual psychological and moral competencies – without these, one is already partially excluded, not just from the moral community, but from certain ways of relating to each other, such as cooperation and trust. Even in cases where Scanlon reaches the intuitively plausible conclusion that certain psychological incapacities will disqualify blameworthiness – particularly where mental illness means ‘a person is unable to understand and assess reasons or his judgments have no effect on his actions’⁷³ – what is owed to these individuals still falls short of respect. Such an individual ‘cannot be a participant in a system of co-

⁷² T. M. Scanlon, ‘Interpreting Blame’, in D. Justin Coates and Neal Tognazzini, eds., *Blame: Its Nature and Norms* (New York: OUP, 2013) p. 95, emphases added.

⁷³ *Ibid.*, p. 280.

deliberation, and must be seen, as simply a force to be dealt with, like an animal'.⁷⁴ Contractual and deliberative respect presupposes one is responsible and subject to moral criticism. Conversely, individuals whose conditions impede their ability to understand and assess reasons and judgements – such as psychopathy or severe anorexia nervosa – are not owed deliberative respect.

Initially, Scanlon's wide-scope of eligible contracting parties might not make this challenge decisive. Like in Darwall, trustees can be used to represent and articulate the views of those with rational and moral incapacities. Scanlon himself remarks that it is 'extremely implausible' to conclude that those who fall short of the capacity to observe moral constraints or confer reciprocal benefit on other participants 'fall outside the protection of morality'.⁷⁵ Moral motivation is grounded on the fact that we have a desire to justify ourselves to others in accordance with the standard of reasonable rejection.⁷⁶ Scanlon states, 'the absence of these capacities alone does nothing to undermine the possibility of justification to a being. What it may do in some cases, however, is to alter the justifications which are relevant.'⁷⁷ Scanlon's more inclusive criterion of 'having a point of view' makes this a legitimate theoretical move which remains unavailable to Darwall.

But convince some as this may, Scanlon's account of blame still distorts what is owed to individuals lacking control and moral competence. For Scanlon, modifications occur in different ways depending on the relationship, and include withholding trust and reliance, breaking off friendship or cooperative relations, altering the meaning assigned to another's actions and our interactions.⁷⁸ Depriving another person these things is justifiable because these are not unconditional claims: '[w]e do not owe it to anyone to trust him or be his friend no matter how he treats us, or to value or take seriously conversation with him no matter what reasons guide his decisions about what to say, or to take pleasure in his well-being no matter what his attitude may

⁷⁴ Ibid.

⁷⁵ Scanlon, 'Contractualism and Utilitarianism', pp. 114-5.

⁷⁶ Wallace, 'Scanlon's Contractualism', p. 450.

⁷⁷ Scanlon, 'Contractualism and Utilitarianism', p. 115.

⁷⁸ Scanlon, *Moral Dimensions*, p. 185.

be toward others.’⁷⁹ Quite understandably, Scanlon discourages individuals from unwisely entering into relationships premised on non-reciprocity and unconditional acceptance on either side. On the flip side, such relationships where modification is appropriate must be premised on contractualist conditions. Cooperative relations presume a person’s ability to understand the standards of the relationship in the first place. The desirable things in relationships, such as trust, serious dialogical engagement, sympathetic concern, require mutuality that is premised on some form of psychological competence, as ‘these attitudes are appropriate only toward those whose attitude makes them appropriate’.⁸⁰ Withholding these attitudes requires no further justification other than these things are not unconditionally owed to anyone. But in articulating what we *don’t* owe to people in this manner, Scanlon risks distorting our ethical obligations in cases of psychological impairment, inequality, and dependency.

Briefly exploring Scanlon’s theory is instructive, as despite a more catholic approach towards the competency condition, his framework, like Darwall’s, would not necessarily rule out the differential treatment of E based on her psychological incapacities. Both contractualist theories require considerable philosophical manoeuvring in order to capture the intuition that second-personal respect is owed to individuals with impairments. Whether we find these endeavours convincing or unconvincing is ultimately beside the point – more significant is the how its starting premises are too limited to capture fully aspects of our moral engagement and obligations in contexts of dependency and incapacity.

