# Policy without Paternalism:

# A Capability Approach to Legitimate State Action

# Jessica Begon

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# Abstract

There has long been a conflict at the heart of theories of distributive justice between a concern to allow individuals autonomy and avoid paternalism, on the one hand, and a concern to promote individual well-being, on the other. The capability approach attempts to tread this line, by providing individuals with certain central capabilities or opportunities: these preserve a space for individual freedom and choice, yet ensure that all individuals have access to those things that are considered central for a flourishing life. Further, ‘all individuals’ is meant expansively, aiming to accommodate the experiences and needs of many groups that are often ignored. However, the perfectionist roots of the capability approach have led to concerns being raised that it cannot successfully protect autonomy and promote inclusivity, and that it will, instead, justify paternalism. I contend that, in particular, Martha Nussbaum's influential account of capabilities falls prey to just this objection.

In my thesis I defend a version of the capability approach that is strictly anti-paternalist, and accommodates a variety of non-standard human experiences. I argue that this focus on autonomy need not be bought at the expense of individual well-being, and that encompassing atypical experiences need not be bought at the expense of accommodating more standard conceptions of the good. I advocate an understanding of capabilities as opportunities to exercise control in certain domains of our life, in contrast to Nussbaum’s construal of capabilities as opportunities to perform (or not) particular valuable functionings. I test my theory against a number of cases that have traditionally provide challenging for anti-paternalists, and theorists of justice more generally – including physical disability, conditions such as asexuality and Asperger’s Syndrome, and voluntary slavery and amputation – to demonstrate that my theory is better able to accommodate such unusual preferences and needs, without paternalism.

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# Introduction

There has long been a conflict at the heart of theories of distributive justice between a concern to allow individuals autonomy and avoid paternalism, on the one hand, and a concern to promote individual well-being, on the other. The capability approach attempts to tread this line by providing individuals with certain central capabilities or opportunities. These preserve a space for individual freedom and choice, yet ensure that all individuals have access to those things that are considered central for a flourishing life. The approach is intended to be universally applicable in order to avoid “turn[ing] things over to the free play of forces in a world situation in which the social forces affecting the lives of women, minorities and the poor are rarely benign”[[1]](#footnote-1), yet also intends to avoid the universal imposition of (a particular set of) Western values and norms. Achieving all of these, often conflicting, goals within a theory of justice is no easy task, but it is one that is worth pursuing.

There are number of competing concerns that must be borne in mind, then, when developing a theory of distributive justice. First, it is important that we adopt a critical stance toward some cultural practices. Failing to do so would undermine individual well-being, as well as being self-defeating: if our concern is toleration and autonomy, this is not best achieved by refusing to take a stand against practices that are intolerant and repressive. Second, if we are to advocate a theory that is universally applicable, and potentially critical of some cultural practices, it becomes particularly important that it is one that avoids paternalism. Specifically, that it avoids the paternalistic imposition of a specific conception of the good on groups who do not accept it, or for whom it is inappropriate. Capability theorists suggest that this can be achieved if what an approach provides universally, to all individuals, are opportunities. In this way we can criticise some practices and regimes (that do not provide these opportunities) yet nonetheless preserve a space for individuals to express their autonomy, choose their own conception of the good, and determine how their lives should go.

To realise its goals, therefore, a capability approach should devise universal norms that protect autonomy and avoid paternalism, yet also promote individual well-being. To achieve this, it is important not only that these norms are not paternalistically enforced on individuals, but that they are appropriate for their lives: provide them with something valuable and meaningful. However, the perfectionist roots of the capability approach have led to concerns being raised that it will be unable to successfully protect autonomy and promote inclusivity, and that it will, instead, justify paternalism. Specifically, I will argue that by relying on an independently defined account of the necessary features of a flourishing life, Martha Nussbaum's influential account of capabilities will be particularly vulnerable to this objection.

Yet despite problems with existing versions of the capability approach, I contend that its aims are better achieved within the capabilities framework than with alternative theories of distributive justice, such as welfarism or resourcism. I will, therefore, defend a version of the capability approach that is strictly anti-paternalist, and accommodates a variety of non-standard human experiences. I argue that this focus on autonomy need not be bought at the expense of individual well-being, and that encompassing atypical experiences need not be bought at the expense of accommodating more standard conceptions of the good.

I advocate an understanding of capabilities as opportunities to exercise control in certain domains of our life, in contrast to Nussbaum’s construal of capabilities as opportunities to perform (or not) particular valuable functionings. I test my theory against a number of cases that have traditionally proven challenging for anti-paternalists, and theorists of justice more generally, and which are often ignored, including physical disability, conditions such as asexuality and Asperger’s Syndrome, and voluntary slavery and amputation. In so doing, I demonstrate that my theory is better able to accommodate such unusual preferences and needs – can provide individuals who have them with entitlements that are meaningful to the way of life they lead – and can do so without paternalism.

Before outlining the structure of the thesis in which this argument is developed, it is worth providing a brief explanation of the key features of the capability approach, since it is this theory of distributive justice that I will primarily critique, modify, and ultimately defend. The approach was devised by Amartya Sen, and later developed by Martha Nussbaum, in response to perceived problems in Rawls’s resourcist approach, as well as the way such resourcism had been utilised as the basis for development policies. Sen broadly accepted Rawls’s critique of utilitarianism, and of welfarist theories more generally. According to welfarism, justice should be concerned with promoting individual welfare – maximising it, equalising it, ensuring a threshold level of it, or providing the opportunity for it (depending on the particular theory). Welfarist approaches are criticised for failing to take account of non-utility concerns, such as individual rights; for assuming that all “dimensions of value”[[2]](#footnote-2) are reducible to individual welfare; and for failing to take account of adaptive preferences, where individuals adjust their desires to their expectations, such that they may be satisfied with very little.[[3]](#footnote-3) Yet Sen argued that though Rawls resolved many of *these* problems with the theory of justice he developed in response, Rawls’s theory raised problems of its own.

Rawls proposed that individuals should be entitled to primary goods: goods that all individuals will want, whatever else they want, or all-purpose means to any (reasonable) conception of the good.[[4]](#footnote-4) Providing individuals with some allocation of primary goods is intended to allow them the freedom to form and pursue their own conception of the good. However, as Chapter 1 will consider, Sen argues that resourcists fail to appreciate that the connection between resources and actual substantive freedoms is only contingent, and influenced by a variety of factors other than an individual’s resource share (most notably, features of particular individuals). Sen’s most famous example to demonstrate this point draws on the relationship between food and nourishment. He argues that resourcists are concerned to ensure that individuals have access to some amount of a resource (food), and do not take account of whether this will actually provide an individual with the relevant opportunity to function (to be nourished) in the specific case. If being able to function is what matters, Sen insists, this should be our direct focus, and not the mere means to this end.

Thus, according to the capability approach individuals should be entitled, not to some amount of resources (or level of welfare), but to certain *central capabilities*. A capability can be defined as “the substantive freedom to achieve alternative functioning combinations”[[5]](#footnote-5), whilst functionings “reflect the various things a person may value doing or being”[[6]](#footnote-6). Functionings, then, are valuable activities or states of being, or as Sen puts it ‘doings and beings’. They may include, for example, being adequately nourished, being free from avoidable diseases, or having the social bases of self-respect. Since capabilities are freedoms or opportunities to achieve a functioning, possessing a capability does not mean the functioning must be exercised. What is important, or a concern of justice, are the functionings individuals are *able* to perform. For example, fasting and starving individuals have the same level of functioning, but different capability sets: the former’s capability set includes the opportunity to achieve adequate nourishment, whilst the latter’s does not. The capability approach can capture the intuition that only the starving individual’s lack of functioning is a concern of justice.

This, then, is the central underlying motivation behind the capability approach and a simple definition of the idea of functionings and capabilities. However, there are other ways in which the idea of ‘capabilities’ can be interpreted, and it is worth considering these. In particular, Nussbaum notes that there are three ways in which this idea can be understood.[[7]](#footnote-7) First, she uses *basic capabilities* to mean “the innate faculties of the person that make later development and training possible”[[8]](#footnote-8). For example, most infants possess the basic capabilities for practical reason and imagination, but cannot exercise them without development and education. Once these innate faculties have been cultivated, such that we possess the developed psychological traits necessary to actually perform a functioning, we can be said to have the *internal capability* to perform it. Yet even this is insufficient to ensure an individual is actually able to perform a functioning, since there may be external factors that prevent them from doing so. Only when an individual has an internal capability combined with the external conditions necessary for the exercise of the function can they be said to have a *combined capability*. This means that there is nothing that would prevent them from performing the relevant functioning.

An example may clarify this point. Consider what it would mean to have the combined capability for freedom of expression. First, an individual would require the basic capabilities for practical reasoning and imagination. These would then need to be developed into the internal capabilities to actually reason, use our imagination, and express the ideas we have formed. Finally, we must live in a society in which the necessary external conditions pertain such that we can make use of these abilities, such as secure rights to freedom of speech and freedom of the press, and the resources to make use of these rights. Unless otherwise specified, the term capability is understood to mean a combined capability: this is what capability theorists suggest that individuals should be entitled to. It is important to remember, then, that capabilities are *substantive* freedoms or opportunities. To have a capability does not mean that we have an undeveloped and unexercised potential ability, nor does it mean that we are not actively prevented from performing a particular activity. To have a capability requires that we possess both the physical and psychological prerequisites of performing a particular functioning. We would not say, then, that women have the capability to work simply because there is no law that prevents them from doing so. To have this capability, women must (amongst other things) be provided with education sufficient to be qualified to seek paid employment, and not be subject to social norms and stigmas that would inhibit them from looking for work.[[9]](#footnote-9)

Having clarified some of the central terms used by capability theorists, I will now elucidate the distinction between the two most influential versions of the capability approach: those of Amartya Sen and Martha Nussbaum. The most significant difference between them is their different methods of identifying which capabilities individuals should be entitled to, and the degree of specificity they are willing to commit to in identifying these capabilities. Whilst Nussbaum identifies a list of capabilities necessary for human flourishing, Sen is much less open to being drawn into specifics. Instead, he believes valuable capabilities should be identified through a process of public reasoning and discussion. He argues that this is “a way of extending the reach and reliability of valuations and of making them more robust”[[10]](#footnote-10).

Sen does not suggest that this process will lead us to arrive at a fixed list of capabilities, but that we can come to a “reasoned consensus”[[11]](#footnote-11) on certain key cases, within particular societies. Given that a central tenet of Sen’s philosophy is that a comparative approach is preferable to a transcendental one,[[12]](#footnote-12) he does not consider it problematic that we cannot reach agreement on “any identifiable perfectly just social arrangement”[[13]](#footnote-13). He insists, however, that this lack of specificity will not mean that his approach will merely defend the status quo. He points out that the roots of freedom, autonomy and democracy can be traced in many non-Western cultures,[[14]](#footnote-14) and that traditions can be challenged by those who partake in them. When subjected to reasoned scrutiny, he argues, “the value of keeping traditions pure and unpolluted is hard to sustain”[[15]](#footnote-15). When traditions that are incompatible with social and economic development *are* challenged, however, Sen argues that there is a “need for the people affected to participate in deciding what they want and what they have reason to accept”[[16]](#footnote-16).

Sen is optimistic, then, about “the ability of different people from different cultures to share many common values and to agree on some common commitments”[[17]](#footnote-17) if they engage in “unobstructed discussion”[[18]](#footnote-18). He argues that recognising “the relevance of our shared humanity in making the choices we face”[[19]](#footnote-19) is sufficient to avoid problematic cultural practices. Nussbaum is sceptical that this is true, however, and I am inclined to agree with her. Allowing the value and weighting of capabilities to be determined by those who are affected by the presence or lack of such opportunities is important, but this seems insufficient protection against repressive practices – “ancient religious taboos, the luxury of the pampered husband, ill health, ignorance, and death”[[20]](#footnote-20). Certainly, individuals should have a voice in determining distributive policies that will affect them, and as Nussbaum argues we must allow capabilities to be locally specified (what it means to possess a particular capability may differ under different circumstances). Yet a theory of justice should not allow particular societies to simply discard nourishment, or bodily integrity, or political participation as a concern of justice.

Insofar as Sen’s account departs from Nussbaum’s, therefore, my focus will be on Nussbaum’s version of the capability approach. Although specifying particularly valuable capabilities leaves Nussbaum vulnerable to some criticisms, an approach that fails to do so is even less defensible. The capability approach was motivated in large part by a concern for marginalised groups, often ignored by other distributive theories: welfarists fail to account for those who have adapted their preferences to their deprived circumstances; resourcists fail to account for those, such as the disabled or elderly, who require more resources to have the same opportunities as others. Unless we take a stand on the opportunities that all individuals are entitled to as a matter of justice, and are willing to make absolute rather than comparative judgements in cases of social injustice, the capability approach will do no better than these other theories at protecting these vulnerable groups.

Nussbaum, then, identifies ten particularly valuable, or ‘central’, capabilities. Chapter 3 will consider in greater detail her method of identifying these. Roughly, she does so by asking us to engage in a process of internal reflection considering the necessary features of a human life – the central functionings. We should then engage in discussion with others, and arrive at an overlapping consensus concerning those functionings that are central to flourishing. Given the central importance of autonomy Nussbaum argues that we should not be compelled to perform these functionings, and live a flourishing life, but be given the opportunity to perform them. These capabilities, then, comprise the various things we should be able to do or be to live (at a lower threshold) a human life, and (at a higher threshold) a *good* human life.[[21]](#footnote-21)

The list is designed to be open-ended and modest, and, as such, open to revision. Indeed, as Nussbaum notes, she has altered her list of capabilities in later works to include bodily integrity, the social bases of self-respect, and control over one’s political and material environment.[[22]](#footnote-22) Although Nussbaum’s list is somewhat lengthy, it is worth quoting it in full to provide a clear picture of what her approach entails.

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. *Bodily health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, imagination, and thought*. Being able to use the senses, to imagine, think, and reason – and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.
5. *Emotions.* Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. *Practical reason.* Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)
7. *Affiliation.* *(A)* Being able to live with and toward others, to recognize and show concern for other humans, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.) *(B)* Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.
8. *Other species.* Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. *Play.* Being able to laugh, to play, to enjoy recreational activities.
10. *Control over one's environment.* *(A) Political.* Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. *(B) Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.[[23]](#footnote-23)

As well as the contents of the list being open to revision, the individual items are open to both plural specification (allowing individuals to interpret the components according to individual taste), and local specification (allowing sensitivity to context in the promotion of a capability). Thus, although the list appears to be specified in some detail Nussbaum intends it to include a degree of flexibility. Yet Nussbaum insists that two of these capabilities have central, and seemingly un-negotiable, importance. These are practical reason and affiliation, which, Nussbaum argues, should “both organise and suffuse all the others, making their pursuit truly human”[[24]](#footnote-24). The rationale behind this is the Rawlsian idea that “choice is not pure spontaneity”[[25]](#footnote-25), and that planning, engagement with our choices, and interaction with others are necessary to ensure people are genuinely able to choose how to lead their lives, and which goods they wish to pursue.[[26]](#footnote-26)

It is important to emphasise that, as the name suggests, the capability approach is concerned to ensure that individuals have access to *capabilities*. Some object to this focus, as Chapter 4 will consider in more detail. Fleurbaey, for example, argues that “adopting the capability metric is not innocuous”[[27]](#footnote-27), since, in doing so, we lose information regarding the functionings individuals actually achieve. He argues that we should not be concerned only with providing individuals with the freedom to achieve functionings, but also with ensuring that they actually achieve functionings. His worry is that “once [individuals] are given the freedom to achieve, [they] lose any right to complain if they fail to achieve”[[28]](#footnote-28). Thus, that the capability approach is a poor guide to individuals’ utility or well-being, and will ignore the claims of those who have a low functioning achievement. Capabilities may be important, but “even those who like freedom a lot do also care in general about their achievements”[[29]](#footnote-29), and the capability approach does not capture this.

To understand why capability theorists tend to focus on capabilities rather than functionings, it is important to understand the intended purpose or role of the capability approach. Fleurbaey understands it to be a guide to individual well-being, or a measure of utility. If this were true then achieved functionings would certainly be important, yet this is not its goal. Rather, the capability approach aims to provide “the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires”[[30]](#footnote-30). The capability approach, then, is a political theory that aims to guide government policy, and determine what we are owed as a matter of justice. It is not intended to delineate every aspect of well-being, for which reason Fleurbaey’s criticisms lack purchase.[[31]](#footnote-31)

The capability approach is a theory of distributive justice, which argues that individuals are entitled to centrally valuable opportunities as a matter of justice. The provision of these opportunities protects individual well-being (against cultural practices that may undermine it) and provides individuals with a space to form and pursue a conception of the good. The approach aims to be sufficiently flexible to allow individuals with non-standard needs, preferences and experiences to form and pursue a conception of the good that is suitable for their lives. Further, because the opportunities it provides are substantive, it should give individuals the developed ability to pursue the goals they set themselves. I believe that these are objectives that any theory of distributive justice should aim to achieve, yet I also contend that they are not fully met by current formulations of the capability approach. As such, my thesis will develop and defend a version of the capability approach that is both anti-paternalist and universally applicable, that promotes individual well-being and protects autonomy, and which is appropriate for many different sorts of life.

I will begin, in Chapter 1, by defending the capability approach in general as a plausible answer to the ‘equality of what?’ question or, in other words, as an appropriate metric for distributive justice. As mentioned, Sen developed the capability approach in response to perceived problems with the existing answers to this question – welfarism and resourcism. However, Thomas Pogge has recently responded that the capability approach is not as plausible as its proponents suggest. On the contrary, he argues that the capability approach will place too heavy a burden on the well-endowed in its attempt to provide substantive opportunities for all individuals, regardless of the resources they require to have these opportunities, or the reasons why they need additional resources. Pogge argues that resourcism is better placed to guide a theory of distributive justice that is neither over-demanding of the well-endowed nor (as capability theorists suggest of resourcism) unable to respond to individuals who require more resources than a ‘standard’ individual, such as the disabled or the elderly. I will assess Pogge’s response and argue that the capability approach will not prove excessively demanding. Further, that in attempting to modify resourcism to respond to non-standard needs Pogge’s approach stands in danger of collapsing into the capability approach, and so being no less demanding.

Having provided reason to think that we should adopt a capability approach to distributive justice, the next two chapters will consider how this approach should be specified. In particular, I will argue that it is important that the capability approach (and, indeed, any theory of distributive justice) should be anti-paternalist. In Chapter 2 I will consider the form such anti-paternalism should take, and argue that adopting an anti-paternalist position need not be detrimental to individual well-being. It is often assumed that if we eschew paternalist interference, and allow individuals to make decisions about their own life, however ‘bad’ these decisions are, then well-being will inevitably suffer. For this reason theorists often suggest that we should reach a compromise position that allows individuals some degree of autonomy, but also permits some interference when a decision appears to be particularly harmful. I will argue that such a compromise is unnecessary and that we should, instead, avoid all paternalist interference.

The chapter begins by providing a definition of paternalism, drawing on Shiffrin’s contention that the distinctive insult of paternalism does not only occur in cases in which we interfere to prevent an individual from harming themselves, or for the sake of their own best interests. Rather, I will show that it is paternalist to intervene in any domain in which an agent has legitimate control, regardless of whether they are in danger of harming themselves. I then develop an account of anti-paternalism that corresponds to this definition of paternalism. Specifically, I defend a form of soft paternalism. Soft paternalism contends that we can intervene when an agent harms themselves involuntarily, but cannot interfere with their voluntary choices. However, if paternalism is no longer restricted to cases related to harm, then soft paternalism will not require simply that individuals do not *harm* themselves involuntarily, but that none of the choices over which they have legitimate control are performed involuntarily.[[32]](#footnote-32)

This account is subject to two competing objections. First, like all anti-paternalist accounts it can be attacked for failing to safeguard individual well-being by refusing to intervene in individuals’ voluntary choices, even when these are harmful. In other words, it will justify too little intervention. Second, that by insisting that all choices over which we have legitimate control should be (procedurally) voluntary it will require that we intervene too often to ensure that choices meet the procedural conditions of voluntariness. I will argue that the version of anti-paternalism I defend will neither require an excessive degree of intervention, nor fail to protect individual well-being (even in cases in which individuals seem to make seriously harmful choices, such as opting for slavery or amputation).

We therefore have reason to think that a capability approach should be anti-paternalist in this sense. However, I argue in Chapter 3 that Nussbaum’s version of the capability approach is not robustly anti-paternalist in the attitudes and policies it advocates. By identifying her list of central capabilities from a list of functionings that are central to a flourishing life, Nussbaum does not allow individuals freedom to pursue their own conception of the good, but may paternalistically force individuals to make the ‘right’ choices. Further, this underlying conception of human flourishing means that Nussbaum’s approach cannot successfully apply to individuals with needs and preferences that do not conform to her conception of a good life. Thus, as well as failing to be appropriately anti-paternalist, the approach fails to apply universally, as she intends.

In light of these problems, I offer a revised formulation of the capability approach, which is genuinely anti-paternalist as well as more universalist than Nussbaum’s own. I argue that capabilities should be understood as opportunities to control certain domains of our life, rather than opportunities to perform (or not) certain functionings. This allows individuals to exert genuine control over central parts of their lives, regardless of the content of their choices, and without the paternalistic insult of having some choices judged to be ‘wrong’. It also provides individuals who have non-standard needs and preferences – who cannot value or perform one of the functionings Nussbaum considers central – with something valuable, and which it makes sense to say justice requires that we provide them. It would, by contrast, be nonsensical to insist (as Nussbaum must) that justice requires that we provide individuals with opportunities (to function) which they do not value and cannot exercise.

Having motivated and developed this version of the capability approach, it should now be defended. In the final two chapters, therefore, I will consider some common criticisms of the capability approach and argue that my account is not susceptible to them. First, in Chapter 4, I consider G.A. Cohen’s influential criticism of the capability approach for focussing on individuals’ freedom – their capability to control their own lives – rather than how well individuals’ lives actually go. He argues that this focus on freedom renders its view of well-being excessively ‘athletic’, ignoring benefits achieved passively, without the active involvement of the benefitted individual.

I argue that Cohen’s criticisms are based on a fundamental misunderstanding of the purpose of the capability approach, and, more broadly, of what it is we take the ‘equality of what?’ question to be asking. As mentioned above, the capability approach is not intended to be a comprehensive account of well-being, but, instead, to act as a guide to egalitarian public policy. Interpreted in this way, the capability approach’s focus on individual freedom and control is justified: in the public domain it is important not just that individuals receive ‘benefits’ but that they participate in their achievement. Further, that it is important that they have the substantive freedom to control how their life goes not just if they make choices widely agreed to be valuable (as on Nussbaum’s approach), but regardless of the content of their choice. Thus, that my approach is a better guide to policy than Nussbaum’s. I also argue that focussing on capabilities or ‘athletic freedom’ can provide a justification for democratic decision making in cases in which groups will be affected by a choice. Whilst the capability approach may have failings as an account of well-being, therefore, it succeeds in its role as a policy guide.

Finally, in Chapter 5 I will respond to critics who attack the capability approach for ignoring preferences that are considered unreliably adaptive. As mentioned, Sen argued for the superiority of the capability approach over welfarism in part because it has the capacity to ignore adaptive preferences: it does not suggest that individuals who learn to be satisfied with deprivation are entitled to nothing further as a matter of justice. However, though this move initially seems plausible, worries have been raised that undermining the reliability of individuals’ apparently strongly held preferences can promote the further exclusion of already marginalised groups. I aim to avoid paternalism because I believe that it is important that we treat individuals, the choices they make and preferences they have, with the appropriate respect. I would contend that to hold this view consistently does not require merely that we avoid intervening. Respecting individuals as agents will also require that we take proper account of their preferences, and should not ignore them (in formulating our theory of justice) unless we are justified in doing so.

I will focus on Elizabeth Barnes’s criticisms of the capability approach for ignoring disabled people’s preferences as adaptive, which, she argues, is unjustified, insulting and potentially paternalistic. I will argue there is an ambiguity between two uses of the term ‘adaptive preferences’, and that we must distinguish adaptations that are an unreliable guide to individual *well-being*, from those that are an unreliable source of evidence for a theory of *justice*. To be adaptive in the latter sense is not insulting, since it does not imply a failure of rational agency. Further, I will argue that given the diverse experiences of disability, a single analysis of ‘disabled people’s preferences’ will not suffice. Instead we should adopt a more nuanced approach, according to which we can justifiably diagnose *some* preferences of *some* disabled people as adaptive. However, because these preferences are only deemed adaptive in the latter sense – as an unreliable guide to distributive justice, not to the individuals’ best interests – this conclusion need be neither insulting nor paternalistic to disabled individuals who prefer their disabled life.

I aim to show, then, that it is possible to develop an approach to distributive justice that can respect autonomy, accommodate unusual needs and preferences, and will not undermine well-being, and these goals can best be achieved with a version of the capability approach.

**Capabilities or Resources?**

**Choosing a Metric for Distributive Justice**

**1. Introduction**

If we accept that ‘we are all egalitarians now’, then the central remaining question for theorists of distributive justice is – in what sense should we be equal? Or, as Amartya Sen famously put it in his 1979 Tanner Lecture, if our aim is equality, then ‘equality of what’? Sen suggested we should not be concerned with the goods we have (resourcism), nor the utility they give us (welfarism), but with the functionings that goods give us the capability to perform (the capability approach). Whilst it is easy to caricature these three positions, and make the differences between them apparent, more plausible versions lie much closer together. All three approaches are motivated by a concern to secure individual well-being, and aim to achieve it through the redistribution of resources. They differ only in what it is this redistribution aims to bring about: some level of individual welfare, resource holdings, or opportunities.

Ever since Rawls mounted his convincing critique of utilitarianism, welfarist theories have fallen somewhat out of favour.[[33]](#footnote-33) I will, therefore, focus on the dispute between resourcism and the capability approach and, in particular, the Rawlsian version of resourcism outlined by Thomas Pogge. The capability approach was devised in response to a perceived problem in Rawls’s resourcism. Proponents of the capability approach argue that by focussing on the goods individuals have access to resourcists fail to take account of individuals’ different abilities to make use of these goods – to convert these resources into opportunities – their ‘conversion capacities’. Sen famously uses the example of food and nourishment, pointing out that focussing on how much food an individual has does not give us reliable information regarding whether they are properly nourished. A pregnant woman, someone who is very tall, or who has a high metabolism will all require more food than the average person to have the opportunity to be nourished.

Sen’s suggestion is that our focus should be on whether people are able to achieve certain functionings (such as nourishment), and not whether they have some amount of the resource (food) that is a means to its achievement. However, Pogge objects that providing *all* individuals with such opportunities is far too demanding and that we should, instead, provide for ‘standard’ rather than specific needs. Thus, we are entitled to the food a ‘standard’ individual needs to be nourished, not the food *we* need to be nourished, should our needs deviate from this standard. Pogge insists that he can formulate a definition of ‘standard’ that is, on the one hand, sufficiently flexible that it does not leave his approach hopelessly inadequate at providing for individuals’ real needs without, on the other hand, being guilty of the over-demandingness of which he accuses the capability approach.

I will argue that once Pogge has offered his modification of what constitutes standard needs there is little difference between his account and capability theorists’. Therefore, if the capability approach is too demanding, so is Pogge’s account. Further, that although both approaches provide for the needy to the same (or almost the same) degree, the justification that underlies resourcist compensation depends on drawing a distinction between the deserving and undeserving needy, which is unjustified and insulting. Thus, the only distinctive element of Pogge’s approach (its justification) renders it inferior to the capability approach.

I will begin by outlining the similarities and differences between the capability approach and both simple, and more complex, versions of resourcism (§2). Next, I will consider the ways in which Pogge suggests resourcism can accommodate individual variation and specific needs, and argue that insofar as these arguments are successful they represent a collapse into a capability approach (§3). Finally, I will demonstrate that the capability approach is not over-demanding in the way Pogge suggests – to provide equal capabilities we must make unreasonable demands of the well-endowed – and that, in fact, the redistributive policies it would recommend are more plausible than resourcism’s (§4).

**2. Resources and Capabilities**

Before discussing the differences between resourcism and the capability approach, we should consider their similarities. Both approaches (at least in the forms I consider) agree on what should be controlled by the state (resources), and on the ultimate end of just distribution (providing individuals with valuable opportunities). To reject resourcism is not to reject the idea that it is resource distribution that should be directly regulated by the state. Indeed, there is no plausible alternative: we can hardly control individuals’ conversion capacities directly. Moreover, rejecting the capability approach does not mean rejecting the idea that resources are only valuable insofar as they enable individuals to perform certain functionings. It would be equally implausible to suggest resourcists must determine the value of resources without considering their usefulness. More specifically, their shared goal is to promote individual well-being, where this involves providing a space in which individuals can form and pursue a conception of the good.[[34]](#footnote-34)

Thus, capability theorists agree only resources can be feasibly distributed, and resourcists accept that resources are valuable only as a means to functioning. The relationship between their means and ends can be represented as follows:

Resources

↓

Opportunities to function (capabilities)

↓

Ability to achieve personal goals

*Figure 1: Relationship between the means and ends of redistribution*

The two approaches differ “in the degree to which their principles of justice are sensitive to internal individual differences, and environmental features and social norms that interact with these differences”[[35]](#footnote-35). Resources are valuable only insofar as they enable functionings – food would not have value if we did not need it to be nourished – but resourcists do not focus on whether functionings are enabled in a particular case. Having identified the valuable resources on the basis of the functionings they enable, they then define “individual shares…as bundles of goods or resources needed by human beings in general, *without reference to the natural diversity among them*”[[36]](#footnote-36). They focus, then, on the first tier of Figure 1, without reference to the effect it has on the lower two tiers in a particular case. By contrast, the capability approach focuses on the opportunities particular individuals have (the middle tier), and vary their allocation of resources depending on what they need to perform a particular functioning.

*2.1 What’s Special about the Capability Approach?*

An account of the capability approach has been given in the Introduction, but it is worth briefly reiterating the two essential features of the capability approach, before providing an account of resourcism. First, the capability approach deems functionings to be the correct informational focus: what matters are the activities or states of being resources allow us to perform, not the resources themselves or the welfare they give us. Its focus, then, is “on the *state* of the person, distinguishing it both from the *commodities* that help generate that state, and from the *utilities* generated by the state”[[37]](#footnote-37). Second, the approach focuses on freedom or opportunities: the *capability* to perform a functioning is what ought to be measured and promoted, not its actual achievement. Furthermore, this should be a substantive opportunity, and not just a formal freedom or lack of constraint. In other words, capability theorists are concerned “not only [with] the kind of lives we manage to lead, but also [with] the freedom that we actually have to choose between different styles and ways of living”[[38]](#footnote-38).

It is possible to separate these features, and use them in other theories, but both are essential to the capability approach. Cohen, for example, agrees with the concern for the functionings (rather than resources or utility) available to an individual, but disapproves of the focus on freedom – on the functionings we have the *capability* to perform. He argues that achieving functionings passively, without the active involvement of the benefitted agent is also valuable. As such, our focus should not solely be on providing individuals with opportunities to achieve these functionings for themselves.[[39]](#footnote-39) Other theorists agree with the focus on our freedom or opportunity, but not its conjunction with functionings. Arneson, for example, has advocated our having an equal opportunity for welfare, emphasising our freedom, and so responsibility, to achieve (or fail to achieve) for ourselves a high level of welfare. Pogge, too, argues that the focus on freedom need not be a unique feature of the capability approach. A resourcist can also embrace this idea, and consider the goods people *really can* – rather than formally can, or do – consume.

Pogge argues that the only distinctive feature of the capability approach is its focus on functionings, so it could appropriately be renamed the ‘functioning approach’.[[40]](#footnote-40) This seems evidently false, however. Promoting substantive opportunities may not be *exclusive* to the capability approach, but Pogge is wrong to insist it is inessential to it. For a capability theorist, unlike a resourcist or welfarist, the idea of substantive opportunities is inseparable from the approach. If we were to separate it we would be left with Cohen’s ‘midfare’, which may be a coherent theory, but is not a capability approach, and lacks much that motivates capability theorists to adopt it.[[41]](#footnote-41)

*2.2 Simple Resourcism*

In the simplest terms, a resourcist assesses the justice of an institutional order on the basis of the goods or commodities a person has access to.[[42]](#footnote-42) The complexity of a resourcist theory is largely determined by what they consider to constitute the relevant valuable resources. In its least complicated form, ‘resources’ should be taken to mean income or wealth. This is not a common view in political theory, however, though it is used somewhat more widely by economists. A slightly more developed (and more plausible) version would consider resources to be material goods of any sort. This would permit the inclusion of public goods, such as access to public spaces or public transport, which could not be readily converted into a monetary value, or seen as solely in the possession of an individual. Considering either version, the difference from the capability approach is clear: by merely ensuring individuals have access to these material goods, no account is taken of the opportunities these goods will provide in particular cases.

Yet more complex versions of resourcism conceive of resources in a wider sense. For example, Dworkin argues that as well as such material ‘external’ resources, we should also see individuals’ native endowments as (‘internal’) resources. Thus, a resourcist redistribution should take account of differences in native talents and predispositions, as well as holdings of material goods.[[43]](#footnote-43) Since Dworkin’s version of resourcism adopts much of what is distinctive about the capability approach, I will not consider it as a paradigm instance of resourcism, but instead focus on Pogge’s version of complex resourcism, which is derived from Rawls’s account.

*2.3 Pogge’s Rawlsian Resourcism*

Pogge, like Rawls, widens the concept of resources to include even non-material goods, such as the social bases of self-respect, being able to plan one’s own life, and human rights.[[44]](#footnote-44) Since such items seem more like activities – or functionings – than resources as usually understood, and since Pogge has argued that the focus on freedom or capabilities could be adopted by resourcists, the dividing line between the two approaches starts to look unclear. It seems that functionings – such as, being nourished, forming emotional attachments, participating in political choices and planning one’s own life – could be deemed resources, on Pogge’s definition. Further, as discussed, both approaches agree on the ultimate aim of distributive justice (providing individuals with valuable opportunities) and that this should be achieved through the reallocation of resources. What, then, distinguishes the approaches?

The approaches differ in their treatment of individual differences in ‘conversion capacities’: the “personal characteristics that govern the conversion of primary goods into the person’s ability to promote her ends”[[45]](#footnote-45). We have a low conversion capacity if we are an inefficient converter of resources into functionings. For example, people who are pregnant, tall, or have a high metabolism have a low conversion capacity with regards to nourishment, since they do not efficiently convert the resource (food) into the functioning (nourishment). They will, therefore, require more of the resource than most people to achieve the functioning.

Rawlsian resourcists argue that our conversion capacities should not determine our resource allocation. Thus, Pogge insists that the distribution of resources should not be determined by the functionings they enable in a *particular* case, but by what they would, counterfactually, enable ‘standard’ or ‘average’ individuals to do. It is this central contention that lead to the development of the capability approach, with Sen’s insistence that we *should* be concerned with the opportunities actually open to people. If we value the opportunity to perform functionings, he argues, we must ensure individuals have these opportunities, regardless of how many resources this requires in particular cases. This response has struck many as plausible: if we care about nourishment, for example, why not ensure individuals are actually nourished?

The intuitive appeal of this simple idea has led to the growing popularity of the capability approach, but Pogge has struck back against this. He argues that whilst it may be highly desirable for every individual to have all of the central capabilities, to ensure this is to go beyond the scope of distributive justice. We may have good humanitarian reasons to secure universal access to the central capabilities, but to insist that this is required as a matter of justice is to place too great a burden on the well-endowed, who must provide for those with low conversion capacities. The capability approach, he argues, fails to take into consideration the demands their theory will make on those with *high* conversion capacities.

Further, Pogge argues that the capability approach unjustifiably grounds our duties of justice in individual need *per se*, and fails to distinguish these from those particular needs for which we bear responsibility, and so are obliged to mitigate. Pogge argues that duties of justice arise from entering cooperative schemes. Thus, it is not *any* non-standard needs we have to a duty to meet, but those that exist only as a consequence of past injustices. Finally, Pogge suggests that on a more expansive definition of ‘standard’ needs, resourcists will accommodate more individuals than capability theorists suggest and in this way hopes to mitigate the more implausible conclusions of resourcism.

In summary, the central dispute is that capability theorists argue that resourcists do not accommodate individual diversity, whilst resourcists insist that attempting to accommodate this diversity renders the capability approach too demanding, and unjustifiably expands the scope of justice.

*2.4 Means and Ends*

It is worth considering this dispute in a little more detail to bring out the difference more clearly. Sen frames the problem with the resourcist focus on ‘general purpose’ primary goods, as a matter of placing the focus on the *means*, and ignoring important information relevant to whether the *end* can actually be achieved. However, Pogge argues that capability theorists are guilty of a similar error, since they too focus on a means to the end they ultimately advocate: “opportunities to fulfil one’s particular goals”[[46]](#footnote-46). Just as resources only have value insofar as they enable us to perform particular functionings, so these functionings only have value insofar as they allow individuals to pursue particular goals.[[47]](#footnote-47) Food would not have value if it did not secure nourishment, and nourishment would not have value if it were not central to our conception of a flourishing human life.

Capabilities, then, are not (or not only) an end in themselves. It seems, therefore, that if focussing on securing means rather than ends is problematic for resourcism, then the same argument can be deployed against the capability approach. Both approaches are concerned to allow individuals to form and pursue a conception of the good, but being able to do so “depends not only on our capabilities but also on the particular goals each of us has”[[48]](#footnote-48). By focussing on “each person’s ability to promote *typical or standard human ends*”[[49]](#footnote-49) the capability approach fails to consider whether the capabilities they consider central are actually valuable in individuals’ lives, and actually allow them to pursue their goals. For example, an individual may be given the opportunity to ‘play’, but there is no guarantee that they will be provided with access to the specific leisure activity they most desire or, indeed, that they will value this opportunity at all. Thus, Pogge suggests, the capability approach is no more able to allow individuals to achieve their ultimate goals than resourcism.

An example may clarify this point. Consider an individual whose personal goal is to read *War and Peace*. A simple resourcist would only provide access to books without considering the ability of individuals to make use of them. A more sophisticated resourcist may consider education to be a resource too, and so provide access to the education a standard individual would require. They would not, however, take account of whether this would enable a particular individual to read: a standard education may not be sufficient for someone with dyslexia, for example. A capability theorist, however, would promote the opportunity to read more generally, and so would provide each individual with however many resources this would require, depending on his individual conversion capacities. Yet no account would be taken of whether this more general opportunity would actually provide him with the specific opportunity to achieve his particular personal goal: *War and Peace* may not be available to purchase, or in libraries.

Pogge’s criticism here is misguided, but is worth raising since it allows us to clarify what it is the capability approach (and, indeed, resourcism) is aiming to do. As Figure 1 laid out, both approaches aim to allow individuals to have the opportunity to pursue their individual goals. However, they have both rejected preference-satisfaction welfarism, according to which the purpose of a theory of justice is (roughly) to maximise or equalise individuals’ ability to achieve these goals. Both wish to reject such a subjectivist approach, and use an objective metric that “defines the measure of justice in terms of objective states of individuals or their possessions”[[50]](#footnote-50). Both approaches, therefore, are not concerned to define and maximise individual welfare, but to provide individuals with what they consider they are entitled to as a matter of justice.

The capability approach contends that we are entitled to certain central opportunities, which are identified on the basis of an overlapping consensus on the necessary features of a flourishing human life. Certainly, not every individual will be able to achieve every one of their goals, but this is not a problem for the approach. It would be an implausible theory of justice (and one Pogge himself would surely reject) that would demand this. Rather, individuals are entitled to capabilities in central areas of their life, which will leave open to them an acceptable range of opportunities. Within this range, they can form and pursue their own conception of the good, though some conceptions may not be open to them. It is not an objection to point out that the capability approach enables individuals to pursue only a sub-set of opportunities, since this is its intention.[[51]](#footnote-51)

The resourcist’s problem is more serious because they do not simply fail to ensure that every individual has the opportunity to achieve every possible goal, but may fail to ensure that individuals have the opportunity to pursue *any* goals. Thus, the means/end objection to resourcism is not that individuals cannot pursue some particular conception of the good, but that they are not in the position to form and pursue a conception of the good at all. Returning to the example of nourishment, if resources are provided in the amounts a standard individual requires, and this is insufficient for an individual to achieve the functioning given their low conversion capacity, they simply will not be able to be properly nourished. Depending on how far the standard allocation falls short of their actual needs, this could mean their options are drastically limited. Why, then, would someone choose to be a resourcist?

*2.5 Why Be Resourcist?*

What motivates resourcists to abandon sensitivity to individual difference? This in part seems to stem from a concern to meet Pogge’s version of an ‘anonymity condition’: the idea that arbitrary personal characteristics should not affect an individual’s chance of obtaining a position, nor how well they are paid for it, nor how heavily they are taxed.[[52]](#footnote-52) That we should, for example, be given equal remuneration for equal work regardless of, say, one’s underlying health and so need for medical support. In other words, our resource allocation should be anonymous with regards to particular features of ourselves (§2.5.1). Relatedly, Pogge insists that needs *per se* do not ground duties of justice: we are not entitled to have all our needs met. Thus, we must distinguish those causes of need to which we have a duty to respond, from those that we do not (§2.5.2).

2.5.1 The Anonymity Condition

The idea of an anonymity condition – that we are entitled to equal treatment, regardless of arbitrary features – does not give us a reason to be a resourcist. If we *presuppose* a resourcist view, then the anonymity condition will lead us to conclude that our resource share should not be affected by our arbitrary features, and it would be unfair if the well-endowed (with high conversion capacities) had fewer resources. However, if we presuppose a capability approach, to adopt an anonymity condition would mean individuals should be entitled to *capabilities* regardless of arbitrary features, like talents that currently command a high market value.[[53]](#footnote-53)

Thus, although capability theorists may consider that those who have high conversion capacities are entitled to fewer resources, this only comprises requiring ‘too much of the well-endowed’, if we define this ‘too much’ in resourcist terms. Through the lens of the capability approach, resourcism mistreats the poorly-endowed, since it denies them access to central capabilities, and allows arbitrary internal features to determine whether their needs are met.

To adopt an anonymity condition, then, does nothing to resolve the dispute between capability theorists and resourcists, given the different ways in which ‘equal treatment, regardless of arbitrary features’ can be cashed out. This can plausibly mean either equal access to resources, or equal access to central capabilities. The use of an anonymity condition, therefore, simply begs the question. Independent and positive arguments are needed to show that the redistribution advocated by either approach is unfair or arbitrary.

2.5.2 The Grounds of Justice: Needs or Cooperation?

One such positive argument, which would explain Pogge’s rejection of the capability approach, is his adoption of an interactional model of justice. On this view, our duties of justice would depend on our relevant interactions with other individuals and not their needs *per se*. Thus, the mere fact that an individual needs a resource is not sufficient to entitle them to its being provided. For this reason, Pogge would be reluctant to accept capability theorists’ assertion that *all* individuals are entitled to the resources they need to perform the central capabilities, regardless of who they are, whether we interact with them, and of what caused their conversion capacity to be lower in a particular domain.

Interactional accounts are often used to argue that we owe more to our fellow citizens – with whom we interact, politically, in a fair scheme of cooperation – than we do to the citizens of other countries.[[54]](#footnote-54) Indeed, it may be thought that justice does not operate at all beyond national borders, and any help we provide to deprived non-nationals is merely an act of charity. In this way they reject the claims of cosmopolitanism: that we owe duties of justice to all who possess the requisite psychological features, wherever they live and, on some theories, whether or not they are human.

Given Pogge’s commitment to cosmopolitanism it may seem that he would wish to reject such an interactional account. However, Pogge offers a defence of cosmopolitanism that draws on the relevance of interaction for justice. He argues that there exists an international institutional order, which means interaction already occurs on a global scale. The international institutional order has a pervasive influence over our lives, setting ground rules that determine individuals’ option sets, as well as their interests, desires, and abilities.[[55]](#footnote-55) Moreover, this is a scheme that “produces extreme poverty on a massive scale…[and is] imposed not by fate or nature but by other, more advantaged participants, ourselves included”[[56]](#footnote-56).

Consequently, Pogge insists that the participants in this order have “a shared collective moral responsibility for its terms”[[57]](#footnote-57), which gives them “a sharp and strong negative duty not to collaborate in the imposition of an unjust institutional scheme”[[58]](#footnote-58). Even if we did not play a direct role in designing the ground rules, or if the rules were not designed to have this outcome, the fact that such deprivation is the foreseeable consequence of these rules, that we participate in the order that upholds them, and that we are in a position to alter them, renders us responsible. We are all responsible for the injustice perpetuated by the current international institutional order, therefore, and have a strong duty to change it.

Although this generates a ‘global duty’, insofar as the effects of the institutional order are *international*, this does not generate a *universal* duty to accommodate every individual need. Our duties arise from our *interaction* with other individuals (our shared participation in the institutional order), and specifically from harms caused by *our agency* (through this participation), as opposed to naturally occurring deprivation. Thus, Pogge’s account identifies some cases in which resourcists will provide for non-standard needs: they should compensate for individual differences in conversion capacities that are the result of the (unjust) international institutional order. Capability theorists, by contrast, do not distinguish between individuals’ needs on the basis of their cause. Yet, although Pogge tries to limit the non-standard needs he responds to, and so the demandingness of his approach, I will suggest that his own approach will ultimately be as demanding as – and, indeed, collapse into – the capability approach in its most plausible form.

**3. Responding to Variation**

To avoid the indefinite outlay of resources in pursuit of providing equal capabilities for all individuals, then, Pogge wishes to limit the degree to which his theory will respond to individual needs. He argues, instead, that individuals should be provided with a share of resources that is blind to their individual differences (meeting his anonymity condition). However, he argues, too, that this nonetheless allows resourcism to accommodate all differences in individual conversion capacities that *ought* to be the concern of justice, and that it is not as insensitive to individuals’ needs as capability theorists suggest.

Following Sen, Pogge notes that our resource share is not the only influence on our conversion capacities, and so eventual quality of life. Personal heterogeneities will affect our ability to function, as well as other factors, including intra-family distribution, one’s relational perspective, social climate, and environmental diversity. Although intra-family distribution and relative deprivation are important concerns, they do not interestingly distinguish the two approaches, so I will not discuss them here.[[59]](#footnote-59) More interesting, is the comparative ability of resourcism and the capability approach to respond to variations in the social climate and environment (which can be loosely grouped as ‘external influences’), as well as their response to personal heterogeneities, which crucially distinguished the approaches. Factoring in these other influences warrants a slight revision to Figure 1:

Resources Personal External

heterogeneities influences

↓ ↓ ↓

Opportunities to function (capabilities)

↓

Ability to achieve personal goals

*Figure 2: Influences on Individual Conversion Capacities*

Pogge argues that his concern to provide for standard or typical needs can be interpreted to include a concern for those external influences or personal heterogeneities with a uniform effect (§3.1). Further, that responding to past injustices will give him the scope to respond to a wide range of personal heterogeneities: all those that were culpably caused (most often by the international institutional order) (§3.2). In this way he hopes to respond to the claim that resourcism will provide a resource bundle unsuitable or insufficient for most actual lives. I will assess this response.

*3.1 Standard Variation, Individual Variation*

Pogge is keen to emphasise that providing for standard needs includes providing for needs that individuals *possess* to differing degrees, but are *caused* by influences that would affect all individuals in a relatively uniform way. For example, it is ‘standard’ to require warm clothes or additional shelter in a cold climate, though not everyone in the world actually lives in a cold climate. Some such needs arise as the result of external influences on individuals’ ability to function: for example social conditions such as public education and health policies, pollution and crime; or environmental factors, such as climate or the prevalence of disease (§3.1.1).[[60]](#footnote-60) Others arise as the result of internal factors with a relatively uniform influence, such as age (§3.1.2).[[61]](#footnote-61) I will argue that Pogge lacks justification to accommodate these needs and not others.