III.

Both Darwall and Scanlon reveal how Kantian contractualism has a tendency to pull into two separate directions – one towards a deeply egalitarian and cosmopolitan aspiration, which explains why human value and dignity is so frequently associated with the faculty of moral choice and responsibility. The other pulls towards an exclusionary direction – the reality is that many

⁷⁹ Ibid.

⁸⁰ Ibid., p. 187.

will lack the capacity to realise this type of agency. Working from the theory to practice, the moral and rational capacities constitutive of second-personal competence means that many individuals with impaired psychological capacities lack the second-personal authority required to demand respect for their choices and values. Conversely, working from the phenomena to the theory, the case of E provides an unsettling example of when second-personal respect becomes moored to psychological capacities, suggesting we need to reconsider how the spheres of rational care and respect intersect theoretically.

This challenge can be met in two ways. First, the competency conditions of respect could be expanded or done away with altogether. This, however, is not a fruitful strategy, as demonstrated by Scanlon's more catholic approach. Alternatively, the competency criteria could be formulated differently through a phenomenological-normative account to better support the D1 thesis and accommodate the second-personal dynamic between individuals with impairments and others. Respect and care are reciprocally embedded in what I call hermeneutic competence, of which is situated within a recognitional but non-contractualist framework that is grounded on compassionate motivational resources, rather than demands for reciprocity and mutual accountability. Phenomenological accounts of the moral demand, compassionate regard, and dialogical ability help gesture towards more promising ways to articulate how second-personal respect and deliberative recognition is owed to individuals who lack the psychological capacities to enter into relations of full moral responsibility and mutuality. Here the ethical focus remains on the moral expertise and virtue of the individual who is on the receiving end of an ethical summons. Whilst I do not pretend that my response is as nearly developed as Darwall, it takes inspiration from the Aristotelian, virtue ethics tradition, where the embodied practices and intuitions in everyday ethical interaction have moral significance.

Hermeneutic competence refers to a particular form of receptivity and moral attunement necessary to attend appropriately to the summons of another individual when one is situated within asymmetrical ethical relations, such as that which is articulated by Levinas's ethics of alterity. Though Darwall's and Levinas's account both overlap in the way that morality and its demands are situated within the second-personal context, the latter's asymmetrical, non-reciprocal

framework leads to a more nuanced account of moral obligation and responsibility. For Levinas, the summons of another triggers recognition of their inherent vulnerability and fragility – what he calls ‘the Face’, revealing an ethical responsibility that is unilateral and categorical. ‘The relation to the Face,’ writes Levinas, ‘is both the relation to the absolutely weak – to what is absolutely exposed, what is bare and destitute, the relation with bareness and consequently with what is alone and can undergo the supreme isolation we call death.’⁸¹ In this encounter the I is summoned by the ‘real concrete presence’⁸² of the Other which binds me to a categorical ethical demand to be responsible for and non-indifferent to the Other – essentially a demand for me to recognise her as a separate but vulnerable being. The ethically significant moment of this encounter is not when a verbal expression of a demand is issued, but prior to that – the passive reception of another’s vulnerability and the moral demand that results. Responsibility on my part is therefore present irrespective of the conditions of psychological competence and reciprocity being met.

Crucially, exposure to the Other’s frailty in this way entails her elevated rather than subordinate position in relation to the self. This seems counterintuitive at first. Its plausibility is clear, however, once we probe the nature of responsibility in conditions of asymmetry. A mother caring for her severely disabled child is aware that she herself is responsible, without any expectation of return. The vulnerability and fragility of the child’s embodied existence is exposed in every interaction, revealing her mother’s categorical responsibility to and for her. The unilateral, unremitting bindingness of this obligation suggests that this child does indeed have an elevated position to that of her mother, in the sense that ‘goodness consists in placing myself in being in such a way that the Other would count more than me’.⁸³ Even deeper, when one sees the utter dependence and vulnerability of an individual, its impact inspires a certain awe and humility that is entirely separate from their faculties of moral choice, as captured in Eva Feder Kittay’s moving description of her relationship with her severely disabled daughter, Sessa, for example:

⁸¹ Emmanuel Levinas, ‘Philosophy, Justice, and Love’, in *Entre Nous*, trans. Michael Smith and Barbara Harshav (London: Continuum, 2006), p. 89.

⁸² Dermot Moran, *Introduction to Phenomenology* (London: Routledge, 2000) p. 347.

⁸³ Levinas, *Totality and Infinity*, trans. A. Lingis (Dordrecht: Kluwer, 1991) p. 247.

She was so vulnerable. She would need so much protection and love from us to shelter her from the scorn of the world, from its dangers, from its indifference, from its failure to understand her and her humanity. We didn't realize how much she would teach us, but we already knew that we had learned something. That which we believed we valued, what we – I – thought was at the center of humanity, the capacity for thought, for reason, was not it, not it at all.⁸⁴

Importantly, a demand to rectify the moral asymmetry would be an inappropriate ethical reaction,⁸⁵ for the relational structure enjoins me to respond out of pure generosity to the Other, independently of how the other responds to me. This is why coming into the concrete presence of an Other involves transcendence of the self and ego. To be purely generous means to forget the self in giving to another.

This Levinasian framework reveals two things about the second-person standpoint and its attendant obligations. Firstly, a non-reciprocal relational structure can generate unilateral moral responsibilities: this asymmetry as such does not reflect the status or capabilities of either individual, nor the actual encounter or mode of engagement.⁸⁶ Secondly, moral responsibility is instigated by an exposure to, and recognition of, human frailty, and is accompanied by a dual experience of humility and awe. As Kittay's words reveal, the Kantian contractualist focus on the faculty for rational and moral agency as a source of respect and dignity fails to appreciate the full moral significance of our responsiveness to fragility. At a pre-reflective level – before I even ask myself what I ought to do – an ethical summons for Levinas does not distinguish between respect and care.⁸⁷ This Levinasian framework by itself, however, cannot provide concrete normative

⁸⁴ Kittay, *Love's Labor*, p. 150.

⁸⁵ For Levinas this asymmetry is corrected with the introduction of the third-person, but this is beyond the scope of my discussion.

⁸⁶ The significance of dialogical symmetry in the E case is discussed in Kong, 'Beyond the Balancing Scales'.

⁸⁷ Barber, 'Reciprocity', p. 642.

content in terms of how one can be simultaneously responsive to the fact of human vulnerability and respectful of another's core alterity and independence. Hermeneutic competence requires additional motivational resources to mediate one's ethical response, specifically compassionate regard and dialogical openness.

Compassionate regard⁸⁸ is the emotional core motivating the redirection of our attention towards another and their condition or state, and incorporates 'eudaimonistic evaluation' whereby another's flourishing extends the boundaries of our self-regard.⁸⁹ Cognitive appraisals in the following ways constitute appropriately directed compassionate regard: i) the depth or 'size' of suffering; ii) the removal of culpability and recognition that goods necessary for flourishing are vulnerable to forces outside our rational control; iii) eudaimonistic judgement where the suffering of another affects our own sense of flourishing.⁹⁰ Compassionate regard therefore has both an agent-neutral and agent-relative dimension. Such motivational resources are triggered by an objective appreciation of humanity's fragile relationship to goodness and flourishing – that its actualisation is not entirely down to our autonomous control. But operating alongside such agent-neutral appraisals is agent-relative, empathetic skills which recognise and respect the inherent separateness of another individual. The second-personal standpoint has to be maintained; if we adopted a non-relational, third-personal perspective, this would prevent us from getting an accurate sense of 'size'. For example, assuming that a pain in my hand is equivalent to that which prevents a violinist from playing is indicative of empathetic deficiencies. Nussbaum states, 'awareness of one's separate life is quite important if empathy is to be for another, and not for oneself, that one feels compassion, one must be aware both of the bad lot of the sufferer and of the fact that it is, right now, not one's own.'⁹¹ Empathetic skills necessary for compassionate regard

⁸⁸ I deliberately use the term, 'compassionate regard' rather than 'compassion' because I want to capture its recognitional and respectful components and avoid colloquial connotations of it as an unreflective emotion.