3.1.1 Society and the Environment

At first sight, social climate and environmental diversity do not appear to be what we would intuitively class as resources. As outlined in Figure 2, they seem to be a further, independent influence on our ability to perform particular functionings. For example, ‘being warm’ requires environmental factors such as a temperate climate, and/or resources such as appropriate shelter and warm clothing; and ‘bodily health’ requires societal factors, such as a public health service, environmental ones, like a disease-free environment, *and* resources such as medicines. However, given that resources are valued on the basis that they allow us to perform valuable functionings, and many functionings have social and environmental prerequisites, we may wish to allow Pogge to expand his definition of resources to include them.

If this is the case then resourcists will consider individuals entitled to a share of social and environmental resources that would enable the standard individual to function. The most charitable interpretation would be to assume that a variety of such resources can be seen as equivalent and provided in combination to ensure the functioning in question is enabled (for the standard individual). In pursuit of the functioning of being healthy, for example, the resourcist would allow any combination of appropriately valuable resources – a public health service, disease-free environment, immunisation programmes, and so on – that can reasonably be provided. Resourcists could hardly insist a *particular* (social or environmental) good must be provided to all individuals regardless of availability.

On this view, resourcists would provide individuals with a resource package tailored to their particular environment. If an individual lacks the resource of a ‘temperate climate’, for example, they would be entitled to a larger ‘warm clothes’ bundle. But is this still resourcism? Resourcists no longer simply use the notion of valuable functionings to identify valuable resources, and then concern themselves solely with the distribution of resources as general purpose means to such functionings. Once we acknowledge the influence our social and environmental context will have on our ability to function, and the interchangeable and interactive nature of resources on Pogge’s definition, the situation becomes more complicated. We are no longer simply entitled to the standard allocation of ‘food’, but to the appropriate allocation given our other resources and environmental factors. We might be entitled to more, or different (more fatty?) food in a cold climate, for example.

The initial (and ostensibly compelling) simplicity of the resourcist approach is lost, therefore. The ‘standard’ bundle of resources individuals are entitled to is no longer very standard, but must be adjusted to their location, social circumstances, and the interactions between other resources in their bundle (we do not need both a vaccine and a cure for one disease, for example). Moreover, this concern to adjust the bundle to accommodate different circumstances begs the question of why we should be concerned to ensure individuals can function regardless of particular social and environmental circumstances, but are not so concerned to ensure they function regardless of their more particular circumstances and needs. Why does living in an environment in which disease is prevalent entitle us to more healthcare resources (since a standard individual would require them), whilst an *individual’s* susceptibility to disease does not? If the effect on our conversion capacities means external influences should count as resources, why can the same not be said of personal heterogeneities?

These concerns can be brought out by considering an example, discussed by Pogge, of an individual who has a choice of working in San Diego for $900 a month or Alaska for $910 a month. Pogge notes that the individual in San Diego will clearly be better off, despite their superficially lower income, due to the additional cost of warm clothes, heating and so on that will be necessary in Alaska. He argues that resourcists can accommodate this intuition, since “[i]n measuring resources persons have access to, one must subtract resources standardly needed to enjoy such access”[[62]](#footnote-62). The real wage of the Alaskan, therefore, should be adjusted to take account of the various other costs they must bear: warm clothes, shelter, heating and so on.[[63]](#footnote-63)

Whilst Pogge is willing to adjust the real wage on the basis of what an *average* individual would need to be warm, capability theorists would be more concerned with what *particular* individuals would need to be able to function. By focussing on standard needs it is likely that, on the resourcist view, some individuals will be left unable to function. It is true that if we are exposed to a cold climate then in nearly every case we will require warm clothes, and will be unable to function normally without them. However, if someone is particularly susceptible to the cold they may need more warm clothes than the average – in either Alaska or San Diego – and be unable to function without them.

A resourcist will only accommodate needs that arise from particular circumstances if these needs would *standardly* arise from these circumstances.[[64]](#footnote-64) Consequently influences on conversion capacities that only some suffer, such as being born disabled, will not warrant a differential bundle. Neither will influences to which we are all exposed, but differently affected, such as a disease to which all are at risk though only some succumb. Being born in an area in which malaria is prevalent, for example, will increase the likelihood of our requiring anti-malarial drugs, but is this sufficient to say this is ‘standard need’ and should be included in the standard resource bundle for individuals living here? Further, why should such needs be any more a concern of justice than the needs of individuals who contract malaria despite living in a low-risk environment? Similar questions can be raised against Pogge’s attempts to accommodate *internal* influences with a uniform affect, such as age, which I will now consider.

3.1.2 Age Related Difference

Initially it would seem that the focus on standard needs mean a resourcist metric cannot take account of “the fact that human needs vary with age”[[65]](#footnote-65). Thus, the particular needs of, for example, the very old or very young would be left unmet because of their non-standard nature. However, Pogge argues that this is a problem only if we think of individuals as ‘time slices’, rather than conceiving of them “as persons over a complete life”[[66]](#footnote-66). He argues that by conceiving of people in this latter way age-specific variation need not be seen as *personal* heterogeneity. Instead, resourcists can specify standard needs at various stages of human life and “define the adequacy of a person’s lifetime share as an intertemporal aggregate of how adequate the resources she has access to in each phase of her life are relative to the age-specific standard human resource needs during this phase”[[67]](#footnote-67).

As in the above cases, then, Pogge suggests that we can revise standard need to include uniform influences on these needs. Thus, ‘standard need’ is now ‘standard need in *x* society, at *y* location and *z* age (etc.)’. In this way Pogge hopes to respond to the more obvious instances where insisting that individuals are entitled to a standard resource bundle seems unfair, yet he does so in an extremely counterintuitive way. Resources are valued on the basis of the functionings they enable, and so the ways of life they allow people to pursue. In the allocation of resources, however, no attention is paid to what the resources *actually* enable in a particular case.

Pogge is right to point out that “having access to dentures as an infant and to mother’s milk in old age is less adequate than the other way round”[[68]](#footnote-68). However, it does not follow that we ought to have access to dentures simply because we are in old age, regardless of whether we actually need them, or the use we could make of them.[[69]](#footnote-69) Moreover, it is unclear why a 30-year-old who needs dentures should be less entitled to them, simply because such a need is non-standard in this age bracket. The resourcist, therefore, faces a dilemma: either tailor the bundle sufficiently specifically that it does ensure individuals are able to function (and so collapse into a capability approach); or allocate a standardised bundle of resources that fails to provide some individuals with the central capabilities, and so the opportunities to form and pursue a conception of the good (falling foul of the anonymity condition if arbitrary features determine which individuals these are).

*3.2 Prior Resource Deprivation*

The second – more consistent – way in which Pogge argues that resourcism can respond to differences in individual needs are when they are the result of prior resource deprivation.[[70]](#footnote-70) Pogge points out that “persons’ developed capacities to derive benefit from resources are co-determined by their prior access to resources”[[71]](#footnote-71), such as the undernourishment of their mothers when pregnant or breast-feeding, or their own early access to education or healthcare. A resourcist would consider such deprivation unjust, and consider the individuals who suffer from it to be entitled to compensation (as §2.5.2 discussed). Indeed, if a resourcist scheme were in place then such deprivation would be avoided in the first place. Pogge argues that individual differences in body and mind – and so difference in conversion capacities – are “overwhelmingly” the result of such previous lack of access to resources.[[72]](#footnote-72)

Moreover, Pogge insists that resourcism can respond to the injustice of prior resource deprivation more effectively than capability theorists: “[w]here the latter criticise institutional schemes for their failure to compensate for special physical and mental frailties, resourcists more powerfully criticise the same institutional schemes for their failure to compensate for frailties *they themselves produce* through the severe mistreatment they impose on so many children and adults”[[73]](#footnote-73). A capability theorist would consider an institutional order to be unjust if it did not accommodate the special mental or physical needs of *any* of its members, regardless of their cause. A resourcist, on the other hand, would perceive injustice only if the institutional order had caused these needs itself. Thus, “on a resourcist view, the *causal origins* of special needs and disabilities are morally significant”[[74]](#footnote-74).

Yet does this mean the resourcist response is really ‘more powerful’? Certainly capability theorists would accommodate needs regardless of their cause, but this by no means implies that they cannot recognise the injustice of avoidable deprivation, and the capability loss it produces. The capability approach has the further benefit that by providing the resources individuals *actually* need to function, it seems less likely that harmful deprivation will occur in the first place. Resourcists, by providing for standard need, may cause avoidable deprivation even when an institutional order has done all that justice requires. For example, if resourcists consider children to be entitled only to the education needed by a standard child, then children with additional educational needs may be avoidably illiterate and innumerate, compared to a capability based system. Obviously these needs will not be considered the consequences of past injustices by resourcist standards, but a large part of the intuitive pull of these examples is that the deprivation, and subsequent need, is *avoidable* (particularly if easily avoidable).

We should, of course, recognise the injustice of prior deprivation and endeavour to avoid it, but should this also colour how we respond to individual need? A disabled individual, for example, would be treated the same by a capability theorist whether their disability was the result of malnourishment of their mothers whilst pregnant, or the result of a genetic condition. A resourcist, meanwhile, would only provide compensation in the former case. Certainly, if a disability is avoidable it ought to be avoided, but an unavoidable disability is no less of a tragedy, and the claims of this individual do not seem to be diminished. I would suggest that distinguishing the ‘deserving’ and ‘undeserving’ needy is not a desirable move for a theory of distributive justice to make, as the following section will discuss.

**4. Capabilities or Resources? Practical Applications and Implications**

The theoretical differences between (Pogge’s) resourcism and the capability approach should now be clear. Resourcism aims to respond to standard individual need (where this includes needs caused by external or internal influences with a uniform effect), and to needs caused by prior, unjust resource deprivation. Part of the reason to focus on needs with these specific causes is to avoid a theory that is overly burdensome to the well-endowed. For Pogge, it also stems from his argument that our duties of justice arise from interactions with others that leave them worse off than they would ‘naturally’ be. Naturally low conversion capacities may give rise to duties of charity, but not justice. I will now consider the practical applications of the two approaches and argue that the capability approach is more plausible than Pogge suggests, and that his resourcism faces serious challenges.

I will argue, first, that although the capability approach does not specify the appropriate *causes* of a need, this does not imply that it is entirely undiscerning in the needs it responds to. Rather, the capability approach will meet only those needs with appropriate *content* or in an appropriate domain, lessening its demandingness (§4.1). Second, that identifying what constitutes individuals’ ‘natural’ needs, as distinct from those caused by an unjust institutional order will be difficult – if not impossible – especially given Pogge’s views regarding the contingent and socially constructed nature of disability (§4.2).

Thus, I will suggest that, in practice, both approaches are equally demanding: *contra* Pogge’s straw man account, the capability approach is not over-demanding, and resourcism will be more demanding than Pogge suggests if he is right that mental and physical differences are ‘overwhelmingly’ caused by prior resource deprivation. To demonstrate the similarity between the two approaches I will outline a more plausible reading of capability compensation (§4.3; §4.4). Finally, I will respond to Pogge’s criticism that the capability approach will insult those with unusual needs and suggest that, on the contrary, by distinguishing needs that do, and do not, warrant compensation – and so the deserving and undeserving needy – it is resourcism that is insulting (§4.5).

*4.1 Identifying Appropriate Needs*

As §2.5 discussed, Pogge does not ground duties of justice in needs *simplicter*, but in a shared scheme of cooperation, though he argues that the existence of an international institutional order means that our theory of justice should, nonetheless, be cosmopolitan. However, misfortunes suffered by fellow participants in the scheme do not justify a demand for compensation unless the *scheme itself* is responsible for causing their misfortune or deprivation. Justice does not require that ‘natural’ deprivation be remedied. It is worth emphasising the importance Pogge places on agency-caused, as opposed to ‘natural’, misfortune. He stresses that “it is not natural”[[75]](#footnote-75) for the least advantaged to occupy the position they currently do: “like most of us, [they] are perfectly capable of leading healthy and successful lives”[[76]](#footnote-76). That they *could* lead a successful life were it not for the imposition of ground rules – of which we can predict the consequences and feasibly change – seems to play an important role in the existence of our duty to change these rules.

The view that natural difference does not deserve compensation stems from the libertarian tradition, where what matters is the historical procedure that led to a current distribution: redistribution is justified only to rectify past unjust transfers, not to compensate for natural deficiencies that may have left some individuals with a smaller initial, and subsequent, share. However, this runs counter to the luck egalitarian intuition that we should hold individuals accountable for the consequences of their choices but not for their poor brute luck.[[77]](#footnote-77) This would lead us to accommodate at least those whose disadvantage was the consequence of some accident, not merely those whose disadvantage was caused by the past injustice of the institutional scheme.

The capability approach, admittedly, goes further and would accommodate non-standard needs regardless of cause, and so even when caused through poor option luck, negligence, or deliberate self-harm or sabotage. Yet this does bring into question where Pogge draws the line between the deserving and undeserving needy. He does not simply consider us undeserving if we ourselves have played some causal role in our current state of neediness. His view is even more restrictive: we are sufficiently deserving only if other agents (not nature) caused our non-standard needs. We must bear the consequences of the good or bad brute luck that determined our natural endowment of talents, the monetary value they command, and so on.

Thus, resourcism, the capability approach, and luck egalitarianism, would each accommodate slightly different sets of individual needs. First, those whose needs are caused by past injustice, or the uniform effect of some internal or external factor, would be accommodated by all three approaches. Second, those whose needs are caused by bad brute luck that affects individuals differently – such as inherited genetic conditions or accidents for which no one is culpable – would be accommodated by luck egalitarians and capability theorists, but not resourcists. Finally, those individuals whose needs have another cause, such as poor option luck or deliberate self-harm, would be accommodated by capability theorists alone.[[78]](#footnote-78)

At first glance, therefore, it may seem that Pogge’s criticism of the capability approach for its breadth is justified, since it does not weed out needs on the basis of their inappropriate cause in the way Pogge’s resourcism (or desert-based approaches, like luck egalitarianism) do. However, the capability approach does have a method of distinguishing those needs that are the concern of justice from those that are not: they do so on the basis of their object, as opposed to their cause. Capability theorists argue that all individuals should have the *central* capabilities – regardless of how many resources this requires, and of why it is they need more resources than others – but they do not argue that individuals are entitled to *all* capabilities.

For example, if we require surgery to ensure our future mobility, capability theorists will consider us entitled to this, whether we need surgery as a consequence of past resource deprivation, an inherited genetic condition, or a decision to engage in a particularly risky activity (such as sky-diving). However, if we require surgery to have the necessary agility to continue our hobby as a gymnast, or to ensure our sense of taste is nuanced enough to enjoy whiskey-tasting, the capability theorist is unlikely to insist we are entitled to *these* surgeries as a matter of justice. If we need them as the result of past injustice, then the compensation we are entitled to may be sufficient to allow us to undergo the surgery. However, there is no reason for a capability theorist to insist that the compensation *must* take the form of surgery to restore our ‘natural capacities’, as a resourcist must.

It is disingenuous of Pogge, therefore, to suggest that the intuitive appeal of the capability approach lies in “the feeling it is not fair that some human beings are less healthy, bright, tall, handsome, athletic, or cheerful than others or just need more food, water, or clothing”[[79]](#footnote-79). To this Pogge responds that though the world may be better if we all had the same capabilities, justice cannot require the necessarily huge sacrifices on the part of the naturally better-off to bring this about. However, the feeling that it is unfair that some people are less tall or handsome, is hardly the same as the feeling that it is unfair that some are less healthy or require more food (and these needs are not met). No plausible version of the capability approach considers *all* capabilities to be (equally) valuable.[[80]](#footnote-80) Just as we only have a right to resources that enable particular valuable functionings, so we are only entitled to capabilities in a limited number of central domains.[[81]](#footnote-81) Furthermore, what it means to possess one of these central capabilities does not entitle individuals to an unreasonably large share of resources, as subsequent sections will consider.

*4.2 What is Natural?*

First, though, it is worth questioning Pogge’s idea that individuals are entitled to compensation for misfortune that ‘is not natural’, and that we should not have our ‘natural capacity’ to lead a healthy life inhibited by an unjust institutional order. Given Pogge’s view regarding the pervasiveness of the international institutional order – it shapes even our preferences, and ability to fulfil them – how are we to determine what our natural or original capacities constitute? It will surely prove extremely difficult to distinguish natural from agency-caused disadvantages, as Pogge must if he is to restore individuals to the lives they are naturally able to lead, by appropriately reforming the institutional order.

This task is made even harder by Pogge’s understanding of disability as socially constructed.[[82]](#footnote-82) As Pogge rightly points out, even in those cases when the lack of certain abilities – such as blindness or deafness – have natural causes, they only constitute disadvantages (at least to the degree they currently do) because the institutional order is designed to favour the able-bodied. Thus, even if it were possible to trace the extent to which our abilities and preferences were ‘unnaturally’ caused by the unjust institutional order, could we also be expected to identify the extent to which they would ‘naturally’ constitute a dis/advantage? Our social context will always determine the meaning and value of our abilities, so giving an account of these abilities divorced from the ground rules that shape our lives seems impossible.[[83]](#footnote-83)

Given this interaction, it may be worth revising Figure 2 to demonstrate that resources and external influences do not only directly determine our ability to function, they will also affect our personal heterogeneities: our abilities, talents, or lack thereof. For example, our social circumstances determine whether our abilities are deemed talents or our lacks of ability are deemed disabilities, and our access to resources such as education determines whether we possess abilities such as literacy and numeracy in the first place.

Resources 🠢 Personal ⭠ External

heterogeneities influences

↓ ↓ ↓

Opportunities to function (capabilities)

↓

Ability to achieve personal goals

*Figure 3: The Interaction of Influences on Individual Conversion Capacities*

Pogge, perhaps, simply means to make the more general claim that it is not natural that the least advantaged people should be concentrated in certain parts of the world, and that given the resources available globally we should not endorse a set of rules that allocates so little to so many, without any real justification in terms of desert or beneficial consequences. This is certainly true, but though it is more ‘natural’ (perhaps) to have needs as the consequence of a condition we are simply born with, or suffer from as a result of our poor option luck, it is not clear it is any more fair to deprive *these* individuals of the central capabilities – to lack health, bodily integrity, or the ability to participate in society – simply because our brute or option luck was ‘naturally’ bad.

At least part of the force of Pogge’s argument surely rests on the thought that the unmet needs in question are foreseeable and avoidable. It is not just our participation in the institutional order, and so minor and indirect causal role in the resulting deprivation that gives us a duty to alter it, but the fact that we have the capacity to do so. On top of this, it is, as discussed, extremely difficult to trace which needs are feasibly soluble, avoidable, *and* the consequences of a pervasive and unjust institutional order. These practical difficulties mean that, in reality, Pogge’s focus is likely to just be need *per se*. This likelihood is further increased by his assertion that deprivation is ‘overwhelmingly’ caused in this way.

Thus, Pogge’s resourcism either places on us a heavy epistemic burden (to identify those needs that have resulted from the injustice in a pervasive institutional order), or will place as heavy a redistributive burden on the well-endowed as the capability approach (simply responding to all needs, regardless of cause). Given that this epistemic burden cannot feasibly be met, Pogge’s practical policies seem likely to be the same as capability theorists’, though his justification will be different: we respond to need not because of its urgency, but because we have participated in a scheme that has caused it.

That the approaches will advocate identical policies is not an insignificant point given that its practical outcomes are exactly the basis on which Pogge criticised the capability approach: that it would demand too much of the well-endowed. By emphasising the role the well-endowed have played in causing much of the deprivation they are being asked to mitigate, the demand for redistribution may be made more palatable, but it is not clear that Pogge’s theory would ask them to contribute any less. Moreover, by distinguishing agency-caused needs that ‘deserve’ compensation from those that are natural, and so undeserving, he places the burden on the needy to show that their needs are of the right sort (as §4.5 will discuss).

*4.3 Equal Capabilities?*

Having argued that resourcism is more demanding than Pogge implies, we should now show that the capability approach is less demanding. Pogge’s arguments for its impracticability depend on a particularly implausible characterisation of the capability approach, and since Pogge has criticised both Sen and Nussbaum for posing their own view in contrast to a crude version of resourcism,[[84]](#footnote-84) this move seems especially unfair. He suggests that capability theorists must be committed to providing individuals with an identical set of expansive opportunities, which is misleading. Capability theorists provide only a limited set of centrally important opportunities, and the content of these opportunities need not be specified in such a way that it will require an indefinite (and potentially futile) outlay of resources to provide these capabilities for all individuals.

I will argue, first, that capabilities should be conceived as opportunities to exercise control over part of our life rather than opportunities to perform specific functionings – an idea I will develop at greater length in Chapter 3 – before arguing that what the central capabilities comprise will be constrained by what we can reasonably ask of others (§4.4). Both points serve to demonstrate that the capability approach avoids Pogge’s accusation of being over-demanding.

The version of the capability approach against which Pogge develops his criticisms, then, is one according to which, having capabilities means that individuals have the opportunity to live exactly identical lives, if they so choose. Yet clearly this cannot be capability theorists’ intention. The most obvious problem with such a view is its evident impossibility. It would be absurd to suggest that men should have the opportunity to give birth, paraplegics to run, or the tone-deaf to be musicians, and to suggest that it would be unjust were they not provided with the substantive opportunities to do or be these things.

The first reason to reject this conclusion is that such opportunities do not number amongst the central capabilities that capability theorists are concerned to protect: being a musician, for example, is unlikely to be agreed to be an opportunity central to human flourishing. Even if some of these opportunities are important for some lives, the central capabilities will be much more vaguely specified. Thus, rather than opportunities to give birth, to run or be a musician, they would be opportunities to found a family, for mobility or creative expression. On this broader understanding, these opportunities can plausibly be said to be open to many more individuals. Yet even this degree of specificity can be problematic. Though more broadly specified, such an understanding of the central capabilities still implies that relatively specific functionings are necessary for a human or flourishing life. For example, there may be a variety of ways in which we can found a family, but founding a family is a necessary component of flourishing (even if we are permitted not to flourish). This may lead to the stigmatisation and insult of those who do not, or cannot, perform the functionings; or to paternalistic intervention to compel them to function, as Chapter 3 will discuss.

For this reason, I will argue there that capabilities should not be understood as opportunities to perform specific functionings, but as opportunities to control certain central domains of our life, regardless of the content of our choices in these domains. This understanding of capabilities is particularly well placed to respond to the criticism that the capability approach will insist on providing individuals with a specific set of opportunities even when this is unrealistic or hugely costly. Having control in a domain does not mean that we must have every possible opportunity. There must be some sense in which the opportunities provided are appropriate for the individual in question. What such appropriateness comprises is a complicated issue to which I cannot provide a complete answer here. It at least seems clear, however, that a man’s opportunity for control regarding founding a family will not include the opportunity to give birth, and the capability of a paraplegic person to control his mobility will not include the ability to run. Thus, at the very least, restrictions would be required such that individuals do not have a justice claim to opportunities for which they are biologically unfit, and which we lack the technology to remedy.

Insisting that some opportunities are not suitable for some people need not imply, however, that we can only provide those opportunities that can meaningfully be made available to all people. The capability for mobility can consistently insist both that it is appropriate that able-bodied individuals should have the capability to run, and that this is not appropriate for some physically disabled people, though they will, nonetheless, be entitled to control over their mobility. The content of particular capabilities will, in large part, be determined by assessments of the opportunities that could reasonably be made available to individuals, in terms of both technological advancement and, as §4.4 will consider, the demands we can reasonably make of others.

Pogge worries that this will mean that ‘natural athletes’, to whom running comes easily, will be penalised by being provided with less resources than others, and so prevented from achieving their potential. As discussed, to see a differential resource share as penalisation presupposes resourcism. Further, the capability approach would not *prevent* such natural athletes from fulfilling their potential, they may simply think that justice does not require that they be provided with as many resources to train as a disabled person does to be mobile, or at least that providing resources for the athlete would be a lower distributive priority in a situation of scarce resources.

This does not seem implausible. Whilst it would be unfortunate if no one could train and reach a peak level of athleticism, if resources were limited such that we had to choose between basic mobility for the disabled and prowess for athletes, it seems a scheme of distributive justice *should* prioritise the former. Thus, a capability approach need not be committed to providing opportunities that are impossible for some individuals, nor to giving those with a low conversion capacity an unreasonably large, perhaps unfulfillable, claim. Neither need it actively prevent more talented individuals from achieving more than the average individual.

*4.4 The Capability to Do What?*

However, it may be objected that even limiting the capabilities that are a concern of justice to the central capabilities, and limiting what having these capabilities comprises to those opportunities appropriate for a particular individual, is not sufficient to diffuse the over-demandingness critique. We may not have the obligation to provide a paraplegic person with the opportunity to run if this were technologically impossible, but what if the technology were available, though extremely expensive? Or the technology could be made available if we were willing to expend sufficient time and money on research and development? It may be argued, then, that even with the above caveats, capability theorists may compel some (better-endowed) individuals to devote their entire lives to providing capabilities for those with low conversion capacities. For example, to curing the diseases, or changing the infrastructure, that currently deny central capabilities to many individuals.

The force of this criticism will be lessened by the relative and contingent nature of the list of central capabilities, both in terms of the capabilities included and what it means to have them. The list of central capabilities is determined on the basis of an overlapping consensus, and so the content of this list will vary over time (and place, if we are not cosmopolitan). For example, what it means to live a life of ‘normal length’ or to have ‘good health’ will vary depending on individuals’ reasonable expectations of how long a ‘normal’ human life should be.[[85]](#footnote-85) Part of what informs these reasonable expectations is the technological and medical advancements of the society in which we live, and part is the limitations of our body. However, our expectations are also importantly informed by what we can reasonably expect others to do to improve this technology and overcome these limitations. It may be the case that if we all devoted ourselves to nothing but medical research – working on this sixteen hours a day, and spending public money on little else – we would be able to provide many individuals with the capabilities to perform functionings that now seem impossible. Individuals with terminal cancer may be given the capability for good health, the entirely paralysed with the capability to move or communicate, and so on. This would undeniably be desirable according to the capability approach.

However, doing so would drastically reduce the capabilities of those who were forced to spend their time working on such cures and advancements. The central capabilities comprise more than the basic opportunities to have sufficient food and shelter to survive. They also include capabilities such as the opportunity to play, to be able to develop emotional attachments to things and people outside ourselves, to be able to form and pursue a conception of the good, to have opportunities for sexual satisfaction, and to be able to participate effectively in the political environment.[[86]](#footnote-86) The protection of these, and other, capabilities places limits on what we can demand of others. We can redistribute some of the products of the labour of the well-endowed to those who are in need – and, *contra* resourcism, can do so simply because they are in need, and not only when the need can be traced to some appropriate cause. However, we cannot co-opt all of their time and resources to improve the capabilities of others.

Discussion and debate will, of course, be required to determine exactly what constitutes reasonable expectations, and so what it will mean to have the central capabilities under particular circumstances. In such discussion, however, consideration will certainly be given to what we can legitimately demand from the well-endowed. Indeed, the specification of central capabilities are likely to prove very useful in helping to shape the debate by providing a benchmark beyond which our demands cease to be reasonable: we cannot demand (as a matter of justice) that individuals lose the capability to perform central functionings (though they may, of course, choose to do so as a supererogatory act of charity).

The problem with resourcism, then, is not that it gives some weight to what we can demand from others. Indeed, Pogge is quite right to point out that avoiding over-demandingness is an important consideration for a redistributive theory. Rather, resourcism is problematic because it uses this concern with what we can demand from the well-endowed to justify providing only for standard needs and preference sets, or non-standard needs caused by some past or on-going injustice. Not only does ignoring those who are in need through some natural accident, or as the result of poor past decisions, seem morally dubious but, given Pogge’s assertion that deprivation is *overwhelmingly* caused by the unjust institutional order, his theory will demand little (if any) less of the well-endowed. It simply places an onus on the needy to show that they fall in the ‘deserving’ category: their deprivation alone being insufficient to justify their claim.

*4.5 Stigmatisation, Insults and Compensation*

Given this distinction between the deserving and undeserving needy, Pogge looks likely to fall foul of another criticism he levels at the capability approach: that the way it conceptualises difference and aims to provide compensation means it is insulting and stigmatising to those who are in need, or have low conversion capacities. Pogge suggests that the capability approach aims to ‘even out’ natural difference, and ensure everyone has equal capabilities. Given that our possession of capabilities depends on both our possession of resources and our natural endowments (see Figure 3), a capability theorist, according to Pogge, would wish to see a negative correlation between resources and natural endowments to ensure “no one scores poorly in regard to both”[[87]](#footnote-87).

If this were true, Pogge may be right to suggest that capability theorists must see inequality of natural endowments as vertical, ranking individuals on this basis to ensure that those who score low here receive a proportionally large bundle of resources to compensate. The consequence of such a vertical conception of inequality is that low-ranking individuals are taken to be inferior to those who rank higher. As Pogge puts it:

[w]hen a capability theorist affirms that institutional schemes ought to be biased in favour of certain persons on account of their natural endowments, she thereby advocates that these endowments should be characterised as deficient and inferior, and those persons as naturally disfavoured and worse endowed – not just in this or that respect, but overall – not just in the eyes of this or that observer, but in the eyes of the shared public criterion of social justice.[[88]](#footnote-88)

On this view, capability theorists’ approach to compensation would be to identify those people who are ‘inferior overall’, and then give them an extra-large (for Pogge, unjustifiably large) bundle of resources in an attempt to compensate them for this inferiority.[[89]](#footnote-89) A theory that grounded claims to redistribution on the basis of individuals’ inferiority would certainly be highly insulting to those who were the subject of such redistribution. Indeed, any approach that took a vertical view of inequality – judging people as better or worse overall, rather than better or worse in certain respects – seems an insulting, not to mention inaccurate, model of human difference. It is fortunate, then, that this is not capability theorists’ view.

First, by specifying different central capabilities, the capability approach makes clear that there are a variety of important facets to a flourishing life. If someone has a low conversion capacity in one domain, this does not make them inferior overall. Their conversion capacities may be high in other domains, and they may be entitled to less than the standard share of other resources. Identifying the different domains in which people can be in need, then, seems a clear demonstration that capability theorists are not concerned with overall rankings.

Second, the idea of inferiority forces a normatively loaded language onto capability theorists that they have no reason to accept. Why should the amount of resources we need to have access to in order to have a capability make us inferior or superior? Indeed, the use of these terms implies that we have a standard against which we can compare ourselves, and be inferior or superior to. It is, of course, *resourcism* that uses the idea of resources a ‘standard’ individual would need. Resourcists, then, may consider it a matter of inferiority to require more resources than is standard – an inferiority which, out of charity, we may assist with. That resourcism fails to accommodate individual difference and non-standard needs, therefore, hardly justifies the claim that resourcists ignore such differences, and make no normative judgements regarding them.

As well as being insulting (judging people inferior overall) the view of redistribution that Pogge attributes to the capability approach (assigning those who are deemed inferior an extra-large resource bundle) is also ineffective. To paraphrase Pogge, capability theorists would respond to disabled people, for example, by saying: ‘given your disability means you have a low conversion capacity, we will ensure you receive more resources as compensation, in the hope that converting your larger bundle of resources will allow you to reach roughly the same level of capability as the rest of us’. A resourcist response, on the other hand, would be: ‘given the institutional order is not as suitable for you as for others, we will make up for the ways in which we treat you worse than others, by treating you better in other respects’.[[90]](#footnote-90)

To demonstrate the difference, let us consider the example of blindness. The resourcist response to blind people being disadvantaged because traffic signals are communicated through visible but inaudible signals would, Pogge suggests, be to provide them with free guide dogs. Since the institutional order is unjust – biased against blind people by failing to employ audible traffic signals – the resourcist would aim to rectify this injustice. However, as Pogge sees it, the objective is that the institutional order will afford blind people equal *treatment*, not necessarily equal *capabilities*: blind people may still be less able to navigate the streets. Pogge suggests that capability theorists must respond by negating the effects of blindness entirely (though it is unclear how a resource bundle of any size would achieve this).

This is not the intention of capability theorists, however. Remember that their focus is providing individuals only with *central* capabilities. First, then, they would be able to recognise the injustice of an institutional order that is constructed in such a way as to avoidably deprive individuals of central capabilities, and would attempt to modify the institutional order if this were possible.[[91]](#footnote-91) Second, since they are concerned to ensure that blind people (like everyone) have the central capabilities, the compensation they provide will aim at ensuring this – and not that they have identical lives and equal capabilities in every respect. This may involve providing individuals with free guide dogs so that they have the capability for mobility, can access public facilities, participate in social life, maintain good bodily health and so on. If blind people have all these central capabilities but are, nonetheless, less able to navigate the streets, this will not concern capability theorists. Similarly, they will not provide them with compensation for not being able to see beautiful works of art or the faces of their loved ones, though these functionings are certainly desirable.[[92]](#footnote-92) Once individuals have the central capabilities (and are compensated for any past mistreatment), the capability approach does not justify further compensation.

Resourcism, meanwhile, may face more problems than Pogge admits. His justification for compensating disabled individuals is that the institutional order is, in large part, responsible for particular impairments being disabling. It is only when disabilities are caused in this way that Pogge will consider compensation justified. For example, blind people should be compensated for the contingent decision to make traffic signals visible, but not for the fact that they ‘naturally’ find it more difficult to get around.[[93]](#footnote-93) However, as §4.2 discussed, what constitutes our natural abilities is extremely difficult to determine: presumably if there were no cars then getting around would be much safer for blind people (indeed everyone) so are they entitled to compensation for this too?

Moreover, it is not clear that it is *possible* to eliminate all bias from an institutional order, or that all biases are unjust.[[94]](#footnote-94) If we made traffic signals audible rather than visible, for example, this would make life harder for deaf people. There is a simple solution in this case (signals that are audible *and* visible) but this is not always so. In some cases it is simply impossible to design an institutional order that would discriminate against no one and, in others, it would be far too demanding or cost ineffective. We may think it is not unjust, then, that we do not all learn (every dialect?) of sign language, though this may lead to the exclusion of deaf individuals; or that structures (chairs, toilets, counter-tops) are built at an appropriate height for people who are 5-6 feet tall, though this makes life much more difficult for those with dwarfism. Thus, Pogge’s suggestion that we should be compensated for needs caused by an institutional order is less compelling, and has farther reaching consequences, if a *just* institutional order can cause these ‘unnatural’ needs.

Finally, this focus on undoing or compensating for deprivation that is caused by the institutional order will suggest some counterintuitive conclusions. A blind individual is entitled to a guide dog because it is features of the institutional order – the inaudible traffic signals – which makes it hard for them to get around. However, we may say that a paraplegic person ‘naturally’ finds it difficult to be mobile. Stairs, for example, may make it more difficult to access some public buildings, but even reaching these buildings would not be possible without a non-standard allocation of resources (a wheelchair or crutches). Does this mean that a paraplegic person is not entitled to a wheelchair? Moreover, since guide dogs are only provided in compensation for traffic signals, if these were made audible then guide dogs would presumably no longer be provided, even if this means blind people lose all capacity for mobility: their *natural* difficulty in getting around is not a concern of justice.

**5. Conclusion**

The capability approach, then, is neither over-demanding of the well-endowed, nor stigmatises the needy. First, the requirement to protect the capabilities of everyone – including those ‘superior’ people with high conversion capacities – means we cannot ask people to work so hard to protect others’ capabilities that they do not have capabilities of their own. The capabilities of the badly off cannot be bought at the expense of the well-endowed. Further, what it means to have capabilities is not as extravagant as Pogge suggests: we are entitled to only the central capabilities (not any opportunities we might value or that anyone else possesses); and we are entitled to these only to the degree that is appropriate given technological advancement and what we can reasonably ask of others. Second, the capability approach acknowledges the variety of human need, and does not take a requirement for additional resources in some domain to be a sign of inferiority. Further, it can acknowledge that many needs are the result of past injustice, but does not ask the needy to prove this is the case to be entitled to assistance.

Resourcists, by contrast, face some worrying conclusions. They intend to provide only for standard needs, and for those non-standard needs that have resulted from the institutional order. First, though, determining what constitutes standard needs is no easy matter, and neither is identifying the ‘natural’ capacities that the institutional order has deprived us of. Moreover, given that Pogge argues that non-standard needs are *overwhelmingly* the consequence of past injustice, this additional epistemic burden does not earn us a theory that is significantly less demanding in terms of redistribution. Second, not only is this approach no less demanding, but it is likely to prove degrading and insulting to those in need, since it requires that they demonstrate that their need has the right cause – the institutional order is to blame, or anyone would have this need in their circumstances – and that it is not a result of their ‘natural deficiencies’.

It is not clear why being born with a genetic disorder should be less a concern of justice than needs traced to the international institutional order, especially when this is defined in such nebulous way as to include unintended consequences, and the actions of governments and corporations over which we have little direct control. Neither is it clear why having the bad luck to be born into a cold place justifies compensation more than having the bad luck to be born susceptible to the cold. It is certainly not clear why *choosing* to move somewhere cold entitles us to more. The resourcist justification for compensation seems counterintuitive, then, when it is not simply insulting.

The alternative option for the resourcist is to adopt a narrower, more restrictive interpretation of their appropriate causes (standard needs and past injustices). For example, they could specify that the institutional order must play a more direct causal role in an individual’s needs, or jettison the expansive understanding of standard needs that includes external influences. This will make their response less demanding (though the concerns regarding their motivations remain). On this reading, though, resourcism becomes what capability theorists always accused it of being – and which Pogge has been working to avoid – a callous theory that leaves many needs unmet.

**Paternalism, Autonomy and Well-Being:**

**A Definition and Defence of Anti-Paternalism**

**1. Introduction**

The capability approach’s ability to withstand Pogge’s criticisms of it, combined with the problems that plague his resourcism, gives us some reason to adopt a capability approach to distributive justice. However, I will argue that whilst we should be capability theorists, we should not adopt the current formulations of the capability approach. In particular, I will argue (in Chapter 3) that Nussbaum’s version of the capability approach relies on a perfectionist conception of the good that, at times, would be paternalistically enforced. Further, that the approach will stigmatise and insult those individuals who cannot perform or do not value what Nussbaum takes to be a good life, and so does not apply universally. In response, I develop a version of the capability approach that can respond to these criticisms. Yet before doing so, it is important, first, to understand what is meant by paternalism, in order to clarify what my criticism of Nussbaum’s account amounts to; and, second, to defend anti-paternalism, to make clear why my project of developing an anti-paternalist capability approach is worth pursuing. Anti-paternalist accounts are often accused of sacrificing individual well-being, and if such accusations were justified then devising an anti-paternalist version of the capability approach would hardly be a desirable goal.

The debate between paternalism and anti-paternalism is often seen to amount to a debate between the importance of individual autonomy, on the one hand, and individual welfare, on the other. Respect for autonomy requires that we permit individuals to choose for themselves the sort of lives they want to lead, yet such permission can lead to individuals making ‘poor’ choices, detrimental to their welfare. A hard anti-paternalist line would insist that, in self-regarding spheres, individual autonomy must be supreme, and we should not interfere with individuals’ choices. Hard paternalists, by contrast, would question this approach and suggest that though autonomy may have value, it can be permissible to intervene in individuals’ self-regarding actions when they will otherwise harm themselves. A modified version of anti-paternalism – soft paternalism – suggests that whilst we should never interfere with individuals’ autonomous or voluntary choices, we can intervene to prevent an individual harming themselves when their choice is non-voluntary.

Whichever account we favour, the debate always centres on cases of *harm*. The dispute turns on identifying the conditions under which it may be permissible to interfere with self-regarding, harmful behaviour: for a paternalist, always; for an anti-paternalist, never; and for a soft paternalist, only when the behaviour is non-voluntary. However, in a recent paper Seana Shiffrin has suggested that the unique insult of paternalism does not only occur in cases when we are attempting to prevent harm. She suggests that what is normatively significant about paternalism is that it involves distrust of, and insult to, a person’s agency, and that this can be captured in a broader definition of paternalism. On Shiffrin’s definition, then, paternalism involves the “substitution of judgement and circumvention of an agent’s will”[[95]](#footnote-95) in all cases that are “properly within the agent’s own legitimate domain of judgement or action”[[96]](#footnote-96) on the assumption that one’s judgement is superior to the agent’s. Thus, she focuses on interference in all cases when we have legitimate control, not just those involving harm.

I will argue that Shiffrin’s account of the unique insult of paternalism is correct (though somewhat underspecified). I will then consider the form that anti-paternalism should take if paternalism is defined in this broader way, and defend this position from the critiques of anti-paternalism. If paternalism involves interfering with individuals’ legitimate domains of control, then, anti-paternalism will require that we refrain from such interference in these domains. Broadening our focus from cases merely involving harm not only captures the normative significance of paternalism, but can also avoid some of the counter-intuitive consequences that can be faced by anti-paternalist accounts. In particular, it can respond to the worry that anti-paternalists will allow their concern for individual autonomy to blind them to the importance of individual well-being.

The form of anti-paternalism I defend will, as well as having this broader focus, be soft paternalist: we must only avoid intervening in agents’ *voluntary* choices.[[97]](#footnote-97) Whilst soft paternalism is more plausible than hard anti-paternalism, standard soft paternalist accounts are still problematic. They must identify harmful behaviours (since these can only be permitted if voluntary), and assume these harms are wrong or generally worth avoiding (hence permitting intervention to prevent them when non-voluntary). This may lead to the stigmatisation of those who would choose to engage in these ‘harmful’ activities. Adopting a Shiffrinian account of soft paternalism, therefore, has an additional benefit: since it suggests we should ensure voluntariness in legitimate spheres of control, not just cases of harm, it need not make judgements about the harmfulness or wrongness of particular activities.

I will begin by outlining the standard accounts of paternalism and anti-paternalism, as well as Feinberg’s soft paternalism (§2). I will also briefly discuss the idea of harm, which is central to all these standard accounts. Next, I will outline Shiffrin’s broader definition of paternalism, which does not focus only on cases of harm (§3). I will argue that her account is underspecified in two key respects: she insists that individuals’ autonomy ought to be respected in spheres over which they have legitimate control, yet does not give a clear account of what either ‘autonomy’ or ‘legitimacy’ consists in. Having fleshed out her definition of paternalism, I will then consider how anti-paternalism should be defined if paternalism is understood in this way.

I will then consider two possible criticisms of this account: that it allows for too little interference with an individual’s action, or that it allows too much. The first concern is one raised for all anti-paternalist accounts: allowing individuals to make choices unimpeded will be detrimental to their welfare, since many of these choices are likely to the poor. I will consider two difficult cases for anti-paternalists – voluntary slavery and amputation – to show that my version of anti-paternalism will not support policies that undermine individual well-being (§4). Finally, I will consider the second concern: that broadening our concern to ensure voluntariness beyond cases of harm may permit *too much* interference, undermining individuals’ autonomy (§5). I will argue that this is not the case, and that the form of soft paternalism I develop can tread the middle-ground in the debate, and avoid threatening either well-being or autonomy. Such soft paternalism must, therefore, be adopted by capability theorists if they are to achieve their twin goals of promoting individual well-being, and allowing individuals sufficient autonomy to form and pursue their own conception of the good (as Chapter 3 will consider).

**2. Standard Paternalist Accounts**

Standard examples of paternalism include compelling individuals to use a seatbelt while driving, to wear a helmet on a motorcycle, and banning the use of some drugs. All these cases involve an attempt to protect an individual from being harmed as the consequence of their own poor decisions. To some, these cases may appear justified, whilst to others they may seem to constitute an impermissible interference with our liberty. Before considering the permissibility of such cases, and the conflicts between autonomy and well-being that they give rise to, it is worth clarifying what is standardly meant by paternalism. I will give a brief account of hard paternalist and anti-paternalist positions (§2.1), before considering Joel Feinberg’s more plausible interpretation of anti-paternalism – soft paternalism (§2.2). Since all these standard accounts centre around the idea of *harm*, and when we may be permitted to harm ourselves, I will conclude by considering how harm should be understood (§2.3).

*2.1 Hard Paternalism and Hard Anti-Paternalism*

Paternalism is standardly defined as “interference of a state or an individual with another person against their will, and defended or motivated by the claim that the person interfered with will be better off or protected from harm”[[98]](#footnote-98), or as “restrictions on a person’s liberty which are justified exclusively by consideration for that person’s own good or welfare, and which are carried out either against his will…or against his prior commitment”[[99]](#footnote-99). The key elements of such accounts are that an individual is actively prevented from, or manipulated into, performing an action or making a choice, on the basis that such interference will be in the agent’s own best interests or avoid their being harmed, and the associated assumption that they are not the best judge of what is in their own best interests. We can call this view ‘hard paternalism’.

Paternalist views depend on the intuition that it may be better to ensure individuals’ lives go well than to always respect their autonomy. Why, to paraphrase Archard, should we never prevent individuals from harming themselves, even if the limitation of liberty is slight and the harm prevented significant?[[100]](#footnote-100) We may value autonomy but still think it should not always trump our concern for an individual’s best interests. Anti-paternalists, however, object to ignoring autonomy in this way on the basis that this “wrongly subordinat[es] the individual’s right to her good”[[101]](#footnote-101). The strongest form of anti-paternalism – ‘hard anti-paternalism’ – suggests that we must never interfere with any self-regarding choice or action performed by an adult (other-regarding actions can, of course, be prevented if they harm others, without any question of paternalism).[[102]](#footnote-102)

Some accounts of paternalism suggest that behaviour is paternalist if it has, or could be given, a paternalist justification. However, this does not capture the fact that our concerns about paternalism centre on the insult to the individual interfered with, which seems to require that our actions have a paternalist *motive*. This also does not capture the fact that the same action could be paternalist or not depending on what motivates us to perform it. For example, if a government requires people to wear seatbelts because they do not trust that they will do so otherwise, and are concerned that they will therefore be injured, they act paternalistically. If, however, a government passes this same seatbelt law because they wish to reduce the cost of healthcare provision by reducing the number of people injured in traffic accidents, this is not paternalist. Motivation here can be taken to mean that, though the intervening agent may also be motivated by other concerns, the paternalist motive is necessary to the act’s performance – it would not have been formed in the absence of this motive. My focus will be motivational accounts of paternalism.

*2.2 Autonomy and Feinberg’s Soft Paternalism*

The standard paternalist debate centres on whether we should interfere with an individual’s choices, where these harm them or set back their interests. The hard anti-paternalist insistence that we should never interfere with any choices of a competent adult leads to the implausible conclusion that we can never interfere with an agent even if the choice they make is not autonomous or voluntary. As such, it does not capture well the anti-paternalist concern with autonomy. Only on a very negative conception of autonomy would it be the case that our autonomy is always best promoted by ensuring that no one interferes with any of our choices or actions, regardless of how informed or considered they are. These worries motivated Joel Feinberg to suggest a more plausible form of anti-paternalism – soft paternalism.

According to soft paternalism, adults should not be protected from the consequences of their voluntary choices (regardless of whether or not these are harmful), but can be protected from the harmful consequences of their *involuntary* choices. Although this allows for some interference, it is classified as an anti-paternalist, rather than paternalist, view because this interference is not motivated by a distrust of individual agency or autonomous choice: no voluntary or autonomous choices are interfered with. Feinberg adopts a proceduralist account of voluntariness (or autonomy[[103]](#footnote-103)) and so lists a number of procedural criteria for choosing voluntarily: choices should be made without coercion, with knowledge of the relevant empirical facts, in a clear emotional state, not based on mistaken reasoning, and be carefully considered.[[104]](#footnote-104)

This tri-partite division of views about paternalism can be nicely illustrated with Mill’s famous case of a man who is about to cross a rotten bridge.[[105]](#footnote-105) Imagine we see a man approaching a rotten bridge, which will likely collapse should he attempt to cross it, plunging him to his death, and to whom there is no chance of communicating the danger. A *soft paternalist* would permit this individual to be forcibly prevented from crossing the bridge in order to ensure that he was aware of the bridge’s state, so his decision to put his life in danger was really voluntary. If the choice *were* voluntary (he knew the bridge was rotten, understood the risks, and was emotionally stable), interference to prevent his crossing the bridge would not be justified. This is in contrast, first, to *hard paternalism*, according to which we could prevent the man from crossing, whatever his knowledge and intentions, for the sake of his own well-being, and because we think he should not put his life in danger (even voluntarily). Second, this contrasts to *hard anti-paternalism*, which prohibits interference with any choices made by a competent adult, meaning we should allow the man to cross, even if unaware of the bridge’s state.