⁸⁹ Martha Nussbaum, *Upheavals of Thought* (Cambridge: CUP, 2003), p. 300.

⁹⁰ *Ibid.*, p. 321.

⁹¹ *Ibid.*, p. 328.

recognises that I can never know the other as I assume to know myself; I cannot make the Other equivalent to myself or the whole. Consequently, the ‘dignity of the unique’ is respected.⁹²

A comportment of dialogical openness must also accompany compassionate regard and its attendant empathic skills. Hermeneutically competent agents recognise every standpoint is constituted by a range of implicit and explicit prejudices which function as an inescapable perspectival orientation. Dialogical openness in intersubjective engagement entails genuine understanding rather than mutual consensus – what Gadamer has characterised as a ‘fusion of horizons’. This vision of two separately existing horizons converging through agreement is somewhat misleading. As a heuristic device, however, it helps articulate the critical moment when our prejudicial horizon is violated by something alien to us – when another ‘addresses us’ or we are ‘awakened to something’, faced with our own limitations, and our understanding is enriched as a result.⁹³ Peggy, Sesha’s carer, eloquently describes this process:

I was working on some walking exercises that the folks at [the medical centre] had assigned. I was working terribly hard trying to get Sesha to cooperate and do what I was supposed to get her to do. [...] I thought, how am I going to do this? How can I possibly do this job, when I looked down at Sesha and saw her little head pushed back against her stroller moving first to one side and then to another. I couldn’t figure out what she was doing. Until I traced what her eyes were fixed on. She had spotted a leave falling, and she was following its descent. I said, “Thank you for being my teacher, Sesha. I see now. Not my way. Your way. Slowly”. After that, I fully gave myself over to Sesha.⁹⁴

This vignette illustrates how a fusion of horizons occurs when our initial experience of alienation from the Other is overcome, so what was alien is now viewed as one of many possibilities. That particular possibility may have eluded us initially, but we now see its value ‘better, within a larger

⁹² Ibid., 167.

⁹³ Jean Grondin, *The Philosophy of Gadamer*, trans. Kathryn Plant (Chesham: Acumen, 2003), p. 97.

⁹⁴ Kittay, *Love’s Labor*, p. 157.

whole and in truer proportion'.⁹⁵ Such potential enrichment of our understanding isn't available to the individual who tries to prove herself right or impose her own view on a situation. Dialogical openness as a constituent of hermeneutic competence may involve conversational skills which enables one to develop an understanding and recognition of a particular individual's interests, feelings, and so on, or, as in the case of Peggy's relationship to Sessa, growing awareness of the salience of the Other's perception – what some have referred to as acquiring 'joint attention'.⁹⁶

Moving away from the contractualist focus on mutuality and reciprocity as necessary for respect makes this account better able to support the D1 thesis. As an amalgam of compassionate regard and dialogical openness, hermeneutic competence reveals how recognition of another's independence and radical alterity is not always coextensive with respect for subjective choice. Rather, it articulates a particular manner of respectful engagement with an individual which, sometimes but not always, implies respecting those very choices. Unlike Darwall's account of rational care, agent-neutral, welfare-regarding deliberation doesn't motivate hermeneutic competence. Even as it is situated in an objective understanding about the vulnerability of our goods, the motivational impetus remains rooted in the second-personal dimension of compassionate regard – the sense that another's flourishing impacts on mine. The recognitional core within empathic and dialogical skills further expresses a way of valuing individuals with deliberative respect when they express their demands. An agent-relative stance towards the another implies that I do not subsume their needs and voice under mine or assume an objectivising gaze in the form of third-personal reasoning, regardless of possible deficits in the another's psychological capacities. Faced with their psychological deficiencies, my orientation towards them is informed by, not that particular reality, but a stance of humility and willingness to learn; I cannot automatically assume I know better what is their good, more than they know it themselves. Since second-personal recognition of another is not bound to the capacity for moral agency and