As the debate stands, therefore, the various accounts of paternalism disagree when individuals are in danger of harming themselves. If they are harming someone else, intervention is generally justified without considerations of paternalism, and if no harm is occurring none of these views would see any reason to intervene. Thus, whatever their attitude to permitting self-harm, all approaches must identify cases where individuals are likely to harm themselves. These views are summarised in Figure 4.

|  |  |  |
| --- | --- | --- |
| **Action** | **Voluntary Choice** | **Non-Voluntary Choice** |
| **Harm to others** | HP: Intervene\*HAP: InterveneSP: Intervene | HP: InterveneHAP: InterveneSP: Intervene |
| **Harm to self** | HP: InterveneHAP: AllowSP: Allow | HP: InterveneHAP: AllowSP: Intervene |
| **Harm to no one**(acting in a legitimate sphere of agency) | HP: AllowHAP: AllowSP: Allow | HP: AllowHAP: AllowSP: Allow |

HP = hard paternalism; HAP = hard anti-paternalism; SP = soft paternalism.

\* ‘Intervene’ here means that according to the theory there is a legitimate reason to intervene, though competing considerations may mean intervention is not, all things considered, justified.

*Figure 4: The Differences between Standard Accounts of Paternalism and Anti-Paternalism*

*2.3 Harm*

I will suggest that the focus of the paternalism debate on cases relating to self-harm is unnaturally restricted: we worry about paternalist intervention on the basis of the insult to an agent that it involves, and there is no reason to think that this insult occurs only when intervention prevents us from harming ourselves. It seems equally insulting to assume that an agent is incapable of deciding well for themselves in other domains in which we think they ought to have control. Before discussing this broader definition, however, I will sketch what paternalists and soft paternalists mean by ‘harm’.[[106]](#footnote-106)

Both accounts must identify what constitutes harm in order to determine which of the three categories in Figure 4 an action falls into, and so what their response should be. Consider the following example:

Bob is in hospital after a stroke. His doctor tells him that he requires a percutaneous endoscopic gastrostomy (a PEG) in order to receive enough nutrition to survive. He understands what the doctor tells him about the procedure (the minimal risks and the substantial benefits)...But he refuses to undergo the surgical procedure simply because he does not think the surgery is worth the risk. He explains this to the doctor and tells her that he would rather do nothing than undergo the procedure.[[107]](#footnote-107)

Questions of paternalism only arise because Bob’s health is at stake, and he will be harmed if he does not undergo the procedure. If this were an elective cosmetic surgery the doctor would not face the dilemma of choosing whether to paternalistically intervene. If harm were not at stake a paternalist doctor would not intervene, and a soft paternalist doctor would not have to ensure Bob’s decision were voluntary before allowing him to go through with it (we do not think that people must choose carefully about *not* having cosmetic surgery). Both paternalists and soft paternalists, then, need an independently defined conception of harm.

However, it may be objected that in such cases we can draw a distinction between independently defined *harm* to an individual and their *best interests*, and that the above accounts need only identify the latter. Since individuals’ best interests are at least partially determined by an individuals’ will or desires, it may seem the idea of harm at work is not will-independent.[[108]](#footnote-108) Thus, in the above example, Bob’s doctor may include in her deliberations not only the degree to which Bob will be harmed (his health impaired) if he does not undergo the surgery, but also the fact that it would not be in Bob’s best interests to ignore his autonomy, and the psychological and physical distress that may result from having surgery performed on him against his will. Thus, the doctor may be a paternalist and willing to override Bob’s will for his own good, but decide that acting according to his will (not giving him a PEG) is actually in his best interests.

That paternalist calculations may include a consideration of the affected agent’s will does not, however, alter the fact that they will need a will-independent conception of what is good, and what is harmful. The paternalist doctor does not value the object of Bob’s will for its own sake, but includes ‘having control over our medical treatment’ or ‘avoiding the trauma of a procedure being forced on us’ as part of their independent conception of the good. As Groll notes, the doctor treats Bob’s will as one consideration in the calculation of what is in his best interests, or what action will harm him least. To avoid paternalism, Bob’s will should be treated as authoritative: it should “silence, or exclude, those other considerations”[[109]](#footnote-109), not merely be given some weight alongside them. For a paternalist to include what an agent wills as part of their conception of his best interests does not, then, protect them from the conclusion that they must also utilise a will-independent conception of harm.

It is, perhaps, unsurprising that paternalists rely on an independent definition of harm, but soft paternalists too will require such a definition. Soft paternalists allow voluntary self-harm, whilst intervening in cases of non-voluntary self-harm. They must, therefore, define what self-harm constitutes, and do so independently of the agent’s views. In §4 I will argue that this may lead to the stigmatisation of those who make choices they deem harmful. Here, I will simply clarify why it is they define harm in this way. Consider three examples of a non-voluntary choice:

(i) Jane is about to eat a sandwich. Unbeknownst to Jane, this sandwich contains a large quantity of poison which, if consumed, will kill Jane. Eating the sandwich in this case is will-independently harmful.

(ii) Mary is about to eat a sandwich. Mary is a vegetarian but, unbeknownst to her, her sandwich contains ham. Eating the sandwich in this case is will-dependently harmful.

(iii) Susan is about to eat a sandwich. Susan has a mild preference to eat only fruit and vegetables grown in Britain yet, unbeknownst to her, the sandwich contains Spanish tomatoes. Eating the sandwich is not harmful.[[110]](#footnote-110)

In all of these cases, providing additional information would lead to the sandwich not being eaten. Thus, eating the sandwich would be non-voluntary, since one of the conditions of voluntariness is ‘full information’. What this should comprise is inevitably vague, but can at least be assumed to mean information that would affect the outcome of a decision.

Providing information in these cases, then – about the poison, ham, or origin of the tomatoes – amounts to allowing the individuals to make a more fully voluntary choice about whether they want to eat the sandwich. In the first case, a soft paternalist would certainly intervene to ensure this will-independently harmful act is undertaken voluntarily. In the last case, they would not intervene since the case does not involve harm. Soft paternalists are concerned to ensure that when we harm ourselves we only ever do so voluntarily. They need not have a broader commitment to ensuring we always make voluntary choices.

How would they respond in the second case? On a sympathetic reading of soft paternalism we may think that they could consider the act harmful, and so intervene to ensure voluntariness. However, I would suggest that this would only be the case if they considered the agent’s second-order desire, which would otherwise be thwarted – in this case, to be a vegetarian – to be legitimate. If the dietary requirement about to be violated is one of which they do not approve, and they would not consider the agent harmed by breaching it even if the agent would consider herself harmed, then they would not be concerned to ensure voluntariness.

For example, imagine Rachel, who only wants to eat sand sandwiches. Unbeknownst to her the sandwich she is about to eat contains cheese instead, and she will consider herself harmed if she eats it. Would a soft paternalist intervene to prevent the ‘harm’ of her eating cheese? I would contend they would not. They would consider it a case in which no one is being harmed, and so would not consider it necessary to intervene to ensure the act is voluntary. They would consider it overly invasive to intervene in *any* case when an individual is not fully informed, even if harm would not result (as I discuss in §5). Thus, I would suggest that a will-independent notion of harm is doing some work for soft paternalists even in the second case: if the second-order views of the agent that make the act in question (will-dependently) harmful does not conform with their (will-independent) account of what may make an act harmful, then the soft paternalist will not intervene. I will now consider accounts of paternalism and anti-paternalist that need no definition of harm.

**3. Paternalism without Harm**

Shiffrin has suggested that this tendency to focus on harm is misguided, and does not capture what is normatively significant about the insult of paternalism. She argues that an action is paternalist when A substitutes her judgement for B’s, on the assumption that her judgement is superior to B’s, and is “directed at B’s own interests *or* matters that legitimately lie within B’s control”[[111]](#footnote-111). We may think that most matters that legitimately lie within our control concern our best interests, so in most cases the approaches may amount to the same thing. This may explain why paternalism is commonly understood to concern cases in which we intervene to protect an agent from harm or promote their best interests. Yet Shiffrin points out that the unique insult that occurs in these cases can also occur in other cases too, where the interests of the agent are not the primary motive: it ‘treats us like children’, for someone else to assume command over any domain of our life that is legitimately in our control, even if they are not doing it for our own good.

I consider Shiffrin’s account of paternalism plausible, and so will begin by setting it out in a little more detail (§3.1), before considering the shape that a corresponding version of anti-paternalism should take. This will require a discussion of two central terms that Shiffrin does not clearly define: autonomy and legitimacy. These are central terms since she understands paternalism as interference with an agent’s *autonomous* choices, motivated by a distrust of individuals’ ability to make decisions in areas over which they have *legitimate* control. I will suggest a procedural account of autonomy, based on Feinberg’s conditions of voluntariness (§3.2), and argue that our domains of legitimate control can be understood to comprise the central capabilities (§3.3).

*3.1 Shiffrinian Paternalism*

Before fleshing out Shiffrin’s account, however, I will consider some of the distinctive features of the account, as she presents it. First, the account is motive-based, and the characteristically paternalist motive is distrust of an individual’s agency, and an assumption our own judgement is superior. As such, if we coerce an agent or undermine their autonomy accidently, or because we are trying to achieve some other goal, our actions are not paternalist. Not only is not all coercion paternalist (depending on motive), not all paternalism is coercive. For example, if we refuse to help someone build some shelves because we think it would be good for them to learn carpentry (and not for some self-regarding reasons, such as the inconvenience of providing help) we treat them paternalistically.[[112]](#footnote-112) We are motivated by a distrust of their agency and a belief in the superiority of our own judgement. In this way, otherwise legitimate (non-invasive or coercive) acts can become insulting, paternalist, and potentially impermissible. Not only is a paternalist motivation necessary for behaviour to be paternalist, then, it is also sufficient.

Second, although paternalism is usually associated with interference that aims to bring about a better outcome than that chosen by the agent, Shiffrin argues that we can act paternalistically towards someone even if we agree with them on the best outcome. We may respect someone’s judgement with regards to the best outcome, but if we distrust her ability to achieve it, we can still be said to distrust her agency. Thus, taking and hiding someone’s cigarettes without their permission is paternalist, even if they have agreed they want to stop smoking.

Third, to be paternalist we need not necessarily act *against* someone’s will: if we act on an agent’s behalf, before they have had a chance to consider the matter and establish their intention, we fail to respect their autonomy. This is true even if they would have favoured the outcome achieved by the paternalist had they reached a decision. For example, if a doctor is concerned that their patient will refuse surgery, and so performs it on them before they have gained consciousness and had a chance to express their opinion, they act paternalistically, even if the patient would have opted to have the surgery. Preventing an individual from making a choice (if motivated by distrust of their agency) is paternalist, then, even though we do not act against their expressed wishes.[[113]](#footnote-113)

Finally, Shiffrin suggests that even freedom-*enhancing* behaviour may be considered paternalist. She argues that if we are given options we have declared we would rather not have (perhaps because we find too much choice overwhelming, or worry about yielding to temptation) then for someone to provide these options (perhaps because they think we would have a better character if tested, or that the option we are trying to avoid is a good one) can be paternalist.[[114]](#footnote-114) If we were, instead, *persuaded* that the additional choices were to be good for us then, of course, this would not be paternalist. Paternalism must involve ignoring or bypassing an individual’s agency because we distrust it, and engaging in discussion and attempts at reasoned persuasion demonstrate an appropriate respect for this agency.

It is important to emphasise that in all these cases, the paternalist agent need not act outside the legitimate exercise of their own freedom. Otherwise permissible actions become paternalist (and so potentially impermissible) on the basis of their motive, not their content. We are perfectly within our rights to refuse to help someone build their shelves, for example, but it may be that we should not refuse help for their own good, or because we distrust them. However, though an action being paternalist gives us a *prima facie* reason to question its permissibility, it need not be the case that all paternalist actions are impermissible. It may even be a valuable feature of some close personal relationships that we perform acts motivated by the other person’s good when we think they are likely to suffer from weakness of will. My focus here, however, is government action, and I suggest that governments should not, if possible, treat their citizens paternalistically. This is supported by my argument that avoiding paternalism need not damage individual well-being. This motivates my claim that, as a guide to government policy, the capability approach has a good reason to avoid paternalism (Chapter 3).

*3.2 Shiffrinian Soft Paternalism*

If this is how we should understand paternalism, then how should we understand the corresponding form of anti-paternalism? Specifically, what will it mean to *avoid* interfering with individuals’ autonomous choices in their legitimate spheres of control? I will begin by considering what should constitute autonomous choices, and suggest that we should take a proceduralist approach to autonomy. Using Feinberg’s requirements of voluntariness I will argue that the form of anti-paternalism we should adopt is a version of soft paternalism, according to which we should permit *voluntary* choices in legitimate spheres of agency, but may have a warrant to intervene to prevent non-voluntary choices in these spheres. The combination of these two approaches I will call ‘Shiffrinian soft paternalism’.

As discussed (§2.2), for a choice to be voluntary for Feinberg it must be made without coercion, with knowledge of the relevant empirical facts, in a clear emotional state, not based on mistaken reasoning, and be carefully considered. I would add that such choices should also be consistent with an agent’s other goals and desires (though this may be implicit in the requirement of unmistaken reasoning).[[115]](#footnote-115) We are concerned, then, about cases in which an individual seems to undergo “a wholesale cognitive failure that undermines warranted attributions of moral responsibility”[[116]](#footnote-116), or acts in ways that do not accord with their own “stable values, attitudes and desires”[[117]](#footnote-117). I will understand autonomy to require that our choices meet these procedural requirements.

To be a consistent Shiffrinian soft paternalist, therefore, we have two requirements: first, allow all voluntary choices in a legitimate sphere, regardless of their content; second, if we intervene in choices in such a sphere our motivation must be a concern to ensure voluntariness (and not distrust of agency). To meet the first requirement, then, our procedural account of autonomy means that we cannot interfere with choices on the basis that they are for something that we consider unwise, or not worthwhile.[[118]](#footnote-118) For example, as §4 will discuss, if we choose voluntarily we should be permitted to physically harm ourselves or sell ourselves into slavery. Given that the procedural conditions are somewhat vague, it may be difficult to ensure they are fully, or sufficiently, met. However, though there may be borderline cases that are difficult to classify, when determining whether a choice is autonomous we should focus on whether it is made voluntarily, and not on whether we approve or disapprove of its object.[[119]](#footnote-119)

To meet the second, related, requirement, our motive for intervention should be to ensure that the choice being made is voluntary, and not a distrust of the agent’s ability to choose. For this reason, it would be permissible to reason with and persuade an agent when we think they are making a poor decision, since this respects and engages with their agency. We may not, however, simply substitute our judgement for theirs. For example, a doctor may attempt to persuade their patient of the benefits of a surgery, but they cannot simply override their decision if they consider the choice they ultimately make to be the wrong one.

Whether we adopt Feinberg’s standard account of paternalism, or the Shiffrinian version I have developed, then, our motive for intervention should be a concern for voluntariness. However, whilst a standard soft paternalist may intervene to ensure voluntariness only in cases where the individuals’ interests are at stake, and they will otherwise be harmed, a Shiffrinian soft paternalist can intervene to ensure voluntariness in any domain that is in that individual’s legitimate control. The difference between the accounts is shown in Figure 5.

|  |  |  |
| --- | --- | --- |
| **Action** | **Voluntary Choice** | **Non-Voluntary Choice** |
| **Harm to others** | SP: InterveneSSP: Intervene | SP: InterveneSSP: Intervene |
| **Harm to self** | SP: AllowSSP: Allow | SP: InterveneSSP: Intervene |
| **Harm to no one**(acting in a legitimate sphere of agency) | SP: AllowSSP: Allow | SP: AllowSSP: Intervene |

 SP = soft paternalism; SSP = Shiffrinian soft paternalism.

*Figure 5: Differences between Standard Soft Paternalism and Shiffrinian Soft Paternalism*

The, perhaps unexpected, result of Shiffrin’s definition of paternalism, then, is that the corresponding anti-paternalism will be more restrictive – will justify intervention in more cases – than standard accounts. It may seem surprising that suggesting that paternalism occurs in more cases than is usually supposed means that anti-paternalism will be *more* interventionist. However, expanding the domain in which questions of paternalism arise, means the anti-paternalist (if concerned to allow voluntary choices) will have a broader domain in which to ensure voluntary choices are being made. I will now consider what this domain of legitimate control should comprise to bolster this form of soft paternalism, before arguing that its adoption does not have counterintuitive consequences with regards to either insufficiently protecting individual welfare (§4), or permitting too much interference with individual autonomy (§5).

*3.3 Legitimate Domains of Control*

Shiffrin relies on examples to demonstrate the kind of cases we seem to have a *prima facie* right to choose about. These tend to be either self-regarding actions, or other-regarding actions over which we have legitimate control, such as a project we are managing or the upbringing of our children. It is important to emphasise the distinction between cases where interference is paternalist and those where it is *impermissibly* paternalist. If we act because we consider our judgement superior to another agent’s, and so override their agency without consultation, we act paternalistically. However, some such interventions, in the context of some relationships, may be permissible. My focus will primarily be paternalist government intervention in self-regarding spheres (though not necessarily motivated by a concern for harm). I suggest that the nature of a relationship between a government and its citizens means this sort of paternalism will always be impermissible. Further, I will argue that the capability approach can provide useful guidance to determining which self-regarding domains should concern us.

I will begin, though, by outlining some examples of cases in which interference in other-regarding spheres may be paternalist. First, such paternalist intervention may be motivated by a concern for welfare, though not that of the agent interfered with. For example, imagine we have a friend with a child. We accept that they are this child’s legitimate guardian, and that this entitles them to make decisions regarding their upbringing (assuming they do not harm the child). Our friend is a vegan and decides to bring their child up on a vegan diet. They go to great lengths to ensure the child receives the necessary amount of protein and nutrients, so the child is not harmed by this diet. Nonetheless, we think that this decision is the wrong one since the child is being denied the gastronomic pleasures to be had from eating a variety of other foods. When babysitting this child one day, we ignore our friend’s strict instructions regarding the food we should prepare for them, and give the child non-vegan food instead. Alternatively, we could imagine that a teacher distrusts the parent’s decision, and gives the child a non-vegan school lunch. Distrusting and overriding a parent’s (non-harmful) decision about their child’s upbringing seems to treat them paternalistically: we consider them incapable of making choices in a domain in which we usually think competent adults can choose.

Second, there are cases of other-regarding paternalist interference that do not involve a concern for anyone’s welfare. For example, we could be appointed to work on a team drafting a new policy regarding disability access at our university. The manager of this project writes a memo to the rest of the staff, which we substitute with a more eloquently written memo of our own, or one that enacts what we consider a superior policy. Although this may be permissible, in cases where individuals have not acted so as to render themselves incompetent, it is paternalist to ignore their decisions and substitute our own. If we were to discuss our concerns with the project manager, or the parent above, engaging with their agency and attempting to persuade them to change their mind we avoid paternalism. We treat them as an agent and show proper respect to their will. We fail to do this when we simply override their decision.

Whilst I share Shiffrin’s intuition that these are instances of the distinctive insult of paternalism, others do not and the cases are controversial. The main reason for dispute may be that many would question how legitimate our control can be in other-regarding spheres. If the above cases do not intuitively strike one as paternalist, I will not defend this conclusion further here. The more central cases for my purposes are those when we intervene in agents’ judgements in self-regarding spheres in cases not directly related to harm. I would suggest that a list version of the capability approach can be used to determine what these domains comprise.

As mentioned in Chapter 1, and considered further in Chapter 3, I believe that capabilities should be understood as domains of our life in which we should be able to exercise control. In these central domains I suggest that it is important that we make informed and voluntary decisions, even if we are not at risk of harming ourselves. Further, if someone were to ignore our voluntary choice in such a domain, and substitute their judgement for ours, this would be paternalist – again, even in cases in which the intervened-with agent does not stand to be harmed. Thus, to fail to provide individuals with the central capabilities as I understand them would be paternalist, whilst a Shiffrinian soft paternalist would respect these domains of control.[[120]](#footnote-120)

To clarify what it means to be a Shiffrinian soft paternalist, it is worth considering an example of paternalist interference in a *self-regarding* domain that is not motivated by a concern for harm to, or the best interests of, the interfered with agent. Imagine a park ranger who refuses to allow a hiker to climb a dangerous route out of concern for her potential widower.[[121]](#footnote-121) Shiffrin argues that this would be an instance of paternalism towards the would-be hiker since the ranger distrusts her agency in, and exerts control over, a domain that lies in her control (the maintenance of her personal relationships).

It would not be paternalist to refuse to allow the hiker to climb the route because the ranger did not want to undertake a rescue attempt if she were injured and stranded. In this case, the ranger exerts control in a domain over which *he* has legitimate control – his own liability to undergo a rescue effort – even though a side-effect of this may be to influence domains in the hiker’s control. As in the shelf-building case above, a legitimate choice by an individual can become paternalist (and potentially illegitimate) if their reason for making the choice is distrust of an agent’s ability to make choices in their legitimate domain of control.

It may be objected that the central, self-regarding domains over which we have legitimate control should not be conceptualised as domains of *control* but, rather, domains in which we have a right *to* something. For example, the capability for health should be the opportunity to have good health, and not the opportunity to control our health. I will consider this idea in greater length in Chapter 3, but it is worth saying something in defence of the importance of having control in central domains. This allows me to respond to those, such as Archard, who consider it “questionable to think that the value of choosing my own health care is such that no amount of good health secured by others choosing for me would fail to compensate it”[[122]](#footnote-122). In other words, that individual control should not be our primary concern.

There are three readings of such a scenario, in which my choices regarding my health care conflict with the good health that could be secured if others chose for me. First, it may be the case that an individual desires good health but is ill-informed about how this can best be achieved: perhaps they have been convinced by homeopathy, for example. In this case, assuming we are a soft paternalist, it would not be paternalist to interfere with such an individual to ensure that they are fully informed, in the same way that we can prevent someone from unknowingly crossing a rotten bridge. Second, they may desire good health but have other competing considerations that prevent them from making choices that will best promote it. For example, a Jehovah’s Witness may desire to be healthy, yet decline the blood transfusion that would ensure this health. Whilst we may sometimes find it hard to understand such decisions, it would surely be paternalist to ignore it, and in such a central case as health, seems to be unjustifiably paternalistic. Third, an individual may, for whatever reason, desire death or ill health (as a healthcare professional understands it). In this case, the ‘good health’ bought at the expense of ‘choosing my own health care’ in no way provides compensation. If we find life unbearable and have made the reasoned decision to commit suicide, or as §4.2 will discuss, have chosen to amputate a limb, will-independently defined ‘good health’ is not good for us.

For this reason, I think that capabilities should comprise having control, where this means the capacity to exercise procedurally autonomous choices, regardless of their content, and so without any reliance on a will-independent notion of harm. A Shiffrinian soft paternalist can avoid such reliance, since they do not need a conception of harm to identify those cases when choosing voluntarily is important. Rather, they should argue that we should be able to make procedurally autonomous choice in legitimate domains of control. Shiffrinian soft paternalism is, therefore, compatible with the version of the capability approach I wish to defend. I will now consider why Shiffrinian soft paternalism is worth adopting in its own right.

**4. Applying Shiffrinian Soft Paternalism: Some Difficult Cases**

The first problem that faces Shiffrinian soft paternalism is that which faces any anti-paternalism account: the charge that it is fanaticism to uphold the value of choice in the face of the ‘obvious’ evils of bodily harm’.[[123]](#footnote-123) Soft paternalism is the most plausible form of anti-paternalism, since it resists the obviously counterintuitive consequence of hard anti-paternalism: that we cannot even interfere to prevent individuals from harming themselves non-voluntary – from harming themselves accidentally or when they are in a temporary state of emotional instability. Once the debate is framed in terms of a conflict between paternalism and soft paternalism most people have intuitions that support both positions. On the one hand, many consider that the “evil of self-harm”[[124]](#footnote-124) may give us a good reason to paternalistically intervene whilst, on the other, many would consider the value of individual autonomy to give us good reasons to allow individuals to make voluntary choices.

If we opt for one of these positions, rather than attempting a “project of reconciliation”[[125]](#footnote-125) or compromise between the two, it seems that we must sacrifice one of these central values – autonomy or welfare. If we choose soft paternalism, it is individual welfare that it seems must be sacrificed: we can do nothing to stop people making harmful choices, as long as they are made voluntarily. However, I would suggest that many of our concerns regarding the ‘evil of self-harm’ involve the assumption that this harm must *really* be involuntary, since no one would choose such a harmful course voluntarily. When we are genuinely assured of the voluntariness of a choice, I would suggest that our intuitive concerns about these harms lessen significantly. Further, not only is the soft paternalist position not counterintuitive, it need not, in fact, be detrimental to individual welfare.

To demonstrate these points I will consider two hard cases for anti-paternalists: voluntary slavery (§4.1), and apotemnophilia or the strong desire to have healthy limbs amputated (§4.2). I will show that although slavery would not be forbidden outright by soft paternalists, it would be rare for the circumstances to obtain in which slavery would be permissible. Further, that the Shiffrinian soft paternalism response to slavery avoids the stigmatisation that may result from the standard soft paternalist response. Apotemnophilia represents a case in which it is more likely that conditions could obtain such that amputation could be chosen voluntarily, and so be permitted by a soft paternalist in practice. However, I will suggest that permitting what seems to be an uncontroversially harmful act need not actually run contrary to our concern for individual welfare.

*4.1 Voluntary Slavery*

First, I will consider whether a soft paternalist would allow us to enter into slavery contracts. Given that slavery is widely agreed to be harmful, a standard soft paternalist could prevent it being entered into non-voluntarily, and since it seems to involve a central domain of control (if not many), a Shiffrinian soft paternalist could intervene to ensure voluntariness too. However, if such a contract *were* entered into voluntarily, it seems both forms of soft paternalists cannot intervene. It may seem a strange conclusion that the soft paternalist’s concern for autonomy will lead them to permit individuals to give up their autonomy in this way.[[126]](#footnote-126) Moreover, failing to prevent such contracts may strike many as unacceptable.

I will argue, first, that the Shiffrinian soft paternalist’s justification for intervening to prevent slavery contracts when they are non-voluntary is superior to the soft paternalist one, since the latter will stigmatise the would-be slaves (§4.1.1). Second, that the difficulties involved in securing the conditions of voluntariness in this case means such contracts would rarely (if ever) be permitted in practice, since usually “the state might be justified in simply presuming non-voluntariness as the least risky course”[[127]](#footnote-127) (§4.1.2). Thus, the concerns that soft paternalists would allow slavery, and so undermine individual well-being, would not materialise in practice.

4.1.1 Slavery and Stigmatisation

According to Feinberg’s version of soft paternalism, we must be assured that an act is harmful before we can intervene to prevent it from being performed involuntarily. Thus, to prohibit non-voluntary slavery, a soft paternalist must insist that slavery is will-independently harmful (a classification with which most people would agree). According to Shiffrinian soft paternalism, on the other hand, it need not be the case that an action is harmful for it to be important that our choice is voluntary, just that it concerns a central and legitimate domain of control. Thus, a Shiffrinian soft paternalist can insist our choice must be voluntary, without making any judgement about the will-independent harmfulness of the particular act (being a slave).

To demonstrate the importance of this point, a useful analogy can be made with rape and consensual sex. We rightly illegalise rape without assuming the underlying act (sex) is harmful, and so without stigmatising consensual sex. It may seem far-fetched to imagine a government which insisted sex is harmful, but imagine, for example, a government which deemed homosexual sex harmful and wrong. This government embraces soft paternalism, however, and so are willing to allow people to engage in this (harmful) act if they can be assured that it is only ever performed voluntarily by consenting adults. This response may avoid paternalism, but I would suggest it is still an impermissible attitude for a government to adopt, since it stigmatises those who would choose to engage in homosexual sexual relationships, though it permits them.

It may be objected that the consensual nature of the act changes whether it is harmful: rape is harmful, whilst consensual sex is not. However, those who argue for the harmfulness of acts such as slavery do not hang their judgement of its harmfulness on voluntariness in this way: slavery is harmful whether we choose it or not (i.e. will-independently), though soft paternalists permit us to voluntarily harm ourselves. It may be, therefore, that the special importance we place on the role of consent in the case of sex means that the analogy between this and slavery does not entirely hold. Nonetheless, this case serves to demonstrate the insult that can occur when a soft paternalist judges that an act is harmful, even if it can be undertaken voluntarily: the *insult* to homosexuals in the above example is analogous to the insult that would arise from a soft paternalist ban on slavery.

I would, further, question whether activities such as slavery (and amputation) *should* be considered will-independently harmful, and suggest instead that, like sex, they are harmful only when entered into non-voluntarily, as the following sections will discuss. For now, though, the point is simply to outline the soft paternalist response, and the fact that the harm-based justification for it would stigmatise those who would (if permitted) make the voluntary choice to partake in slavery contracts. It may even lead to the stigmatisation of those who engage in comparable relationships such as dominant-submissive partners, since these involve a very real loss of autonomy. For the soft paternalist, the harmfulness of these relationships may explain why they must be voluntary. A Shiffrinian soft paternalist can agree that these relationships should be entered voluntarily, but can make this judgement without assuming individuals are in danger of harming themselves. They need not, therefore, characterise voluntary slavery as allowing individuals to voluntarily harm themselves.

As §4.1.2 will argue, ensuring that master-slave relationships are entered into voluntarily may prove difficult, and for this reason a soft paternalist (of either sort) may opt for a blanket ban on slavery. The point is that a Shiffrinian soft paternalist can do so without a theoretical commitment to the overriding harm of slavery. Altering the rationale behind policies, such as the prohibition of slavery, may not immediately have a significant impact on its actual stigmatisation, but this is an important first step towards seeing such unusual life choices as harmful *when involuntary*, not harmful *per se*. Moreover, it simply seems unacceptable and insulting for a liberal government to classify the lifestyle of some of its citizens as harmful and wrong (though permissible). This would give us a reason to change the rationale behind government policies, even if we were not convinced that this would have the hoped for knock-on effects on public attitudes. Finally, we may think that it is not the role of the government to identify harm and help citizens to avoid it (by ensuring their voluntariness), but more generally to enable them to make voluntary decisions in central domains of their lives – to have the central capabilities.

4.1.2. Slavery and Exploitation

A Shiffrinian soft paternalist, then, would not *need* to consider slavery harmful to insist it can only be undertaken voluntarily. In this section, I will argue that, indeed, slavery is not necessarily harmful. It is, however, often involuntary, so our commitment to voluntariness may allow us to prohibit such contracts as a general rule. Both these points hang on the fact that slavery necessarily involves a second-party (a ‘master’), who has much to gain from exploiting their slave. First, the two features central to the harm of slavery – (a) loss of autonomy and (b) irreversibility or lack of freedom of exit – are not intrinsically problematic, but are made so by the existence of an exploitative master. Second, it is the benefit that accrues to the master that makes coercion into slavery likely. Thus, slavery is morally troubling not for paternalist reasons (that individuals should not be allowed to harm themselves) but for the non-paternalist reasons that exploitation is wrong (and should not be supported by the state), and the soft paternalist reason that voluntariness ought to be ensured, and that an exploitative institution is inimical to voluntary choice.

Slavery can be roughly defined as entering into a work contract that does not specify any limits on what you can be ordered to do, and which has no exit clause (and which usually does not involve appropriate remuneration). The central features, then, are loss of autonomy and irreversibility. However, these are not features that, in themselves, we think must always be avoided. First, someone may give up their autonomy, or ability to make choices about how their life goes to something inanimate, such as the strictures of a religious text. We do not tend to suggest these choices are impermissible or harmful. For example, we accept the life choices of monks or nuns who live in accordance with rules that structure almost every moment of their lives. Thus, we do not seem to consider there to be something intrinsically wrong with sacrificing our ability to control how we spend our lives.

We may think that slavery is worse because, unlike monks or nuns, slaves cannot regain their autonomy and control if they no longer wish to lead this life. However, many widely permissible decisions cannot be reversed, for example, being sterilised. Perhaps what makes the case of slavery so troubling is that there is nothing inherent in the slave’s situation that makes it irreversible, other than the reluctance of his master to set him free: the slave is capable of returning to a state of autonomous control over his life. Similarly, if we chose to be sterilised, changed our mind, but were prevented from having the procedure reversed by a second-party – perhaps our partner does not want children and does not want to use an alternative form of contraception – this would be unacceptable. Slavery looks so unappealing not because it involves individuals giving up their future options, but because it may involve other agents keeping them from options they desire, and are capable of possessing.

Our reluctance to allow slavery, then, is not primarily motivated by paternalist concerns (reluctance to allow individuals to harm themselves (even voluntarily)). Much concern centres on preventing the existence of an institution that upholds exploitation. These worries seem similar to those which motivate the unconscionably doctrine, which “enables a court to decline to enforce a doctrine whose terms are seriously one-sided, overreaching, exploitative, or otherwise manifestly unfair”[[128]](#footnote-128). This is often seen as a paradigmatic case of paternalism – the court fails to uphold a voluntary contract on the basis of its exploitative nature – but, as Shiffrin argues, a non-paternalist case can be made for it.

Simply, the argument is first, that a contract requires the *participation* of the community, so upholding the contract does not just require the state to not get involved, but to be complicit in the contract. Second, the potential promisors do not have the right to the community’s unqualified assistance: the nature of a promise does not create obligations to anyone other than the promisor. Finally, the community’s refusal to give assistance need not be made on paternalist grounds. Choosing not to be involved in a particular contract need not be paternalist if the motives behind choosing not to be involved are self-regarding.[[129]](#footnote-129) A state could prohibit slavery, then, not for the paternalist reasons that it fears for the weakness, or distrusts the agency, of the supposedly exploited party. Rather, because it is concerned with the strength, and behaviour of, the stronger, exploitative party, and does not wish to be involved in such activity. If a state refuses to uphold a slavery contract for such self-regarding reasons, it does not act paternalistically.

As well as these non-paternalist reasons not to uphold slavery contracts, we have soft paternalist reasons not to, on the basis that slaves are unlikely to have chosen their situation voluntarily. Feinberg describes at length the ‘demoralising public spectacle’ that would result in a society that permits slavery, since ordinary citizens would either have to assist in the ‘misery’ of the slaves, or break the law to help them escape.[[130]](#footnote-130) This assumption that slaves will be miserable, and wish to escape, implies that they did not choose this life voluntarily.[[131]](#footnote-131) Whilst the conditions of making a voluntary choice do not preclude an individual being mistaken or changing their mind, if a decision is made freely, with full information about the consequences, and fits with an individual’s other desires and goals, it is implausible to suggest that this would *necessarily* result in misery.

Concerns that slavery is non-voluntary are, of course, consistent with soft paternalism. Further, the existence of masters with an interest in exploiting their slaves means such concern is warranted: it would be very difficult to ensure a free and voluntary slave market, especially given existing inequalities of power. Recent government ‘workfare’ policies compelling individuals to work for free in order to claim benefits are a good example of this. Whilst the claims that this, itself, is ‘slave labour’ may seem slightly exaggerated, in a limited job market it does not seem impossible that large employers may be able to force employees to enter into contracts that come close to (or possibly are) conditions of slavery.[[132]](#footnote-132) When our options are severely limited, our choice to enter such contracts does not seem to be a voluntary one.[[133]](#footnote-133)

In a similar way, the current market for drugs, such as heroin, renders the choices of many drug-users involuntary, since drug dealers have an interest in coercing their potential customers into using. We may be able to imagine a modified system, where heroin was distributed freely or cheaply at government-run clinics, which had no interest in acquiring more custom, and which provided a wide range of information on the likely consequences of heroin use. If we considered this sufficient to make voluntary choice possible, then a Shiffrinian soft paternalist could lift the ban on heroin. In the case of slavery the beneficiary is not so easy to remove: though there need not always be drug dealers, as long as there is slavery there will be masters, and at least some of these are likely to employ coercive tactics. Further, for as long as there are economic inequalities it is unlikely that a decision to enter a slavery contract can be guaranteed to be voluntary. Nonetheless, if a truly voluntary slavery market could be created, slavery should be permissible.

A residual worry for the soft paternalist, even if this voluntary market were created, may be that if individuals change their mind they lack autonomy in a central domain of control. One response is to simply point out that possessing procedural autonomy over part of our life does not mean we will always possess this autonomy. We often choose to limit our future options, and this is simply an unavoidable consequence of allowing individuals to control their lives. Alternatively, we may think that given the degree of autonomy lost when we enter into slavery – we lose all control in many, if not all, central domains – we should write in some exit clause (perhaps involving a penalty) to any permissible slavery contract.[[134]](#footnote-134) This may seem the best way to uphold the Shiffrinian soft paternalist’s commitment to allowing us voluntary choices in certain central domains: that insofar as possible we should have the *on-going* capacity for choice, and that a second-party would violate our rights if they prevented us having this control.

In general, I do not think that our intuitive worries about slavery centre on the voluntary cases, which are, indeed, hard to envision. Rather, our intuitions against slavery, and the misery it potentially entails, arise from concern for those who did not choose slavery voluntarily in the first place; and those who change their mind and are no longer voluntarily committed to it, but are prevented by the benefitting party from escaping their situation. When entered voluntarily, there is nothing intrinsically harmful about slavery, and the experiences of those in submissive relationships suggest it may have value in some cases. The practical difficulty of ensuring that we allow voluntary, and only voluntary, slavery may mean that Shiffrinian soft paternalists would not generally permit slavery contracts. This is especially likely when combined with a state’s (non-paternalist) concern not to participate in an exploitative institution. These reasons to prohibit slavery are not paternalist, nor are they soft paternalist: they do not rest on the assumption that slavery is harmful and so avoid stigmatising those who would choose this way of life.[[135]](#footnote-135)

*4.2 Voluntary Amputation*

The second example I will consider is body integrity identity disorder (BIID) or apotemnophilia (the strong desire to have healthy limbs amputated). Such instances of serious self-harm, like slavery, are assumed to be cases that any anti-paternalist should want to prohibit, but will be unable to. However, I will argue that allowing voluntary amputation need not be implausible nor undermine individual welfare, so we need not attempt to devise an anti-paternalist justification for prohibiting it. This is a useful second example since it shares some relevant features with voluntary slavery – it is widely considered harmful, is a highly unusual choice, and is irreversible – but avoids the complications inherent in involving a beneficiary. Apotemnophilia is likely to involve another person (to perform the relevant operation), but they are unlikely to benefit from their involvement, so we need not worry about exploitation. Nor is it the actions of other individuals that would prevent us from having our decision to amputate reversed if we changed our minds.

I will argue that, like slavery, amputation is not necessarily harmful and that we incline towards prohibition only because we assume choosing amputation must be involuntary. However, since amputation will not involve a manipulative beneficiary, such concerns about voluntariness are not justified in this case. It is certainly difficult to understand why someone would voluntarily choose to remove a healthy limb. Indeed, it is telling that of the three possible motivations Feinberg lists for ‘self-mayhem’, the only voluntary, and so permissible, one he envisions is when it is done by religious fanatics for purification or atonement.[[136]](#footnote-136) He can see no reason why anyone else, who was not mad, would choose such a course. However, our difficulty in understanding why someone would chose to undergo an amputation should not lead us to assume this choice can never be voluntary. Given the procedural account of autonomy and voluntariness being used here, we cannot classify a desire as a disorder on the basis of its object alone. Our focus should be on the *means* by which we make a choice, and not the *object* of this choice.[[137]](#footnote-137)

Our attitude to two similar instances of body modification (sex reassignment and cosmetic surgery) suggests that when we consider a decision procedurally rational or autonomous, we are indeed willing to accept the decision is voluntary. The alteration or ‘harm’ to our bodies may be as serious in these cases, but because we understand the reasons for people choosing *this* sort of body modification we permit it. There is nothing structurally different about amputation, however, and so no reason not to allow this when assured of its voluntariness too. I will now discuss the cases of sex reassignment and cosmetic surgery in more detail to demonstrate their relevant similarity to amputation, and so show that we can accept as voluntary, and permit, individuals’ decisions to amputate a healthy limb.

First, sex reassignment surgeries (SRS), which are conceptually very similar to voluntary amputation, since they often involve the removal of a healthy body part, such as a penis or breasts. SRS are permitted because there is a recognised psychological and physiological condition – gender dysphoria – that functions as a legitimate explanation for the desire to have one’s sex reassigned. Moreover, people can empathise more easily with the desire to be of a different sex or, rather, to have the external genitalia associated with the sex we psychologically feel ourselves to be, than they can with the desire to amputate a limb. We may, therefore, tend to assume that the decision to undergo SRS is more autonomous or rational, but there is no principled reason to assume that this is the case. Indeed, there is now evidence to suggest that there is a physiological (neurological) explanation for apotemnophilia. Roughly, this is a failure to represent one or more limbs in the right superior parietal lobule, with the consequence that although sufferers can feel the affected limb being touched, it does not integrate into their body image.[[138]](#footnote-138) As such, they wish to have it removed, claiming that they will only feel ‘whole’ without it, and that the limb in question does not really belong to them or is not part of their body. Such explanations render it even closer to gender dysphoria and the associated desire for SRS.[[139]](#footnote-139)

An alternative explanation may be that some consider amputation a means to meet some ideal of beauty, and indeed, we already do permit people to undergo surgery to meet their ideal of beauty (when it is less unusual). In fact, we do so without requiring anything like the conditions of ensuring a voluntary choice that we do for those wishing to undergo SRS: psychological testing, ensuring the individual has a fully-informed support network, social reassignment (living as their desired sex for a number of years), and so on. Such conditions seem to ensure procedural autonomy and so would be important for a soft paternalist. Thus, to ensure amputation is really voluntary we may wish to implement a similar screening and support process: for example, requiring psychological testing and a demonstrated, and rationally explained, commitment to the process. This would not be a fail-safe procedure, but given that similar standards have proven relatively successful in the case of SRS, it seems such a system may be workable.

Even without this process, we may have more reason to think an amputation is more likely to be chosen voluntarily than standard cosmetic surgeries because it involves such an unusual conception of beauty that an individual is unlikely to have been coerced into conforming to it. The concerns that either a particular individual, or the standards of society, may pressure an individual into surgery are unlikely to be relevant in the case of amputation. Under a Shiffrinian soft paternalist system, then, voluntary amputation would be permitted, but great efforts would be made to ensure that it really was voluntary. When chosen voluntarily, I see no reason to think that the individual would be harmed any more than someone who alters their body to change their sex, or meet an ideal of beauty.

Shafer-Landau envisions a society in which ‘amputation shops’ are set up, and advertise their ‘mutilation services’.[[140]](#footnote-140) His worry seems to be that companies with a financial interest in persuading people to have amputations may coerce people into involuntary amputations. Such a scenario seems highly implausible since, like SRS, this is unlikely to be something anyone would do on a whim and, even if it were, the psychological vetting process ought to exclude such individuals. However, even if this were the case, and the advertising employed by these companies was sufficiently successful to make the absence of a limb a desirable ‘look’, this seems no more objectionable than advertising that persuades people to have cosmetic surgery, such as liposuction or elective plastic surgery.[[141]](#footnote-141) I find a situation in which advertising compels people to radically alter their face at least as unpleasant as Shafer-Landau seems to find one in which people are persuaded to remove their limbs.

This is not to suggest, however, that because such advertising is already common-place we should not be concerned about it. If advertising were deemed to be coercive, compelling people into surgeries they did not really want, contrary to the conditions of voluntariness, then a soft paternalist may have reason to intervene to protect voluntary choice. One possible response would be to prohibit advertising (both for amputation and currently available cosmetic surgeries) that produces non-voluntary choices. Alternatively, a government could run a counter-campaign to ensure individuals were better informed and so more able to make a voluntary choice. If the government’s motivation is a concern to ensure voluntariness, their actions are compatible with soft paternalism.[[142]](#footnote-142) With such safe-guards in place to ensure voluntariness, we should permit elective amputations, and this should not undermine the welfare of the individuals involved.

*4.3 Soft Paternalism in Practice*

To conclude this section, it is worth reiterating the likely shape that soft paternalist policies will take since, as the above discussion has indicated, there may often be a difference between ideal policy and practical dictates. We may have a strong commitment to enabling autonomous choice in legitimate spheres of agency, but this is not always best achieved with straightforward lack of interference. First, we may sometimes have good reasons to make a presumption of non-voluntariness in the first instance, and to prevent individuals from acting until we can be assured that they are acting voluntarily. As §5 will discuss, we will have a warrant to assume an action is involuntary when it is one that is rarely performed by people in general, or radically out of character for a particular person. Self-harm and slavery are rarely chosen voluntarily, so we may have a reason to initially prevent these behaviours (or even prevent them indefinitely) until we are sure a choice is voluntary.

Second, there may be cases when ensuring voluntary choice is difficult because individuals do not have settled preferences. Sunstein and Thaler argue that individuals’ decisions necessarily depend on the way in which they are presented with information, and consider the influence of default rules, framing effects and starting points on people’s choices. They conclude that many people, on many subjects, do not have fixed prior, or ‘true’, preferences.[[143]](#footnote-143) Policy makers, therefore, will inevitably influence individuals’ preferences, depending on the way in which options are presented. For example, whether a scheme is opt-in or opt-out has a huge impact on the number of people who sign up to a pension plan, or choose to be organ donors.

The soft paternalist has two options in this case. One would be to force people to consider the issues and form preferences. Thus, rather than making a scheme opt-in or opt-out, we require people to make a decision one way or another about being an organ donor. It may be very epistemically costly, however, to expect individuals to make informed and autonomous decisions in every case, especially when gaining the relevant information is particularly taxing, as in choosing a pension plan. Under these circumstances, a soft paternalist may be justified in taking the second option and designing policies with overall well-being in mind. For example, making a donor scheme opt-out with the intention of increasing the survival rate for those with organ failure. If these policies are not motivated by a distrust of individuals’ ability to choose, and the possibility for voluntary choice is available (we can still opt-out), this is consistent with soft paternalism.

Ideally, then, we should make voluntary choices in all central domains of our life but, in practice, it may be that we are not able to fully consider every option in every case. Nonetheless, we can still be said to retain control over central domains of our life for as long as our agency is not distrusted, ignored or overridden.[[144]](#footnote-144) Thus, in practice, anti-paternalist policies may sometimes be similar to paternalist ones, though they will be differently motivated.

**5. Excessive Interference and Anti-Paternalism**

All anti-paternalist accounts have to respond to the concerns that they will not intervene in central cases of self-harm, and so allow individuals to make choices detrimental to their welfare. However, the particular form of anti-paternalism I have developed – Shiffrinian soft paternalism – may also be subject to the opposite criticism. That is, that by arguing that we can intervene to ensure that individuals are choosing voluntarily in a greater range of cases than just those related to harm, the approach may justify *too much* interference. Wall has made a similar criticism of libertarian accounts,[[145]](#footnote-145) so I will outline his critique, before suggesting how a Shiffrinian soft paternalist could respond

Libertarianism is distinguished by its commitment to maximal rights of self-ownership: it will provide individuals with “the most extensive set of stringent rights over themselves and their powers that is logically compatible with all other persons having an equally extensive set of stringent rights over themselves and their powers”[[146]](#footnote-146). It seems, therefore, that libertarians must be anti-paternalist, since a strict commitment to individual rights would allow no room for paternalist interference. Indeed, it seems libertarians must be committed to a form of hard anti-paternalism, rather than soft paternalism, since a maximally extensive set of rights over ourselves would require that our self-regarding actions are *never* interfered with (not that we are only immune from interference when acting voluntarily).

Some libertarians have attempted to modify their view such that intervention to prevent non-voluntary harms is permissible. One attempt at such modification is to suggest that we should be concerned to maximise *autonomy* rather than rights to self-ownership. As Wall argues, this is incompatible with the central libertarian concern to give people as much control over themselves and their powers as possible. However, more importantly for our purposes, it raises the same worry that the Shiffrinian soft paternalist faces: in order to maximise autonomy we could interfere with *any* of a citizen’s non-autonomous choices, even if they bring “no, or only trivial, harm”[[147]](#footnote-147).

Feinbergian soft paternalists have a straightforward response to these concerns regarding excessive interference. This view is motivated by the dual objects of promoting agency or voluntariness, and a concern for (will-independent) harm. They assume that some things are harmful for everyone – falling off a rotten bridge, becoming a slave – but since they value autonomy more highly than harm avoidance, they will allow these acts to be undertaken voluntarily. They are not concerned to ensure voluntariness in cases when an act does not involve harm. Their approach may stigmatise individuals for their choices, then, but its focus on only preventing non-voluntary *harm* allows them to respond to the excessive intervention concern.

However, things are somewhat more complicated for the Shiffrinian version of soft paternalism, since this approach aims to ensure individuals choose voluntarily in *all* spheres of legitimate agency, not just those related to harm. The procedural requirements of voluntary choice suggest that ensuring voluntariness in legitimate spheres of agency will require us to have full information about, and fully consider, every decision we make in such a sphere. Thus, it seems any ‘unthinking’ minor decision could be interfered with, and an agent’s autonomy unacceptably restricted.

In response, it should be emphasised what this interference amounts to: it simply involves checking whether we really want to make the decision in question. For example, ‘are you sure you want to cross that bridge, it’s rotten?’ or ‘are you sure you want that ice cream, it’s snowing outside?’. We thus make the individual consider their choice more fully, and their subsequent decision is likely to be voluntary. The ‘interference’, then, is not overly onerous. Yet it may be objected that having to prove that every decision we make is voluntary in this way would, nonetheless, be rather demanding. Further, that asking such questions could be deemed offensive or disrespectful in the context of some relationships, since it assumes the individual has not initially considered and assessed the available information and made their choices voluntarily.

We must consider, therefore, when even this minimal interference would be advocated by a Shiffrinian soft paternalist. Given that respect for individual agency motivates Shiffrin’s whole approach, it seems reasonable to give people the benefit of the doubt in judging whether an action of theirs is voluntary. Thus, we would need a reason to assume that someone’s choice was not voluntary. Furthermore, since the concern of the approach is to allow voluntary choice, and constant interference seems likely to be inimical to this, we have an additional reason to think that the burden of proof lies with the interferer to demonstrate a reason for supposing non-voluntariness.

We would have a reason to think an action is not voluntary when it is one that is rarely engaged in voluntarily. In the case of strangers, the most obvious instances will be actions that seem harmful, since people rarely harm themselves voluntarily. For those we know well, this may also include behaviours that are radically out of character. To return to the examples in §2.3, it would be reasonable to assume no one would eat a poisoned sandwich voluntarily, that someone we knew to be vegetarian would not eat ham voluntarily, and that someone who cared about the origin of their food would not eat Spanish tomatoes. In such cases, we could justifiably intervene (by providing the relevant information) to ensure that they chose voluntarily.

A Shiffrinian soft paternalist may, therefore, make use of a working definition of (will-independent) harm. However, this would only function as an indicator of non-voluntariness, and by no means a unique indicator. More generally they will be concerned to identify behaviour that is out of character – that does not fit with an individual’s other beliefs and desires – since this is likely to be non-voluntary. Interference may be more frequent in cases where we think someone is likely to harm themselves, but unlike standard soft paternalist accounts, this link with harm is contingent. In the rotten bridge case, for example, we would stop the individual not because we consider non-voluntary *harm* to be problematic. Rather, we consider all non-voluntary behaviour problematic in a legitimate sphere of agency, but can better predict its non-voluntariness when it is likely to cause harm.

Thus, whilst standard soft paternalism must rely on an account of will-independent harm to identify cases where an action is wrong, and should be prevented unless chosen voluntarily, Shiffrinian soft paternalism needs no such will-independent definition of harm. Consequently, the approach does not pass normative judgements on the choices people make about how their lives should go. Further, by requiring that we have a reason to think that an action is non-voluntary before interfering, and given that interference merely involves checking an action is voluntary, I believe worries about the escalation of interference can be laid to rest.

**6. Conclusion**

In conclusion, I have shown that it is possible to devise a version of anti-paternalism – Shiffrinian soft paternalism – that does not involve excessive interference in our lives (for the sake of ensuring voluntariness) nor is excessively inattentive to individual welfare (fails to intervene to prevent self-harm). This account argues for allowing individuals to make voluntary choices in central domains of their life, and suggests it would be paternalist to interfere with these choices. As subsequent chapters will argue, avoiding interference in these domains is a good guide to government policy. Governments, then, should avoid paternalism. They should avoid, too, a soft paternalism that relies on a will-independent conception of harm, and makes normative judgements about the contents of individuals’ choices. Shiffrinian soft paternalism retains the plausible elements of soft paternalism – the promotion of voluntariness – without judging or stigmatising individuals for their decisions.

Protecting procedural autonomy in central domains need not conflict with individual welfare. Slavery would, most likely, continue to be prohibited due to the inherently exploitative nature of the institution, though with less stigmatisation of prospective voluntary slaves. Voluntary amputation ought to be permitted (with stringent conditions), which would render it more consistent with current policies on body modification. To think that this would decrease individual flourishing suggests a failure to engage with those with a deep and stable desire for amputations, in order to feel ‘whole’ but who are denied them. Being committed to anti-paternalism, then, and so not directly concerned to promote individual welfare, need not necessarily undermine actual individual well-being.

**Capabilities without Paternalism**

**1. Introduction**

The conflict around which the paternalism/anti-paternalism debate revolves – between a concern to allow individuals autonomy and avoid paternalism, on the one hand and a concern to promote individual well-being through paternalist intervention, on the other – is of particular significance for theories of distributive justice. I have suggested that if we adopt the anti-paternalist position I have outlined (Shiffrinian soft paternalism) individual autonomy can be respected without undermining individual well-being. We should now consider whether a theory of distributive justice can be formulated that is anti-paternalist in this sense, and so safeguards both autonomy and well-being.

The capability approach certainly attempts to tread this line: by providing individuals with capabilities or opportunities, it preserves a space for individual freedom and choice, and by identifying centrally important capabilities it ensures that all individuals have access to those things that are considered central to a flourishing life. The account of social justice the capability approach provides is also intended to be universally applicable: applying to very different cultures, as well as accommodating the experiences and needs of many groups that are often ignored. These aspirations of universality make it especially important that the approach avoids paternalism, since if all governments are obliged to follow certain distributive policies it is important that these do not involve “push[ing] citizens into certain valued ways [of life]”[[148]](#footnote-148).

Despite these laudable aims, I suggest that, as it stands, the capability approach fails to successfully protect autonomy and promote inclusivity and will, instead, justify paternalism. Specifically, I will focus on Martha Nussbaum’s influential formulation of the capability approach, and argue that the methodology she uses to identify her list of central capabilities means that they are neither universal in their application, nor successfully avoid paternalism in the attitudes and policies they advocate. Thus, her account fails to live up to both its universalist and anti-paternalist aspirations. In light of this, I offer a revised formulation of the capability approach, which is genuinely anti-paternalist as well as more universalist than Nussbaum’s version.

Nussbaum’s version of the capability approach began as an Aristotelian project that was committed to promoting a conception of human flourishing, on the basis that “we urgently need a version of essentialism in public life”[[149]](#footnote-149) in order to avoid culturally relativistic positions that suggest “no traditional practice ought to be changed”[[150]](#footnote-150). Nussbaum has since embraced Rawlsian liberalism and political neutrality, and so is concerned to allow individuals to form and pursue their own conception of the good, and to respect their autonomy. As such, she is committed to “not being dictatorial about the good”[[151]](#footnote-151). These twin foundations have resulted in an approach intended to challenge repressive and harmful cultural practices and norms (protecting well-being), yet also to avoid the paternalistic imposition of a single conception of the good (protecting autonomy).

There are two central components of Nussbaum’s account that allow her to achieve these dual aims. First, Nussbaum identifies a list of centrally, and universally, valuable capabilities. These are intended to do the work of primary goods on their original formulation, and comprise those things that are “of central importance in any human life, whatever else the person pursues or chooses”[[152]](#footnote-152), and “which it is supposed a rational man wants whatever else he wants”[[153]](#footnote-153). In Rawlsian fashion, the content of this list of capabilities is identified through an overlapping consensus (as §2.1 will discuss). Thus, whilst Sen is reluctant to adopt a stance on which capabilities are centrally important, allowing societies to determine a list in keeping with their local norms and beliefs, Nussbaum intends her approach to ground universal norms, or universally applicable political principles.[[154]](#footnote-154) Although she permits some variation in the specification of her list depending on societal context, she also insists that the underlying norms of justice ought to apply to all those considered human (on some plausible definition), regardless of the culture to which they belong.

Second, as a liberal theorist, Nussbaum “allows people plenty of liberty to pursue their own conceptions of value, within limits set by the protection of the equal worth of liberties of others”[[155]](#footnote-155). She insists that her approach is politically neutral and “does not rest on any single account of the good life”[[156]](#footnote-156). For this reason she stipulates that our goal should be the promotion of capabilities – freedoms or opportunities – rather than functionings. Despite being universal in application, therefore, the norms advocated should not inhibit individuals’ ability to exercise control in self-regarding spheres of action, and so should avoid treating them paternalistically.

Nussbaum argues, then, that the dangers of both relativism and paternalism can be avoided by identifying a specific list of particularly and universally important (or ‘central’) capabilities. However, although I believe that Nussbaum’s goal – of identifying universal norms without paternalism – can be achieved within the capability framework, I suggest that Nussbaum’s account is not fully successful. Despite Nussbaum’s avowed liberalism, I will argue that she retains an underlying account of what a flourishing life entails, and identifies her list of central capabilities on the basis of an overlapping consensus on the *functionings* central to a flourishing human life (§2). This method of identifying capabilities means the approach does not successfully avoid paternalism in the attitudes and policies it advocates, compelling individuals to function and preventing them from sacrificing capabilities deemed valuable (§3). Nor is the approach universal in its application: it fails to accommodate those who are unable to value or perform the functionings considered central (§4).

My critique of Nussbaum’s capability approach, then, is an internal one: her account fails by her own standards. However, these problems are not endemic to all versions of the capability approach, and in the final section (§5) I identify a modified version, which can avoid the problems I raise whilst retaining the important elements of the capability approach: providing people with substantive opportunities, and leaving them space to pursue their own conception of a good life. Briefly, this modified approach relies on the idea that we should have the capability not for particular functionings, or the opportunity to do certain things, but the capability to exercise control over certain parts of our life, or make choices in certain important domains. By not specifying centrally important functionings but only *domains* of choice, the approach avoids identifying or enforcing ‘right’ choices and can include those who cannot exercise, or do not value, a particular functioning. However, by identifying central domains in which choice should be made, rather than simply valuing choice or autonomy *per se*, the approach does not slide into relativism.

**2. Capabilities and Paternalism**

In its original, more explicitly perfectionist and Aristotelian formulation, Nussbaum’s account was subject to criticism from two conflicting viewpoints. First, it was suggested that the perfectionism of her account resulted in the paternalistic imposition of her conception of flourishing. Conversely, it was objected that if she was committed to a substantive view of flourishing she ought to be concerned with the functionings individuals could actually perform, and so the degree to which they could flourish, not just their capabilities.[[157]](#footnote-157) Nussbaum is no longer so explicitly perfectionist: “she now insists that the capabilities approach should be regarded as a liberal, or ‘political’ conception of justice in the Rawlsian sense – that is, one that does not rest on any single account of the good life”[[158]](#footnote-158). I will consider whether her account is really free of a commitment to a ‘single account of the good life’, and suggest that even if she allows people to choose not to flourish she still holds a substantive conception of flourishing, (§2.1). I will then briefly outline the form of anti-paternalism that a capability theorist *should* adopt, and argue that Nussbaum’s account fails to conform to it (§2.2).

*2.1 Nussbaum’s Central Capabilities: Opportunities to Flourish*

According to capability theorists, justice requires that individuals be provided with certain central capabilities, which comprise both the developed psychological capacity to perform the requisite functionings, and the necessary external conditions or lack of physical impediments to perform them. Nussbaum’s approach was novel in her willingness to identify a single, and universally valuable, list of capabilities. The content of this list is derived from her list of central functionings: we ought to have the substantive opportunity to perform those functionings required to lead a flourishing life or, at a lower threshold, a minimally human life.[[159]](#footnote-159)

In her early works, Nussbaum suggests that we must identify the central features of a human life: “we must ask, which things are so important that we will not count a life as a human life without them?”[[160]](#footnote-160). Nussbaum argues that this question cannot be answered independently of human experience, but does insist that “the deepest examination of human history and human cognition *from within*…reveals a more or less *determinate* account of the human being”[[161]](#footnote-161). This approach she calls ‘internalist essentialism’, since we can determine the essential features of a human life without recourse to anything external to human experience. This internal reflection is combined with Rawls’s idea of an overlapping consensus. Thus, broadly, Nussbaum argues that this process of internal consideration of human nature, tested through discussion with others, will lead us to identify those functionings we can agree to be necessary to a human, or flourishing, life. These will include being nourished, using reason, forming emotional attachments, engaging in play, controlling our environment and so on.

However, whilst it is *functionings* – (valuable) activities, such as those just listed – that are identified as the subject of the overlapping consensus, it is *capabilities* that governments should promote, to ensure they respect individual autonomy.[[162]](#footnote-162) More recently, Nussbaum has emphasised how this focus on capabilities allows her to avoid the imposition of a particular conception of the good, and to embrace political liberalism. The capability approach, then, is now explicitly political, as is the overlapping consensus: we are asked to “endorse the basic ideas of the Capabilities Approach *for political purposes only*, not as a comprehensive guide to life”[[163]](#footnote-163), and it would be “inappropriate for any particular comprehensive conception of ethical value to be endorsed by politics”[[164]](#footnote-164). Thus, although Nussbaum retains the “evaluative and ethical” element of her approach and “asks, among the many things that human beings might develop the capacity to do, which ones are the really valuable ones…?”[[165]](#footnote-165), she only requires agreement on the answer for political purposes.

I agree that the capability approach should be seen as a political theory that aims to guide government policy rather than assess individual well-being, or dictate individual decisions.[[166]](#footnote-166) I agree, too, that such a theory should be one that allows people plenty of liberty to form and pursue their own conceptions of the good (is anti-paternalist), and one that both stands a chance of gaining wide cross-cultural support and provides entitlements that are appropriate for individuals with a diverse array of needs and preferences (is universally-applicable). However, even in its more liberal incarnation, I suggest that the structure of Nussbaum’s capabilities means they cannot achieve these aims. This is because her capabilities are formulated as opportunities to perform particular functionings – “capabilities are the possibilities the agent has of bringing about functionings”[[167]](#footnote-167) – and not more general autonomy in certain parts of our life.

For Nussbaum, then, flourishing requires that we perform certain functionings. However, being a political liberal, Nussbaum values people’s ability to choose their own conception of the good – what she calls their ‘capacity for practical reason’ – which she includes as a central functioning.[[168]](#footnote-168) To achieve this functioning, we must allow people the capability to perform the other central functionings (or not), and so the choice of whether to lead this flourishing life. To some extent this is simply because we *cannot* be forced to lead a good life: play is no longer meaningfully play if enforced.[[169]](#footnote-169) However, most functionings do not require our having the right attitude to them: we do not have to want food to be nourished by it. The focus on capabilities, then, arises because Nussbaum considers human dignity to require that we “protect and support agency… [and do not] infantalize people and treat them as passive recipients of benefits”[[170]](#footnote-170). Thus, for political purposes, we should not endorse a comprehensive conception of the good.

However, there are reasons to think that Nussbaum has not been wholly successful in expunging her Aristotelian conception of human flourishing, and making her political theory fully neutral. I will consider some evidence that backs up this interpretation. First, her willingness to sacrifice autonomy for the sake of ensuring individuals actually function (§3.2), and to protect ‘crucial areas of empowerment’, even if the individuals who are to be empowered do not recognise their value.[[171]](#footnote-171) For example, she insists that a free press must be maintained, even if women (on whom she focuses) do not see the value in it. More generally, she insists that “if there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained”[[172]](#footnote-172). Thus, whilst for “political purposes…[we should] shoot for capabilities”[[173]](#footnote-173), the philosophical foundations of her theory suggest that what is really important is being able to perform functionings.

Second, the independent value Nussbaum places on her central functionings is suggested by her assumption that people will come to value *functionings* (such as literacy or free speech) once they have experience of them.[[174]](#footnote-174) Arguing for the political stability of her theory, she notes that individuals do not tend to want to lose the capabilities once they have them: “the preference for the central human capabilities is not merely habitual or adaptive, but has much more the unidirectional structure of preferences formed by learning”[[175]](#footnote-175). Yet it is not clear that it is the *opportunities* that she thinks people learn to value. She refers, for example, to “women who have become literate [and] find literacy valuable and even delightful”[[176]](#footnote-176), not women who have the opportunity to become literate and find this opportunity valuable.

Finally, some other accounts of Nussbaum provide a similar interpretation. Ian Carter, for example, presents three possible readings of Nussbaum, which he considers paternalist to different degrees. Even on his third, least paternalist, interpretation of the approach, functionings remain of central importance:

while [the capability approach] abandons any concern with the realisation of valuable functionings, it retains a concern with their possibility. What matters, on the third interpretation, is the capability to function *well*, not capability as such, and to identify and make assessments of such capabilities we will still need to refer to a list of (independently specified) functionings.[[177]](#footnote-177)

I do not suggest that Nussbaum is disingenuous about her concern for capabilities, nor that she is really concerned to promote functionings. My objections to her theory depend only on her attaching some value to specific functionings, and on her understanding capabilities to be opportunities to perform (or not) these particular functionings. I will not defend this interpretation further here.[[178]](#footnote-178) I agree with Carter, then, that the capability approach “remains paternalistic insofar as it retains its reliance on a list of (independently specified) valuable functionings”[[179]](#footnote-179), but I disagree with him that this should lead us to abandon the capability approach.

*2.2 An Anti-Paternalist Approach*

In Chapter 2, I outlined in some detail the most appropriate definition of paternalism and the corresponding anti-paternalism. For the purposes of this chapter, the central features of paternalism are that it comprises interference with an agent’s autonomous choices, and that this interference is motivated by a distrust of individuals’ ability to make decisions in their best interests and the corresponding assumption that the intervening agent’s judgement is superior. Following Shiffrin, paternalist interference need not involve preventing an agent from harming themselves, but can be any instance in which an individual is prevented from choosing for themselves in a domain over which she has legitimate control. The anti-paternalism I define and defend – Shiffrinian soft paternalism – requires that individuals’ autonomous choices in these domains are not interfered with.

These definitions of paternalism and anti-paternalism fit well with Nussbaum’s own account, so it seems fair to assume that her theory ought to avoid paternalism as Shiffrin defines it, and to adopt Shiffrinian soft paternalism. First, this form of anti-paternalism places a great deal of importance on autonomous agency, arguing that we should ensure all choices meet the procedural requirements of autonomy in central domains. This corresponds with the importance Nussbaum places on practical reason as a good that ‘suffuses’ all the others, and her insistence that respect for human dignity requires that we adopt the Kantian imperative to treat individuals as ‘ends in themselves’. She understands this to mean that we should treat people as a source, or ‘point of origin’, of ends. In other words, as beings who can set ends for themselves.[[180]](#footnote-180)

Second, both accounts limit the domains in which autonomy is particularly important. Shiffrinian soft paternalism does not involve a concern for ensuring individuals choose autonomously in general, but in their domains of legitimate control. Similarly, Nussbaum is not concerned to protect and promote every capability, given that “some capabilities are trivial, and some are even bad”[[181]](#footnote-181). “[T]he freedom to rape one’s wife without penalty… [or] the freedom of an employer to discriminate on grounds of race or sex or religion”[[182]](#footnote-182), for example, have little value. Rather, Nussbaum identifies centrally important capabilities.

Finally, I would suggest that Nussbaum’s concern to remain politically neutral means she should adopt a procedural account of autonomy, as in Shiffrinian soft paternalism. In other words, the freedom or voluntariness of an action should not be determined by its content, and so if (as soft paternalists) we are to intervene only with involuntary choices, content cannot be used to justify intervention. Thus, though being ‘free to rape our wife’ may be a ‘bad’ freedom, we should acknowledge that this can be done freely or autonomously. Further, that when these seemingly bad freedoms involve harming ourselves, not others, it would be paternalistic to interfere (and, indeed, stigmatising to judge the act bad). Unfortunately, Nussbaum is not consistently committed to a procedural view of autonomy: as §3 will demonstrate, Nussbaum is willing to prevent choices with the ‘wrong’ content, and is paternalistically motivated (by a distrust of individual agency and a concern for agent welfare).[[183]](#footnote-183) However, given her other commitments it seems she should be.

Given the compatibility of the approaches, as well as the independent plausibility of Shiffrinian soft paternalism, it seems reasonable to assume that Nussbaum should be an anti-paternalist of this sort, and to criticise her if she fails to be. For a Shiffrinian soft paternalist capability theorist, the central capabilities should be areas over which we legitimately have control. Within these domains, government should allow us to exercise our autonomy, prevent others from interfering with our autonomy, and ensure we are capable of exercising this autonomy in a meaningful sense. In other words, these should be domains in which we can exercise autonomy, regardless of the content of our choices. Nussbaum’s version of the capability approach is not anti-paternalist in this sense, due to her underlying commitment to the importance of central functionings: her capabilities are opportunities to function. This understanding of the capabilities will also mean that it fails to be universally applicable (to those who do not value or cannot perform one of these functionings). A truly Shiffrinian soft paternalist understanding of the capability approach, on the other hand, will be universally applicable, as well as avoiding paternalistic policies.

**3. Choice or Flourishing? Capabilities or Functionings?**

There is a tension in Nussbaum’s capability approach between her concern to allow individuals to choose their own way of life, and her desire that they choose well, where this involves them choosing to perform the central functionings. As Nussbaum puts it, “freedom has intrinsic value…[but t]he capabilities would be pointless and idle if they were never used”[[184]](#footnote-184). How will she respond, then, when someone chooses not to function, and so not lead her conception of a flourishing life? There are certainly cases in which individuals choose not to perform a central functioning and, in such cases, I will argue that Nussbaum must consider their decision ‘wrong’ or even ‘not human’ (§3.1). To say that Nussbaum would deem some individuals’ lives or choices ‘not human’ may seem an overly harsh interpretation of her theory but, since at the lower threshold her central functionings are necessary for a minimally human life, she is vulnerable to this criticism. Moreover, if she insists that individuals who do not or cannot perform valuable functionings *are* human, she is left open to even more implausible conclusions, in which justice requires that we provide individuals with opportunities they do not value and cannot meaningfully possess (as §4 will discuss).

In this section, though, I will focus not on those individuals who cannot value or exercise her central capabilities to function, but those who simply choose not to function. Nussbaum’s willingness to ensure certain functionings are performed (§3.2) or to prevent individuals from signing away their capabilities (§3.3) suggests she will consider such choices the wrong ones. The fact that Nussbaum permits such exceptions to promoting capabilities supports my interpretation of her as committed to a substantive notion of what flourishing entails, which, in these instances, she allows to be advanced at the expense of autonomy. Moreover, because her justification for these policies is motivated by a distrust of individuals’ ability to make ‘good’ choices, and a concern for their independently defined welfare, these policies are genuinely paternalist.[[185]](#footnote-185) Yet many of Nussbaum’s suggested policies can be justified without paternalist motivations. This means we do not need a conception of flourishing to ground these (often plausible) policies, which paves the way for my version of the capability approach (which lacks such a conception).

*3.1 Making the Right Choice*

The first problem for Nussbaum relates to the neutrality of the choice the capability approach provides: all else being equal, is the decision to exercise a capability – to perform a functioning – morally equivalent to the decision not to exercise it? The answer ought to be ‘yes’ if Nussbaum is to make good her commitment to anti-paternalism (in the Shiffrinian soft paternalist sense), but the foundations of her approach, as they stand, mean she is unable to answer in the affirmative. By deriving her list of central capabilities from the functionings essential for a human, or flourishing, life, it seems it must be better if we *do* perform the functioning. If we do not, we miss out on flourishing and, in extreme cases, cannot be said to lead a human life at all.

Nonetheless, it is possible for someone to choose not to perform these functionings, and not just occasionally (for example, fasting), but all the time (as when someone goes on hunger strike). Nussbaum insists that her approach “says nothing against”[[186]](#footnote-186) decisions not to function, such as fasting or celibacy, yet this does not seem accurate. These functionings are selected on the basis of their being essential components of a good life, so choosing not to exercise them will make one’s life less good. Thus, even if Nussbaum permits individuals to make these bad choices (and I will consider instances below when she does not), her approach will stigmatise individuals who make such choices.

At best, then, her approach can be seen as soft paternalist in the standard Feinbergian sense: choices are judged as good or bad, harmful or not, but our respect for autonomy will mean we allow individuals to make these choices anyway. Chapter 2 considered the problems with approaches that consider acts ‘harmful and wrong, but permissible anyway (if we are assured of their voluntariness)’. Judging homosexual sex or master/slave type relationships to be harmful, but permissible if voluntary, may avoid paternalistic interference, but it does not avoid insulting individuals who make these decisions. When these judgements motivate interference, as they do for Nussbaum, then we move from a problematic and insulting form of soft paternalism to a genuinely paternalistic approach.

Although, as I will argue, Nussbaum judges some decisions not to function to be wrong there are, nonetheless, *some* cases in which she would, indeed, ‘say nothing against’ decisions not to function. These are instances in which functionings are necessarily in conflict, since choosing not to perform one functioning *for the sake of another* is legitimate. For example, for a celibate monk, a failure to function in one way (such as sexual satisfaction) may be thought necessary for another functioning he values more highly (such as spiritual fulfilment). There are also instances when functionings are not inherently incompatible, but conflict due to the limitations of circumstance. For example, in Scanlon’s famous case of someone who would prefer help building a temple to their god to being decently fed,[[187]](#footnote-187) a conflict arises between religious functioning and nourishment, both of which Nussbaum values. The individual sacrifices one valuable functioning for another, though in this case the requirements of religion and nourishment need not conflict: if sufficient funds were available both could be achieved.

For Nussbaum, these would be cases of ‘tragic choice’, since whichever functioning is exercised, something valuable is lost.[[188]](#footnote-188) Further, in both cases, individuals do not question the value of the capabilities or functionings, and so would not undermine the possibility of an overlapping consensus on the central capabilities (§4 will consider instances when this is not the case). These are cases, then, in which individuals sacrifice something valuable for something else valuable, and whilst there may be an element of tragedy in this sacrifice, it need not undermine Nussbaum’s theory or the content of her list.

The problematic cases for Nussbaum, are those in which someone is not compelled by circumstance to give up a central functioning, but does so anyway. They choose to give up a functioning Nussbaum considers necessary for one she does not: for example, starving oneself to meet some ideal of beauty, or choosing the pleasures of drug-use at the expense of one’s long-term health. These functionings are selected as essential components of a good life, so choosing not to exercise them will make one’s life less good, and it is not clear that Nussbaum would ‘say nothing against’ such choices. Nonetheless, like the Feinbergian soft paternalist, she may permit these choices when assured of their voluntariness. This may be because a functioning would lack value if we were forced to perform it, or because individuals can only make the valuable (genuine) choice *to* function if they have the opportunity to choose not to.[[189]](#footnote-189) Individuals who choose not to function, then, may be a necessary evil to allow most people to have freely chosen, flourishing lives.

However, the fact that we do not paternalistically intervene with an individual’s choices does not mean we do not demonstrate the distinctively paternalistic insult of distrusting their agency and their ability to choose well. That there are good practical reasons not to intervene does not change the stigmatising and insulting stance that would be taken by a government motivated by Nussbaum’s theory. By providing people with capabilities rather than ensuring they achieve functionings, we permit people, in the name of autonomy, to live a less good life than they might otherwise, and in so doing ensure that people have the freedom to lead a better life. Nonetheless, the lives of those who choose not to function are considered worse.

That her theory passes judgement on individuals’ choices may not seem too damaging a critique. It is, perhaps, a necessary consequence of adhering to any moral view that we evaluate others’ behaviour, so we should be careful of accusing any moral judgement of being an expression of paternalism. Yet this is not my suggestion. Instead, my point is that the normative judgements Nussbaum’s approach would support may lead governments to stigmatise and insult citizens whom they take to make wrong decisions, and that these may become the basis for genuinely paternalist interventions, as I will now consider.

*3.2 Promoting Functioning: For Our Benefit, or Others’?*

Nussbaum begins her account of the instances when governments can legitimately promote functionings with children who, she argues, may be forced to function to ensure they have capabilities in later life. She then moves on to her more controversial claim, that “[e]ven where adults are concerned, we may feel that some of the capabilities are so important…that we are sometimes justified in promoting functioning rather than simply capability”[[190]](#footnote-190). Nussbaum lists four particular instances when governments currently do promote functionings, and are justified in so doing: health, affiliation, dignity, and practical reason. In all cases, the motivation for promoting these functionings is their central importance to human life, and the worry that left to their own devices, individuals will not always choose the functionings for themselves, suggesting a distrust of individual agency.

Given that Nussbaum uses the central importance of these functionings to individual well-being combined with a concern that they may not always be chosen to justify the promotion of functionings in these cases, the policies as she presents them are genuinely paternalist. However, in all the cases she discusses an alternative, anti-paternalist, justification can be offered. As such, although the policies as Nussbaum describes them do constitute genuine instances of paternalism, it is possible to maintain our intuitive judgements about the legitimacy of such interventions without accepting paternalism. I will briefly consider her first two examples – health and affiliation – to demonstrate this point.

First, she suggests health and safety rules are enforced because “health is a human good that has value in itself, independent of choice, and that it is not unreasonable for government to take a stand on its importance that to some extent…bypasses choice”[[191]](#footnote-191). However, if we are concerned to respect individual autonomy, it *does* seem unreasonable for the government to consider a particular good so important that it permits them to bypass choice. A concern to ensure that individuals have access to certain functionings (not just capabilities) when these functionings are agreed to be valuable is not uncommon. Richardson, for example, seems to consider it uncontroversial to suggest that “promoting the capability of functioning in a certain way should not be taken to trump the appeal to promoting functioning in that way”[[192]](#footnote-192). Yet Nussbaum insists explicitly that it is capabilities she is concerned to promote, and claims that her identification of central functionings is merely a means to selecting the central capabilities. She should not, therefore, allow these functioning to trump capabilities.[[193]](#footnote-193)

Moreover, Nussbaum seems descriptively wrong to claim that the importance of our health is why we allow governments to bypass our choice and enforce health and safety rules. If our concern *were* really to ensure health, regardless of individual preference, then we would have reason to illegalise self-harm, and to never allow individuals to refuse available medical treatments. On the contrary, control of our medical treatment is often seen as a paradigm case in which individuals should have autonomy. The more likely motive for health and safety rules is that they are forced on us for the protection of others: it is important that we clean up a spillage, for example, so someone else does not slip on it.[[194]](#footnote-194) We do not consider them being enforced on *us*, then, to be directly beneficial to us (often quite the reverse). As such, we would not be compelled to clean up a spillage at home, when risking only our own safety. Thus, we can advocate health and safety laws without having to value health at the expense of autonomy, or distrusting individuals’ ability to choose well for themselves.

Second, Nussbaum considers affiliation, a life without this – in which we “manifest no concern for others”[[195]](#footnote-195) – would, she thinks, be ‘frightening’. Indeed, she thinks it almost impossible, since even a hermit cares for others, though by the rather indirect method of prayer. In terms of forcing functioning, she thinks we can require citizens to ‘manifest care for others’, by compelling them to pay taxes and obey the law. However, it is not clear that either paying taxes or obeying the law, especially when compelled to do so, should be characterised as performing the functioning of affiliation. If we reluctantly pay taxes, for example, because compelled by law, we have not thereby been compelled to manifest *concern* for our fellow citizens. Indeed, it is not clear that affiliation is a functioning that we *can* be compelled to perform.

Moreover, we do not even seem to be *attempting* to enforce affiliation with such policies. Rather, in our role as citizens of a particular state, we can be required to do certain things necessary to uphold that state. Thus, our choice (about paying taxes or obeying the law) is not sacrificed for the sake of a valuable functioning (affiliation) that will make our life better. Rather, it is sacrificed in order to uphold an institution (the state) we consider important (among other reasons, because it helps protect and advance people’s capabilities), and which we are (perhaps) obliged to uphold in our role as citizens.

The general point to be drawn from these cases is that if Nussbaum were right about our motivations, then these policies would be paternalist, but since she seems descriptively wrong, these policies need not be so. In reality, such policies are motivated not by a concern for individuals’ well-being, and a distrust of their ability to promote it, but a concern for other goals (preserving others from harm, upholding democratic institutions, and so on). Indeed, Nussbaum herself admits that such cases are paternalistic, but insists paternalism can be acceptable to “underwrite…central values”[[196]](#footnote-196). This view is not uncommon, but is one that can and should be avoided by a capability approach.

*3.3 Maintaining Capability: The Importance of Voluntary Choice*

Nussbaum’s second set of exceptions to a government’s unequivocal promotion of capabilities involves cases when individuals may be prevented from signing away their capabilities. Nussbaum lists a number of cases “when adults, apparently without coercion, want to sign away a major capability in a permanent way”[[197]](#footnote-197), and where we will ‘frequently’ consider interference justified to protect the capability. The examples she lists include: permitting suicide for all depressed people, allowing voluntary enslavement and drug use, repealing helmet and seatbelt laws, deregulating risky medical procedures and sterilisation, and permitting female genital cutting (FGC). Again, I think Nussbaum offers paternalist reasons to allow these exceptions (individuals are prone to making ‘wrong’ choices) when anti-paternalist justifications are available.[[198]](#footnote-198)

If the anti-paternalism we adopt is Shiffrinian soft paternalism then we will be concerned to ensure that individuals can make voluntary choices in central domains. We will be justified in intervening, therefore, to ensure voluntariness and prevent choices that are involuntary. In the cases Nussbaum considers we can rely on such motives, rather than the paternalistic distrust of voluntary choice and an assumption that some decisions are just ‘wrong’. For example, we may have reason to think that FGC is unlikely to be chosen voluntarily: with full information, in the absence of coercion, and so on. We may therefore be justified in intervening to prevent this when it is not voluntary, and may even be warranted in proposing a blanket ban if we have good reasons to think that ensuring the conditions of voluntary choice will be difficult in the current social climate (as in the case of slavery).

However, whilst such assumptions of involuntariness would not necessarily be paternalist, they would be mistaken in many of the cases Nussbaum considers. The above activities may be *rare* if everyone could choose voluntarily whether or not to perform them, but it does not follow that they could not, and would never be, the subject of genuinely voluntary choice. For example, as Chapter 2 considered, arrangements similar to voluntary slavery can exist between dominant and submissive sexual partners,[[199]](#footnote-199) and FGC may be chosen for religious reasons. As a Shiffrinian soft paternalist we should be concerned with the procedure of making a choice, rather than its content. Thus, if a choice meets the procedural requirements of voluntariness, an anti-paternalist capability theorist should not intervene.

Adopting a procedural account of voluntariness, and allowing voluntary choices in central domains, does leave us open to the worry that we cannot ensure that people will maintain their capabilities. Providing freedom in this way may give people space to make choices that limit their future freedom: they may make themselves less free, by signing away capabilities they once had. Furthermore, we may worry that individuals will regret the serious and permanent results of their long-term choices if they later change their minds. For example, someone may decide they never want children at 20, but change their mind when married, 35 and now sterilised.

It is, of course, a worry that if we allow people choice, they will choose in ways that make themselves unhappy or, indeed, less free. However, this does not justify paternalistically distrusting, and interfering with, their voluntary choices. If we are to give someone “choice in matters of reproduction”[[200]](#footnote-200), as Nussbaum suggests, this should not just involve the opportunity to *have* children, but also the opportunity never to have them. Respect for human agency and autonomy includes allowing people the space in which to make what may seem to us (or to them later) like mistakes. This is not just, as Olsaretti suggests, because the chance to ‘choose wrongly’ is necessary to have the real freedom to ‘choose right’. Rather, it is necessary if we are to be consistent in our commitment to allow individuals to form and pursue *their own* conception of the good.

It is also worth stressing that there are many instances when Nussbaum *would* allow us to sign away certain capabilities: some jobs, for example, may inhibit our capability to be healthy; or having children may limit our opportunity to play. Thus, Nussbaum cannot consistently claim to oppose the sacrifice of *any* important capability. This again implies that her concern amounts to scepticism about individuals’ ability to make good choices. For an aim Nussbaum accepts as valid – such as having children – capabilities can be sacrificed. However, for an aim of which she disapproves – such as giving up autonomy to be in a submissive master/slave relationship – capabilities must be protected. This has echoes of the decisions not to function of which she approves (the celibate monk or the choice of worship over nourishment) and those of which she does not (the drug-user or under-nourished model[[201]](#footnote-201)).

To conclude this section, then, to be consistently anti-paternalist, if a decision is made voluntarily, it should be permitted, regardless of content. Of course, there may be great logistical difficulties in ensuring that the conditions of voluntary choice are met: making a decision about FGC or voluntary enslavement that is not subject to outside pressure, for example, or about complex medical procedures with sufficient information and knowledge. If conditions are such that a decision cannot be made voluntarily, then we may prohibit people from making this decision, just as we would prohibit them crossing Mill’s unsigned rotten bridge. Our reason for doing so, however, would not be that we distrust their agency, but simply that, due to circumstances, their agency cannot be expressed (or we cannot be sure that it is).

It may be objected either that these policies are mere examples, not definitive of Nussbaum’s considered position, or that she could simply adopt the soft paternalist motivations for the policies I have suggested. The importance she attaches to functionings, and so the capability to perform these specific functionings, means she is perhaps unlikely to accept this modification. However, even if she were to rescind her commitment to compelling people to perform functionings, or maintaining the capability to perform them, I will argue that the formulation of her capabilities – as opportunities to function – remain problematic, since it undermines the universal applicability of her approach.

**4. Failing to Be Human?**

In this section, then, I will argue that Nussbaum’s approach cannot accommodate those individuals who do not value, or cannot perform, one of the central functionings. Specifically, I will consider the examples of asexuality and Asperger’s Syndrome. I will argue that her method of identifying central capabilities – on the basis of an overlapping consensus on the central features of a human life – will result in a dilemma in such cases. Either she must remove the opportunity for the functioning that cannot be performed from the list of central capabilities, or remove the individuals from the group who forms the overlapping consensus (§4.1). Nussbaum often suggests that the central functionings are necessary features of a fully human (not just a flourishing) life. For example: “certain functions are particularly central in human life, in the sense that their presence or absence is typically understood to mark the presence or absence of human life”[[202]](#footnote-202). As such, it may be the case that these individuals will not just be excluded from formulating the overlapping consensus, but will not count as having or leading a human life.

More recently, Nussbaum has emphasised that the subjects of justice need not be identical to the group who formulate the contents of a theory of justice.[[203]](#footnote-203) Thus, we may exclude individuals from the overlapping consensus but still count them as human. However, although this avoids one problematic conclusion for Nussbaum, it raises another. We need not suggest that individuals who cannot perform or value a central functioning are not human or do not lead a human life, but we would insist that justice requires that these individuals are given the substantive opportunity to perform a functioning of which they are incapable (§4.2). As §5 will consider, these individuals may value control over this part of their life and, indeed, may require such control to flourish. They may, therefore, value capabilities as I define them (opportunities for such control). It is meaningless, however, to suggest that they are entitled to capabilities in Nussbaum’s sense, so her approach cannot accommodate these cases.

*4.1 Failing to Value Functioning*

The individuals I will consider in this section are not those who just fail to perform a functioning, but who do not, and have never, valued it, or are physically incapable of performing it. Thus, they do not just prefer something other than the central functionings (as in §3.1), but reject the notion that at least some of the central functionings are valuable at all (at least for them). According to Nussbaum’s methodology, central functionings are identified on the basis of an overlapping consensus on the central features of a human or flourishing life. It is possible to include individuals in the overlapping consensus even if they choose not to exercise a functioning: the celibate monk may see the value of sexual satisfaction in human life (though in his own case he values other functionings more highly). However, there are cases in which individuals see no value in a functioning Nussbaum takes to be central, and so they cannot be part of the consensus on her central functionings.

It is important to be clear about which individuals will be excluded in this way. Consider, for example, Eric Nelson’s list of those who he takes to be excluded from the overlapping consensus Nussbaum envisages:

Suppose I am a celibate, and I believe that sexual satisfaction is sinful; or suppose I am a misanthrope who does not see any value in associating with other human beings; or suppose I am one of those who thinks that laughter is a cruel expression of hatred (like Descartes) or of vainglory (like Hobbes); or suppose I am a Christian Scientist who thinks it is illicit to employ many fundamental techniques of Western medicine (such as blood transfusion). These may not be views of the good life to which most of us are terribly attracted…But they are all excluded from the "overlapping consensus" which gives rise to this list.[[204]](#footnote-204)

Nelson is right that some individuals will be excluded, but he is wrong to suggest that all individuals he lists will be treated in the same way. Nelson takes the overlapping consensus to concern what “we all want an *entitlement* to”[[205]](#footnote-205), but this is not a fair representation of Nussbaum’s theory. Rather, Nussbaum seeks agreement on the central features of a human or flourishing life. Having established that these functionings are important, she then suggests that we should be entitled to the opportunity to perform them as a matter of justice. A libertarian, for example, may agree that humans need to be nourished, but not that individuals are entitled to the capability for nourishment. This would not be grounds to say that libertarians cannot be part of the overlapping consensus (though they are likely to object to the resulting theory of justice).

Nelson’s celibate, misanthrope and critic of laughter would only be a problem for Nussbaum, then, if they do not simply choose not to perform these functionings in their own life and do not think we are entitled to these opportunities, but entirely fail to appreciate their value in human life in general. Considering many of the examples of individuals who choose celibacy it does not seem to be the case that they see no value in this opportunity. It is an important and significant sacrifice because it *is* a sacrifice, and they do not deny that it can be an important part of the life of many others. It would be an unreflective celibate or misanthrope, then, who having chosen not to have this function in their own life, denied it was important to human life in general (ignoring all evidence to the contrary). Indeed, Nussbaum hopes to rule out unreflectiveness of this sort by suggesting that we test our considered moral judgements against others’.

Nonetheless, these cases are psychologically implausible, rather than psychologically impossible, so we will not set them aside entirely. However, the more interesting variety of these cases are, I think, not those individuals who decide that some functioning is sinful or undesirable, but those who *cannot* perform the functioning. In these cases, it is far more likely that the individuals would (reflectively) come to question the content of the list of central capabilities: they have a flourishing life in the absence of this functioning, so why does this functioning deserve a place on the list? Further, the existence of such individuals will have far more damaging implications for Nussbaum’s approach.

I will consider two examples to illustrate this point which are, in some ways, analogous to Nelson’s celibate and misanthrope. First, asexual individuals lack all sexual desire and so do not value sexual satisfaction.[[206]](#footnote-206) Indeed, in at least some cases, it seems they will be *incapable* of sexual satisfaction. Asexual individuals can, of course, engage in sexual activities, but, given that they lack sexual desire, this can hardly be described as ‘deriving satisfaction’ from them (as §4.2 will consider further). Second, people with Asperger’s Syndrome provide an instance of individuals who cannot perform the supposedly central functioning of forming emotional attachments.

Many individuals who are either asexual or who have Asperger’s do not regret their condition, consider themselves to lead a fully flourishing life and may consider the emphasis that is placed on sexual satisfaction or sociality to be misguided. In these cases, in which individuals dispute the centrality of the functioning for a human, or flourishing, life it seems that Nussbaum faces the dilemma. Either we must remove the capability from the list, on the basis that the functioning is not part of the consensus on what constitutes a human life, or exclude the individuals from the group who should arrive at the consensus, and disqualify them as human (or at least consider them less than fully human).[[207]](#footnote-207) Neither option seems desirable, since these capabilities are arguably necessary for the autonomous, good, human lives of the majority, yet it would be unacceptable to consider those who do not, or cannot, value them less than human. Further, these individuals seem to have a flourishing human life without the capability to perform a central functioning.

However, it may be objected that many individuals who are asexual or have Asperger’s do not consider their life to be fully flourishing. Thus, they may be part of the overlapping consensus concerning the centrality of these functionings, and regret their own condition exactly because this functioning is not available to them. Few groups are homogenous in their attitudes, and though many in the Autistic community, for example, dispute the claim that sociality is to be valued and that their condition is a mental illness that ought to be ‘cured’,[[208]](#footnote-208) many others would not share this view. Yet even when this attitude is adopted, the same dilemma can arise for Nussbaum. The list of central functionings are not just those things that we require to lead a flourishing life. At a lower threshold they are also required features of a minimally human life, and so of humanity. This is a reflexive process: the list comprises the features by which we determine who should be in the group who determines the list. To be excluded from the group, therefore, implies that the life we lead is not a human one.

Indeed, Nussbaum herself has discussed the issue of ‘exclusion’, and the distinction of humans from human-like creatures, such as Greek Gods. Thus, just as she insists that the Cyclopes of Homer’s *Odyssey* who “lack all sensitivity to the needs of others, all sense of community and affiliation”[[209]](#footnote-209) appear (somewhat) human, though we would not recognise them as such, so it seems Nussbaum must make a similar point about those with Asperger’s, or who are asexual, and who are also unable to perform one of the functionings Nussbaum considers functioning a necessary requirement for humanity. In the case of the Cyclopes this leads to their exclusion from the category of ‘human’ – presumably even if they wished to be sensitive to the needs of others – and it is unclear how she could avoid the same conclusion being drawn about those with Asperger’s or who are asexual, too, at least on her original methodology.

*4.2 The Value of Choice*

However, the objection may be raised that such conclusions are simply a relic of Nussbaum’s early Aristotelianism. We should now take at face value her claim that only “bare human birth and minimal agency”[[210]](#footnote-210) are required for someone to count as human, and that being unable to participate in devising a theory of justice is no reason to think that we cannot be its subject.[[211]](#footnote-211) However, allowing Nussbaum to refuse to grasp either horn of the above dilemma – neither eliminate these problematic functionings from her list, nor disqualify individuals who cannot exercise them as human – does not resolve her problem. Rather, allowing her to make this move will leave her with the implausible proposition that it is a requirement of justice that these individuals are given opportunities they do not value, and (I will argue) cannot exercise.

It is unclear, therefore, what the benefit would be in including these individuals as human on Nussbaum’s approach. Counting as human means an individual should possess the central capabilities – the opportunity to perform the central functionings – but what would this mean to someone who did not desire or was unable to perform them? Again, it is important to be clear about the cases that I consider problematic for Nussbaum. Arneson, for example, raises a superficially similar objection. He argues that “[i]f one’s ultimate ethical concern is the quality of lives that people lead, then capability provision that in no way enhances anyone’s life is pointless”[[212]](#footnote-212). Further, that “[j]ustice according to the capability approach obligates society to ‘help’ [people] in ways that do [them] no good by [their] own lights”[[213]](#footnote-213).

However, the ultimate concern of the capability approach is not individual quality of life. It is a theory of distributive justice that aims to guide government policy, and is not a welfarist theory.[[214]](#footnote-214) As such, it is not concerned to ensure individuals have as much well-being as possible, but that they have those opportunities that individuals should be entitled to. It is true, then, that an opportunity that someone does not value highly may do little for their welfare, but this does not mean that its provision is not the concern of justice. For example, someone may not wish to exercise (or value) their capability to vote, but this does not mean that it would not be unjust if they were denied it.

However, there are opportunities that would have no value to an individual, not because they are currently choosing not to exercise them, but because they *cannot* exercise them. In such cases it is not simply ‘by her own lights’ that the provision of the capability does her no good. Rather, it is simply nonsensical to suggest that it is possible to provide an individual with the substantive opportunity to do something of which they are incapable. It may be argued that there is value in being able to control part of our life, even if we do not value a particular functioning: for example, the ability of an asexual person to choose not to enter a sexual relationship may be essential to their flourishing, though the functioning of sexual satisfaction is not. Indeed, it is exactly as domains of control that I argue capabilities should be interpreted. However, it is not such opportunity to *control* that Nussbaum provides, but instead the opportunity to choose whether to perform certain functionings: functionings some people cannot perform. Thus, on Nussbaum’s definition, not everyone can possess the central capabilities.