⁹⁵ Hans-Georg Gadamer, *Truth and Method*, 2nd ed., trans. Joel Weinsheimer and Donald Marshall (London: Continuum, 2004), p. 304.

⁹⁶ Michael Tomasello, 'Joint attention as social cognition', pp. 103-30; Dare Baldwin, 'Understanding the link between joint attention and language', pp. 131-58, both in Chris Moore and Philip Dunham, eds., *Joint Attention: Its Origins and Role in Development* (Hillsdale: Lawrence Erlbaum, 1995).

choice, the basis of respect – and our expression of it towards another – shifts accordingly. The normative focus moves towards the competency and its motivational constituents of the individual on the receiving end of an ethical summons in the second-personal context; it demands the development of its constituent skills and eventual expertise through lived experience and repeated practice, with the aim of extending the boundaries of moral concern encircling the individual through the appropriate exercise of compassionate and dialogical mechanisms.⁹⁷

One possible objection might be that the motivational and evaluative basis of hermeneutic competence amounts to a humiliating and paternalistic way of valuing an individual. Why Darwall and other contemporary Kantians emphasise the reciprocal and contractualist structure underlying respect for one's dignity and autonomy is understandable. Motivating this move historically are laudable egalitarian and universalist commitments as well as worries that acknowledging the constitutive role of vulnerable external goods in flourishing concedes too much of our dignity to luck. From that perspective, compassionate regard has, at best an uneasy relationship to respect; at worst, it humiliates the moral worth of the individual who is its object.⁹⁸ However, compassion, like Kantian respect, has at its basis the thought of common humanity. Respect for dignity must escape this theoretical preoccupation with our moral faculties so as to attend to both the fragile nature of autonomous agency and the external goods necessary to develop and promote its constitutive capacities. Because compassionate regard takes this as its starting point, it is in fact better positioned to respect those with psychological impairments and guard against their paternalistic or humiliating treatment. And should the worry persist, the conditions of empathetic skill and dialogical openness function as checks against condescending impulses.

Doubts as to whether this approach can provide principled guidance that is applicable to clinical and legal practice might be assuaged when we extend this discussion back to the case of E.

⁹⁷ Hubert Dreyfus and Stuart Dreyfus, 'Towards a Phenomenology of Ethical Expertise', *Human Studies* 14 (1991): 229-50; Julia Annas, 'The Phenomenology of Virtue', *Phenomenology and the Cognitive Sciences* 7 (2008): 21-34.

⁹⁸ *Ibid.*, p. 383.

The Levinasian relational structure of asymmetry and non-reciprocal responsibility accurately captures E's relationships with other parties. In their support for her refusal of treatment, E's family and carers demonstrate the type of hermeneutic competence I have been defending. Notably, the judge had not met with E, and the court-appointed court expert had met with her only once.⁹⁹ Even as it is doubtful that E's claims express second-personal competence in Darwall's sense, the compassionate regard of her advocates drew attention to the moral salience of her suffering and the importance of autonomous control to her in the given circumstances.¹⁰⁰ Their efforts to respect E's independence in spite of her apparent lack of second-personal competence is a reflection of their competence: their acceptance of E's alterity is expressed in their dialogical attunement to her own unique voice in the given situational context, even if it means setting aside their own preconceived judgements. E's parents stated:

[W]e have watched our daughter preparing for her death in a very dignified and considered way, with a powerful sense of control over her situation. In this time, she has never faltered from her wish not to be re-fed.