To demonstrate this point I will consider, first, those individuals who do not value a particular functioning, focusing on the case of asexuality. It should be emphasised that these are not cases in which individuals see an option as tempting but wrong, such as the monk who sees the value of sexual satisfaction but chooses to forgo it. Rather, I am considering those cases where individuals simply do not see any value in, or reason to act on, one option.[[215]](#footnote-215) The cases I am concerned with, then, are those when an individual would never succumb to such a choice through weakness of will, or indeed ever choose it whilst retaining their current world-view. Further, that it is not merely due to lack of reflection that they fail to value the functioning. It is in this sense that asexual individuals lack all desire for sexual satisfaction.

Whilst they are (physically) capable of performing sexual acts, their complete lack of desire means they cannot be said to derive satisfaction from them. This functioning seems to require both the performance of the act and that it is chosen for the right reasons (because we desire sexual satisfaction): it is for this reason that the functioning is valuable, and could hope to be the subject of an overlapping consensus. An asexual individual may choose (voluntarily) to perform a sex act because they wish to achieve some other end, such as the satisfaction of another’s sexual or emotional needs. Nonetheless, they have not chosen to perform the functioning, since they have failed to achieve what is uniquely valuable about this functioning – a satisfying sexual experience – for which reason Nussbaum included it in her conception of a flourishing life.

Nussbaum insists “we respect the preferences of those who don’t care…[about a functioning] by making capability the goal, not the actual function”[[216]](#footnote-216). However, if an individual really ‘doesn’t care’ about a functioning in this strong sense, it is unclear in what sense they can be provided with the capability. Certainly, an asexual person may be enabled to perform sexual acts, but for as long as they are asexual they cannot achieve sexual satisfaction as Nussbaum describes it. We could, perhaps, suggest that they are entitled to therapy to enable them to experience sexual desire and so sexual satisfaction, yet such a suggestion would be just as offensive as it would be to suggest that we should offer homosexual people therapy to enable them to have the ‘right’ sexual desires. We can give a celibate person a substantive opportunity for sexual satisfaction, though they may never use it, but it is unclear how this capability can, or should, be the goal for asexual people.

The case is perhaps even clearer when someone cannot perform even the act underlying the functionings: asexual individuals can, superficially at least, have a sexual life, but individuals with Asperger’s cannot always have an emotional one. If we accept that some individuals with Asperger’s necessarily lack the psychological conditions to form emotional attachments then, barring a cure, they could never possess the capability (substantive freedom) to perform this functioning. We cannot be enabled to do something of which we are incapable. Since they cannot perform the functioning, they cannot have the capability, so it would be futile to suggest that justice requires they be provided with it. Why should it be a requirement of justice, and a necessary constituent of dignity, that we have an opportunity that is both undesired and unachievable?

**5. Modifying the Capability Approach**

Nussbaum’s version of the capability approach, then, does not meet its own aims. First, the underlying list of central functionings, and the policies that Nussbaum advocates as a result of this, are paternalist and insult those who make the wrong choices. Second, even if we let her off this hook, her approach still faces the objection that it will not be universally applicable. Either she must choose between removing a seemingly central functioning from her list, or denying that some individuals are the appropriate subjects of a theory of justice. Alternatively, we can allow Nussbaum to exclude neither those individuals who repudiate a central functioning, nor the capability to perform this functioning, but the result will be a theory of justice that insists individuals are entitled to a functioning they *cannot* meaningfully possess.

These problems will plague any account that understands capabilities to be opportunities to perform, or not, particular central functionings. However, they need not pervade every version of the capability approach. The challenge, then, is to find an alternative way to achieve Nussbaum’s aim of promoting universal norms without paternalism. I will argue that this goal can be achieved if we understand capabilities as opportunities to *control* central domains of our life (rather than opportunities to function).

*5.1 Capabilities to Control, Capabilities to Function*

In providing this modification of Nussbaum’s approach, I take myself to meet Carter’s suggestion that “[t]he key to treating a person as an end in herself is valuing her freedom *non-specifically*”[[217]](#footnote-217). However, I dispute Carter’s claim that the only way to provide freedom in this non-specific way is to adopt a resourcist approach. As Chapter 1 discussed, whilst the freedom resources provide may be non-specific (resources can be used to pursue various functionings), they will not provide freedom equally to all individuals (those with low conversion capacities will have less of this non-specific freedom). The capability approach can provide this ‘non-specific freedom’ without discriminating between individuals on the basis of their conversion capacities.

The key feature of the version of the capability approach I defend is its understanding of capabilities as domains of control, and my critique of Nussbaum centres on her own understanding of the capabilities. I will not, therefore, question Nussbaum’s methodology, according to which the best way to arrive at an agreement on what constitutes a human life is through internal consideration and interpersonal discussion, which can then be used to ground a theory of justice. However, whilst I retain the idea of an overlapping consensus, I question what it is we should attempt to come to a consensus on. I suggest that we should not ask what the necessary *functionings* are for a flourishing human life, but rather list the centrally important domains of control.

The question about which people attempt to reach an overlapping consensus, therefore, is ‘which domains ought people to have control over if they are to lead a good human life?’.[[218]](#footnote-218) As such, our reason for including ‘the opportunity to be nourished’, for example, would not be due to the importance of being nourished (the functioning) but, rather, due to the importance of choosing how, or if, we are nourished. The different focus of the overlapping consensus alters the structure of the resulting capabilities: they are no longer the chance to perform (or not) a particular functioning, but the substantive opportunity to function in whatever way we (voluntarily) choose, in a domain we have agreed to be important. The capability for bodily health, for example, will not be the opportunity to achieve a predefined conception of bodily health. Instead, it will be the opportunity to control our bodily health: to determine the sort or degree of health that is appropriate for us, and have the substantive opportunity to achieve this.

This approach better captures the intuitive appeal of the idea of capabilities. Capabilities were intended to be a means of ensuring that individuals had space to form and pursue their conception of the good. Providing them control over central parts of their life allows them to do this, without predetermining the proper use they should make of this control. To respect individual autonomy, then, and treat individuals as the origin of ends, we should not simply give them the narrow freedom to perform functionings. We must allow individuals to *control* their bodily health, their nourishment, their sexual satisfaction, their emotional attachments, and so on, and to choose the ends that *they* wish to pursue in these domains.[[219]](#footnote-219)

Nelson argues that “[t]he very act of making a list excludes various ideas of the good life, not least the one according to which it is part of my human dignity to be *responsible for making my own list*.”[[220]](#footnote-220) However, whether this is true depends on what it is we make a list of. By asking individuals to agree on central domains of control we can derive a specific list of capabilities without a specific, substantive conception of a flourishing life, and so without excluding certain conceptions of the good (violating political neutrality). In forming the overlapping consensus I envision, individuals cannot express a view on the particular functionings they consider central, and so the use we should make of the control we have in this central domain. Consequently, a religious conservative could agree with a free-love hippy that we ought to be able to control our sexual expression. Indeed, even Nelson’s celibate would agree on the importance of being able to exert control over this domain of our life. They would, of course, disagree about the proper use that should be made of such control but they can, nonetheless, accept the central value of setting our own ends in this domain of human life.

By not specifying functionings, there is no chance that the approach will (paternalistically) try to enforce an underlying notion of flourishing. Moreover, individuals will not be excluded if they fail to value, or cannot perform, a particular functioning. Further, this control will be meaningful to their flourishing even if the ends they choose to pursue are non-standard (as §5.2 will discuss). Nonetheless, it may be objected that this approach remains paternalist. By concentrating on the domains in which we should be allowed to exercise control, it ‘writes-in’ a commitment to autonomy, and so paternalistically enforces autonomous choice, even on those who do not value it. Returning to the previous example, a religious conservative might agree that human sexuality is important, but vehemently disagree with the idea that our choices in this domain should be open, limited by nothing other than a concern for the consent of, and potential harm to, others. They may object even more to being expected to fund individuals’ choices in this domain, as may be necessary to ensure we have substantive opportunities.

In response, it should be pointed out, first, that the approach makes fewer assumptions about what is valuable than Nussbaum (who writes in the importance of autonomy (practical reason) along with her nine other central functionings). Second, it is impossible to value anti-paternalism without valuing autonomy. Just as relativism is self-subverting – “in asking us to defer to local norms, it asks us to defer to norms that in most cases are strongly nonrelativistic”[[221]](#footnote-221) – so it would be similarly incoherent to say that we ought to avoid paternalism because individuals have a right to autonomous control of their lives, and yet object to a theory that assumes that autonomy is valuable. In pursuing an anti-paternalist objective, then, the value of autonomy *must* be assumed.

Indeed, in pursuing any politically liberal objective we must assume the value of autonomy and, indeed, Rawls makes just such an assumption, arguing that it is acceptable to ignore those conceptions of the good that reject the importance of liberty. As Nelson notes, “the exclusion of liberty-violating accounts of the good life is the *only* departure from neutrality explicitly allowed in…[Rawls’s] theory as written and defended”[[222]](#footnote-222). The only conceptions of the good that my approach will not be neutral to are the liberty-violating ones: we cannot have the capability to restrict others’ freedom to pursue ends that they consider valuable simply because we do not approve of the use they are making of their autonomy. These ‘anti-liberty’ individuals will have the opportunity to pursue their own conception of the good in these domains of their *own* life, but they will not be able to prevent others’ freedoms, either through act or omission. My version of the capability approach can, therefore, remain neutral between reasonable conceptions of the good, and so is consistent with the aims of political liberals.[[223]](#footnote-223)

Finally, in a similar vein, it may be objected that my approach unjustifiably writes in a commitment to abstract opportunities, or a broad construal of capabilities. Richardson makes this criticism of Nussbaum’s approach: “[Nussbaum] must insist that a more abstract level of interpretation – namely her own – has normative priority over any of the more concrete local specifications that may arise”[[224]](#footnote-224). It may seem that my own account would be even more vulnerable to this worry, since I argue that Nussbaum’s approach is not abstract *enough*: she avoids specifying very particular ways of life, but she does identify central functionings. In response, I would point out that these abstract freedoms will include the substantive freedom for individuals to pursue their own specific conceptions of the good (indeed, is better able to do so than Nussbaum’s approach). Further, if individuals object to the use that some individuals are making of their liberty – the more abstract freedoms were not what they agreed to – we can simply note that it is a feature of all liberal approaches that accounts that wish to restrict others’ freedoms are excluded.[[225]](#footnote-225)

*5.2 Justifying the List*

The intention of my modification is to change the structure of capabilities – removing the idea of functionings it would be ‘good’ to perform – not to dispute the particular capabilities Nussbaum advocates. There is no reason, then, to think that this modification would produce a list of central capabilities substantively different from Nussbaum’s. Indeed, the change may make it easier to include some of the more controversial items, since it is more likely that we can reach a consensus on central domains of control than on central functionings. Consequently, this approach will not require the exclusion of individuals who do not value, or cannot perform, certain functionings, and will provide them with something meaningful for their lives.

First, people with different preferences could value a choice without needing to agree on what it is best to choose. For example, Nussbaum includes “having opportunities for sexual satisfaction”[[226]](#footnote-226) under the more general capability for bodily integrity. This implies a bias in favour of more active forms of sexual expression: sexual *satisfaction* is important for many human lives, and so we ought to have the opportunity to achieve it. As discussed above, this may not appeal to those who, though capable of sexual satisfaction, do not see the value in it (or even consider it sinful) and have chosen celibacy. Focussing instead on ‘control of, or choice in, matters of sexual expression’ is more likely to include them in the consensus: controlling their sexual expression (choosing celibacy) is an important part of their lives.[[227]](#footnote-227)

More importantly, even those who cannot have a capability of Nussbaum’s sort – because they cannot value or perform a functioning – may value having control over this domain, and so being allowed to do what comes naturally to them. For example, asexual individuals may not be able to experience sexual satisfaction, and so cannot possess the capability to perform this functioning. They can, however, exercise, and value, the capability to control their sexuality, and so embrace their condition, rather than being forced into conventional sexual relationships. Similarly, individuals with Asperger’s Syndrome, who cannot form emotional attachments in the way Nussbaum describes, could still value having control over this area of their life: allowing them, for example, to refuse any attempt to ‘cure’ their condition. Consequently, they too can be included in the consensus on the central capabilities, without having to see the value of, or be provided with the opportunity to perform, a functioning of which they are incapable.[[228]](#footnote-228)

Thus, my approach can accommodate individuals with non-standard preferences or functioning abilities. These individuals are both included and provided with something they can reasonably be expected to value: control over an important part of their life. This is not true of an approach that suggests individuals should be provided with opportunities they do not value and cannot exercise. The modified approach, then, can give practical reason and autonomy the role Nussbaum intends them to have in her own account, as “a good that suffuses all the other functions, making them human rather than animal”[[229]](#footnote-229). In reality practical reason for Nussbaum is just one important functioning amongst many, which she (usually) allows to trump the others. Practical reason tops Nussbaum’s hierarchy of functionings, then, but all the functionings have value in their own right.

However, if capabilities are understood to be ‘opportunities to control’, it is important only that we exercise autonomy in certain domains: it does not matter whether our autonomous choice is directed towards performing a functioning or abstaining from it. Thus, practical reason really does suffuse all the capabilities on this understanding, since each one is a domain in which autonomy is exercised. As such, we can better accommodate the intuition in Nussbaum’s Marxian example, that fasting seems a more truly human activity than unthinkingly eating. Paraphrasing Marx, Nussbaum notes that “a starving person doesn’t use food in a fully human way…a way infused by practical reason and sociability”[[230]](#footnote-230). I understand her to mean that a starving person does not engage with the opportunities available – indeed has few opportunities available to them – and when they are provided with the opportunity to eat they do not autonomously *choose* to take it. Fasting, by contrast, implies a more conscious engagement with the capability on offer, and a consideration of the choice most appropriate for one’s life.

Capabilities, according to my approach, place value on this use of autonomy in central domains of our life, whatever it is directed towards. If only choosing (in central domains) is valuable, as long as a decision is made voluntarily, we can be permitted to make any decision, or sign away the future possibility of making a choice. There can be no ‘wrong’ choice, and so no danger of attempting to enforce the ‘correct’ way to flourish or function. Further, we will provide individuals with the broad opportunity to control a domain of their life. Nussbaum, by contrast, only provides the substantive opportunity to perform a specific functioning, and sometimes insists that this functioning is performed, rendering her account paternalist.

My criticism of Nussbaum here is not that she helps individuals to achieve some goals and not others: that individuals who do not care about their health or nourishment, but care a lot about going on an expensive holiday will not be able to achieve their conception of the good. Theories of justice must distinguish between those goals and domains that are a concern of justice and those what are not. Rather, I object to Nussbaum’s view on the basis that *within the domains that are a concern of justice,* she supports some conceptions of the good and not others.

For example, it seems that Nussbaum would provide substantive support to an individual who chose to be healthy: we would have the physical and psychological prerequisites to meet this goal. However, whilst she may not force an individual to function in this way, she would not provide the same degree of substantive support to enable an individual to pursue a different goal in this domain. We would not, then, have the substantive opportunity to achieve what is deemed ‘ill health’: undergoing a voluntary amputation, for example. Even if such decisions are permitted (and §3 considered cases when they were not), the unequal treatment of different choices in central domains suggests a paternalist distrust of individual agency: even if we cannot stop people from making ‘bad’ choices, we will not enable them. As Chapter 2 and §3.1 have considered, this suggests a stigmatising and paternalistic insult to agency, even if it does not ultimately motivate paternalist intervention (if Nussbaum chooses to disavow those interventions she is currently committed to). My approach does not judge the value of a choice on the basis of its content, and so will not insult or stigmatise in this way.

**6. Conclusion**

My version of the capability approach, then, attempts to tread the middle ground between protecting autonomy and promoting well-being that I have suggested Nussbaum cannot successfully occupy. It is, in other words, a theory that aims to avoid, on the one hand, identifying a single good form of life and, on the other, valuing all capabilities, without distinguishing what is good for a person, from what is *essential* for a decent human life (thus sliding into relativism). By taking capabilities to be opportunities to control rather than opportunities to function, the approach is anti-paternalist, and universally applicable.

Being consistently anti-paternalist, on my definition, does not mean that individual choices will never be inhibited. Since it is procedural autonomy that is valued, in cases where coercion cannot be avoided, or full information provided, we may not allow individuals to make any choice. This is not paternalist since the motivation is not a distrust of individual agency, but a concern to ensure autonomous or voluntary choices – which may not be possible in some cases, such as slavery or FGC. Thus, my approach may sometimes advocate similar policies to Nussbaum’s, though with a different (anti-paternalist) justification, and in some cases would advocate different policies. It would be less likely to ban seemingly harmful behaviours such as FGC or amputation, for example, and more likely to assess them on a case-by-case basis, permitting them when voluntary.[[231]](#footnote-231)

Focussing on control, without a more substantive conception of flourishing will also include those who do not, and can never, agree to value or perform this conception of flourishing. It includes them in the overlapping consensus, provides them with something they can meaningfully possess, and provides support for their conception of the good whether or not it involves the central functionings. Nussbaum’s relatively specific account of a flourishing life (from which she derives her central capabilities) conflicts with her concern for choice and autonomy, and leads to various inconsistencies in her approach as she tries to reconcile the two. As her approach stands, the norms she advocates provide paternalist justifications for (potentially legitimate) government policies, stigmatise individuals who make ‘wrong’ decisions, and exclude individuals from her account who ought to be considered human. The modifications I have suggested make the capability approach more universally applicable, and less paternalistic.

**Athletic Policy, Passive Well-Being:**

**The Capability Approach as a Guide to Public Policy**

**1. Introduction**

The version of the capability approach I have developed aims to respond to the elements of perfectionism and paternalism in Nussbaum’s approach. However, Nussbaum’s approach may be subject to the opposite criticism: that rather than promoting functionings too much (at the expense of autonomy), it promotes them too little (at the expense of well-being). The suggestion is that we should be concerned about how good individuals’ lives actually are, and not about whether they have they the opportunity to lead a good life: “[s]urely what matters, normatively, is whether individuals *are* living well”[[232]](#footnote-232). My version of the capability approach is even more vulnerable to such concerns, since I place an even greater focus on individuals’ opportunities to control their lives, and less on the use they make of these opportunities. It is, therefore, worth considering how the capability approach, particularly on my understanding of it, can respond to this line of criticism.[[233]](#footnote-233)

My focus will be on G.A. Cohen’s influential version of this critique, which suggests that capability theorists are wrong to focus on freedom or capability to function, and to ignore the value of functionings that are achieved without the exercise of freedom.[[234]](#footnote-234) I believe that Cohen’s criticisms are misguided, and that a consideration of Cohen’s arguments raises broader questions concerning what it is we take the ‘equality of what?’ question to be asking, and what distinctive contribution the capability approach aims to provide with its answer. Cohen criticises the capability approach as an inadequate account of *well-being*. However, in determining a metric for our egalitarianism, well-being is not the only criterion we consider. Instead, this question, and the capability theorists’ answer, concerns distributive justice, and so legitimate government policy, which is motivated by concerns other than identifying and promoting well-being.

In choosing a metric for distributive justice, then, our concern should not just be with what promotes well-being, but rather with what ought to guide government policy. Individual well-being is certainly an important concern in devising a theory of justice, but the goals of welfare and justice are not co-extensive (if we reject welfarism). In criticising the capability approach as an inadequate account of well-being, then, Cohen does not engage with it on its own terms. Further, when we understand the capability approach as an account of distributive justice and a guide to public policy, as is intended, then Cohen’s criticisms are no longer compelling.

If we were to take the capability approach as a guide to individual well-being, we could interpret it to mean that an individual’s well-being consists in the capabilities available to them. Cohen insists that by focussing on capabilities – and so the freedom to control one’s life – capability theorists ignore passively-achieved benefits, and therefore provide an excessively ‘athletic’ account of well-being. He maintains, on the contrary, that our well-being does not depend on the world conforming to our will *because* it is our will, or as a *consequence* of our choices or actions: “[t]here are many benefits I get which I do not literally succeed in getting”[[235]](#footnote-235).

Such criticisms are based on a fundamental misunderstanding of the purpose of the capability approach. Sen does, at times, argue that the capability approach should inform the metric used to measure individuals’ quality of life. He developed the approach in response to perceived problems in development policy and so, in part, to perceived problems in measurements of well-being and quality of life on which these policies were based. Yet for most theorists the capability approach has always been taken to form part of a theory of justice, which ought to inform government policy. Even Sen, in more recent work, defines it as such. As Nelson notes, “the capability approach emerged out of an attempt to redefine ‘development’, but Sen converted it into a claim about moral philosophy and distributive justice quite early on”[[236]](#footnote-236).

The capability approach is not, then, a comprehensive account of all factors that contribute to our well-being, but rather is concerned with delineating the legitimate basis of government action: to establish the “task of government…[under] a decent political order”[[237]](#footnote-237). In other words, “the capability approach is to be understood as providing the basis for normative political theory, and not merely as a theory of individual well-being…a theory that leads to certain political prescriptions”[[238]](#footnote-238). My argument here is that even if Cohen is right that passively-achieved benefits do contribute to our *well-being*, the capability approach’s failure to account for them is no reason to reject it if such benefits are an inappropriate policy goal – which, I will argue, they are.

We may, as Cohen claims, “unambivalently welcome”[[239]](#footnote-239) the world coincidentally conforming with our will, without similarly welcoming government action coincidentally ensuring such conformity, without reference to our will. That we would be glad that some event occurred by chance does not necessarily imply that we would be glad if a third-party ensured the occurrence of this event. Such lack of consultation, by a government in particular, displays a paternalistic disrespect towards citizens, which is exactly what I have tried to avoid in my elaboration of the capability approach. In this chapter I will argue that when the capability approach is understood as a political doctrine, aiming to guide policy, its focus on individual freedom and control is justified, and Cohen’s criticisms of it, as an inadequate account of well-being, simply lack purchase.

**2. The Goals of the Capability Approach: Public Policy and Non-Instrumental Freedom**

*2.1 Cohen’s Critique*

Cohen approves of much of what the capability approach sets out to achieve, and commends Sen for his identification of a space between resources and utility in answer to the ‘equality of what?’ question.[[240]](#footnote-240) He accepts the capability theorists’ contention that resourcist approaches fail to take account of individuals’ different resource needs and conversion capacities (as outlined in Chapter 1). Consequently, he agrees that we should consider not what goods people possess, but what goods do *for* people. He also agrees with capability theorists that the welfarist assessment of goods, in terms of the utility they generate, takes too narrow a view of what goods do for people. Given this, Cohen agrees that we should reject these two standard approaches and focus instead on the (valuable) activities or states of being that goods enable us to achieve: the functionings they give us the capability to perform.

Cohen disagrees, however, when Sen calls this space, between resources and utility, ‘capabilities’, since this implies that what matters is what goods enable us to do *for ourselves*. Cohen contends that the space Sen has identified is broader than the categories of either capabilities or functionings imply: “[w]hat goods do to people is identical neither with what people are able to do with them [their capabilities] nor with what they actually do with them [their achieved functionings]”[[241]](#footnote-241). Thus, Cohen argues that we should not be concerned *only* with individuals’ capabilities. In a similar vein Fleurbaey notes that “[k]nowing the capability set is usually not sufficient in order to know the individual’s utility function”[[242]](#footnote-242).

Cohen points out that goods may also provide us with *passively*-achieved benefits. For example, babies do not maintain themselves through the exercise of capabilities, but nonetheless get more from goods than just utility: they also experience (without participating in the achievement of) valuable functionings, such as nourishment or health. Moreover, it is not for the sake of their utility alone that we think we ought to provide them with these goods. Adults, too, can get benefits from goods without the exercise of capabilities: health from being in a malaria-free environment or from the rays of the sun, for example, or nourishment from a nutrient drip.

Cohen calls the broader category of “what goods do to (or for) human beings”[[243]](#footnote-243), with or without their participation, ‘midfare’. On this view, it is not always our capability to achieve functionings that matters, but sometimes merely their achievement. Midfare, then, incorporates three valuable categories:

1. the capacity and opportunity to perform a valuable functioning (*capabilities*);
2. a (valuable) activity or state of being (*functioning*), achieved:
	1. through an individual’s activity (exercised freedom to function); or
	2. without their participation (passively-achieved).

Cohen argues that this final category – passively-achieved benefits – does contribute to individual well-being, but that Sen ignores it by being concerned only with our *freedom* and its exercise, and that, as such, his account of well-being is excessively ‘athletic’.

Cohen does not dispute that freedom has some value and, indeed, includes it as an important element of midfare. It may be *particularly* good, then, if we have and exercise a freedom to achieve a functioning, since we gain two elements of midfare: freedom plus the valuable functioning that was its object. Cohen’s worry is that capability theorists value only freedom, insisting that for a functioning to contribute to our well-being it is *necessary* that we are free to perform it, and that we achieve this functioning through an exercise of our freedom. Cohen is, therefore, unlikely to approve of my approach, given that it is concerned with promoting individual freedom in certain domains without even specifying which functionings our choices should be directed towards. Cohen, in contrast, contends that individual freedom should have a *less* prominent role, since well-being may be increased in cases that do not involve the possession and exercise of freedom.

*2.2 Freedom and Choice in the Capability Approach*

I will take ‘freedom’ to mean that our choices (*or preferences*) must exert control in the world or determine an outcome: my choice will be satisfied because it was my choice.[[244]](#footnote-244) Cases where the world coincidentally conforms to one’s will – Sen’s notion of ‘effective freedom’, or what Cohen calls a ‘weak’ reading of freedom – cannot be considered freedom in the sense intended by the capability approach. As §3.1 will discuss, some passively, or coincidentally, achieved benefits may *contribute* to our freedom, but they are not freedoms in themselves. To be free requires that we, in some sense, exert control on the world. Thus, I accept Cohen’s contention that insofar as the capability approach promotes freedom it will not promote passively-achieved benefits.

However, whilst it may be a weakness of an account of well-being to fail to take passively-achieved benefits into account, the capability approach is not aiming to provide a comprehensive guide to all factors that will have a positive impact on our well-being. Even when Sen treats the approach as a way to assess quality of life, he does not suggest that it is adequate to account for every dimension of a good human life. Moreover, as a development of Rawls’ theory of justice – as both Nussbaum, and now Sen, intend it – the focus is on what governments have a right to do, and not on all those things that are good for people.

Many versions of the capability approach are committed to at least a partial conception of the good:, and delineate the functionings considered valuable or central to a human life. However, they also intend to leave individuals space to form and pursue their own conception of the good. Thus, capability theorists would agree that their substantive conception of the good is not best achieved by allowing individuals capabilities, since they may choose not to perform a valuable functioning.[[245]](#footnote-245) Nonetheless, they insist that “the capability to function, not actual functioning, should be the goal of legislation and public planning”[[246]](#footnote-246). This is because capability theorists accept (at least in theory) the anti-paternalist thought that well-being is not our only goal in the public realm, and that governments should allow individuals freedom and choice, even if this will not always improve their well-being.

Given this, Olsaretti’s argument that capabilities are promoted because they have instrumental value as a means to promoting well-being, does not capture the motivation of capability theorists. It is worth briefly outlining this argument to show that capability theorists not only do not, but *should not*, take such an instrumental approach but, instead, value individual autonomy and capabilities for their own sake. Olsaretti’s argument runs, briefly, as follows: the endorsement of valuable functionings is necessary for well-being; endorsement is best secured when people choose freely which functionings to achieve; and people are better placed to choose freely when they also have the freedom to forgo these functionings.[[247]](#footnote-247)

This argument responds to Cohen on his own terms. It defends the capability approach as an account of well-being, insisting that choosing worthwhile functionings is central to well-being, and this can only be achieved by giving individuals capabilities, and so the chance not to function. However, if capability theorists were to use this response, it would raise serious problems for their approach. First, such an argument explicitly rejects the validity of choosing not to perform a valuable functioning: these ‘disvaluable’ choices are permitted only as a means to ensuring that most people endorse a valuable way of life. For example, a government may insist that a monogamous heterosexual marriage is the ‘right’ relationship to choose, but allow other forms of relationship – homosexual marriage, non-married cohabitation, polygamy and so on – as a means to ensuring that most people endorse, and so are committed to, monogamous heterosexual marriage. This does not avoid the distinctively paternalist insult, discussed in Chapters 2 and 3, of distrusting individuals’ capacity to make decisions in their own best interests (even if we ultimately allow them to make these decisions anyway).

Second, it provides only a contingent justification for the promotion of freedom. Capabilities are important only as a means to ensuring individuals endorse valuable functionings. If the causal connection between capabilities and endorsement does not hold, the justification for capabilities falls away. Indeed, it seems likely that this causal connection often will not hold, given that Olsaretti’s definition of endorsement includes instances when a person’s will is bypassed, such as cases of brainwashing, indoctrination, or hypnosis.[[248]](#footnote-248) Returning to the example of marriage, Olsaretti’s instrumental justification of capabilities would, therefore, make the toleration of a variety of relationships rather tenuous: if a superior means to making people endorse the ‘right’ choice of monogamous heterosexual marriage were found (more effective brainwashing techniques?), such toleration would no longer be necessary.

Consequently, if a capability approach is to be anti-paternalist in the right way, it must attach non-instrumental value to individual freedom and control. Thus, we should allow individuals to have capabilities even in instances where they will choose not to perform valuable functionings and may, as a result, have a worse life then they would otherwise have done (if the state had intervened to prevent them). Cohen may be right, then, that the promotion of capabilities is sometimes bad for well-being, but in the public realm well-being is not our only goal.[[249]](#footnote-249) I will argue that giving freedom (as control) the central role it has in the capability approach is justified when the approach is conceived as a policy guide, and that this does not require excessive individual activity, participation, or ‘athleticism’.

I will respond first (§3.1) to Cohen’s suggestion that capability theorists’ failure to value passively-achieved benefits means they cannot recommend that we be made free from environmental obstacles – such as malaria – which would (passively) confer on us an important benefit (in this case, health). Such cases may appear difficult for capability theorists to accommodate, since passively-achieved benefits are not their concern. Moreover, the ‘freedom-from’ a harm or burden will remove an available option or limit our capabilities (to be subject to that harm), which may appear contrary to the aims of the capability approach. However, I will argue that a concern for capabilities does not require the maintenance of a maximally large option set, and so does not rule out making us ‘free from’ certain environmental factors, even if this places some limits on our opportunities.

Next, in §3.2, I will consider further what it means to have freedom as control. I argue that it requires that our preferences or choices (made in a procedurally appropriate way) should determine outcomes independently of their content and context. Independence of context, here, means that our ability to control an outcome is not dependent on the arbitrary will of another. Thus, I will suggest (§3.3; §3.4) that the capability approach supports an argument in favour of a democratic system for decision making in certain cases. The joint determination of an outcome I call ‘collective capabilities’. They allow groups to make cooperative decisions in cases that affect them all without disrespecting the agency or undermining the control of the individual group members. There may be some limitations on the decisions a group can make (§3.5), but nonetheless it is important that we have this control over our shared environment, as well as control over the more specific functionings we perform. Thus, I will demonstrate that the capability approach does not, in practice, demand excessive athleticism from individuals, and that its focus on individual freedom is justified.

**3. In Defence of Freedom as Control**

Why is it so important that the government ensures we have control over our environment, rather than simply promoting our well-being, even if our own role in its achievement is a passive one? To answer, I will focus on the passively-achieved benefits that most concern Cohen: ‘freedoms-from’ environmental obstacles, in particular the freedom from diseases such as malaria. Freedom from malaria seems like a prime example of something the government ought to promote regardless of our choices or preferences, and even if we do not play an active role in achieving this benefit. Yet, I will argue, whilst such a freedom-from can be *valued* (as a possible contributor to well-being), it should not be *unilaterally promoted* by governments. It may seem counterintuitive to say that governments should not always confer benefits on their citizens, but to do so without consultation treats people with a paternalistic lack of respect, which, I have argued, we ought to avoid.

*3.1 Freedoms-from and Capabilities*

To argue that capability theorists’ concentration on individual freedom leads to implausible consequences, Cohen considers cases where benefits are achieved passively: when we are made free from some obstacle or risk “that impede[s our]…achievement of valuable functionings in *choice-insensitive* ways”[[250]](#footnote-250). Cohen insists that since capability theorists aim to provide individuals with capabilities, or freedoms to function, they cannot promote such freedoms-from obstacles, since whilst they may enhance our freedom, they are not freedoms in themselves, and so not the direct concern of the capability approach. This is in contrast to Cohen’s own theory of midfare, which is not solely concerned with the promotion of freedom.

I believe Cohen is right to assert that that although freedoms-from may contribute to our freedom, by removing an obstacle to choice, their value is instrumental: they are not freedoms.[[251]](#footnote-251) Nonetheless, the response capability theorists can make initially seems remarkably straightforward: despite some ambiguities in Sen’s writing, they do not consider freedoms-from to be capabilities, nor need they do so in order to promote them. The capability approach aims to provide freedoms in the sense of *substantive opportunities*, which include the physical and psychological conditions of making a choice. This seems likely to include the removal of obstacles that prevent people from making such choices: we cannot have a secure capability for good health whilst living in a malarial environment, for example.

As well as securing new opportunities, freedoms-from may also improve our ability to choose between available options. For example, being free from starvation may allow us to choose to leave a job we hate, if the consequences of doing so are no longer so dire (starvation). Further, the decision to *exercise* some functionings, once free from the obstacles to performing them, may also increase our ability to choose. For example, deciding to be nourished may improve our brain functioning, as well as removing the distraction of perpetual hunger, and so give us a greater capacity for reasoning and decision-making than when we were malnourished. Thus, capability theorists have many reasons to value (and even promote) freedoms-from as a means to their end of promoting capabilities, without having to concede that freedoms-from are, themselves, capabilities.

However, it may be objected that whilst a capability theorist may indeed *value* freedoms-from as a component of well-being, if they are committed to allowing individuals control in the domain of policy, they cannot *promote* them. This, it could be argued, is because removing some obstacle from an individual’s environment may make a functioning unavailable, and so remove their capability to perform it, in direct contradiction to the capability approach’s policy aims. Yet in most cases this seems unlikely to be true: making an individual free from starvation does not prevent them from fasting. Ordinarily, then, being free from an environmental obstacle will simply give individuals better control over whether they function.

In rare cases, however, the change in the environment necessary to achieve a freedom-from *may* mean an individual is compelled to perform a functioning: making an individual free from malaria does not stop them choosing ill-health by some other means, but it does prevent them achieving the specific functioning of contracting malaria. Yet, once again, capability theorists can make a simple response to this and many of the other examples Cohen raises. If their approach distinguishes valuable, or ‘central’, capabilities (as most do), then they can point out that when the option lost is not a valuable one, this need not concern them. Thus, that we lose the capability to contract malaria would not be a reason for standard capability theorists to object to our being made free from malaria as a precondition to having the capability for health more broadly.[[252]](#footnote-252)

Even in cases where the functioning blocked by a freedom-from *is* valuable, capability theorists need not insist that removing this capability is always impermissible. As Chapter 3 considered, there are cases when the central capabilities conflict, and in these instances capability theorists allow individuals to sacrifice the capability to perform one valuable functioning for the sake of another: for example, the sacrifice of sexual satisfaction in the celibate life of a monk for the sake of his spiritual fulfilment. More generally, we frequently allow individuals to make decisions that limit their future option sets, or future opportunities to control their lives. For example, allowing sterilisation, though this removes individuals’ opportunity to control whether they have children in the future.

A commitment to individual control does not entail a commitment to the *maximisation* of this control in every case. Indeed, this is likely to be contradictory when the choice we want to make in one part of our life requires the elimination of options in some other domain. A commitment to the capability approach, therefore, does not rule out the elimination of valuable options, but it *does* rule out their elimination without consulting the affected individuals. It is only plausible to permit individuals to sacrifice future, seemingly valuable, opportunities because it is the affected individual who controls the reduction of their option set.[[253]](#footnote-253) Thus, sterilisation (‘freedom-from fertility’?) is acceptable if chosen by the person to be sterilised, but unacceptable when it is the result of some government policy concerning population control.

The freedoms-from Cohen focuses on tend to be public, non-excludable goods that limit the future options of many people for the sake of other valuable options. What it means to *control* being made free-from something is more complex in these collective cases, where it is the affected *group* who should exercise control. For example, the institution of a public health service may require taxation that, if levied, will make many individuals unable to perform other *prima facie* valuable functionings. We can say, then, that this tax may limit a group’s access to the central capabilities. I will argue that this loss of capability is legitimate if the group controls whether this tax is introduced, where control means that our preferences are counted equally in the democratic process. Hence, just as sterilisation should not be forced on an individual, so public health policies should not be unilaterally imposed on a group. I will discuss these issues of group and individual choice further below.

Whether a freedom-from removes the capability to perform a valuable functioning (as in the case of tax or sterilisation) or a disvaluable functioning (as in malaria control) to achieve some passively-achieved benefit, then, standard capability theorists can permit them. They would insist, however, that when the capability lost is valuable, we should control whether we lose it. Thus, whilst governments may promote freedoms-from that block valuable functionings, they should not promote them unilaterally. Given that I believe that capabilities should be interpreted as the ability to control central domains of our lives, regardless of the content of our choices in these domains, I would argue that even seemingly disvaluable functionings should not be sacrificed without consultation. On my view, then, unlike standard approaches, we must have control over whether we lose a functioning in a central domain, whether or not this is deemed a ‘valuable’ functioning.[[254]](#footnote-254) We identify which domains of our life are the concern of justice, not which functionings are.

For example, the capability for health as I understand it would consist of the ability to autonomously determine what degree of bodily health is appropriate for us, and the capacity to achieve it. This should include the permission and ability to permanently sacrifice the ability to be healthy. The capability is not an opportunity to achieve the pre-defined functioning of ‘healthiness’, which can be used or not, but never sacrificed. As discussed in Chapter 3, this interpretation is in contrast to most versions of the capability approach, according to which to have a capability is exactly to have the opportunity to endorse one of a pre-determined list of valuable functionings.[[255]](#footnote-255)

The consequence of adopting this view is that since *control* in a domain is important, limiting this control is problematic *whatever* options in a domain are lost – including, say, the opportunity to contract malaria. Individuals can choose, of course, to limit their options, but they must do the choosing, and not the government nor any other third party. I treat the loss of any functioning as other capability theorists would the loss of a valuable functioning. Thus, on my view, the institution of *any* freedom-from (and consequent lost capability) requires that the affected individual or group’s preferences be decisive. This approach seems especially vulnerable to Cohen’s criticisms, yet even this more ‘extreme’ version (requiring that individuals be in control in a greater range of cases) is not implausibly athletic, as I will show.

*3.2 Freedom as Control*

The capability approach insists we have capabilities, or control over central domains of our life, not simply to ensure that we get what we want in these domains (or what some capability theorists consider good for people), but to ensure we are treated in an appropriate (non-paternalistic) way: our agency is respected.[[256]](#footnote-256) Enforced sterilisation is not *just* problematic because some individuals lose a valued opportunity (to have children), which may decrease their well-being. The more pertinent problem is that the failure to consult, and take account of, the preferences of the affected individuals insults their agency in a characteristically paternalist way. Similarly, the relevant problem with the undemocratic introduction of an anti-malarial policy, or tax to support a public health service, is not that some people lose a desired opportunity,[[257]](#footnote-257) but that they are not respected as agents capable of choice. Simply failing to have our preferences met may be detrimental to our well-being, but it need not be paternalist, and it is paternalism that governments should be concerned to avoid.

According to the definitions of paternalism and anti-paternalism that I have adopted, individuals are respected, and paternalism avoided, when they have control in central domains. This comprises their choices or preferences playing a role in determining an outcome (whether or not this outcome is generally considered valuable). Yet two challenges remain. First, more needs to be said about the nature of this control, and the sense in which our choices and preferences should ‘play a role’. Second, it should be explained why what seems attractive in Cohen’s criticism – that control should not *always* be promoted, and sometimes passively-achieved benefits, freedoms-from, or the elimination of disvaluable options are worth pursuing (regardless of the affected individuals’ preferences) – is not, in fact, compelling.

It is important to note, first, that preferences that lead us to endorse some option or goal should be formed under the right procedural conditions. In other words, should meet the procedural conditions of autonomous or voluntary choice I have outlined.[[258]](#footnote-258) By endorsement, then, I mean something more substantive than Olsaretti’s use of the term, according to which endorsement is mere assent however such assent is obtained (including by brainwashing, indoctrination, or hypnosis). Instead, I mean something more akin to Nussbaum’s practical reason, with its emphasis on being able to plan one’s life, and “engage in critical reflection”[[259]](#footnote-259) about that plan.

We should be given the opportunity to participate and engage in the decision-making process and, when we do so engage, the functionings we subsequently endorse can be said to reflect our considered and informed preferences. These preferences are likely to be a reasonably reliable guide to what is in our best interests. However, even when this is not the case, a government’s aim (as discussed) should not necessarily be the achievement of individual well-being by any means: to be a consistent Shiffrinian soft paternalist they should also permit citizens to control central domains of their life out of respect for individual agency.

As well as being formed according to the above procedural requirements, for an individual to be free (in the sense of controlling their lives) their choices or preferences must also be decisive independently of their content and context.[[260]](#footnote-260) To be independent of content accords with my view that capabilities are not opportunities to achieve *specific* functionings – such as being healthy – but to control central domains of our life – such as our bodily health. Thus, whatever the content of our preference, whether we prefer good health or ill-health, to have the relevant capability, this preference must be decisive.

To be independent of context, the decisiveness of our preferences should not depend on the ‘gratuitous favour’ of a third party. Thus, if our preferences are decisive only insofar as we retain the favour of some other(s), then this is insufficient for freedom. This would rule out our being said to possess capabilities under a dictatorship, however benevolent. Pettit gives an example of a benevolent potentate who uses his wealth to improve the healthcare and education systems of his country.[[261]](#footnote-261) As long as our having access to these benefits depends on his favour, however, we cannot be said to truly possess the *capability* for health or education. Even if, for as long as his favour lasts, we are able to achieve these functionings, we do not have the capability to achieve them since we lack effective control over whether we are able to function.

*3.3 Capabilities and Democracy*

Developing Pettit’s account of the importance of context-independence for freedom can usefully elucidate the control the capability approach would advocate, and demonstrate how this may be achieved in collective cases through democratic participation. This point can be brought out by considering one way in which the capability approach (at least my version of it) appears to differ from Pettit’s account. To do so, imagine two benevolent potentates. The first sets up a social infrastructure, such as a system of public health and education, but once set in motion, he no longer exerts control over its running, and so access to it is not dependent on his whims. Imagine, for example, that he formally relinquishing control over its operation to an independent body over which he has no influence. The second is as Pettit describes: he continues to control who has access to health and education (even if this power is never exercised).

On Pettit’s view we are free when we are not currently being dominated; it need not be the case that we are in active control of our lives. Hence, in the first society, Pettit would consider the individuals free, since the potentate lacks the power to dominate them. Their capabilities for health and education are context-independent: not reliant on the favour of a third-party. Yet, whilst it is true that these people would have the individual capabilities for health and education, I believe capability theorists should also consider it important that they lack control over the establishment of these conditions, and that they lack freedom in an important sense without this.

When a group is affected by a decision – whether the establishment of public schools or the eradication of malaria – it is the group who should control what decision is made (as §3.1 discussed). Without this control, we are mere passive recipients of these benefits, and, *contra* Cohen, I argue that this is not enough for genuine freedom, and should not be the goal of policy. However, whilst citizens of a dictatorship lack such control, as citizens of a democratic state our preferences *can* be said to be sufficiently decisive. As Pettit notes, “[a] democratic government is passively forced to respect what are assumed to be my preferences or the preferences that we in a certain group – perhaps the citizenry as a whole – share”[[262]](#footnote-262). Thus, even if citizens do not have direct control over policy, their preferences as a group determine the shape policy takes (or should do).[[263]](#footnote-263)

A natural worry is that such *collective* freedom to control government policy gives each individual very little ‘real’ control over determining what the outcome will be. However, as discussed, the value of control is not to ensure we get the outcome most conducive to our well-being (or even the outcome we would, individually, prefer), but that we are treated appropriately (respected). Paternalism, as I have defined it, involves a distrust of individuals’ choices, and so disrespect of their agency, and in at least some cases this can be avoided simply by giving our preferences equal weight and value to that of other citizens.[[264]](#footnote-264) It need not always be the case, therefore, that in order to avoid paternalism and possess freedom as control, a change in our preferences must lead to a change in policy.

To be in the minority in a democratic vote is not to be subject to a paternalistic insult when the government acts on the majority decision. In contrast, when the government acts for what it considers to be the good of the majority, without taking account of anyone’s decisions, all citizens are insulted, even those who would have supported the policy if they were given the chance.[[265]](#footnote-265) Thus, an anti-paternalist capability approach need not ensure that no desires are ever *frustrated* – even in the central domains – but that preferences in these domains are *respected*.

*3.4 Collective and Individual Capabilities*

A question still remains to be answered: how are we to distinguish between cases when the ‘appropriate’ respect for our preferences means that they are counted equally to others’ and those when this respect requires that our preferences more directly control the outcome? The answer, simply, is that when only an individual is affected, their preference alone should control the outcome. When a group is affected the group should have control, and respect for individuals requires that they are treated as equal members of this group. This is largely for the simple reason that it would be impossible to allow any other sort of control in such group cases: to allow one individual’s choices or preferences to be decisive would remove control entirely from other individuals.

When decisions concern public, non-excludable goods, then, we should have what can be called *collective capabilities*: the capability, or freedom to control, is possessed by the collective, or relevant group. Such public goods usually involve determining environmental conditions (such as whether we are free from malaria) since a group will necessarily be affected in these cases. These collective decisions, regarding external conditions, determine individuals’ option sets, or the parameters within which they can choose. However, it is still left up to the individual how they respond to this environment. Within this domain they still possess the *individual capability* to determine which particular choices to make and which functionings to exercise.

An example of a capability with both collective and individual elements may clarify this point. Consider the capability of health. There are a number of public health policies that will affect all individuals, such as the availability of certain drugs or the establishment of a public health service. These determine the background conditions against which groups of individuals can make particular choices. Decisions in these cases should be made by all individuals, counted as equals. Individuals have the collective capability to determine these outcomes and, consequently, not all individuals will get their ideal option set. For example, libertarians may be compelled to contribute to a public health service. However, all individuals should be provided with some range of opportunities: possessing a capability in my sense (control over a domain of our life) will require the individuals are provided with some options in this domain. What constitutes an appropriate range is a complex question, but it seems clear that having control requires the possession of at least some options.[[266]](#footnote-266)

Consequently, it is likely to be impermissible to exercise collective capabilities so as to limit individuals’ options to the extent that they no longer possess an individual capability, and so cease to have control over a central domain of their life, such as their health. For example, compare two vaccinations against serious, but rarely life-threating, diseases; both of which require a high proportion of the population to be immunised to be effective. In the first case, the vaccine has no side-effects, whilst in the second it will cause infertility in a reasonably large number of cases (say, half). A collective decision to adopt a compulsory programme of vaccinations in the first case seems permissible. Although it will deprive individuals of the capability to contract the particular disease and slightly lessens their control over their healthcare, they still retain general control over their health. Compulsory immunisation is unlikely to be permissible in the second case, however, since this completely removes some individuals’ control over a central domain (their “choice in matters of reproduction”[[267]](#footnote-267)).

There will, of course, be many difficult cases: if the disease was life-threatening, could we compel individuals to have the second vaccine? How high would the risk of becoming infertile have to be before forcing us to have the vaccine is impermissible? Could we expect those with certain religious views, such as Jehovah’s Witnesses, to receive even the first sort of vaccine?[[268]](#footnote-268) There is no simple answer, but when considering the decisions it is permissible for a collective to make we should be guided by a concern to allow individuals as much control as possible in important domains of their life, as will be discussed further below (§3.5). The idea is that the collective determine the options that are available and the background conditions against which we choose. The affected individual should then determine their actual, specific functioning achievement – exert control. For this control to be meaningful, a collective must leave individuals a range of options to choose from.

*3.5 The Limits of Collective Decision Making*

We may still wonder, however, what constitute the acceptable limits on the particular option sets that can be forced on members by the decision of a group. Who constitutes the relevant collective for a collective capability, and what decisions can they make for other members of that collective? Drawing strict lines here will be difficult, but the intention is that (a) those who are affected should constitute the relevant group, (b) decisions should be made by a collective only in cases when a group is necessarily affected, and (c) an effort should be made for individuals to retain a space to exercise control over central domains of their lives (the central capabilities as I understand them).

In this way we can avoid policies such as forced sterilisation, since in such instances: individuals outside the affected group would exert control over those within it (violating (a)); it is unlikely that this is a decision that *must* be placed in the hands of a group (violating (b)); and it clearly and severely limits the capacity to choose of the individuals affected (violating (c)). These arguments somewhat assume that the population size is sufficiently under control for individual births not to have a significant effect on others, meaning that the affected group is limited to those forced to undergo sterilisation. Even if this were not the case, however, it seems preferable (for a capability theorist) to control population size by fining those with more than some agreed threshold number of children – lessening the effect of their doing so on others, and preserving some degree of individual control – rather than endorsing the invasive act of enforced sterilisation.

Thus, the capabilities that I have argued we should be provided with (as a matter of public policy) constitute collective control over external conditions that will affect a group, and individual control over how our life goes given these specific external conditions. It is a concern of justice only that we have these capabilities in particular important domains: controlling our health, bodily integrity, use of our practical reason and so on.[[269]](#footnote-269) Though it may improve our well-being to have control over our lives more generally, as a matter of policy we should only be concerned with providing these central capabilities.

Before concluding, it is worth noting that the suggestion that we should be able to control the conditions within which we choose – as well as which particular functionings we perform – raises interesting issues of intergenerational justice. Decisions that limit the options of future generations would deny them their collective capabilities, and so render them unfree in an important sense. This is true even if the limitation of options were to make them free from something widely considered burdensome. There is a *sense*, then, in which it is problematic if we confer a passively-achieved benefit on a future generation, by eradicating HIV or curing cancer, for example.

It may seem absurd to suggest that we have, in any sense, wronged future generations with such actions. However, whilst all-things-considered these actions seem to be uncontroversially justified, I think it is right to say there is a *sense* in which we wrong future generations by controlling their environment and removing their options, even if they are options we take to have no value. In part, this may be because we do not know the value such alternatives may have. More importantly, by removing options we may also demonstrate a paternalistic disrespect and distrust of their agency. Like the benevolent dictator who sets up a social welfare system then stands back, whilst we have done much good, we have also done some wrong in denying individuals the chance to exercise control over their environment and determine the content of their option sets.

Of course, motivation matters here. According to the definition of paternalism I adopt, interference is paternalist if it is motivated by a distrust of individuals’ ability to make decisions in their best interests, and the corresponding assumption that the intervening agent’s judgement is superior.[[270]](#footnote-270) It is possible to treat future generations in this way – for example, jettisoning all remaining fossil fuels into space because we cannot trust them to stop burning them and destroying their atmosphere. However, this is unlikely to be our motive for prioritising cancer research: we do not fear that future generations will not take the threat of cancer sufficiently seriously but, instead, are concerned for the well-being of current generations. If we are not motivated by such distrust, we do not treat future generations paternalistically. However, whatever our motive, we should take care not to remove all options for future generations, leaving them no control (or individual capabilities) in a domain.

The case of future generations raises interesting questions for the idea of collective capabilities, since they constitute a part of the affected group who necessarily cannot be involved in the decision-making process. Some limitation of their collective capabilities seems a necessary evil, since though we ideally ought to consult them we simply cannot, and it would be nonsensical to suggest that we can make no decisions with long-term consequences. We should, however, avoid limiting future options insofar as this is possible, and when we do make such limitations, should not be motivated by distrust of their capacity to choose well for themselves.

**4. Conclusion**

Cohen misunderstands the goals of the capability approach. It is not concerned just with what we must equalise to improve individual well-being, but rather with the sort of equality that is an appropriate policy goal. I have argued that public policy should not be concerned with well-being alone, but should also aim to protect individual autonomy, treat individuals with appropriate respect, and so avoid paternalism. I believe that the version of the capability approach I have outlined can capture these concerns well. Governments treat individuals with the appropriate respect when they allow people to have freedom in the sense of controlling both their environment and how they respond to this environment (when these affect central domains of their life).

This respect requires that in some cases our preferences should cause an outcome (an individual capability) and, in others, that our preferences should be *amongst* those that cause an outcome (a collective capability). Even if our preference is for a seemingly valueless option, I believe it is problematic if a government fails to respect it. Thus, we should both be allowed to refuse medical treatment, and have our vote against an anti-malarial policy counted, if the government is to give us capabilities and to avoid paternalism. Such conclusions do not display the excessive athleticism that Cohen diagnoses.

Thus, Cohen’s criticism of the capability approach for its athleticism is misplaced: government policy *should* aim to provide people with the ‘athletic’ freedom as control over decisions in central parts of our life. In particular, individuals should have the more extensive, content-independent control over their lives that I advocate, rather than the mere opportunity to function that Nussbaum’s account would provide. It may be that an account of *well-being* should focus more on benefits that are passively-achieved, but when considering how governments ought to treat us it is important that *we* achieve these benefits for ourselves. Governments should not simply assume they are the best judges of our interests without reference to, or consultation of, our preferences. Even if a government proves to be a good judge, we should be treated as agents capable of choice, regardless of whether we sometimes make choices we regret (or choices that others think we *ought* to regret).

**Which Preferences Count?**

**Adaptation, Capabilities and Disability**

**1. Introduction**

It is a longstanding problem for theorists of justice that many victims of injustice seem to perpetuate their own oppression: for example, those who choose to stay with an abusive partner, or sufferers of Stockholm Syndrome (wherein a kidnap victim feels trust or affection for their captor). In conditions of great hardship or deprivation individuals may cope with their circumstances by claiming to prefer their situation to any alternative. They may form an *adaptive preference* for their mistreatment. Yet these apparent preferences should surely not legitimate such practices, or be taken as reliable evidence about these individuals’ well-being: “women’s compliance with sexist norms [for example] does not legitimate those norms”[[271]](#footnote-271). Individuals may adapt to deprivation or oppression, but the resulting ‘adaptive preferences’ should not determine individuals’ entitlements. Unreliable adaptive preferences are particularly problematic for theories of *distributive* justice, where preferences can play a role in determining the goods or opportunities an individual is entitled to. The fact that a kidnap victim does not desire release does not mean they are not entitled to freedom, nor should a woman’s satisfaction with fewer material resources mean they are entitled to less.

This problem is starkest for (preference-satisfaction) welfarists for whom the unreliability of individuals’ stated preferences translates directly into an unreliable theory of justice. Indeed, the idea of adaptive preferences was initially developed as a critique of welfarist theories that “take…account of wants only as they are *given*”[[272]](#footnote-272), and so assume that that those who claim to be satisfied are, indeed, satisfied, and so not entitled to anything further. In response, other theories of justice – perhaps most prominently the capability approach – have argued that stated preferences should play a less direct role in determining appropriate redistribution. Thus, the capability approach argues for a two stage process in which our preference and beliefs regarding the necessary features of a flourishing life form the basis of an overlapping consensus, and we are then entitled to the opportunities to perform those functionings that are agreed to be central in this way: the central capabilities.

If preferences are adaptive, it is assumed they can be legitimately ignored and so not taken as reliable evidence regarding the quality of that individual’s life, nor as evidence regarding the central features of a flourishing life. Thus, if a person with Stockholm Syndrome insists that freedom from captivity is unimportant – they neither desire it, nor consider it necessary for flourishing – this will *not* be taken to support the idea either that they are not entitled to the capability for freedom, nor that this capability is inessential to flourishing, and need not be provided as a matter of justice. Capability theorists need to be able to identify adaptive preferences, then, to know which preferences should be ignored in this way. They can thus avoid the problem that plagues welfarists, and do not use the kidnap victim’s apparent satisfaction as evidence that they are not entitled to be free.

This response is uncontroversial in such paradigmatic cases, but there has been a growing backlash against this strategy of undermining the reliability of, and ignoring, individuals’ apparently strongly held preferences. When applied to individuals and groups who are already oppressed and mistreated, it seems that this may promote the further exclusion of those who are already marginalised. The capability approach, in particular, has been criticised on this basis. For example, it has been suggested that, although the approach prides itself on being robustly feminist, it unjustifiably classes the preferences of third-world women as adaptive, undermining their autonomy and status as agents.[[273]](#footnote-273) Given that my version of the capability approach aims to avoid paternalism and to apply universally, including to those with unusual preferences or needs, this line of criticism is one I will be particularly concerned to avoid. Whilst we must identify adaptive preferences to avoid ingrained mistreatment and oppression being formalised into the dictates of a theory of justice, we must also avoid ignoring cultural practice and preferences merely because they are not widely shared. In other words, we must ensure that when we ignore preferences as adaptive, we have sufficient justification to do so.

I will focus on Elizabeth Barnes’s critique of the capability approach, which suggests that it will ignore all disabled people’s preferences as adaptive. To simply ignore preferences for such a vibrant and valued culture is, she argues, unjustified, insulting and potentially paternalistic. Barnes argues that rather than identifying adaptive preferences on the basis of substantive judgement about their content (an approach Nussbaum adopts), we should, instead, adopt a more proceduralist account that focuses on the *process* of preference formation. This approach, she argues, will not class disabled individuals’ preferences as adaptive.

I will agree with Barnes’s critique of Nussbaum, and her move towards a more proceduralist method of adaptive preference identification. However, there is a central ambiguity in the literature, which Barnes does not take account of, and which undermines the ability of her approach to identify unreliably adaptive preferences. This is the distinction between a preference being adaptive in the sense of being an unreliable guide to the individuals’ own best interests (*well-being adaptive*), and a preference being adaptive in the sense of being an unreliable guide to our redistributive entitlements under a theory of justice (*justice adaptive*). To be unreliable in the former sense means that the person expressing the preference is a poor judge of what will improve their well-being, and may be responding irrationally to their circumstances. To be adaptive in the latter sense means that though their preference may be a rational response to their particular circumstances and a reliable guide to *their* interests, there are reasons to think we should not use these preferences to determine other individuals’ entitlements. A preference may be unreliably adaptive in one sense but not another, and I will argue that it is only potentially insulting to judge a preference as adaptive in the former sense.

Moreover, Barnes (like many theorists) treats disability as a single category, implying that if we can demonstrate the reliability of some disabled individuals’ preferences we can conclude that all disabled people’s preferences are similarly reliable. I will argue that we should adopt a more nuanced account of disability, according to which some disabled individuals’ preferences for some elements of their disability may be adaptive in one or other of the above senses: one judgement will not cover all cases. Though Barnes is right that disabled individuals’ preferences should not be completely ignored, neither are they universally reliable. Some disabled individuals may have an experience of life sufficiently different from our own that they cannot be a reliable source of evidence of the important features of a life without these experiences. Some disabled individuals come to accept the social exclusion, stigmatisation, and deprivation that is a central part of many disabled lives in modern society. That individuals adapt to such mistreatment should not suggest it is not unjust, and these preferences should not guide theories of justice. Yet this need not imply that individuals’ preferences for the intrinsic features of many disabling conditions – deafness, blindness, mobility impairments, dwarfism – should be similarly ignored.

I will begin by outlining Nussbaum’s critique of standard accounts of adaptive preferences, the account she develops in response, and Barnes’s critique of this (§2). I will then explain the role that preferences play in theories of justice, and so clarify what it means to say that a preference is adaptive (§3). Specifically, I will argue that we must distinguish well-being and justice adaptive preferences, and argue that capability theorists need only judge preferences to be adaptive in the latter sense. To identify justice adaptive preferences, I will suggest a modification of Barnes substantive proceduralist account, according to which preferences are (justice) adaptive if individuals lack the central capabilities when they form them (§4). Finally, I will consider how my account would respond to cases of disability and, *contra* Barnes, will argue that our response should differ in different cases of disability (§5).

Thus, despite the problems Barnes has identified in Nussbaum’s account of adaptive preferences, I contend that the capability approach can rehabilitate the idea of adaptive preferences such that it does not simply ignore any unusual preferences, yet has the tools to identify and exclude those preferences that would render the redistribution they advocate implausible. Once again, therefore, though important criticisms can be raised against the capability approach as it currently stands, it is possible to respond to these within the capability framework, so these do not give us reason to abandon the capability approach.

**2. Identifying Adaptive Preferences**

The idea of adaptive preferences was initially developed by Jon Elster, and modelled on Aesop and La Fontaine’s ‘Fox and Grapes’ parable. On realising he cannot reach the grapes he desires, the fox insists ‘grapes are too sour for foxes’, and he did not want them anyway. It is assumed this response is irrational, and not a reflection of what the fox *really* prefers or what would be good for him. Standard accounts focus on procedural flaws in the process of preference formation that render the resulting preferences irrational. For example, that the preferences were formed unconsciously, necessarily unconsciously, or do not cohere with our other beliefs and preferences.[[274]](#footnote-274) Thus, the fox’s apparent preference not to eat grapes (because they are too sour) is an unreliable guide to his interests, since he did not consciously change his preferences in light of his diminished options, and the resulting preferences do not accord with his other beliefs and preferences regarding the ideal sweetness of fruit.

Nussbaum rejects such proceduralist accounts – focussing on the process of preference formation – and argues that “[Elster] needs something he does not give us, a substantive theory of justice and central goods”[[275]](#footnote-275). Nussbaum proposes a substantive normative account, according to which an adaptive preference is one with the ‘wrong’ content: it is more rational to prefer education and literacy than ignorance, for example, even if both preferences were reached by the same process (§2.1). Barnes argues that those who prefer their disabled life will have the ‘wrong’ preferences by Nussbaum’s standards, and will be duly ignored. She therefore offers an alternative account of adaptive preferences – the social warrant approach – that aims to accommodate them (§2.2).[[276]](#footnote-276)

*2.1 Nussbaum’s Normative Account of Adaptive Preferences*

Standard accounts of adaptive preferences distinguish between rational (conscious and autonomous) preference alteration in light of diminished options (*character planning*), and irrational (unconscious) preference alteration (*adaptive preferences*). Nussbaum argues that we should not be “suspicious of any desire that is formed through adjustment to reality”[[277]](#footnote-277), and that it is not whether a desire is formed unconsciously that determines whether it should be ignored. She points out that we often unconsciously adapt to our circumstances, and this does not always provide a warrant to consider a preference unreliable. For example, she notes that“[s]omeone as a child may want to be the best opera singer in the world (as I did), or the best basketball player, and most people adjust their aspirations to what they can actually achieve…But clearly this is often a good thing, and we probably should not encourage people to persist in unrealistic aspirations”[[278]](#footnote-278).

Instead of adopting a proceduralist account to identify adaptive preferences, then, Nussbaum argues that we should employ a substantive normative account to identify problematic *content*: “change in preferences is only problematic insofar as it leads to a preference for something which one *should not*, ceteris paribus, prefer”[[279]](#footnote-279). For Nussbaum, even placing substantive conditions – such as “an absence of traditional hierarchy, absence of fear, and a sense of one’s worth and dignity”[[280]](#footnote-280) – on the process of preference formation is insufficient. Such conditions may ensure that the resulting preferences are appropriately informed, but an informed preference account is no more than a convenient heuristic device for Nussbaum.[[281]](#footnote-281) It is useful only insofar as it is successful at generating preferences for those things she determines we ought to value.

For example, considering educational videos produced by SEWA (Self-Employed Women’s Organisation), encouraging women to have a greater awareness of their options, Nussbaum notes:

we would not think this progress, or a correction of malformed preferences in the direction of `true' preferences, if the women were taught by the videos to hide away in the house all day, or to believe that they were made for physical abuse…It is because we have an implicit theory of value that holds self-respect and economic agency to be important goods that we think the preferences constructed by the videos are good...[[282]](#footnote-282)

Thus, it is not raising of awareness *per se* that makes the videos valuable, but the fact that they are raising awareness and moulding preferences in the *right direction*.

We do have reasons consistent with the capability approach to promote informed choice: exercising a capability involves choice, an informed choice demonstrates the use of the central functioning of practical reason, and being better informed is likely to be a good means to ensuring our preferences have the ‘right’ content. However, for Nussbaum, our preference being more informed or considered does not determine that it is more adaptive or reliable than a habituated and unconsidered preference. On the contrary, if an unconsidered preference is for a good way of life (economic empowerment) and a considered preference is not (physical abuse), it is the former we should rely on. As Nussbaum puts it, “[a] habituated preference not to have an item on the list [of central functionings]…will not count in the social choice function, and the equally habituated preference to have these things will count”[[283]](#footnote-283).

*2.2 Barnes’s Social Warrant Approach: Extrinsic and Intrinsic Influences*

Barnes objects to this response on the basis that it will identify the wrong preferences as adaptive and, in particular, that it will unjustifiably deem disabled individuals’ preferences to be adaptive. She insists that “[p]hysical disability represents, according to the capabilities approach, an absence of one or more basic goods (bodily integrity, physical health etc…)”[[284]](#footnote-284). As such, Barnes suggests that “[a] disabled life, according to the capabilities approach *cannot* be as optimal as a relevantly similar non-disabled life”[[285]](#footnote-285). This means that disabled individuals who claim to prefer their disabled life have preferences with the ‘wrong’ content: they claim to prefer this inferior life to a truly flourishing life in possession of all the central capabilities.

If Barnes’s characterisation is right, and capability theorists would consider a disabled life to be inferior, then it seems that Nussbaum must treat disabled people’s preference for their life as unreliable, just as she would the preferences of a spouse who had been habituated to prefer their abusive relationship. Disabled individuals’ apparent preference for their condition will be taken to be a mere coping mechanism, developed in response to the tragic circumstances in which they find themselves. Barnes argues that we should not “decide what constitutes a flourishing life from the armchair…[but] listen to testimony”[[286]](#footnote-286), before deciding a life is sub-optimal and a preference for it is adaptive.

Barnes is right to point out that to assume ‘from the armchair’ that preferences for disability must be adaptive because disability is sub-optimal simply begs the question: “whether disability is sub-optimal is the question up for debate”[[287]](#footnote-287). However, Barnes does not only argue that such substantive judgements about a flourishing life should be informed by testimony. More crucially, she argues that these substantive judgements should be made about the circumstances under which a preference was formed, not its content. Although Barnes does not make this move explicit, making substantive judgements about process rather than content seems the right move, since content alone does not seem to determine whether we consider a preference reliable. For example, the preference of someone in a religious order for an ascetic lifestyle does not seem problematically adaptive, whilst the preference of a woman in an oppressive society for the same lack of material comforts may be. The reason we consider the former preference more reliable seems to lie in the process by which it was formed: the individual had alternative options, was more informed and so on.

Even if Nussbaum modifies her approach to make better use of individual testimony (and this is certainly her intention[[288]](#footnote-288)), I would suggest that we reject such substantive content-based approaches in favour of substantive proceduralism. Barnes’s own substantive proceduralist account begins from a concern to “make warrant for diagnosing adaptive preference behaviour difficult to obtain”[[289]](#footnote-289). All else being equal, we should trust individuals’ testimony about their own well-being, and we need a good reason to diagnose a person’s testimony as untrustworthy. This (weak) claim she calls ‘hard warrant’. Her stronger, more specific, and more controversial, claim is that we have a warrant to diagnose preferences as adaptive when their formation has been subject to influences we identify as problematic. Specifically, she suggests that we should be concerned about ‘extrinsic influences’, as contrasted to unproblematic ‘intrinsic influences’. This claim she calls ‘social warrant’.

Preferences formed as the result of an intrinsic influence – and usually *for* this feature or influence – are *not* taken to be adaptive, irrational or unreliable.[[290]](#footnote-290) Intrinsic features are ‘facts about who we are, in and of ourselves’, such as our sex or sexuality. Whilst many of the consequences of these features may be extrinsic or socially constructed, for Barnes, the features themselves are intrinsic: “you can certainly be female or gay without someone acting against you – you can be female or gay on a desert island”[[291]](#footnote-291). Barnes notes, too, that it may often be the case that our life would be easier or better if we lacked these features (were straight and male instead), yet we do not think this gives us a reason to distrust people’s preferences for them.

By contrast, we do have a warrant to distrust – and diagnose as adaptive – preferences subject to extrinsic influences. The clearest examples of extrinsic influences are “general social distortion[s]”[[292]](#footnote-292), “social wrongs or inter-personal moral badness”[[293]](#footnote-293). By this Barnes means unjust and agent-caused influences, such as the abuse of power relationships, the exertion of dominance over an individual, or the removal of an individual’s rights or freedoms. Thus, the preferences of the abused spouse or kidnap victim are adaptive because they are a consequence of the individual being wronged in these ways. Barnes’s definition of intrinsic influences, however, suggests that extrinsic influences may include more than just social distortions, but potentially any influences that are *not* ‘facts about ourselves’ or ‘features we could possess on a desert island’. However, she has yet to flesh out which other influences in this broader category should concern us.

Barnes argues that disability is an intrinsic feature: “[t]hat a person has a disability is a fact about herself, rather than a social distortion…a way a person is in and of themselves”[[294]](#footnote-294). As such, though a disabled life may be more difficult (as is being female or homosexual in many places), its influence on preference formation does not give us warrant to judge that the preference is adaptive. Barnes’s focus on the distinction between extrinsic and intrinsic influences means that if we were to discover that some feature Barnes takes to be intrinsic is, in fact, extrinsic, then we would have to change our diagnosis of the resulting preferences. Barnes gives the example of homosexuality and agrees that she would accept the *conditional* claim of those on the religious right: “[i]f being gay really were just a response to a painful childhood trauma, then we might have reason to question whether the preferences of adult gay people toward being gay are in fact good evidence for the value of gayness”[[295]](#footnote-295). Thus, if disability is not always or only intrinsic, as I will suggest is the case, then Barnes account looks likely to give us warrant to diagnose their preferences as adaptive.

**3. Adaptive Preferences and Theories of Justice**

Much of Barnes’s critique of Nussbaum, and her own positive view, are convincing. However, as her account stands it is underspecified in certain key respects. First, it is important to clarify the role preferences play in theories of justice – and the capability approach in particular – to demonstrate the significance of judging a preference to be unreliably adaptive. I will, therefore, distinguish between well-being adaptive and justice adaptive preferences (§3.1), before considering the connection between adaptive preferences and the capability approach specifically (§3.2). I will then suggest a modification of Barnes’s substantive proceduralism account in light of this (§4). Second, I will argue that Barnes’s account of disability is insufficiently nuanced: whilst some disabilities may be intrinsic in her sense, this is not true of all disabilities. I will therefore suggest a distinction between different categories of disability, and demonstrate that my account of adaptive preference formation is better able to accommodate the diverse array of experiences of disability (§5).

*3.1 Well-Being Adaptive or Justice Adaptive?*

There is a sense in which all our preferences are adaptive, insofar as they are informed by environmental factors such as the options we can reasonably expect to be available to us, and internal factors such as a reasonable assessment of our own abilities. The term ‘adaptive preferences’ used in the literature is intended to distinguish adaptations that undermine the reliability of our preferences from those that do not. However, within adaptive preferences of the unreliable sort, there is a further distinction that is not explicitly acknowledged. Standard accounts of adaptive preferences – developed by Elster and his critics – model the notion on the paradigm example of the fox and his ‘sour grapes’. They focus on identifying something in the process of preference formation that renders it irrational: the preferences are unconsciously formed, or do not conform with our other beliefs. This captures the central idea that the reason we do not rely on the fox’s stated preference is that he seems to be ‘fooling himself’: he has failed to acknowledge the limitations of his situation, or recognise that the *real* reason he claims to be satisfied without the grapes is not that he thinks they are too sour. If the fox’s response to being unable to reach the grapes was to cultivate a preference for a sweeter, lower-hanging fruit – consciously changing his tastes in light of his options – this would not be an adaptive preference on these standard accounts.

For an individual’s preference to be adaptive in this sense is for them to be irrational, and an unreliable guide to their best interests or well-being. Thus, in these cases, their well-being would improve if the individual were to (a) repudiate their current preference, and (b) achieve the object of their new preference. The fox, for example, would be better off if he preferred grapes and was able to reach them. The kidnap victim would be better off if they were to desire their freedom and escape. On standard accounts, it is assumed that the process of preference formation was in some sense irrational, and they have ‘fooled themselves’ into preferring an option that they do not, and should not, really endorse. Nussbaum, by contrast, focusses on the irrationality of the object preference rather than the process of preference formation: it is irrational to prefer captivity to freedom, for example, regardless of how we came to hold this preference. We can call these ‘well-being adaptive preferences’.

This is not (or not always) the sense in which the idea of adaptive preferences is used by theorists of distributive justice, however. When they assert that a preference is unreliably adaptive, this may not mean it is an unreliable guide to an individual’s well-being, but an unreliable guide to just redistribution. From a welfarist perspective this amounts to the same thing: if preferences directly determine the requirements of justice, then if individuals’ preferences are reliable the resulting theory of justice will be too. It may be that this distinction is not usually significant, then, because the idea of adaptive preferences is usually raised as a problem for welfarists. However, for other theories of distributive justice, including the capability approach, what individuals are entitled to is distinct from what would improve their well-being.

An example may illustrate this point. Sen has used the self-reported levels of health of widows and widowers in India in 1944 following the Great Bengal Famine to argue convincingly against the welfarist reliance on preferences. Although widows actually suffered a greater rate of malnutrition and associated health problems, only 2.5% reported their health to be ‘ill’ or ‘indifferent’, as opposed to 48.5% of widowers.[[296]](#footnote-296) Sen’s point is that welfarists would prioritise health-care for widowers on the basis of such data, ignoring the fact that women’s subordinate role, particularly within the family, mean they are accustomed to, and expect, much lower levels of nourishment and health, and so are satisfied with less.

The idea of adaptive preferences allows us to ignore individuals’ stated preferences in such cases, and allocate food, for example, independently of the apparent satisfaction it produces. The capability approach, specifically, would suggest that our concern should be individuals’ actual capability to perform valuable functionings. Thus, in this case, our focus should be on people’s opportunity to achieve the functioning of nourishment or bodily health, even if some widows claimed to be satisfied without it. Indeed, few would argue that the fact that women are used to giving up their own food to ensure their husband and children are nourished, means that their malnourishment is any less a priority than that of men who are less used to doing without.

However, we must distinguish the different senses in which we could say the widows’ preferences here are adaptive. First, they may be well-being adaptive in the sense that their claim that they are satisfied with their current level of health is a poor guide to their actual level of well-being: they would be better off if they preferred, and achieved, a higher level of nourishment and health. It is not this sense of adaptive on which I focus here, however. Rather my concern will be what Serene Khader, perhaps, had in mind when she noted that feminists use the term adaptive preferences “to identify self-regarding preferences *worthy of social concern*”[[297]](#footnote-297).

The widows’ preferences are well-being adaptive, then, insofar as they are unconscious of their reasons for holding them, and ‘fool themselves’, or form the preference irrationally. However, as Serene Khader points out, when their circumstances are unlikely to change, there is a sense in which these preferences are a rational response to a difficult situation: it does not make us “a defective agent”[[298]](#footnote-298) to come to accept and prefer the deprivation we must live with. For example, prioritising our children’s nourishment and preferring our own malnourishment may sometimes be a good guide to our best interests if, being nourished, they can then look after us later. In this case, their preferences may not be an unreliable guide to their interests, but *are* an unreliable guide to their (and others’) entitlement.

Their preferences may not always be well-being adaptive, but they are *justice* adaptive. What they consider to be a good or satisfactory level of health should not be used to determine how healthy individuals have the right to be. Further, unlike the fox, it is not the case that they would simply be better off if they achieved what they claim not to want, but that they *ought* to be able to achieve it: we are entitled to good health in a way the fox is not entitled to grapes. Indeed, the widows are likely to be *un*happier if food is taken from their children and given to them, even if that redistribution is more equitable. As Nussbaum notes, we may “view it as progress that they come to realize they have a *right* to better treatment, even if that better treatment is not yet forthcoming”[[299]](#footnote-299), but recognising this right may do nothing to improve their well-being. Preferences are ‘justice adaptive’, then, when they are an unreliable basis for determining distributive entitlements. To clarify this idea I will consider what it means for a preference to be justice adaptive for the capability approach specifically.

*3.2 Adaptive Preferences and the Capability Approach*

Preferences play two central roles in the capability approach. First, on most accounts, they are used to identify which capabilities should count as ‘central’, and so a concern of justice. Second, our preference in a particular case is usually thought to allow us to determine whether we exercise a capability, and perform a functioning, or not. For example, our preference regarding a desirable level of nourishment will determine how much food we eat, though we should, nonetheless, have the capability to be fully nourished if this has been identified as a central capability. I will not focus on this latter role since capability theorists are less likely to use the idea of adaptive preferences to compel individuals to perform particular functionings, contrary to their preferences. Even if they insist that some functionings are central to individual well-being, most acknowledge that it is either counter-productive to override a preference not to perform them, or an unacceptable violation of an individual’s autonomy. I discussed exceptions to this rule in Chapter 3, so even if some capability theorists ignore individual preferences in this way, I have argued that they should not and, on my version of the capability approach, would not.

It is the former role on which I will focus, then, according to which preferences have epistemic value, providing evidence of what is good for people, and so which capabilities ought to be central. Nussbaum hopes that if individuals undergo a process of reflective equilibrium, testing their considered moral judgements against their conception of what a flourishing life entails, we can reach an overlapping consensus on the functionings that are central to human life amongst a large, cross-cultural group. We should then be provided with the capability to perform these central functionings, which, she suggests, will include being nourished, bodily health, bodily integrity, the capacity to exercise practical reason, and control of our political and material environment.[[300]](#footnote-300) This may seem a slightly unnatural use of the term ‘preferences’, since we are not concerned here with how individuals want their own lives to go, but with their views on what constitutes a flourishing life. Nonetheless, we tend to extrapolate what we prefer in our own lives to what we judge generally important. Since determining the central capabilities determines the content of a theory of justice, if these preferences are unreliable they will be *justice* adaptive.

It is also on this understanding of the role of preferences that Barnes’s contention that capability theorists must judge disabled people’s preferences to be adaptive would be problematic for the approach. Given that list capability theorists, such as Nussbaum, hope that it will eventually be possible for us to arrive at an overlapping consensus on the functionings central to flourishing, intransigent disagreement on what these functionings will be raises a dilemma for them, as Chapter 3 considered. If some individuals repudiate one or more of the central capabilities, it seems we must either remove this capability on the basis that it cannot be the object of an overlapping consensus, or suggest that this group’s preferences are unreliable, and so they should be excluded from the overlapping consensus.[[301]](#footnote-301)

It is important to remember that repudiating a capability here does not mean that an individual does not value it in their own life, but that they deny that it has value for human life in general. For example, the oft-discussed celibate monk who sees the value of the opportunity for sexual satisfaction, but chooses not to experience it in his own life, is not our concern. Rather, the concern is with proponents of FGC, for example, who argue that (women’s) capability for sexual satisfaction is unimportant. Moreover, we must not only reach an overlapping consensus on the items that should be included in the list of central capabilities, but also determine their content. Thus, the preferences of Sen’s malnourished widows are justice adaptive not because they repudiate the value of health – they claim their health is good, and no doubt consider this positive. Rather, they are adaptive because what they consider to constitute good health has been rendered unreliable by the circumstances they have adapted to – they are malnourished but claim their health is satisfactory. Consequently, if we allowed them to determine the level of health we are entitled to, we would not be free from malnourishment as a matter of justice.

It is worth emphasising that this case differs from that of individuals with well-being adaptive preferences, though similar circumstances can produce both sorts of adaptation. For example, some of the malnourished widows Sen describes may acknowledge the importance of health for human life, and may not consider their own health to be good. Nonetheless, they claim that they do not desire health – prefer not to have it – unconscious of the fact that it is their past mistreatment and deprivation that has led them to hold this view. If they are unconscious of the fact that it is oppression that causes them to disvalue their own health (like the fox rejecting the grapes), then this preference is well-being adaptive. Their preferences may not be justice adaptive, however, if they understand what would constitute good health and could form part of the overlapping consensus on its value.

Barnes criticises the capability approach for assuming that disabled people’s preferences are *justice* adaptive: for excluding their voices from the determination of what constitutes a good life because their preference for a life we have predetermined to be sub-optimal renders them unreliable. Barnes argues that disabled individuals lack one or more of the central capabilities, yet insists that they can flourish without them: not just that they can choose to do without them, but that the capabilities they lack are not an essential feature of a flourishing life. If Barnes is right to think that disability must involve capability deprivation, then capability theorists will, indeed, face the dilemma of choosing between removing a central capability from their list, or excluding some individuals from the group who determines the content of this list. Barnes suggests they opt in practice for the latter horn of this dilemma, and exclude them.[[302]](#footnote-302)

Nussbaum’s method of identifying adaptive preferences may, more generally, seem to generate a vicious circle: the list of central capabilities is developed through discussion with those who have reliable preferences, but our preferences are only reliable if we value the central capabilities. Thus, the approach seems in danger of applying only to those who already accept it and, according to Barnes, the conception of flourishing at the heart of the capability approach does not capture disabled people’s conception of the good.

**4. Capability Deprivation and Adaptive Preference Identification**

Interpreted in this way, Barnes’s critique of Nussbaum is persuasive: excluding all disabled individuals from determining what constitutes a flourishing life, and so the capabilities we are entitled to, on the basis that valuing their ‘sub-optimal’ life makes their preferences and opinions unreliable (justice adaptive) is, indeed, unjustified and insulting. However, more work needs to be done to flesh out and modify Barnes’s positive approach. In the next section I will suggest a modification to her characterisation of disability. First, though, I will suggest a revision to her method of adaptive preference diagnosis, since her distinction between problematic extrinsic, and unproblematic intrinsic, influences on the process of preference formation does not seem to capture our intuitions in a number of key cases. I will argue instead that the influence on preference formation that should concern us, and may give us a warrant to diagnose a preference as (justice) adaptive, is that it was formed in the absence of central capabilities.

Like Nussbaum, Barnes recognises the need to make substantive normative judgements to determine which of our preferences are adaptive. However, Barnes makes these substantive judgements about the circumstances under which our preferences are formed, rather than their content. In particular, she suggests that we must determine what constitutes a problematic extrinsic influence on the process of preference formation, and suggests too that it “might prove easier to provide independent arguments for the *badness* of certain social distortions…than for the badness of non-social or intrinsic features”[[303]](#footnote-303). She trades on our intuition that even when intrinsic features – like being female – make our life difficult, we do not tend to think that someone’s preference for this feature is adaptive and unreliable; whilst preferences for hardships that are extrinsically caused – such as abuse – do seem adaptive. I will argue that although the distinction between extrinsic and intrinsic influences often *correlates* with those influences that do and do not lead to adaptive preferences, it is not this distinction that does the work.

I will begin by putting aside the worry that, by focussing on capability deprivation, my account may appear to be just as question-begging as Nussbaum’s, and generate the same vicious circle in which the approach only applies to those who already accept it. Whilst Nussbaum argues that repudiating the *value* of a central capability makes our preferences unreliable, my account is more proceduralist. I argue that we should use the opinions of those who *possess* the central capabilities to determine which are central, and exclude the preferences of anyone who does not possess them as unreliable. It is having access to capabilities when forming preferences that should concern us, then, not whether or not we ultimately consider them valuable. Thus, the preference of a woman for economic disempowerment, for example, is not deemed adaptive on the basis of its content. It is adaptive only if the woman in question did not have the opportunity to be economically empowered when she was forming this preference. I do not suggest that individuals must value the central capabilities or be excluded from the overlapping consensus, but that they must have the chance to exercise them before their decision to reject them can be taken as reliable.[[304]](#footnote-304)

To demonstrate why we should be concerned about capability deprivation, it is important to say more about what the central capabilities are, and so what it means to be deprived of them. I have argued that the central capabilities should be understood as domains of our life in which we should be able to exercise control, and that these domains of control are likely to be similar to those capabilities Nussbaum identifies through a consideration of valuable functionings. A further key feature of the list of central capabilities, though, is that this list is not immutable and eternal, but contingent and changing.[[305]](#footnote-305) What constitutes a good life, or the degree to which we can reasonably expect to flourish, will vary depending on technological and social advancement (as Chapter 1 discussed). We cannot identify a single list of human capabilities and insist that justice requires that all people, at all times and places, should have these opportunities, regardless of feasibility. The content of the list – both which capabilities are included, and what it means to possess them – will be determined by the reasonable expectations of those who formulate the list.

For example, the content of the list of central capabilities five hundred years ago would differ from the current list. Our reasonable expectations concerning our bodily health, nourishment and life expectancy, for example, have changed over time due to medical advancements, more efficient farming methods, improved transportation and storage of food and so on. My suggestion is that we should have access to the capabilities as currently defined if our preferences are to be taken as reliable evidence for a theory of justice: part of the overlapping consensus on what these capabilities should constitute. This would mean that if individuals five hundred years ago possessed the 16th century central capabilities we should not consider their preferences justice adaptive (they are a reliable source of evidence for identifying the 16th century capabilities). However, if the Indian widows Sen discusses face a similar degree of deprivation, and have similar expectations and preferences, we *should* consider these preferences justice adaptive (they would not have been a reliable source of evidence for identifying 20th century capabilities).

It may seem strange to suggest that the same absolute degree of deprivation can make preferences unreliable in one case, but not in another. Yet when we consider that these preferences are considered unreliable *as a source of information for distributive policy*, this seems less counterintuitive. A preference that is well-being adaptive is an unreliable guide to our best interests; a preference that is justice adaptive is an unreliable guide to our entitlements. We would be *better off* if we repudiated a well-being adaptive preference and achieved its object; we are *entitled* to what we claim not to want when we hold a justice adaptive preference.[[306]](#footnote-306) Thus, the individuals from the 16th century and the widows from the 20th century may both be better off if they preferred and achieved better health, but only the widows are entitled to this improved health. Hence, only the widows’ preferences should be disregarded in determining individuals’ (current) distributive entitlements.

The focus on capability deprivation, therefore, seems to capture our intuitions about such cases. The Indian widows are entitled to the 20th century understanding of the capability for good health, and the fact that their deprivation and mistreatment has given them a skewed understanding of what good health constitutes should not be taken as evidence for their entitlement to healthcare, nor of what the capability for bodily health more generally should constitute. The views of the individuals from the 16th century regarding the appropriate level of bodily health can guide their entitlement at that time (though it would be a poor guide to what modern justice demands).

Barnes’s account looks so plausible because nearly all capability deprivation is the result of the kind of unjust extrinsic influences she discusses. If the central capabilities comprise our reasonable expectations about a flourishing life, we should expect extrinsic influence to track capability deprivation, since it is usually such influences that prevent our reasonable expectations from being met. The Indian widows’ lives are not just worse than a human life could possibly be, but worse than they could reasonably expect *their* lives to be, since their malnourishment was avoidable, as was their previous experience of malnourishment that made them more accepting of their experiences during a national famine.[[307]](#footnote-307) It is usually extrinsic injustice, then, that prevents us from achieving our capability entitlements.

This connection suggests that the idea of capability deprivation can provide the argument Barnes has yet to fully articulate, and flesh out what it means for an extrinsic influence to be problematic: such an influence is unjust when it leads to our being deprived of the capabilities we could reasonably expect to possess. Whilst it initially seems that the two accounts are compatible, then, they come apart when we realise that capability deprivation is not *necessarily* the result of extrinsic influences. Though less common, it is possible to lack central capabilities due to our intrinsic features. In some cases, the list of capabilities the majority come to a consensus on simply does not reflect an individual’s experiences and capacities, and they will not be able to possess the capabilities widely considered essential. This may be true of *some* individuals with *some* disabilities (though not all, as Barnes contends (§5)).

I would suggest that we would have a warrant to diagnose these preferences as justice adaptive, as we would in the above cases when capability deprivation is the result of extrinsic influences. The preferences of individuals with radically different experiences of life may not be an appropriate source of information for distributive policy, where they may lead to the ‘vetoing’ of some capabilities otherwise agreed to be central. We will not, however, have a warrant to diagnose these individuals’ preferences as well-being adaptive, and so will not insult these individuals as ‘defective agents’, unable to determine what is in their best interests. Diagnosing preferences as justice adaptive does not impugn individuals’ rationality, but merely suggests that adapting to some of their intrinsic features may make them a poor guide to what constitutes a flourishing life for individuals who do not possess these features. Like the people from the 16th century, we do not insult their rationality by saying that their expectations about how their life should go should not determine what they, and others, are entitled to.

It may, nonetheless, be objected that by denying these individuals the collective capability to control their environment, and participate as equal in determining the dictates of a theory of justice, they are subject to a paternalist insult. Whilst we do allow them *individual* capabilities in their legitimate domains of control, by denying them collective capabilities in these domains, it may seem that their capabilities are unjustifiably limited. However, as ever when discussing paternalism, motivation is important. We do not exclude the preferences of individuals with a radically different experience of life, which has led to their repudiating central capabilities, because we distrust their agency or consider them irrational. We exclude them because, like the 16th century individuals, their experience may not be an appropriate guide to the capabilities that should now be considered centrally important.[[308]](#footnote-308) Whilst ideally all individuals should have both collective and individual capabilities, as the following section will discuss, this may not always be possible. However, as in cases in which future generations are unavoidably denied collective capabilities, this need not be paternalist.

**5. Disability and Adaptive Preferences**

Having clarified the sorts of influences that may lead to the formation of adaptive preferences, it is now important to refine our understanding of disability, before considering whether Barnes is right to suggest that capability theorists will judge disabled people’s preferences to be adaptive. I will argue, first, that we should draw a distinction between two classes of disability: those where the disability is primarily the result of social causes (category 1, hereafter C1), and those where the disability is inherent to the impairment (category 2, hereafter C2) (§5.1).

Only those in the second category of disabilities can be characterised as intrinsic features. However, since I have rejected Barnes intrinsic/extrinsic distinction, this does not mean that only these cases are unproblematic. On the contrary, C2 disabilities necessarily involve capability deprivation, and so are more likely to produce adaptive preferences. We have a warrant to diagnose an individual’s preference as adaptive whenever they involve capability deprivation. This may be the result of the intrinsic features of C2 disabilities, or the result of extrinsic social biases against C1 disabled individuals. I will argue that many of the cases of disability Barnes discusses do not involve capability deprivation, so we will have no reason to distrust these individuals’ preferences (§5.2). However, since both C1 and C2 disabilities *may* involve capability deprivation, we can sometimes consider disabled people’s preferences justice adaptive, though this need not be insulting (§5.3).

*5.1 Conceptualising Disability*

The disparate array of experiences that fall under the category of disability means using a single model to conceptualise them is not appropriate. This may seem like an obvious point, yet it is rarely emphasised in writings on disability.[[309]](#footnote-309) Barnes, for example, largely treats all (physical) disability as a single, uniform category, arguing that the fact that some disabled people’s preferences should be treated as reliable (non-adaptive) means all should be. However, the effects various conditions have on people’s lives differ enormously, and it simply is not possible to characterise blindness as we do MS, or deafness as we do cystic fibrosis. Since Barnes must consider all disabilities to be intrinsic influences if they are to be immune from accusations that the preferences they cause are adaptive, it is unsurprising that she classifies all disabilities in the same way: as intrinsic features, or facts about ourselves. This involves rejecting the social model of disability according to which disability is a social, not a natural, phenomenon, and “caused by institutional forms of exclusion and by cultural attitudes embedded in social practices”[[310]](#footnote-310) – extrinsic influences.

According to the social model, then, disability is ‘socially constructed’, but it is worth distinguishing two senses in which this claim could be meant. First, we may think that the *category* of disability is socially constructed: the decision to group together conditions we consider disabilities, as distinct from other inabilities, is an arbitrary move that does not capture a natural kind. Second, we may think social practices and institutions cause some impairments to be disabling. For example, many argue that the inability to hear is a disability only because social structures are designed for the hearing. Absent these social structures, there is no necessary causal connection between an impairment and the resulting disability. The social model argues that disability is socially constructed in this latter sense, in contrast to the medical or individual model, which *does* “establish…a causal relation between individual impairment, seen as departure from human normality, and disability, seen as restriction in abilities to perform tasks”[[311]](#footnote-311). Barnes rejects the social model, but can (and does) accept that disability is socially constructed in the former sense, though this is not my focus here.[[312]](#footnote-312)

The social model has been adopted by many in the Disability Rights Movement (DRM), but Barnes cannot rely on it if she is to emphasise the intrinsic nature of disability, since on this view only impairments are intrinsic, whilst disabilities are socially or extrinsically caused. However, though compelling criticisms have been made of the social model, this should not lead us to doubt its usefulness in every case, given the variety of disabilities and impairments. Barnes may be right to point out that “[i]f, for example, someone is in chronic pain, it seems that no amount of social awareness would be able to fully alleviate the ways in which they suffer from their disability”[[313]](#footnote-313). Yet this does not mean the social model is not appropriate for other conditions. Below I will distinguish C1 disabilities, which can be characterised by the social model, from C2 disabilities, which cannot. First, though, it is worth briefly responding to a criticism of the social model, presented by Linda Barclay.

Barclay criticises proponents of the social model on the basis that “it is implausible to suppose that social justice for those with disability can be achieved simply by eliminating discrimination, or by fixing unacceptably biased social and institutional arrangements”[[314]](#footnote-314). In other words, she objects to views (such as Anderson’s and Pogge’s[[315]](#footnote-315)) that imply disability is the consequence of *unjust* discrimination or biases, and could be eliminated if the social order were just. However, it does not follow from accepting the social model – and so the idea that some disabilities are the contingent consequence of social institutions and structures – that we must consider this unjust or easily avoidable. It may not be unjust to organise a society to suit the majority of its members, and it may be that a society free from any discrimination or bias is simply unattainable. For example, if everyone communicated by signing this would make communication harder for blind people. Alternatively, imagine that someone woke up to find that everyone else was now 10 feet tall, the height of stairs, chairs and so on were changed, and their ‘normal’ height was now disabling. These changes may be reasonable, and not unjust, but the social model is still an appropriate conceptual tool to explain why someone 6 feet tall is disabled. To say a disability is socially caused, then, need not imply these causes are unjust or avoidable.

The social model is a useful conceptual tool in some cases then, and indeed, I contend that we should distinguish those cases for which this model is appropriate from those for which it is not. I will take ‘disabling’, here, to mean that it prevents the sufferer from having one or more of the central capabilities. C1 includes impairments that are disabling in this way only as a consequence of contingent, extrinsic influences, and so refers to those disabilities most discussed by the literature (including Barnes’s work) such as deafness, blindness, mobility impairments and dwarfism. These conditions may prevent us from performing certain activities, but they will not *necessarily* prevent us from having the central capabilities. C2 is intended to incorporate those cases when impairments are intrinsically and necessarily disabling, or capability depriving, and the social model is not appropriate. C2 disabilities may include chronic pain and near complete paralysis. Although the distinction we draw here will not be sharp, and some cases are likely to bridge this gap, we can draw a rough distinction that captures significantly different experiences of disability.[[316]](#footnote-316)

First, C1 is intended to capture those disabilities, or elements of disabilities, that are only contingently disabling. Deafness would not be a disability in societies in which all or most people were deaf, for example, and dwarfism would not be a disability if average adult height were 4 feet.[[317]](#footnote-317) The disability is the contingent result of a particular social infrastructure. It would be odd to think of a group of Congolese pygmies as universally disabled,[[318]](#footnote-318) for example, or a largely deaf society that communicate non-verbally. C1 disabilities may necessarily involve the loss of certain opportunities – careers, activities and pursuits no longer open to us – but the same can be said of being born tone-deaf or ugly or very clumsy. The opportunities that are lost are not central capabilities, and so not the concern of justice (as §5.2 will discuss). However, unlike tone-deafness, ugliness or clumsiness, capability loss *is* frequently the consequence of having C1 conditions in societies set up for the able-bodied majority. For example, it is intrinsic to deafness that we cannot hear, and so that we cannot listen to music or easily engage in verbal communication. It is not intrinsic to deafness to be unable to participate in society, or to be excluded from (some) forms of mass communication and entertainment, and it is only these features of deafness that are disabling, and for which individuals demand, and are entitled to, compensation.