It upsets us greatly to advocate for our daughter's right to die. We love her dearly but feel that our role should now be to fight for her best interests, which, at this time, we strongly feel should be the right to choose her own pathway, free from restraint and fear of enforced re-feed. We feel that she has suffered enough. She stands no hope of achieving the things that she would value in her life and shows no signs of revising these aspirations. We would plead for E to have some control over what would be the last phase of her life, something she has been denied for many years. [...] We want her to be able to die with dignity in safe, warm surroundings with those that love her.¹⁰¹

⁹⁹ Kong, 'Beyond the Balancing Scales'.

¹⁰⁰ Simona Giordano, 'Anorexia and Refusal of Life-Saving Treatment: The Moral Place of Competence, Suffering, and the Family', *Philosophy, Psychiatry, & Psychology* 17 (2010): 143-154.

¹⁰¹ *A Local Authority v E*, para. 80.

This perspective illustrates how care and respect should be integrated within a best interest decision. E's carers and advocates never move away from the second-personal, relational perspective which is to recognise the truth of her particular experience of suffering, thus ensuring that her uniqueness and independence is heard and respected regardless of whether she can reciprocate in a free and reasonable manner, and whether she is their equal in moral responsibility and competence. This illustrates how respectful engagement with an incapacitated agent is orientated around dialogical skilfulness and compassionate regard as constituents of hermeneutic competence, striking an important balance between the undesirable extremes of intrusive, unnecessary paternalistic intervention and 'a shoulder-shrugging indifference'¹⁰² to an incompetent patient's potentially harmful decision.

This paper has three important practical implications. First, hermeneutic competence clarifies the ethical obligations of best interest decision-making under the MCA, and ensures that the unique voice of the patient is fundamental to the determination of what is her good. The statutory requirements of best interest decision-making under the MCA are significant precisely in its normative intention to make the incapacitated patient central to the actual decision-making process. Occupying a middle ground between traditional objectivist and substituted judgement standards, the MCA formally endorses a participatory model which stresses the importance of patient consultation and the consideration of past and present feelings, wishes, beliefs, and values.¹⁰³ HH Judge Marshall QC argued,

Given the policy of the Act to empower people to make their own decisions wherever possible, justification for overruling P and "saving him from himself" must [...] be strong and

¹⁰² To use a phrase of Raymond Tallis in correspondence to me.

¹⁰³ MCA s.4; Mary Donnelly, 'Best Interests, Patient Participation and the Mental Capacity Act 2005', *Medical Law Review* 17 (2009): 1–29. Cf. *PS v LP* [2013] EWHC 1106 (COP).

cogent. Otherwise, taking a different course from that which P wishes would be likely to infringe the statutory direction in s [1(6)] of the Act [...] ¹⁰⁴

Although it is true that the best interests approach in the MCA is ambiguous enough to accommodate different statutory intentions¹⁰⁵, a recent Supreme Court ruling¹⁰⁶ clearly tips the balance away from an objectivist test towards the participatory model. Lady Hale explicitly disagreed with the suggestion that the test of a patient's wishes and feelings is an objective one, 'what the reasonable patient would think'. She stated:

The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. [...] But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.¹⁰⁷

This participatory ideal, however, has been realised imperfectly to date, leading to my second point. Analysis of Darwall's division between second-personal respect and rational care helps focus our critical attention to an implicit bias towards traditional models of best-interest decision-making in current judicial practice. A traditional best interests approach enshrines beneficence and objectivity towards the determination of a patient's welfare, whereas substituted judgement requires a surrogate to make decisions in accordance with what a patient herself would have wanted if she had decisional capacity. Either way, both approaches are inclined to minimise

¹⁰⁴ Re S and S (Protected Persons) [2008] EWHC B16 (Fam), [2009] WTLR 315, [2009], para. 58. For a different statutory interpretation, Re P [2009] EWHC 163 (Ch), para. 41.