Barnes is right that we should not ignore the preferences of those who seek to defend disability as a unique and valuable culture, and that the burden of proof surely lies with those who wish to dismiss these experiences in favour of “the armchair reflection of the able-bodied”[[319]](#footnote-319). However, we must be careful to identify what it is they aim to defend, and what they demand compensation for. As Anderson points out:

[i]t is useful to ask what the deaf demand on their own account, in the name of justice. Do they bemoan the misery of not being able to hear, and demand compensation for this lack? On the contrary: like the disabled more generally, they resent being cast as poster children for the abled to pity…They insist that sign language is just as valuable a form of communication as is speech and that the other goods obtainable through hearing, such as appreciation of music, are dispensable parts of any conception of good.[[320]](#footnote-320)

I suggest that it is such *intrinsic* features of disabilities, such not being able to listen to music or using sign language, that many individuals claim enrich their lives, and for which they want neither pity nor compensation. However, few claim the exclusion, stigma and isolation that disabled people routinely face – the *extrinsically* caused capability loss – is part of the positive experience of disability.[[321]](#footnote-321)

The intrinsic features of C1 disabilities, such as the inability to hear or see or walk, may make our life more difficult, but the same can be said of many inabilities, which we all experience. Divorced from the extrinsic influences that lead to capability loss, there is no reason to think that C1 disabilities are any worse, or more deserving of our pity, than these other inabilities. A famous opera singer may think leading Nussbaum’s life would be a tragedy – the loss of the ability to sing that defines her own life may seem unbearable – but this is no reason to distrust Nussbaum’s preference for her own life, in which she lacks this ability. Similarly, we may not want to lose our sight or hearing, but this is no reason to distrust the preferences of those who live fulfilling lives without this ability, or to assume that *this* loss must be tragic.[[322]](#footnote-322) Some may regret this loss, as we may regret any of our inabilities but, as §5.2 will discuss, as long as individuals possess the central capabilities we have no more reason to compensate them, or to distrust their preferences, than anyone else (we all lack some ability).

The social model, then, captures the fact that in many cases a particular impairment or inability is disabling (prevents us having those opportunities or capabilities we are entitled to) due to particular social structures. In other cases, however, Barnes’s criticism of the social model seems to stand, and increased social awareness and revised social structures will not ‘alleviate’ a disability. The disabilities of which this is true – those that are not merely contingently disabling, but necessarily or intrinsically involve capability loss – I will call C2 disabilities. Though it is somewhat difficult to identify examples, this may include chronic pain or severe paralysis. We may not consider the Congolese pygmies disabled, but if we were to come across a Congolese tribe who suffered from chronic pain, it would not be implausible to consider them disabled (though without a basis for comparison they may not think of themselves as such). Their capability deprivation does not arise from a biased social infrastructure. The idea of these remote tribes echoes Barnes’s idea of conditions we could have ‘on a desert island’: we could be a dwarf or suffer chronic pain on a desert island (or in the Congo), but only the latter would be a *disability* on a desert island, so only the latter (the C2 disability) is *intrinsically* disabling.

Unlike C1 disabilities, therefore, C2 disabilities simply are not analogous to the lack of talents that we all experience and adapt to. They do not just deprive us of some opportunities, but the opportunities we are entitled to (the central capabilities). This difference is suggested by the fact that whilst there are compelling accounts of the benefits of a life with the intrinsic features of C1 disabilities (not in spite of them), the same cannot be said of C2 disabilities. None of the first-person testimony Barnes quotes comes from C2 disabled individuals. Further, whilst many individuals with C1 disabilities would object to the suggestion that the abilities they lack are a necessary component of human flourishing, the same is not true of individuals with C2 disabilities. For example, deaf individuals insist we do not need to be able to hear to flourish, but analogous claims are not made that we do not need to be free from pain, or be able to move, to flourish.

Like many advocating for disability rights, Barnes does not focus on C2 cases, but on those with C1 conditions – perhaps because they are most vocal in defending their way of life as valuable. This may account for her assumption that intrinsic features are unproblematic (do not generate adaptive preferences), since the intrinsic features of C1 disabilities are not. Preferences for intrinsic features of C2 disabilities, however, may be treated as justice adaptive. If individuals were to claim that freedom from pain or mobility are inessential to flourishing because they had adapted to their own experience of these disabilities, would Barnes be willing to insist that, as in the C1 cases, these are not problematic adaptations, and should be used as evidence for what constitutes a flourishing life, and what we are owed as a matter of justice?

*5.2 Which Preferences Can We Rely On?*

I will argue, then, that in some cases we will have a warrant to diagnose disabled individuals’ preferences as justice adaptive. However, before considering these cases, when disabled individuals’ preferences will be ignored, I will suggest that in most cases this exclusion will be unnecessary. Barnes’s argues that since disabled individuals will lack some central functioning – such as bodily integrity, physical health, mobility, and the use of their senses[[323]](#footnote-323) – to value their life is to reject the value of the central capabilities. On Nussbaum’s substantive normative account, such ‘wrong content’ is enough to diagnose their preferences as adaptive. Accordingly, we have the vicious circle, in which individuals’ preferences are not reliable enough to determine the list of central capabilities unless they already value them. I have argued for a more proceduralist approach, according to which we must *have* (not value) the central capabilities if our preferences are to avoid being adaptive. Thus, we must experience the opportunity to perform a functioning widely considered essential to flourishing before our decision to reject it can be considered reliable. Yet on my view, too, disabled individuals’ preferences will be excluded if Barnes is right that they cannot function, since they will lack this experience of central capabilities.

However, despite Barnes’s claims, C1 disabled individuals both possess and value the central capabilities. They are, therefore, already part of the overlapping consensus, and we will have no reason to exclude them on either Nussbaum’s view (their preferences have the wrong content) or my own (their preferences were formed in the absence of the central capabilities). Barnes’s suggestion only makes sense if we adopt a very restrictive (and implausible) interpretation of capabilities. For example, Barnes suggests that blind and deaf individuals lack the capability to use their senses. However, the sensory experiences of blind and deaf people form a large part of their positive experience of their condition. It would seem strange, therefore, to say they lack, or do not value, the opportunity to use their senses, even if they have little or no use of one or more of them. Consider a first-person account (by Helen Keller) that Barnes herself quotes:

My world is built of touch-sensations, devoid of physical colour and sound; but without colour and sound, it breathes and throbs with life. Every object is associated in my mind with tactual qualities which, combined in countless ways give me a sense of power, or of beauty, or of incongruity…[[324]](#footnote-324)

Such accounts make clear that whilst C1 disabled individuals may make different use of the central functionings, they do not possess or value them any less than able-bodied people. Whilst someone who is blind or deaf may miss out on some forms of sensory experience, so may someone who is not. As the same account countinues: “[r]emember that you, dependent on your sight, do not realise how many things are tangible”[[325]](#footnote-325). To have a C1 disability, and a preference for this disabled life, then, does not involve repudiating the central capabilities. Consequently, such individuals do not have preferences with the ‘wrong’ content (on Nussbaum’s view), nor have they formed them under the ‘wrong’ circumstances (on my own). In neither case, therefore, would their preferences be considered justice adaptive, and unreliable evidence for determining the central capabilities.

The fact that capability theorists will have no reason to exclude the preferences of C1 disabled individuals for the intrinsic features of their condition does not mean there is nothing further that should be done to accommodate them. We should, perhaps, place more explicit emphasis on the different ways that capabilities can be exercised to ensure individuals possess them even if this requires non-standard support. For example, deaf individuals may possess the capability to use their senses, but their capability for practical reason, imagination and thought may be in jeopardy if their education focuses on teaching them to lip-read and speak, at the expense of using sign language and promoting their broader education. The capability approach should, therefore, give greater prominence to the experience of (C1) disability in the *specification* of the central capabilities, but there is nothing in this experience that suggests we must either alter the content of the list, or exclude these experiences.[[326]](#footnote-326)

By emphasising that C1 disabilities do not (necessarily) involve capability deprivation, we can consider their preferences for their way of life reliable, and not justice adaptive.[[327]](#footnote-327) However, since possessing capabilities is not just a prerequisite of having reliable preferences, but also the aim of distributive justice for capability theorists, this may have a potentially undesirable consequence. If C1 disabled individuals possess the central capabilities (in the absence of extrinsic influences) justice will not entitle them to any further compensation. This would mean that if, for example, we could remove all extrinsically caused capability deprivation associated with deafness, and a ‘cure’ for deafness became available (cochlea implants are, perhaps, moving in this direction), individuals would not be entitled to its provision.

Many in the deaf community would embrace this position, but this is by no means a homogenous group, and no doubt many others would object to being denied a cure as a matter of justice. The capability theorist’s response may, therefore, seem implausible and, indeed, cruel. However, if there were no capability loss involved in deafness, what would we compensate deaf individuals for? Certainly, many would think it a great tragedy to be unable to listen to music or hear the voices of our loved ones, but this is not why we provide compensation. It may also seem a great tragedy for many people to be, or become, very ugly, and many ugly people may opt for a ‘cure’. However, this does not imply individuals are entitled to be beautiful.[[328]](#footnote-328)

It is the capability deprivation – social exclusion, stigmatisation, and political marginalisation – which arises as a result of contingent and extrinsic social conditions, for which we compensate C1 disabled individuals. These social conditions, which favour the able-bodied majority, may be impossible, or excessively demanding, to remove. In practice, therefore, we may always compensate C1 disabled individuals: for example, providing cochlea implants rather than demanding that everyone speaks (every dialect?) of sign language. However, it is only this (contingent) capability deprivation that we compensate individuals for.

*5.3 Which Preferences Should We Ignore?*

C1 disabled individuals, then, are not prevented by their condition from having the central capabilities, and any capability deprivation they do suffer is largely avoidable, either by removing biases, or via more direct compensation. When this capability deprivation is avoided, capability theorists will not consider their preferences justice adaptive (nor provide them with further compensation). However, when individuals have *not* had experience of the central capabilities – either as an extrinsic consequence of a C1 disability, or the intrinsic consequence of a C2 disability – I suggest we should not use their preferences to guide a theory of justice.

First, I will consider the contingent capability deprivation associated with C1 disabilities. Since our focus is justice adaptive preferences, we need not be concerned with cases in which individuals prefer capability deprivation in their own life, but with those in which their experiences lead them to reject the value of an opportunity more generally. If C1 disabled individuals, in social circumstances that deprive them of the central capabilities, insist that these opportunities are inessential to flourishing, I suggest *these* preferences should be excluded from the overlapping consensus. We should not allow unjust treatment to lower individuals’ expectations until they are entitled to no better treatment, in the same way that the Indian widows’ past deprivation should not be used as evidence that nourishment and health are unimportant. Neither should we allow their mistreatment, and lowered expectations, to determine the capabilities other (able-bodied) individuals are entitled to.

Suggesting that these preferences are justice adaptive need not imply that they are irrational. It may be rational for someone who is deaf to conclude that having the opportunity for meaningful work is unimportant if this is not an option that will be open to them.[[329]](#footnote-329) Yet this is not a reliable guide to what justice requires. If individuals are excluded from a domain of functioning that those who have experience of it consider central to human life, their preference for their way of life seems poor evidence to think that this functioning lacks value. Thus, we have a warrant to diagnose as justice adaptive the preferences of individuals, who social circumstances have deprived of a central capability. This does not suggest these agents are irrational, or are defective agents. On the contrary, the capability approach is exactly arguing that they *should* have the capability to make choices regarding central domains of their life – and, in C1 cases, that this is possible.

Second are those cases where capability deprivation is not avoidable, but rather the necessary consequence of a condition, such as C2 disabilities. Here, we cannot claim that if individuals were treated better, they could have the capabilities, and their preferences would no longer be justice adaptive. We are not insisting, as in the C1 case, that individuals be provided with opportunities that biased social structures have deprived them of before we consider their preferences. Rather, we suggest that as long as individuals claim that their life – with a C2 disability, and so without a central capability – is flourishing, we have a warrant to diagnose their preferences as justice adaptive. This diagnosis, and consequent exclusion of preferences may, therefore, seem more problematic than in the case of C1 disabilities. Thus, though Barnes is wrong to suggest that capability theorists exclude the C1 disabled individuals on which her discussion focuses, do we nonetheless face her criticism that we unjustifiably exclude a group’s conception of the good on the basis that we judge their life to be worse than ours?

We should first point out that few individuals actually have the sort of preferences that concern us. Even those who accept chronic pain or complete paralysis seem unlikely to reject the importance of the opportunity for mobility, or a life free from avoidable pain, for others’ flourishing human life.[[330]](#footnote-330) However, given such preferences are possible, how should we respond? I contend that we would be justified in saying that their experience of life is sufficiently different from ours that their testimony would not constitute a reliable guide to the capabilities appropriate for *us*. In the same way, we would not rely on preferences of the (unavoidably deprived) individuals from five hundred years ago as a guide to modern distributive policies. This is not to suggest these individuals are not rational, or that their lives are worthless, or even that their preferences are an unreliable guide to their interests (well-being adaptive). It is simply to point out that although the capability approach is intended to be universally applicable, in those rare cases in which people have an experience of human life radically different from the norm, and no experience of any alternative, it may be that their preferences should not be allowed to veto the capabilities considered central by the rest of us.[[331]](#footnote-331)

C2 disabled individuals’ preferences are justice adaptive, then, though need not be well-being adaptive: they may be rationally and consciously formed, and a reliable guide to their own best interests. C1 disabled individuals’ preferences, by contrast, (in the absence of extrinsically imposed capability deprivation) are *not* justice adaptive, but may be well-being adaptive.[[332]](#footnote-332) Judging a preference *justice* adaptive does not involve passing judgement on an individuals’ degree of rationality or their ability to choose well about their own life. Rather, it involves judging whether or not their experience of life has influenced their preferences such that they are no longer a reliable guide to individual entitlement and what we can reasonably demand from others. Their preferences may be unreliable due to poor treatment and contingent capability deprivation, as in the case of C1 disabled individuals or the Indian widows. Alternatively their intrinsic features may mean that their experience of life simply differs sufficiently from others’ that their conception of flourishing should not be universally applied. These judgements are not insulting to individual agency, and do not deny the value of disabled culture.

**6. Conclusion**

To conclude, we have a warrant to diagnose a preference as adaptive only when the process that has led to its formation involves the lack of the central capabilities. C1 disabilities do not necessarily involve capability deprivation, but in modern society frequently involve the loss of capabilities, such as political participation, communication, mobility, bodily integrity (if subject to attack), forming emotional attachments (if stigmatised and excluded), and the ability to use imagination and reason (if improperly educated). Thus, whilst we do not have warrant to consider preferences for the intrinsic or necessary features of these disabilities adaptive, we would have a warrant to consider a preference for these extrinsic features to be justice adaptive. We would also have warrant to consider preferences of C2 disabled individuals, for the capability deprivation intrinsic to their conditions, to be adaptive in the same way. These categories of disability may require further revision, but we should not lose sight of the fact that having a good reason to trust some disabled people’s preferences does not mean we should trust them all. Focussing on the idea of justice – as distinct from well-being – adaptation allows us to set aside some preferences in the domain of justice without questioning individuals’ rational agency or their ability to decide for themselves how their life should go. We can, therefore, conclude that some disabled people’s preferences should not inform a theory of distributive justice – like those of the malnourished widows, abused spouse or kidnap victim – but it does not insult their agency, or undermine their culture, to say so.

# Conclusion

As Nussbaum concludes her latest work on the capability approach, “the purpose of global development, like the purpose of a good domestic national policy, is to *enable people to live full and creative lives*, developing their potential and fashioning a meaningful existence commensurate with their equal human dignity”[[333]](#footnote-333). Policy should be designed to provide individuals with substantive opportunities to devise and pursue their own understanding of what it means to live a valuable human life. In the tradition of Millian liberalism, it is individuals themselves who should be allowed to concoct their own mode of living or “laying out [their] existence…not because it is the best in itself, but because it is [their] own mode”[[334]](#footnote-334).

Allowing individuals this substantive freedom requires governments to avoid the paternalistic imposition of their own conception of the good in cases where they take individuals to be making poor choices. For as long as our choices are made voluntarily, and concern a domain of our life legitimately within our control, our choices should not be interfered with. Yet, as Nussbaum’s quote suggests, the goal of the capability approach is also to make individuals’ lives *good*. We should not only enable individuals to choose their own way of life, but enable them to choose a life that is ‘full, creative and meaningful’. I have argued that securing such a flourishing life, contrary to received wisdom, is not best achieved by intervening in individuals’ voluntary choices when we think these are not in their best interests. For this reason, policy should be anti-paternalist, yet this need not mean that individuals will no longer lead flourishing lives.

Well-being is not radically undermined by allowing individuals to make autonomous choices. This is not to deny that there are some cases in which individuals do not choose optimally (by their own lights), yet even here, our respect for human dignity should mean that we do not prevent them from choosing autonomously in cases in which they have legitimate control. This is the underlying idea that I have defended in this thesis. An idea that, in some form, is at the heart of most liberal theories: that we should allow individuals to autonomously form, and freely pursue, their own conception of the good. More specifically, I have argued that a particular version of the capability approach may be the best means of achieving this goal in the realm of distributive justice. Further, that policy should be guided by individuals’ entitlement to opportunities to exert substantive, and content-independent, control over central domains of their life.

I began, in Chapter 1, by arguing that contrary to Pogge’s claims, the capability approach is neither over-demanding of the well-endowed, nor stigmatises the needy. Any plausible version of the approach will avoid being demanding in the way Pogge suggests since individual entitlement to capabilities will be determined by current technological advancement, as well as what we can reasonably ask of others. Further, the approach will not be stigmatising since it does not take a need for additional resources to be a sign of inferiority, nor require the needy to demonstrate that their needs have the ‘right’ cause if they are to be entitled to assistance. Resourcist approaches, by contrast, are subject to both these problems. If Pogge is right that resourcism can accommodate nearly all non-standard needs – since these are ‘overwhelmingly’ the consequence of past injustice – then the approach will prove as demanding as the capability approach. Further, resourcism lacks the caveat that help for the needy should not be bought at the expense of the capabilities of the well-endowed. However, though nearly all the needy may be accommodated, resourcists would nonetheless stigmatise them by dividing them into the ‘deserving’ and ‘undeserving’. To qualify as deserving they must demonstrate that the institutional order is responsible for their non-standard needs, or that their need is standard given their circumstances. As well as being insulting, it is counterintuitive to suggest that being born with a genetic disorder is not a concern of justice, whilst being malnourished as an infant or, indeed, choosing to live in a cold climate, is. Resourcism, therefore, either collapses into the capability approach, or fails to respond to many individuals’ needs.

In broad terms, therefore, the capability approach stands up well as a metric of distributive justice. However, current versions of the approach are not without problems. In particular, although they avoid insulting individuals by identifying the ‘deserving needy’ as resourcists do, they may paternalistically insult individuals whom they deem to make the wrong sorts of choices. In Chapter 2, therefore, I consider how paternalism and anti-paternalism should best be defined, in order to clarify what my critique of the capability approach amounts to. I then argue that anti-paternalism as I understand it – Shiffrinian soft paternalism – does not involve excessive interference in our lives (for the sake of ensuring voluntariness) nor is excessively inattentive to individual welfare (fails to intervene to prevent self-harm). Conforming to this approach will avoid paternalistic interference and, unlike standard soft paternalist accounts, will avoid relying on an will-independent conception of harm that can ground potentially stigmatising normative judgements about the contents of individuals’ choices.

Having explained the sense in which a theory *should* be anti-paternalist, the next step is to consider whether existing versions of the capability approach *are* appropriately anti-paternalist, or can be made to be. Such anti-paternalism is essential if a theory of distributive justice is to tread the middle ground between protecting autonomy and promoting well-being, as I have argued it should. In Chapter 3, I suggest that Nussbaum’s approach is not consistently anti-paternalist in this way. By identifying the central capabilities on the basis of the functionings that are central to a flourishing life her approach can motivate policies that require individuals to perform these functionings, or prevent them from signing away the capability to function. Moreover, this methodology means that her approach does not apply to those who cannot value or perform the functionings she considers central, such as asexual individuals or those with Asperger’s Syndrome. It seems that Nussbaum must either exclude these individuals as part of the group that formulates a theory of justice, or else remove the opportunity for the functioning they cannot perform from her list of central capabilities. If she opts for neither horn of this dilemma she will be committed to the, perhaps even more implausible, conclusion that justice requires that individuals are provided with opportunities they do not value and cannot exercise.

I therefore suggest a modification of the capability approach that both ensures the approach is anti-paternalist in the right way, and allows it to apply universally, in the sense of meaningfully including individuals whose conception of the good does not involve the functionings that are widely valued. I argue that capabilities should be understand as domains of (content-independent) control, rather than opportunities to function. By focussing on the importance of procedural autonomy in central domains my approach allows no scope for justifying policies that prevent choices with the ‘wrong’ content. Further, this procedural understanding of autonomy means the approach can accommodate those who cannot value or perform the functionings Nussbaum identifies as important: it includes them in the overlapping consensus, provides them with something they can meaningfully possess, and provides support for their conception of the good.

It may be objected, however, that such focus on freedom and control *per se* is misguided and ignores the value of actually achieving functionings. In other words, it may be suggested that a theory should not be concerned about what individuals are able to do with their lives, but with how their lives actually go. In Chapter 4, therefore, I consider G.A. Cohen’s critique of the capability approach on this basis. I argue that Cohen misunderstands the goals of the capability approach and that, as such, his criticisms lack purchase. Cohen argues for the importance for *well-being* of benefits that are passively achieved, without the exercise of freedom. However, the capability approach is a guide to public policy, not well-being; and policy, I have argued, should not be concerned with well-being alone, but should also aim to protect individual autonomy and treat individuals with the appropriate respect. In the realm of policy, therefore, the focus on freedom is justified. It is important not just that our life goes well, but that we choose and pursue a good life for ourselves. A government’s focus should not be on whether individuals’ lives conform to their conception of the good, but whether individuals have the substantive opportunities to pursue their own conception of the good.

Finally, in Chapter 5, I consider a second objection to the capability approach. Chapter 3 demonstrated that my approach can accommodate individuals with unusual preferences or needs, in the sense of including them as subjects of justice, and providing them with appropriate entitlements. However, it may nonetheless be objected that the capability approach does not fully accommodate such individuals if it does not treat their preferences with the appropriate respect. In particular, it may be argued that capability theorists unjustifiably ignore, as adaptive, the preferences of individuals with lives they take to be sub-optimal. It is important that some preferences are ignored as adaptive to avoid the codification of existing oppression and deprivation, which may occur if we take a welfarist approach. According to such theories, it seems that as long as individuals claim to be satisfied with the status quo, we will have no reason to change it. Yet, on the other hand, we must not use this as a justification to exclude the preferences of those in vibrant and valuable sub-cultures, such as those in the disabled community.

I argue that the capability approach can avoid this critique if we distinguish between well-being adaptive and justice adaptive preferences. I contend that capability theorists need only diagnose preferences as *justice* adaptive, and that they should do so only if a preference was formed in the absence of the central capabilities (on my understanding of them). On this view, most preferences of most disabled individuals will not be considered (justice) adaptive, or be ignored by a capability theorist. However, the fact that most disabled individuals’ preferences are reliable should not give us a warrant to think that all are. Some such preferences *should* be excluded. Specifically, those of C1 disabled individuals for (extrinsically caused) capability deprivation and of C2 individuals for (intrinsically caused) capability deprivation. Such a diagnosis allows us to criticise the institutional injustice that cause many C1 disabled individuals to (avoidably) lack central capabilities, and does not allow C2 disabled individuals with ways of life very different from our own to veto the items that should be included on a list of central capabilities. Whilst my approach is far more inclusive than Nussbaum’s, then, it may not be appropriate to devise a single theory of distributive justice, including even those (C2 disabled) individuals whose experience of life is so radically different from others’.

My intention is to have developed a version of the capability approach that can provide individuals with freedom that is sufficiently unspecific that it allows them to form and pursue their own conception of the good, in keeping with the commitments of liberal theorists. This requires that it can incorporate choices, preferences and needs that are unusual, and may even be widely considered harmful. However, though unspecific, the opportunities and freedoms that the approach provides are substantive, and provide each individual with the genuine freedom to pursue these choices – not mere freedom from interference, or the resources to achieve this goal that a ‘standard’ individual would require. In certain central domains, then, individuals should be entitled to the substantive ability to pursue whatever way of life they choose for themselves.