¹⁰⁵ Thanks to Genevra Richardson for raising this point.

¹⁰⁶ Aintree University Hospitals NHS Foundation v James [2013] UKSC 67.

¹⁰⁷ *Ibid.*, para. 45.

the voice of the incapacitated patient herself¹⁰⁸ and sanction paternalistic intervention with nominal patient consultation.¹⁰⁹ The MCA's core principle of patient participation has been interpreted as contingent on 'the careful judgment' of 'the decision maker [who determines] the extent to which an incapacitated person can participate in decisions about their welfare.' Further, the range of participation may vary depending on the facts of the case and 'whether the person has responsibility for making and living with the consequences of any decision which they choose to make'.¹¹⁰ Like in Darwall's theory, more participation implies one has the capacity to enter into mutual relations of moral responsibility. This understanding of the MCA is more common than not in judicial determinations of best interests: non-participation of the patient is not only the practical reality, but is thought of as a legitimate interpretation of the statute's normative intent. Yet we need to challenge this assumption should we wish to avoid reducing the participatory ideal of best interest decision-making to mere tokenistic gestures at best. The starting point for best interests decision-making requires at least some dialogical engagement with the patient.

Finally, my discussion above could be seen to accord with arguments which claim that tests of capacity and substituted decision-making mechanisms are discriminatory under the CRPD.¹¹¹ The usefulness of the concept of capacity is itself uncertain. Combined with the debatable use of inherent jurisdiction to override the choices of individuals who formally pass the capacity test, one could argue that jurists have inadvertently distorted the distinction between capacity and incapacity, whilst moving towards an increasingly paternalistic and interventionist direction.¹¹² Under the CRPD universal legal capacity implies any form of substituted judgement is impermissible; mechanisms for supported decision-making are required instead.¹¹³ Much has to

¹⁰⁸ Donnelly, 'Best Interests', pp. 1-29; L. Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment', *Yale Law Journal* 100 (1990): 1-71; Allen Buchanan and Dan Brock, *Deciding for Others; The Ethics of Surrogate Decision Making* (Cambridge: CUP, 1990) pp. 112-22.

¹⁰⁹ *DH v NHS Foundation Trust v PS* [2010] EWHC 1217 (Fam).

¹¹⁰ *LB Haringey v FG* [2011] EWHC 3932 (COP), para. 15, emphasis added.; *W v M, S, NHS Primary Care Trust* [2011] EWHC 2443 (Fam), para. 81.

¹¹¹ Peter Bartlett, 'The United Nations Convention', p. 763.

¹¹² *DL v A Local Authority & Ors* [2012] EWCA Civ 253.

¹¹³ Richardson, 'Mental Capacity in the Shadow of Suicide', p. 92.

be explored in terms of how these supportive mechanisms are to be provided. The ethical reorientation implicit in these developments is nonetheless welcome, as the evaluative focus moves away from the competencies of the individual in question, towards those of her surrounding relational, societal, and institutional frameworks.

Conclusion

This paper has worked back and forth from Darwall's theory and judicial practice in order to make conceptual space for the categorical obligation to respect an individual's unique voice, even in relationships of asymmetrical responsibility and unequal capacities. Whilst Darwall's theory of the second-person standpoint is both timely and important from a theoretical standpoint, the presuppositions of his contractualist framework cannot comfortably accommodate the intuition that second-personal respect is owed to individuals with impaired psychological competencies. My analysis of hermeneutic competence has not been exhaustive but gestures towards important areas requiring further critical attention. Firstly, my alternative account challenges the connection between differential treatment and psychological competencies which validates the paternalistic but well-meaning disrespect of persons in both theory and practice. Secondly, it provides better normative grounding for the MCA's participatory model of best interest decision-making. Numerous worrying incidents of systemic neglect and intervention in the care of incapacitous patients should make us wary of setting aside respect for a person's unique voice in well-meaning but unwarranted paternalistic care.