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1. M.C. Nussbaum, ‘Human Functioning and Social Justice: In Defence of Aristotelian Essentialism’, in *Political Theory* 20:2 (1992), p.212 [↑](#footnote-ref-1)
2. A. Sen, *The Idea of Justice*, (London: Penguin, 2009), p.241 [↑](#footnote-ref-2)
3. I will not focus on assessing welfarist approaches, but the idea of adaptive preferences will be discussed in Chapter 5. [↑](#footnote-ref-3)
4. I define primary goods as Rawls does in *A Theory of Justice* (J. Rawls, *A Theory of Justice* (Revised ed.), (Harvard: Harvard University Press, 1999)), rather than *Political Liberalism* (J. Rawls, *Political Liberalism* (Expanded ed.), (New York: Columbia University Press, 1993)), since it is this definition that is used by Sen and Nussbaum. [↑](#footnote-ref-4)
5. A. Sen, *Development as Freedom*, (Oxford: Oxford University Press, 1999), p.75 [↑](#footnote-ref-5)
6. Sen, *Development as Freedom*, p.75 [↑](#footnote-ref-6)
7. For example, M.C. Nussbaum, *Women and Human Development: The Capabilities Approach*, (Cambridge: Cambridge University Press, 2000) (hereafter, *WHD*), pp.84-86; or M.C. Nussbaum, ‘Capabilities and Human Rights’, in *Global Justice and Transnational Politics*, ed. P. De Greiff and C. Cronin (Cambridge, Massachusetts: The MIT Press, 2002), pp.132-133. It should be noted that Dowding (K. Dowding, ‘Can Capabilities Reconcile Freedom and Equality?’, in *The Journal of Political Philosophy* 14:3 (2006), pp.323-324) makes a similar division in the notion of capability, though without acknowledging that Nussbaum draws this distinction. Roughly, Nussbaum’s ‘basic capability’ is equivalent to his ‘capability proper’; her ‘internal capability’ to his ‘ability proper’; and her ‘combined capability’ to his ‘ableness’. I will use Nussbaum’s labels here. [↑](#footnote-ref-7)
8. M.C. Nussbaum, *Creating Capabilities: The Human Development Approach*, (Cambridge MA: Harvard University Press, 2011), p.24. Confusingly, Sen takes the term ‘basic capabilities’ to mean something different. In early work, he uses ‘basic capability’ rather than simply ‘capability’ as his answer to the ‘equality of what?’ question. Later, he uses the term to refer to a threshold level of a capability: “the ability to satisfy certain elementary and crucially important functionings up to certain levels” (A. Sen, *Inequality Reexamined* (Oxford: Oxford University Press, 1992), p.45, fn. 19). For Sen, then, “[b]asic capabilities refer to the freedom to do some basic things considered necessary for survival and to avoid or escape poverty or other serious deprivations” (I. Robeyns, ‘The Capability Approach’, in The Stanford Encyclopedia of Philosophy, ed. E.N. Zalta, (2011)). It is Nussbaum’s sense of the term in which I will focus. [↑](#footnote-ref-8)
9. It is often easier to identify cases in which individuals *possess* a combined capability than those in which they do not. For example, two spouses may individually have the combined capability to take demanding jobs, but if they have small children, or other relatives with caring needs, then only one of them may be able to effectively realise that capability (I. Robeyns, ‘The Capability Approach in Practice’, in *The Journal of Political Philosophy* 14:3 (2006), p.354). In such cases, should we say that neither possess the capability, or both, or only one (though it is unclear which)? If our access to an opportunity is dependent on others’ choices in this way I would suggest that we cannot be said to possess the capability. I will not consider these issues in detail, though in Chapter 4 I do discuss the relevance of Pettit’s idea of context-independence to the capability approach: that our access to capabilities should not depend on another’s arbitrary decisions. [↑](#footnote-ref-9)
10. Sen, *The Idea of Justice*, p.241 [↑](#footnote-ref-10)
11. Sen, *Development as Freedom*, p.78 [↑](#footnote-ref-11)
12. Sen, *The Idea of Justice*, pp.5-10; F.M. Kamm, ‘Sen on Justice and Rights: A Review Essay’, in *Philosophy and Public Affairs* 39:1 (2011), pp.82-104 [↑](#footnote-ref-12)
13. Sen, *The Idea of Justice*, p.15 [↑](#footnote-ref-13)
14. For example: Sen, *Development as Freedom*, pp.232-240; Sen, *The Idea of Justice,* pp.xiii-xiv; pp.227-228; pp.330-331 [↑](#footnote-ref-14)
15. Sen, *Development as Freedom*, p.243 [↑](#footnote-ref-15)
16. Sen, *Development as Freedom*, p.32 [↑](#footnote-ref-16)
17. Sen, *Development as Freedom*, p.244 [↑](#footnote-ref-17)
18. A. Sen, ‘Elements of a Theory of Human Rights’, in *Philosophy and Public Affairs* 32:4 (2004), p.320 [↑](#footnote-ref-18)
19. Sen, *Development as Freedom*, p.283 [↑](#footnote-ref-19)
20. Nussbaum, ‘Human Functioning’, p.204 [↑](#footnote-ref-20)
21. Not all capabilities have a split threshold in this way, but where they do, Nussbaum sees it as the responsibility of the international community to assist societies to ensure all citizens reach the lower threshold, and the responsibility of individual governments to ensure the higher threshold is reached. This does not imply the higher threshold is optional. Capabilities should be understood “as a list of urgent items that should be secured to people no matter what else [is] pursued” (Nussbaum, ‘Capabilities and Human Rights’, p.143). For Nussbaum, then, all governments have an obligation to provide capabilities for their citizens to the higher threshold, even if other governments are not permitted to intervene to compel them to. [↑](#footnote-ref-21)
22. Nussbaum, ‘Capabilities and Human Rights’, pp.129-130 [↑](#footnote-ref-22)
23. Nussbaum, *Creating Capabilities*, pp.33-34 [↑](#footnote-ref-23)
24. Nussbaum, *WHD*, p.82 [↑](#footnote-ref-24)
25. M.C. Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999), p.45 [↑](#footnote-ref-25)
26. I will argue in Chapter 3, however, that Nussbaum does not successfully promote practical reason and free choice. Her concern to ensure the capabilities for practical reason and affiliation are *maintained* leads her to argue that individuals should not be allowed to sign away certain capabilities or to choose not to perform some functionings. [↑](#footnote-ref-26)
27. M. Fleurbaey, ‘Capabilities, Functionings and Refined Functionings’, in *Journal of Human Development* 7:3 (2006), p.303 [↑](#footnote-ref-27)
28. Fleurbaey, ‘Capabilities, Functionings, and Refined Functionings’, p.306 [↑](#footnote-ref-28)
29. Fleurbaey, ‘Capabilities, Functionings, and Refined Functionings’, p.306 [↑](#footnote-ref-29)
30. Nussbaum, *WHD*, p.5 [↑](#footnote-ref-30)
31. In Chapter 4 I will provide further argument for the understanding of the capability approach as a guide to public policy, and the importance of focussing on capabilities rather than functionings if this is the case. It is worth noting, however, that Nussbaum does, in places, interpret Sen as having different goals to her own. She argues that Sen’s primary use of the notion of capability is “to indicate a space within which comparisons of quality of life…are most fruitfully made” (Nussbaum, *WHD*, p.12). Although Sen initially understood his approach as a way of modifying metrics for assessing quality of life, and so improving development policies that rely on them, he has since moved towards understanding the capability approach to be a political account, and development of Rawls’s theory of justice. Nussbaum is wrong, therefore, to attempt to distinguish their approaches in this way. [↑](#footnote-ref-31)
32. Voluntariness here is understood to require that our choices meet certain procedural conditions. [↑](#footnote-ref-32)
33. Arneson, for example, developed an influential welfarist theory – equal opportunity for welfare – though he is no longer committed to this position. (For a defence of his version of welfarism see, for example, R.J. Arneson, ‘A Defense of Equal Opportunity for Welfare’, in *Philosophical Studies* 62 (1991), pp.187-195; or R.J. Arneson, ‘Equality and Equal Opportunity for Welfare’, in *Philosophical Studies* 56 (1989), pp.77-93. Later, he seems less confident that individuals are the best judges of their own well-being and adopts a less subjective approach. For example, R.J. Arneson, ‘Two cheers for capabilities’, in *Measuring Justice: Primary Goods and Capabilities*, ed. H. Brighouse and I. Robeyns (Cambridge: Cambridge University Press, 2010), pp.101-127; or R.J. Arneson, ‘Perfectionism and Politics’, in *Ethics* 111:1 (2000), pp.37-63). Peter Vallentyne, on the other hand, continues to defend a version of equal opportunity for welfare (for example, P. Vallentyne, ‘Debate: Capabilities versus Opportunities for Well-Being’, in *The Journal of Political Philosophy* 13:3 (2005), pp.359-371; or P. Vallentyne, ‘Brute Luck, Option Luck, and Equality of Initial Opportunities’, in *Ethics* 112:3 (2002), pp.529-557). I will take G.A. Cohen’s ‘equal access to advantage’ to be archetypical of this form of welfarism, and engage with his account and corresponding critique of the capability approach in Chapter 4. [↑](#footnote-ref-33)
34. There are, of course, other ways in which well-being can be conceptualised, but since this seems to be the focus of both prominent capability theorists, such as Sen and Nussbaum, as well as prominent resourcists, such as Rawls and Pogge, I will adopt it for the purposes of this paper. For example, as Sen says, “[a] person’s advantage in terms of opportunities is judged to be lower than that of another if she has less capability – less real opportunity – to achieve those things *she* has reason to value” (Sen, *The Idea of Justice*, p.231 (my emphasis)); or, for Pogge, “what ultimately matters is that opportunities to pursue human goals are distributed equitably in some sense” (T.W. Pogge, ‘Can the Capability Approach Be Justified?’, in *Philosophical Topics* 30 (2002), p.35). They do not necessarily aim to *maximise* well-being so construed, since they must accommodate other concerns, such as the legitimate limits of government power. Unlike welfarist approaches, then, the concerns of justice are not reducible to a concern for individual welfare. However, it is from their contribution to this component of individual well-being that resources or capabilities derive their value. [↑](#footnote-ref-34)
35. E. Anderson, ‘Justifying the capabilities approach to justice’, in *Measuring Justice: Primary Goods and Capabilities*, ed. H. Brighouse and I. Robeyns (Cambridge: Cambridge University Press, 2010), p.87 [↑](#footnote-ref-35)
36. Pogge, ‘Can the Capability Approach Be Justified?’, p.34 (my emphasis) [↑](#footnote-ref-36)
37. A. Sen, ‘Capability and Well-Being’, in *Quality of Life*, ed. M.C. Nussbaum and A. Sen, (Oxford: Oxford University Press, 1993), p.43 [↑](#footnote-ref-37)
38. Sen, *The Idea of Justice*, p.227 [↑](#footnote-ref-38)
39. G.A. Cohen, ‘Equality of What? On Welfare, Goods, and Capabilities’, in *Quality of Life*, ed. M.C. Nussbaum and A. Sen, (Oxford: Oxford University Press, 1993), pp.9-29; G.A. Cohen, ‘Amartya Sen’s Unequal World’, in *New Left Review* 203 (1994), pp.117-129; Chapter 4 [↑](#footnote-ref-39)
40. Pogge, ‘Can the Capability Approach Be Justified?’, pp.16-17 [↑](#footnote-ref-40)
41. Chapter 4 will consider the differences between these two approaches in more detail. [↑](#footnote-ref-41)
42. An institutional order (plural, institutional schemes), is a term used by Pogge, to mean “the important and pervasive social institutions or ground rules that structure and organise a society or other social system” (Pogge, ‘Can the Capability Approach Be Justified?’, p.2, fn.3), and so is very similar to Rawls’ ‘basic structure’. I will use the term institutional order, here, to remain consistent with Pogge’s terms. [↑](#footnote-ref-42)
43. R. Dworkin, ‘Equality of Resources’, in *Sovereign Virtue* (Harvard: Harvard University Press, 2000), pp.65-119 [↑](#footnote-ref-43)
44. Pogge, ‘Can the Capability Approach Be Justified?’, p.21 [↑](#footnote-ref-44)
45. Sen, *Development as Freedom*, p.74 [↑](#footnote-ref-45)
46. Pogge, ‘Can the Capability Approach Be Justified?’, p.36 [↑](#footnote-ref-46)
47. Returning to Figure 1, not only is it the case that each tier is the means to the one above, each also derives its value from the tier below. [↑](#footnote-ref-47)
48. Pogge, ‘Can the Capability Approach Be Justified?’, p.37, fn.83 [↑](#footnote-ref-48)
49. Pogge, ‘Can the Capability Approach Be Justified?’, p.34, fn.76 [↑](#footnote-ref-49)
50. Anderson, ‘Justifying the capability approach’, p.85 [↑](#footnote-ref-50)
51. Having said this, there may be something in the objection that some versions of the capability approach are too specific. In particular, Nussbaum’s list of central capabilities seems to be formulated as relatively specific opportunities: the opportunity to perform or not certain, strictly defined functionings. The result of this may be that some individuals are prevented from pursuing any conception of the good compatible with their needs and preferences. This is a problem I will consider in detail in Chapter 3, but one that can, I contend, best be resolved within the framework of the capability approach. [↑](#footnote-ref-51)
52. Pogge, ‘Can the Capability Approach Be Justified?’, p.9 [↑](#footnote-ref-52)
53. Pogge argues that Sen cannot adopt an anonymity condition, since it would not allow an individual’s rightful allocation of resources and to depend on their natural features (Pogge, ‘Can the Capability Approach Be Justified?’, p.10). The anonymity condition as used by a resourcist is, indeed, incompatible with a capability approach, but this does not mean capability theorists cannot adopt their own version. [↑](#footnote-ref-53)
54. This is the view of, for example, Rawls (J. Rawls, *The Law of Peoples* (Harvard: Harvard University Press, 2001)) and Nagel (T. Nagel, ‘The Problem of Global Justice’, in *Philosophy and Public Affairs* 33:2 (2005), pp.113-147). [↑](#footnote-ref-54)
55. T.W. Pogge, ‘Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions’, in *Social Philosophy and Policy* 12:2 (1994), p.242 [↑](#footnote-ref-55)
56. T.W. Pogge, *Realizing Rawls* (New York: Cornell University Press, 1989), p.11 [↑](#footnote-ref-56)
57. Pogge, ‘Three Problems’, p.242 [↑](#footnote-ref-57)
58. Pogge, ‘Three Problems’, pp.242-3 [↑](#footnote-ref-58)
59. Approaches that do not take account of potentially unfair distributions within the family may allow some family members to be subject to systematic, and unrecognised, deprivation. This should certainly be avoided, but it is only the crudest of resourcist approaches – assessing household income – that would be subject to this criticism. There is no reason that a resourcist approach cannot focus on *individuals’* resource share. Similarly, it is open to a resourcist, as it is to a capability theorist, to vary their valuation of functionings, and the resources that are a means to them, depending on an individual’s context, and the opportunities available to those with whom they interact. [↑](#footnote-ref-59)
60. Pogge, ‘Can the Capability Approach Be Justified?’, pp.21-23 [↑](#footnote-ref-60)
61. Pogge, ‘Can the Capability Approach Be Justified?’, pp.26-28 [↑](#footnote-ref-61)
62. Pogge, ‘Can the Capability Approach Be Justified?’, p.23 [↑](#footnote-ref-62)
63. It is worth drawing attention to the rather ambiguous way in which Pogge expresses this point: in measuring *resources* persons have access to, one must subtract the costs of the resources standardly needed to enjoy such access. What ‘resource’ are we measuring the Alaskan’s access to? Surely we are concerned with their ability to pursue a *functioning* (being warm), and are acknowledge that they will need a greater bundle of resources to achieve this functioning in Alaska. One resource is not necessary as a means to another *resource* here, and it is hard to think of a case where it would be. Rather, resources are a means to a functioning, and it is functionings we are concerned to secure access to. [↑](#footnote-ref-63)
64. Delineating the scope of the group amongst which a certain need would be standard adds another element of arbitrariness: is it a standard need if most people in the world would have it under certain conditions? If most members of our gender would? If most people in our age group, or fitness level? [↑](#footnote-ref-64)
65. Pogge, ‘Can the Capability Approach Be Justified?’, p.26 [↑](#footnote-ref-65)
66. Pogge, ‘Can the Capability Approach Be Justified?’, p.27 [↑](#footnote-ref-66)
67. Pogge, ‘Can the Capability Approach Be Justified?’, p.27. Pogge argues the capability approach would be equally open to the worry that providing for age-specific needs would constitute unjustified differential treatment. This is because, as discussed, capability theorists advocate an ‘anonymity condition’, requiring that an institutional order cannot treat individuals differently on the basis of arbitrary personal characteristics. However, to provide a differential share of resources to ensure that individuals possess central capabilities, regardless of age, location or anything else, would not constitute arbitrary treatment. On the contrary, giving individuals the *same* *resource share* regardless of age, such that we possessed *different capability* *sets* would be arbitrary: age is not a legitimate reason to justify a lack of capability. (This does not, of course, imply an 80-year-old should have the opportunity to do all the things a 20-year-old is able to. Rather, they should both have the opportunity to control central domains of their life, though what this control comprises is likely to differ in the two cases, as §4 will discuss.) [↑](#footnote-ref-67)
68. Pogge, ‘Can the Capability Approach Be Justified?’, p.27 [↑](#footnote-ref-68)
69. I do not mean to imply here that the resourcist would compel all individuals of a certain age to have dentures, whether or not they need them. However, it seems our *entitlement* to dentures does not depend on our need for them. [↑](#footnote-ref-69)
70. Pogge does offer one additional response to Sen’s accusation that resourcists cannot accommodate individual difference: he argues that the needs of breast-feeding and pregnant women can be taken into account by a resourcist, by considering the needs of the infant or foetus. Whilst this provides a partial response, it seems that the capability approach can focus attention more effectively on the needs of the woman in these cases, and the suffering that *she* will undergo if, for example, undernourished whilst pregnant: it is not only the foetus who would suffer. This also side-steps any worries about the moral status of the foetus as an appropriate subject of redistributive claims. [↑](#footnote-ref-70)
71. Pogge, ‘Can the Capability Approach Be Justified?’, p.28 [↑](#footnote-ref-71)
72. Pogge, ‘Can the Capability Approach Be Justified?’, p.29 [↑](#footnote-ref-72)
73. Pogge, ‘Can the Capability Approach Be Justified?’, p.29 [↑](#footnote-ref-73)
74. Pogge, ‘Can the Capability Approach Be Justified?’, p.30 (my emphasis) [↑](#footnote-ref-74)
75. Pogge, *Realizing Rawls*, p.11 [↑](#footnote-ref-75)
76. Pogge, *Realizing Rawls*, p.11 [↑](#footnote-ref-76)
77. I am following Dworkin’s distinction, here, according to which option luck is a matter of “how deliberate and calculated gambles turn out” (Dworkin, *Sovereign Virtue*, p.73), whilst brute luck concerns “how risks fall out that are not in that sense deliberate gambles” (Dworkin, *Sovereign Virtue*, p.73). Whilst this distinction may not, in fact, be stable, the problems with distinguishing brute and option luck are not relevant to my argument here. [↑](#footnote-ref-77)
78. It should be noted that a luck egalitarian could adopt either resourcism or capabilities (or, indeed, welfare) as their metric of justice. The distinction between the three approaches may, therefore, seem somewhat artificial. However, the distinction is intended to capture the difference between Pogge’s resourcism, Nussbaum’s capability approach, and luck egalitarians such as Dworkin in terms of the needs they would accommodate. Since my focus is the debate between these particular forms of resourcism and the capability approach, I will not assess other (resourcist or capability approach) versions of luck egalitarianism here. [↑](#footnote-ref-78)
79. Pogge, ‘Can the Capability Approach Be Justified?’, p.58 [↑](#footnote-ref-79)
80. Arguably Vallentyne takes this approach (Vallentyne, ‘Capabilities versus Opportunities for Well-Being’, pp.359-371), though the result is that his ‘capability approach’ collapses into preference-satisfaction welfarism: what matters for justice is that we have those opportunities we value. [↑](#footnote-ref-80)
81. See the Introduction for a list of the central capabilities and how they are identified. My focus, as discussed there, is Nussbaum’s version of the capability approach to avoid the cultural relativism that may result from Sen’s refusal to identify such a list (see also Chapter 3). [↑](#footnote-ref-81)
82. For a more in depth discussion of the social model of disability, see Chapter 5. [↑](#footnote-ref-82)
83. Moreover, given humans’ social nature it is far from clear that we could ever exist in a natural state where our level of advantage or disadvantage is not dictated, in some way, by the institutional scheme we happen to live under. [↑](#footnote-ref-83)
84. Pogge, ‘Can the Capability Approach Be Justified?’, p.17 [↑](#footnote-ref-84)
85. The role of reasonable expectations in determining the list of central capabilities will be discussed further in Chapter 5, in relation to the reasonable expectations of disabled individuals. [↑](#footnote-ref-85)
86. Nussbaum, *Creating Capabilities*, pp.33-34; Introduction, pp.8-9 [↑](#footnote-ref-86)
87. Pogge, ‘Can the Capability Approach Be Justified?’, p.41 [↑](#footnote-ref-87)
88. Pogge, ‘Can the Capability Approach Be Justified?’, pp.54-55 [↑](#footnote-ref-88)
89. It is worth emphasising that Pogge’s assertion that the capability approach will advocate an institutional scheme that is ‘biased in favour’ of individuals with low conversion capacities presupposes a resourcist view, and a resourcist understanding of the anonymity condition. For a capability theorist, meeting the anonymity condition means ensuring individuals have the *central capabilities* regardless of arbitrary features (such as low conversion capacities), not that they are guaranteed a resource share regardless of arbitrary features. [↑](#footnote-ref-89)
90. Pogge, ‘Can the Capability Approach Be Justified?’, pp.32-3 [↑](#footnote-ref-90)
91. For example, E. Anderson, ‘What is the Point of Equality?’, in *Ethics* 109:2 (1999), pp.227-228; 333-334; and M.C. Nussbaum, *Frontiers of Justice*, (Harvard: Harvard University Press, 2006), pp.188-189. [↑](#footnote-ref-91)
92. See Chapter 5 for a more detailed discussion of the compensation a capability approach would provide for disabled individuals. [↑](#footnote-ref-92)
93. This is assuming their blindness is caused by congenital defect or some accident. If it were the result of prior resource deprivation or some other cause that we could trace back to the international institutional order then the individual may be entitled to further compensation to make up for their past unjust treatment. [↑](#footnote-ref-93)
94. L. Barclay, ‘Disability, Respect and Justice’, in *Journal of Applied Philosophy* 27:2 (2010), pp.154-171; Chapter 5, pp.165-6 [↑](#footnote-ref-94)
95. S.V. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, *Philosophy and Public Affairs* 29 (2000), p.213 [↑](#footnote-ref-95)
96. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p.216 [↑](#footnote-ref-96)
97. Although the terminology is somewhat confusing, soft paternalism is a form of anti-paternalism, and when I refer to ‘my version of anti-paternalism’ I will mean a soft paternalist account. [↑](#footnote-ref-97)
98. G. Dworkin, ‘Paternalism’, in *The Stanford Encyclopaedia of Philosophy*, ed. E.N. Zalta (2010), p.1 [↑](#footnote-ref-98)
99. R.J. Arneson, ‘Mill versus Paternalism’, in *Ethics* 90:4 (1980), p.471 [↑](#footnote-ref-99)
100. D. Archard, ‘What is Wrong with Paternalism?’ (*unpublished draft*), (2010), p.1 [↑](#footnote-ref-100)
101. R.J. Arneson, ‘Joel Feinberg and the Justification of Hard Paternalism’, *Legal Theory* 11 (2005), p.260 [↑](#footnote-ref-101)
102. Few are willing to adopt a hard anti-paternalist line (though some argue that libertarians ought to (for example, Wall (S. Wall, ‘Self-Ownership and Paternalism’, in *The Journal of Political Philosophy* 17:4 (2009), pp.399-41)), but as Arneson has noted, it is a consistent alternative to soft and hard paternalism (Arneson, ‘Joel Feinberg’, pp.265-7). [↑](#footnote-ref-102)
103. For our purposes here, I will take voluntariness and autonomy to be roughly synonymous. [↑](#footnote-ref-103)
104. J. Feinberg, *The Moral Limits of Criminal Law: Volume Three, Harm to Self*, (Oxford: Oxford University Press, 1986), pp.104-6. Since it would be difficult both to meet, and to be sure that someone else met, these criteria to their fullest extent, according to Feinberg’s account, voluntariness is a scalar, rather than binary, concept. [↑](#footnote-ref-104)
105. J.S. Mill, *On Liberty*, ed.G. Himmelfarb (London: Penguin, 1974), p.166 [↑](#footnote-ref-105)
106. For the sake of simplicity, I will not discuss hard anti-paternalism since soft paternalism is a far more plausible version of the anti-paternalist position. [↑](#footnote-ref-106)
107. D. Groll, ‘Paternalism, Respect and the Will’, in *Ethics* 122:4 (2012), p.692 [↑](#footnote-ref-107)
108. I will not consider here the exact basis on which we should define will-independent harm, but will focus on examples that are uncontroversially harmful on a wide range of views, such as death, slavery, or amputation. [↑](#footnote-ref-108)
109. Groll, ‘Paternalism, Respect and the Will’, p.701. I will argue that an agent’s will can only be treated as appropriately authoritative in this way if we do not rely on any will-independent conception of harm. [↑](#footnote-ref-109)
110. It is important to emphasise that Susan’s views here are not strong, and so do not amount to a considered ethical position or outlook. Though she would not choose to eat a Spanish tomato if she were given the choice (and would prefer to have the choice), she would not consider herself harmed if she ate one. An alternative example would be a mild dislike of tomatoes: someone would pick them out of their sandwich if they knew they were there, but would not consider eating them harmful. [↑](#footnote-ref-110)
111. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p.218 (my emphasis) [↑](#footnote-ref-111)
112. Example from Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p.213 [↑](#footnote-ref-112)
113. Other theorists have also made this point (for example, Groll, ‘Paternalism, Respect and the Will’, pp.697-8). [↑](#footnote-ref-113)
114. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, pp.213-4 [↑](#footnote-ref-114)
115. I will not consider here the complex problems that arise when individuals radically change their goals, desires and beliefs. This may make it the case that their choice is not consistent with their previous goals and desires, but is consistent with their new ones. I will assume that to be voluntary or autonomous an agent’s choice must simply be consistent with their current goals and desires. [↑](#footnote-ref-115)
116. R. Shafer-Landau, ‘Liberalism and Paternalism’, in *Legal Theory* 11 (2005), p.172 [↑](#footnote-ref-116)
117. Arneson, ‘Joel Feinberg’, p.265 [↑](#footnote-ref-117)
118. It is worth noting that if these ‘unwise’ choices involve harming someone else – the procedurally autonomous desire to murder someone, for example – the soft paternalist need not permit such behaviour. They are concerned only to permit voluntary *self-regarding* choices, or choices that fall in our legitimate domains of control, so murder would fail to qualify on any plausible delineation of these domains. [↑](#footnote-ref-118)
119. Standard soft paternalist would not determine whether or not an action was *permissible* on the basis of its harmful content, but they would need to judge whether a choice was harmful in order to determine whether it is a case in which we should be concerned to promote voluntariness. §4 will consider why this may be problematic. [↑](#footnote-ref-119)
120. This need not imply that we can never be interfered with in these domains: that if these are areas of legitimate control, any inhibition of this control must be illegitimate. As Shiffrin notes, “some… forms of legitimate control may be disrespected when a great deal is at stake” (Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p.220, fn.25). If the interference is minimal and the agent is still able to exercise control in this domain, though their particular voluntary choice is thwarted, it may be that under some circumstances (in some relationships) such paternalism could be permissible. However, paternalism will almost always be illegitimate if we eliminate all control in a central domain, or if it is a government that is acting according to paternalist motives. (Chapter 4 will discuss further how much control is necessary to have a central capability.) [↑](#footnote-ref-120)
121. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p.217 [↑](#footnote-ref-121)
122. Archard, ‘What is Wrong with Paternalism?’, p.10 [↑](#footnote-ref-122)
123. For example: Arneson, ‘Joel Feinberg’; Shafer-Landau, ‘Liberalism and Paternalism’. [↑](#footnote-ref-123)
124. R Shafer-Landau, ‘Liberalism and Paternalism’, p.186 [↑](#footnote-ref-124)
125. P. De Marneffe, ‘Avoiding Paternalism’, in *Philosophy and Public Affairs* 34:1 (2006), p.68 [↑](#footnote-ref-125)
126. Since the soft paternalist is concerned for *procedural* autonomy, whilst this conclusion may seem counterintuitive it is not logically contradictory. A concern to allow individuals to make voluntary choices need not imply that we aim to maximise this ability to choose, or insist that the individual does not sacrifice this ability. [↑](#footnote-ref-126)
127. Feinberg, *Harm to Self*, p.79 [↑](#footnote-ref-127)
128. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p.205 [↑](#footnote-ref-128)
129. Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, pp.221-4. Shiffrin notes that a liberal would wish a state to act so as to preserve or, as she puts it, accommodate, choice in some spheres. However, to argue that this would preclude the unconscionability doctrine would require an argument that unfair contracts constitute an important sphere of freedom that should be accommodated. It would be difficult to argue that slavery contracts ought to be upheld on this basis. [↑](#footnote-ref-129)
130. Feinberg, *Harm to Self*, p.75 [↑](#footnote-ref-130)
131. The first set of worries I raised are also relevant here: that concerns about slavery centre on the exploitation involved, and not the features of loss of autonomy and irreversibility. This scenario demonstrates that the irreversibility – inability of the slave to escape, and illegality of others assisting them in doing so – depend on the existence of a master, who will not free the slave, and whose rights we would violate were we to forcibly free them. [↑](#footnote-ref-131)
132. For details of ‘workfare’ see, for example, E. Metcalfe, ‘The Jobseekers Bill: A Shameful Retroactive Stich-up’, in *The Guardian* (2013); or C. Reilly, ‘Why the Government Was Wrong to Make Me Work in Poundland for Free’, in *The Guardian* (2013); or organisations such as Boycott Workfare that campaign against such schemes (www.boycottworkfare.org). [↑](#footnote-ref-132)
133. G.A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), e.g. pp.34-35 [↑](#footnote-ref-133)
134. Given that it is reversible this contract would not meet all the conditions of slavery. Though other slavery practices have included some exit clause – for example, allowing slaves to buy themselves – without undermining the suggestion that this is ‘real slavery’. [↑](#footnote-ref-134)
135. If, as I have suggested, slavery is almost always exploitative, it may be objected that it would be *good* to stigmatise the practice, to discourage any potential slaves from putting themselves at risk of such exploitation. However, if slavery is banned then the exploitative mechanisms of slavery do not exist. Therefore, stigmatising the desires of a would-be slave, in the absence of any masters who could have manipulated these desires, is of no benefit. It is already the case that they cannot act on these desires, so making them feel like they ought not to have them will decrease their welfare further, without any beneficial consequences. [↑](#footnote-ref-135)
136. Though fanaticism itself may be thought to speak against rationality, and so voluntariness. The other two he lists are: (i) when it is performed for fraudulent purposes, for example to claim on an insurance scheme, and so is prohibited on the basis that it would harm others; and (ii) when it is performed by a madman, and so irrationally (Feinberg, *Harm to Self*, p.145). [↑](#footnote-ref-136)
137. As in Anscombe’s example of the putative desire to eat a ‘saucer of mud’, the desire should be rejected not on the basis of its object, but on reflection of how it fits with other desires or preferences we have. It is the coherence of the desire, and not its object, that determines its rationality. [↑](#footnote-ref-137)
138. P.D. McGeoch, *et al.*, ‘Apotemnophilia – The Neurological Basis of a Psychological Disorder’, in *Nature Precedings* (2009) [↑](#footnote-ref-138)
139. It may be suggested that the appropriate course of action in such cases is to focus on ‘curing’ the neurological condition rather than responding to the symptom (the desire for amputation). Distinguishing unusual desires from psychopathologies is a hugely complicated area, which I will not consider in detail here. It is worth noting, though, that trans\* (transsexual or transgender) individuals would (mostly) consider it hugely insulting to suggest that their desires are the result of a mental disorder, and those with apotemnophilia may well feel the same. That our desires could be altered does not stop us feeling like they are an integral part of our personality. Individuals should be made aware of their options, but should not be forced to opt for the neurological ‘cure’ rather than amputation or SRS. This is a central domain of their life, and they should be able to exercise control over it. [↑](#footnote-ref-139)
140. Shafer-Landau, ‘Liberalism and Paternalism’, p.177 [↑](#footnote-ref-140)
141. It may be objected that such procedures are not as extreme as amputation. To this I would respond that some cosmetic surgeries are both drastic and risky. Moreover, if the issue is one of severity, then we could ask whether amputation would be acceptable if just a foot or a finger is removed. I doubt that these less severe amputations would not provoke just the same reactions from those who oppose them. If they did not, these opponents would face the difficult task of showing just how much of ourselves we would have to want amputated before it became impermissible. [↑](#footnote-ref-141)
142. Limiting the *influence* on people’s choices (i.e. restricting advertising) is not as restrictive of their autonomy as directly limiting their choices would be, and the restrictions on advertising should increase individual autonomy overall. [↑](#footnote-ref-142)
143. C.R. Sunstein and R.H. Thaler, ‘Libertarian Paternalism is Not an Oxymoron’, in *The University of Chicago Law Review* 70:4 (2003), pp.1159-1202. For Sunstein and Thaler this means paternalism is unavoidable since they consider paternalism to be behaviour aiming to influence an individual out of a concern for their welfare, and have shown such influence cannot be avoided. Given this, they argue that such influence is best aimed at increasing welfare: what they call ‘libertarian benevolence’. On my definition of paternalism, however, such influence need not be paternalist unless motivated by a distrust of individual agency. [↑](#footnote-ref-143)
144. We could not make a scheme opt-out, then, in the hope of stopping people from making a ‘bad’ decision: out of distrust of, or disrespect for, their agency. [↑](#footnote-ref-144)
145. Wall, ‘Self-Ownership and Paternalism’, pp.399-417. I use libertarianism here in the sense in which it is employed in political theory, and not as it is used in the free will debate. [↑](#footnote-ref-145)
146. Wall, ‘Self-Ownership and Paternalism’, pp.400-1. Roughly speaking, left-libertarianism is committed to some form of equality principle as well as self-ownership, whilst right-libertarianism is committed to self-ownership alone. [↑](#footnote-ref-146)
147. Wall, ‘Self-Ownership and Paternalism’, p.411 [↑](#footnote-ref-147)
148. Nussbaum, ‘Human Functioning’, p.225 [↑](#footnote-ref-148)
149. Nussbaum, ‘Human Functioning’, p.229 [↑](#footnote-ref-149)
150. M.C. Nussbaum, ‘Public Philosophy and International Feminism’, in *Ethics* 8:4 (1998), p.768 [↑](#footnote-ref-150)
151. Nussbaum, *WHD*, p.69 [↑](#footnote-ref-151)
152. Nussbaum, *WHD*, p.74 [↑](#footnote-ref-152)
153. Rawls, *A Theory of Justice*, p.79 [↑](#footnote-ref-153)
154. For this reason, I will not consider Sen’s account here since this lack of a clear method of identifying a set of universally important capabilities leaves his approach in danger of a collapse into relativism, of the sort Nussbaum aims to avoid (as discussed in the Introduction). [↑](#footnote-ref-154)
155. Nussbaum, *WHD*, p.55 [↑](#footnote-ref-155)
156. E. Nelson, ‘From Primary Goods to Capabilities: Distributive Justice and the Problem of Neutrality’, in *Political Theory* 36:1 (2008), p.94 [↑](#footnote-ref-156)
157. For diagnoses of Nussbaum’s paternalism see, for example, Nelson, ‘From Primary Goods to Capabilities’; I. Carter, ‘Is the Capability Approach Paternalist?’ in *Economics and Philosophy* (forthcoming); S. Deneulin, ‘Perfectionism, Paternalism and Liberalism in Sen and Nussbaum’s Capability Approach’, in *Review of Political Economy* 14:4 (2002), pp.497-518; R. Claassen, ‘Capability Paternalism’, in *Economics and Philosophy* (forthcoming); or A.M. Jaggar, ‘Reasoning About Well-Being: Nussbaum’s Methods of Justifying the Capabilities’, in *The Journal of Political Philosophy* 14:3 (2006), pp.301-22. For suggestions that Nussbaum should embrace these paternalistic implications, and so adopt a ‘functioning approach’ see, for example, H.S. Richardson, ‘Some Limitations of Nussbaum’s Capabilities’, in *Quinnipiac Law Review* 19 (2000), pp.309-332; Arneson, ‘Perfectionism and Politics’; Fleurbaey, ‘Capabilities, Functionings and Refined Functionings’; or Cohen, ‘Equality of What?’. In Chapter 4 I discuss Cohen’s critique of the capability approach for promoting opportunities to function rather than their achievement, and defend the focus on capabilities. [↑](#footnote-ref-157)
158. Nelson, ‘From Primary Goods to Capabilities’, p.94 [↑](#footnote-ref-158)
159. These two thresholds roughly align with what a government should provide for its citizens (the higher threshold), and what we owe to all humans, regardless of national boundaries (the lower threshold) (e.g. Nussbaum, *WHD*, p.12; p.75; p.212). I will not consider here whether such a distinction is appropriate. [↑](#footnote-ref-159)
160. Nussbaum, ‘Human Functioning’, p.206 [↑](#footnote-ref-160)
161. Nussbaum, ‘Human Functioning’, p.207 (latter emphasis mine) [↑](#footnote-ref-161)
162. See Introduction (pp.8-9) for the complete list of central capabilities. In brief, these are opportunities for: (i) life; (ii) bodily health; (iii) bodily integrity; (iv) senses, imagination and thought; (v) emotional attachments; (vi) using practical reason; (vii) affiliation; (viii) interaction with other species; (ix) play; and (x) control over one’s environment (political and material) (Nussbaum, *Creating Capabilities*, pp.33-34). [↑](#footnote-ref-162)
163. Nussbaum, *Creating Capabilities*, p.90 [↑](#footnote-ref-163)
164. M.C. Nussbaum, ‘Aristotle, Politics and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan’, in *Ethics* 111:1 (2000), p.124. Indeed, “one need only show that the capability approach excludes various permissible conceptions of the good life in order to demonstrate its incompatibility with Rawls’s account of the equal liberty of persons” (Nelson, ‘From Primary Goods to Capabilities’, p.108), not that it is committed to a single conception. [↑](#footnote-ref-164)
165. Nussbaum, *Creating Capabilities*, p.28 [↑](#footnote-ref-165)
166. And argue as such in Chapter 4. [↑](#footnote-ref-166)
167. Carter, ‘Is the Capability Approach Paternalist?’, p.7 [↑](#footnote-ref-167)
168. This is the sixth central capability Nussbaum lists (see fn. 162 above or Introduction). [↑](#footnote-ref-168)
169. Nussbaum, *WHD*, p.88 [↑](#footnote-ref-169)
170. Nussbaum, *Creating Capabilities*, p.30 [↑](#footnote-ref-170)
171. M.C. Nussbaum, ‘On Hearing Women’s Voices: A Reply to Susan Okin’, in *Philosophy and Public Affairs* 32:2 (2004), p.199 [↑](#footnote-ref-171)
172. Nussbaum, *WHD*, p.87 [↑](#footnote-ref-172)
173. Nussbaum, *WHD*, p.87 [↑](#footnote-ref-173)
174. For example: Nussbaum, ‘On Hearing Women’s Voices’, p.199; Nussbaum, *WHD*, p.87; pp.152-54 [↑](#footnote-ref-174)
175. Nussbaum, *WHD*, p.152. It is worth noting that some of the examples she uses to back up this point are not very convincing. For example, she argues that women who choose traditional lives after having led more politically active lives “do not campaign for the political denial of choice to all citizens” (Nussbaum, *WHD*, p.153). More evidence is required, however, to demonstrate that this is actually indicative of their preferences to allow others (and themselves) to continue to possess these opportunities. A lack of campaigning against them may simply indicate that they no longer consider such campaigning appropriate for women, hence their choice of a more traditional life. [↑](#footnote-ref-175)
176. Nussbaum, *WHD*, p.152 [↑](#footnote-ref-176)
177. Carter, ‘Is the Capability Approach Paternalist?’, p.22 [↑](#footnote-ref-177)
178. Arguably she is moving in an increasingly liberal direction, in which case she may be willing to accept these criticisms and come out more firmly against the remnants of perfectionism in her approach. However, her use of a substantive conception of the good elsewhere, such as her account of adaptive preferences – a preference is adaptive if it has the ‘wrong’ content – suggests there is a deep tension in her work that will not easily be resolved. (See Chapter 5 for discussion of this point.) [↑](#footnote-ref-178)
179. Carter, ‘Is the Capability Approach Paternalist?’, p.22 [↑](#footnote-ref-179)
180. See Carter (‘Is the Capability Approach Paternalist?’, pp.11-15) for a defence of this interpretation of the Kantian imperative in Nussbaum. This reading explains why she would be concerned to promote capabilities since “directly promoting…proper functioning means failing to treat that individual as a *point of origin* of ends” (Carter, ‘Is the Capability Approach Paternalist?’, p.13), as it would not allow them to determine ends for themselves. [↑](#footnote-ref-180)
181. Nussbaum, *Creating Capabilities*, p.67 [↑](#footnote-ref-181)
182. M.C. Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’, in *Feminist Economics* 9:2 (2003), p.46 [↑](#footnote-ref-182)
183. See Chapter 5 for further discussion of instances in which Nussbaum adopts a more substantive conception of autonomy. [↑](#footnote-ref-183)
184. Nussbaum, *Creating Capabilities*, p.25 [↑](#footnote-ref-184)
185. It may be objected that since Nussbaum’s examples of policy are intended as illustrative rather than definitive of her approach, it is unfair to focus criticisms on this element of her work. However, these policy recommendations arise from, and are consistent with, her more developed theory, and so can legitimately be taken to be indicative of its likely practical consequences. [↑](#footnote-ref-185)
186. Nussbaum, *WHD*, p.87 [↑](#footnote-ref-186)
187. T. Scanlon, ‘Preference and Urgency’, in *Journal of Philosophy* 72 (1975), pp.659-60 [↑](#footnote-ref-187)
188. Nussbaum, *Creating Capabilities*, p.37 [↑](#footnote-ref-188)
189. For example, S. Olsaretti, ‘Endorsement and Freedom in Amartya Sen’s Capability Approach’, in *Economics and Philosophy* 21 (2005), p.99. See Chapter 4 for further discussion of this instrumental justification of capabilities. [↑](#footnote-ref-189)
190. Nussbaum, *WHD*, p.91 [↑](#footnote-ref-190)
191. Nussbaum *WHD*, p.91 [↑](#footnote-ref-191)
192. Richardson, ‘Some Limitations of Nussbaum’s Capabilities’, p.319 [↑](#footnote-ref-192)
193. I rely on *WHD* here and, whilst relatively representative of Nussbaum’s current views, it may be objected that she would no longer allow the exceptions (to pure capability promotion) I discuss. However, the reason that she would make this change is important. If she were willing to give up her claim to the central importance of the underlying functionings (health, affiliation and so on) then her approach would, indeed, collapse into my own. If she remains committed to the value of the functionings but allows individuals not to choose them anyway, perhaps for the practical reasons I have discussed, then (a) she would still be committed to the insulting and stigmatising judgements (discussed in §3.1); and (b) would be unable to apply her theory universally (as §4 will consider). [↑](#footnote-ref-193)
194. Whilst public health campaigns – to reduce smoking, for example, or promote healthy eating – are intended to influence those to whom they are directed, they are not paternalist since they engage with and attempt to persuade individuals, rather than simply overriding their agency, as banning smoking or certain unhealthy foods would. (The ban on smoking in *public places* can be seen in a similar light to health and safety rules: directed towards the benefit of third-parties (the non-smokers) not those whose behaviour is inhibited (smokers).) [↑](#footnote-ref-194)
195. Nussbaum, *WHD*, p.92 [↑](#footnote-ref-195)
196. Nussbaum, *WHD*, p.53 [↑](#footnote-ref-196)
197. Nussbaum, *WHD*, p.93 [↑](#footnote-ref-197)
198. Nussbaum also mentions instances when short-term capability loss should be prevented (Nussbaum, *WHD*, pp.*95*-96). Her examples here include physical abuse, dangerous medicine, and alcohol or tobacco, which she is willing to prohibit and disincentivise out of concern to protect and maintain the central capability of health. These cases are even harder to justify than long-term or permanent capability loss, since they lack even the potential worry that an individual might later change their mind: if they do, the capability is not irrevocably lost to them in this case. [↑](#footnote-ref-198)
199. Admittedly, this is unlikely to be irreversible, but Nussbaum disapproves of short-term capability loss too, which this certainly constitutes. [↑](#footnote-ref-199)
200. Nussbaum, *WHD*, p.78 [↑](#footnote-ref-200)
201. Indeed, part of the reason why Nussbaum may disapprove of such cases is because they seem to represent instances when decisions not to function can result in capability loss in the short or long term (primarily our health in these cases). [↑](#footnote-ref-201)
202. Nussbaum, *WHD*, pp.71-72 [↑](#footnote-ref-202)
203. Nussbaum, *Frontiers of Justice*, pp.16-17 [↑](#footnote-ref-203)
204. Nelson, ‘From Primary Goods to Capabilities’, p.99 [↑](#footnote-ref-204)
205. Nelson, ‘From Primary Goods to Capabilities’, p.103 [↑](#footnote-ref-205)
206. Asexuality is, admittedly, a little more complicated than this. It is usually understood to mean that individuals feel sexual attraction to no one (as opposed to homosexuals who are attracted to members of their own sex, heterosexuals who are attracted to the opposite sex and so on). In some cases asexual individuals do masturbate, though this is often understood as an enjoyable physical act more than a sexual experience. (For definitions of asexuality see, for example, the AVEN (Asexuality Visibility and Education Network) website (www.asexuality.org).) For simplicity I will understand asexuality to refer to those individuals who have no sexual desire, and there are certainly some who would fall into this category. [↑](#footnote-ref-206)
207. Nussbaum’s central capabilities are not supposed to be the subject of a current consensus, but a potential, future one. Thus, the point is not that some people currently dispute her list, but that for as long as people are asexual, or have Asperger’s, there can *never* be a consensus on her list. [↑](#footnote-ref-207)
208. See, for example, the various groups associated with the Autistic rights, or anti-cure, movements, such as the Autism Self-Advocacy Network or the Autistic Rights Movement UK. Their view is one my own approach can accommodate (§5). [↑](#footnote-ref-208)
209. Nussbaum, ‘Human Functioning’, p.216 [↑](#footnote-ref-209)
210. Nussbaum, *Creating Capabilities*, p.63 [↑](#footnote-ref-210)
211. Nussbaum, *Frontiers of Justice*, pp.16-17 [↑](#footnote-ref-211)
212. Arneson, ‘Perfectionism and Politics’, p.60 [↑](#footnote-ref-212)
213. Arneson, ‘Perfectionism and Politics’, p.61 [↑](#footnote-ref-213)
214. If it were welfarist then the requirements of justice would be identical with the promotion of individual welfare. [↑](#footnote-ref-214)
215. We may wish to include Nelson’s vehement celibate or misanthrope if they are understood to see no value (or even negative value) in the functioning, and consider their life to be fully flourishing in its absence. [↑](#footnote-ref-215)
216. Nussbaum, *WHD*, p.158 [↑](#footnote-ref-216)
217. Carter, ‘Is the Capability Approach Paternalist?’, p.26 [↑](#footnote-ref-217)
218. It is worth noting that I am also dispensing with Nussbaum’s use of the two thresholds – the necessary features for a minimally human life, and the necessary features for a flourishing life. This is because I believe that the requirements of justice should be global, and that all individuals are entitled to the opportunity to live a flourishing life, regardless of whether they reside within our national borders. This point is not central to my argument, however, and I will not defend it here. [↑](#footnote-ref-218)
219. §5.2 will consider further the idea that by only providing the substantive opportunity to perform the specific functionings, Nussbaum’s approach will fail to support many reasonable conceptions of the good. [↑](#footnote-ref-219)
220. Nelson, ‘From Primary Goods to Capabilities’, p.103 [↑](#footnote-ref-220)
221. Nussbaum, *WHD*, p.49 [↑](#footnote-ref-221)
222. Nelson, ‘From Primary Goods to Capabilities’, p.102 [↑](#footnote-ref-222)
223. For those still unmoved by the value of autonomy, a further possible response is that we should focus on control due to the provisional – “open-ended and humble” (Nussbaum, *WHD*, p.77) – nature of the capabilities list. Since we cannot be sure it is correct, as a pragmatic concession a capability theorist should, perhaps, permit individuals to decide which functionings to perform. [↑](#footnote-ref-223)
224. Richardson, ‘Some Limitations of Nussbaum’s Capabilities’, p.329 [↑](#footnote-ref-224)
225. There is an interesting discussion to be had on whether Rawls, and the political liberals who have followed in his wake, are justified in distinguishing reasonable and unreasonable conceptions of the good, and whether their criteria of identifying the ‘unreasonable’ are justified. It may be the case that Rawls excludes more theories than he should, and that more people would count as unreasonable on his view than he would acknowledge. However, we will not get far in building a liberal theory without assuming the value of liberty, and my aim here is to provide an internal critique and modification of a liberal theory, not to question its underlying assumptions and aims. [↑](#footnote-ref-225)
226. Nussbaum, *WHD*, p.78 [↑](#footnote-ref-226)
227. Inclusion of such individuals would not have a repressive effect: individuals cannot enforce their view of what is ‘right’, since they would be asked only what individuals should control (assuming the importance of autonomy (§5.1)) and not the proper use that should be made of this control. [↑](#footnote-ref-227)
228. A potential objection is that we may value a functioning, but not control over this functioning (even if merely the choice to give up that control). I cannot think of a case, central to flourishing, of which this is true but, if found, this would provide a counter-example to my argument here. They would be less problematic than the counter-examples raised against Nussbaum’s account, however, since the difference would be of intuition, not incapacity, and would, therefore, be potentially resolvable. [↑](#footnote-ref-228)
229. Nussbaum, *WHD*, p.87 [↑](#footnote-ref-229)
230. Nussbaum, *WHD*, p.72 [↑](#footnote-ref-230)
231. Given it aims to be *Shiffrinian* soft paternalist, it would also be concerned to ensure that choices are voluntary even in cases that are not potentially harmful. Indeed, it would not make judgements regarding the harmfulness of certain activities, but only whether they fall within a central domain of control. [↑](#footnote-ref-231)
232. Richardson, ‘Some Limitations of Nussbaum’s Capabilities’, p.318 (my emphasis) [↑](#footnote-ref-232)
233. In Chapter 5 I consider another potential criticism of the capability approach, to which my own account is also vulnerable: that the capability approach will ignore some individuals’ preferences as adaptive and unreliable. Given that my approach aims to avoid paternalism out of a concern to respect individual agency, it would be problematic if it were to ignore and distrust preferences in this way, regardless of whether this results in actual paternalist intervention. [↑](#footnote-ref-233)
234. See, for example, Cohen, ‘Equality of What?’; Cohen, ‘Amartya Sen’s Unequal World’. [↑](#footnote-ref-234)
235. Cohen, ‘Equality of What?’, p.23. Other commentators also take the view that achieved functionings are what matter, not opportunities: “[w]hat should matter to the public, it seems to me, is not whether people ‘can’ stop smoking, but whether they do” (Richardson, ‘Some Limitations of Nussbaum’s Capabilities’, p.316). (Also Arneson, ‘Perfectionism and Politics’, and Fleurbaey, ‘Capabilities, Functionings and Refined Functionings’). [↑](#footnote-ref-235)
236. Nelson, ‘From Primary Goods to Capabilities’, p.118, fn. 42. For evidence of this understanding of the capability approach (as a policy guide) see, for example: Sen, *The Idea of Justice*; A. Sen, ‘The Place of Capability in a Theory of Justice’, in *Measuring Justice: Primary Goods and Capabilities*, ed. H. Brighouse and I. Robeyns (Cambridge: Cambridge University Press, 2010), pp. 239-253; or Nussbaum, *Creating Capabilities*, p.19; p.27. [↑](#footnote-ref-236)
237. Nussbaum, *Creating Capabilities*, pp.32-3 [↑](#footnote-ref-237)
238. Carter, ‘Is the Capability Approach Paternalist?’, p.3 [↑](#footnote-ref-238)
239. Cohen, ‘Amartya Sen’s Unequal World’, p.124 [↑](#footnote-ref-239)
240. Cohen focuses his critique on Sen’s elaboration of the capability approach, and in presenting his account I will maintain this focus. However, the same points could be made about Nussbaum’s account (or my own) and in defending the capability approach later in the chapter it is these accounts on which I will concentrate, in keeping with the rest of the thesis. [↑](#footnote-ref-240)
241. Cohen, ‘Equality of What?’, p.19 [↑](#footnote-ref-241)
242. Fleurbaey, ‘Capabilities, Functionings and Refined Functionings’, p.303. Like Cohen, Fleurbaey (wrongly) understands the capability approach to be a means of measuring an individual’s well-being or utility, and criticises it as inadequate in this regard. [↑](#footnote-ref-242)
243. Cohen, ‘Equality of What?’, p.18 [↑](#footnote-ref-243)
244. I follow Philip Pettit here in arguing that it is sufficient for freedom that our *preferences*, and not just our choices, be decisive. Roughly, a choice can be defined as our explicit selection of an option, and a preference as what we “counterfactually would have chosen” (P. Pettit, ‘Freedom in the Spirit of Sen’, in *Amartya Sen*, ed. C.W. Morris (Cambridge: Cambridge University Press, 2010), p.92). I can be said to freely achieve an outcome if my preference is satisfied *because it is my preference*, since “[my] preference is at the origin of a causal sequence that fixes the alternative to be realised” (Pettit, ‘Freedom in the Spirit of Sen’, p.100). For example, this is so if someone acts on my behalf to ensure I receive the medical treatment I prefer (because I prefer it) even if I am unconscious, and so incapable of choosing. [↑](#footnote-ref-244)
245. As discussed in Chapter 3, Nussbaum is sufficiently reluctant to allow individuals to make ‘wrong’ choices, detrimental to their well-being, that she is sometimes willing to override their autonomy to prevent this. In general though, capabilities are intended to be the goal of capability theorists. [↑](#footnote-ref-245)
246. Nussbaum, ‘Human Functioning’, p.221 [↑](#footnote-ref-246)
247. Olsaretti, ‘Endorsement and Freedom’, pp.98-100. Olsaretti may be wrong that these instrumental reasons explain why capability theorists promote capabilities, but she is right that *choosing* to perform a functioning surely improves well-being more than simply performing it, or being made to perform it (*contra* Fleurbaey (in ‘Capabilities, Functionings and Refined Functionings’)). [↑](#footnote-ref-247)
248. Olsaretti, ‘Endorsement and Freedom’, pp.103-104 [↑](#footnote-ref-248)
249. It is worth noting that there is likely to be a considerable well-being gain simply from allowing individuals to make choices for themselves: it may be preferable to choose and pursue a sub-optimal goal than have the best possible goal forced upon us. I acknowledge, though, that being allowed to make our own mistakes is not always an efficient means to maximising our well-being. However, unless making our own choices is likely to be *very* detrimental to well-being (which, I argue in Chapter 3, is unlikely) this should not shake the government’s commitment to freedom. [↑](#footnote-ref-249)
250. Olsaretti, ‘Endorsement and Freedom’, p.94 [↑](#footnote-ref-250)
251. Despite Olsaretti’s argument to the contrary (Olsaretti, ‘Endorsement and Freedom’, pp.95-6), though I will not provide a detailed response to this here. [↑](#footnote-ref-251)
252. This response is not open to my own version of the capability approach, since I do not distinguish dis/valuable specific functionings, but only dis/valuable domains of functioning. However, since list versions of the capability approach that specify valuable functionings are common it is worth noting how they could respond to Cohen. [↑](#footnote-ref-252)
253. For some – such as Arneson, in recent work – the idea that we should give individuals control over their lives even in cases when they will ‘misuse’ it by giving up valuable options (according to their objective, or preference-independent, notion of well-being) will never be plausible. This is not a view I can respond to here, though even those who adopt it will usually accept that at least some *prima facie* valuable options can be sacrificed, to achieve other (objectively valuable) goals. [↑](#footnote-ref-253)
254. The restriction to specific domains is to avoid the untenable expansion of the account: justice requires that we have the capacity to determine our functioning in *central* domains, not to perform *any* functioning we desire. The scope of these domains, however, is restricted only by the harm our choices may do to others. For example, for as long as our choices over our sexual life involve consenting adults and harm no one other than ourselves, we should have the capability to make whichever choice we wish. This does not mean that a rapist should be given the capabilities they desire since this would, of course, drastically limit someone else’s capability for control over this domain. There is no need to appeal to a concept of (will-independent) harm to make this point. [↑](#footnote-ref-254)
255. The arguments here, however, do not depend on my version of the capability approach being accepted. Though I believe this approach will prove a better guide to government policy, even standard versions of the capability approach can respond to much of Cohen’s critique. [↑](#footnote-ref-255)
256. As §2.2 discussed, Olsaretti’s instrumental account of the value of freedom does not capture this. [↑](#footnote-ref-256)
257. It is difficult to imagine regretting the loss of malaria from one’s environment, though some may enjoy the risk, or wish to carry out research that requires its continued prevalence. [↑](#footnote-ref-257)
258. These are taken from Feinberg and include: being formed without coercion, with knowledge of the relevant empirical facts, in a clear emotional state, not based on mistaken reasoning, and being carefully considered (Feinberg, *Harm to Self*, pp.104-6). [↑](#footnote-ref-258)
259. Nussbaum, *WHD*, 79 [↑](#footnote-ref-259)
260. P. Pettit, ‘Capability and Freedom: A Defence of Sen’, in *Economics and Philosophy* 17 (2007), pp.1-20. Later, Pettit (‘Freedom in the Spirit of Sen’, pp.98-99) renames context-independence ‘permit-independence’, but I will continue to use the ‘context-independence’ label here. [↑](#footnote-ref-260)
261. Pettit, ‘Capability and Freedom’, pp.13-5 [↑](#footnote-ref-261)
262. Pettit, ‘Capability and Freedom’, p.18 [↑](#footnote-ref-262)
263. This is not to imply that direct democracy is appropriate for every government decision. There are many areas – the minutiae of healthcare policies, for example – which we lack the time and expertise to engage with effectively. Yet even if governments make some unilateral decisions regarding specific policies and their implementation, we can still insist on consultation regarding general policy direction. [↑](#footnote-ref-263)
264. We may think that some preferences *do* have more value than others, and so should not be counted equally: for example, my choice to be healthy over your choice to smoke in public. However, it is possible to consider some concerns as more important than others without paternalism. We can take the choice of *anyone* regarding their health to have this special value, and so are not committed to the view that any individual or their choices are worth less. This is accommodated by the idea that some domains of control (like health) are central, or the concern of justice, while others (like choosing where to smoke) are not. [↑](#footnote-ref-264)
265. As Shiffrin (‘Paternalism, Unconscionability Doctrine, and Accommodation, p.214) points out, we can treat someone paternalistically when we act on their behalf without allowing them to form a preference and make a choice, as well as when we override a choice they have in fact made (see Chapter 2, pp.62-4). [↑](#footnote-ref-265)
266. I will not attempt to specify exactly how many, or what sort of, options should be left open to individuals, but I broadly accept Olsaretti’s point that voluntary choice usually requires that we have acceptable alternatives available (S. Olsaretti, *Liberty, Desert and the Market* (Cambridge: Cambridge University Press, 2004), pp.119-21). I would, however, dispute the degree to which the standard of acceptability should be objective, especially when making decisions regarding public policy. [↑](#footnote-ref-266)
267. Nussbaum, *WHD*, p.78 [↑](#footnote-ref-267)
268. If most, but not all, of the population must be immunised for the vaccine to be effective we may wish to allow such exceptions. It may, however, be difficult to determine what would count as a legitimate reason to opt-out, especially if too many opt-outs would have disastrous consequences for the whole population. [↑](#footnote-ref-268)
269. As discussed in Chapter 3, I will keep roughly to Nussbaum’s list in terms of content (e.g. Nussbaum, *Creating Capabilities*, pp.33-34) though I alter the structure of the capabilities included. [↑](#footnote-ref-269)
270. It may be argued that mere ‘distrust of agency’ is insufficient to motivate an action, and that we also need some further goal. This may either be a concern for the agent’s well-being and so a distrust of their ability to advance it; or a concern with some wider goal or project, and a distrust of the agent’s ability to promote this. Since I argue that the central component of paternalism is distrust of agency, whether or not it is directed towards promoting agent’s well-being or protecting them from harm, I will consider an action paternalist whichever of the above motives it is conjoined with (see Chapter 2). Thanks to Carl Fox for pushing me on this point. [↑](#footnote-ref-270)
271. S.J. Khader, ‘Must Theorising about Adaptive Preferences Deny Women’s Agency?’, in *Journal of Applied Philosophy* 29:4 (2012), p.302 [↑](#footnote-ref-271)
272. J. Elster, ‘Sour Grapes’, in *Utilitarianism and Beyond*, ed. A. Sen and B. Williams (Cambridge: Cambridge University Press, 1982), p.237 [↑](#footnote-ref-272)
273. Khader (Khader, ‘Theorising about Adaptive Preferences’) focuses her criticisms on the work of Nussbaum and Okin (for example, Nussbaum, *WHD*; S.M. Okin, ‘Feminism and Multiculturalism: Some Tensions’, in *Ethics* 108:4 (1998), pp.661-684; S.M. Okin, ‘Gender Inequality and Cultural Differences’, in *Political Theory* 22:1 (1994), pp.5-24). Yet, whilst Okin is willing to judge the preferences of some oppressed women to be unreliable, she has mounted her own criticism of Nussbaum for failing to take proper account of the voices of women in the third-world (S.M. Okin, ‘Poverty, Well-Being and Gender: What Counts, Who’s Heard?’, in *Philosophy and Public Affairs* 31:3 (2003), pp.280-316), to which Nussbaum has since responded (Nussbaum, ‘Hearing Women’s Voices’). [↑](#footnote-ref-273)
274. These are the views of Elster (J. Elster, *Sour Grapes: Studies in the Subversion of Rationality*, (Cambridge: Cambridge University Press, 1983), Colburn (B. Colburn, ‘Autonomy and Adaptive Preferences’, in *Utilitas* 23:1 (2011), pp.52-71), and Bovens (L. Bovens, ‘Sour Grapes and Character Planning’, in *The Journal of Philosophy* 86:2 (1992), pp.57-78) respectively. [↑](#footnote-ref-274)
275. M.C. Nussbaum, ‘Symposium on Amartya Sen’s philosophy: 5 Adaptive preferences and women’s options’, in *Economics and Philosophy* 17 (2001), p.79 [↑](#footnote-ref-275)
276. Although I aim to defend a version of the capability approach, I will not embark on a textual analysis of Nussbaum, or engage in a dispute with Barnes on the most accurate portrayal of Nussbaum’s considered attitude to disabled individuals. There does seem to be a tension between Nussbaum’s normative account of adaptive preferences and her concern to include disabled individuals as subjects of justice (notably in *Frontiers of Justice*). I will not attempt to guess on which side of this tension she would ultimately come down, but her genuine concern for disabled individuals suggests that she would sympathetic to my view, and so the adoption of a substantive *procedural* account of adaptive preferences. On the other hand, she has demonstrated her commitment to a substantive account of autonomy in a number of places, as Chapter 3 discussed, which may undermine such sympathy. (For example, she notes that “[u]nlike Rawls, I do not seek a procedural justification for political principles” (Nussbaum, ‘Hearing Women’s Voices’, p.196).) My intention, though, is not to provide a work of Nussbaum scholarship, but to provide a plausible reading of the capability approach in light of the problems of (physical) disability and adaptive preferences. [↑](#footnote-ref-276)
277. Nussbaum, ‘Adaptive preferences and women’s options’, p.78 [↑](#footnote-ref-277)
278. Nussbaum, ‘Adaptive preferences and women’s options’, pp.78-9 [↑](#footnote-ref-278)
279. E. Barnes, ‘Disability and Adaptive Preference’, in *Philosophical Perspectives* 23 (2009), p.5 [↑](#footnote-ref-279)
280. Nussbaum, ‘Adaptive preferences and women’s options’, p.74 [↑](#footnote-ref-280)
281. For example, Nussbaum, ‘Hearing Women’s Voices’, p.200; Jaggar, ‘Reasoning About Well-Being’, p.319 [↑](#footnote-ref-281)
282. Nussbaum, ‘Adaptive preferences and women’s options’, p.74 [↑](#footnote-ref-282)
283. Nussbaum, ‘Adaptive preferences and women’s options’, p.84. It is also worth noting that Nussbaum’s stance here backs up my interpretation of her in Chapter 3: it is preferences for *functionings* she considers worth promoting. [↑](#footnote-ref-283)
284. Barnes, ‘Disability and Adaptive Preference’, p.2 [↑](#footnote-ref-284)
285. Barnes, ‘Disability and Adaptive Preference’, p.6 [↑](#footnote-ref-285)
286. Barnes, ‘Disability and Adaptive Preference’, p.8 [↑](#footnote-ref-286)
287. Barnes, ‘Disability and Adaptive Preference’, p.7 [↑](#footnote-ref-287)
288. Nussbaum argues that since “desire is not brutish, but an intelligent reaching-out-for-the-good, we ought to show it some respect, after all, in the process of justification” (Nussbaum, ‘Hearing Women’s Voices’, p.200). For Nussbaum, though, this respect merely involves giving individuals’ desires “a heuristic role…[and] a modest ancillary role in political justification” (Nussbaum, ‘Hearing Women’s Voices’, p.200). Whilst Nussbaum is optimistic that proceduralist, informed-desire accounts will coincide with her more substantive approach, then, such proceduralism is not what does the justificatory work in her theory: individuals’ desires and testimony will only ever have an ancillary role. [↑](#footnote-ref-288)
289. Barnes, ‘Disability and Adaptive Preference’, p.14 [↑](#footnote-ref-289)
290. I assume, following Barnes, that the influence of an intrinsic feature is to cause us to have a preference for (or at least concerning) this feature. For example, being female is an intrinsic feature, so its influence on our preferences will be considered an intrinsic influence, and the likely result of this influence is that we have a preference to be female. It may be argued that we should not assume that the influence of intrinsic features will concern this feature, but Barnes makes this assumption and my goal here is to explain her account. [↑](#footnote-ref-290)
291. Barnes, ‘Disability and Adaptive Preference’, p.13 [↑](#footnote-ref-291)
292. Barnes, ‘Disability and Adaptive Preference’, p.13 [↑](#footnote-ref-292)
293. E. Barnes, ‘Disability, Minority and Difference’, in *Journal of Applied Philosophy* 26:4 (2009), p.345 [↑](#footnote-ref-293)
294. Barnes, ‘Disability and Adaptive Preference’, p.14. This understanding of disability derives from Barnes’s scepticism regarding the social model of disability. As §5 will discuss, this scepticism is not fully justified, so disabilities are not all, in fact, ‘intrinsic’, as Barnes suggests. [↑](#footnote-ref-294)
295. Barnes, ‘Disability and Adaptive Preference’, p.14 [↑](#footnote-ref-295)
296. A. Sen, *Commodities and Capabilities* (Oxford: Oxford University Press, 1999), p.53. (Nussbaum cites the proportion of widowers to report their health ‘ill’ or ‘indifferent’ 45.6% (Nussbaum, ‘Adaptive preferences and women’s options’, pp.79-80). In fact, Sen notes that 45.6% of widowers reported their health ‘*indifferent’* (leaving out the category of ‘ill’) compared to 0% of widows.) [↑](#footnote-ref-296)
297. Khader, ‘Theorising about Adaptive Preferences’, p.310 [↑](#footnote-ref-297)
298. Khader, ‘Theorising about Adaptive Preferences’, p.303 [↑](#footnote-ref-298)
299. Nussbaum, ‘Adaptive preferences and women’s options’, p.79 (my emphasis) [↑](#footnote-ref-299)
300. See Chapter 3 for further discussion of this process. My focus will be on Nussbaum’s (list) version of the capability approach here, both because this thesis is primarily intended to critique and modify her approach, and because it is on this approach that Barnes focuses her criticisms. [↑](#footnote-ref-300)
301. Or, at least, excluded until they can be brought to see the value of the functioning. In other words, disabled individuals would be excluded until they reject the value of their capability-less lives. I raised a similar worry in Chapter 3 concerning individuals who cannot perform or value one of the central functionings. I argued there that if we conceptualise capabilities in the right way (as domains of control), these individuals could be included in the overlapping consensus. I argue here that whilst some (physically) disabled individuals can be included in this way, some of their preferences *should* be excluded from the overlapping consensus, though this need not be insulting in the way Barnes suggests. [↑](#footnote-ref-301)
302. Given that Nussbaum (*Frontiers of Justice*, pp.16-17)distinguishes those who agree the *contents* of a theory of justice, from those to whom it *applies*, we may think she could reply that being excluded from the overlapping consensus does not imply that disabled individuals are not the subjects of justice. In response, we might point out that (a) we lack justification to exclude physically disabled people as appropriate ‘choosers’, as we would severely mentally disabled individuals, children or animals, (b) that being (unjustifiably) so excluded is insulting, and (c) that being excluded will mean the theory is less likely to be appropriate for their lives. Consequently, we have reason to think that excluding physically disabled people’s preferences would be a troubling conclusion for Nussbaum (if she were committed to it). [↑](#footnote-ref-302)
303. Barnes, ‘Disability and Adaptive Preference’, p.13 [↑](#footnote-ref-303)
304. As §5 will consider, contrary to Barnes’s suggestion, most disabled individuals *do* possess (and value) the central capabilities, so will not be excluded. Further, those disabled individuals who are unable to possess some of the central capabilities are *rightly* excluded from the overlapping consensus on what these capabilities should be: this will not be insulting or unjustified. [↑](#footnote-ref-304)
305. If we are not cosmopolitans, the content of the list will vary across location as well as time. For simplicity, I will tend to assume a cosmopolitan view though, since it is not necessary to my main arguments, I will not defend it here. It is worth noting, however, that given the arguments that follow, to take a statist approach would mean the same preferences would be adaptive or not, depending on context. For example, a preference for malnourishment would only be (justice) adaptive in countries rich enough to alleviate it. This may give us some reason to adopt cosmopolitanism. [↑](#footnote-ref-305)
306. As Chapter 4 discussed, the capability approach aims to guide public policy, and so is concerned with what individuals are entitled to, not what would most improve their well-being. [↑](#footnote-ref-306)
307. ‘Avoidable’, here, means that these capabilities can be provided without costing others their central capabilities. A plausible capability approach cannot be committed to providing individuals’ capabilities at the cost of others’ capabilities: we cannot spend all our time and income on cancer research to provide cancer sufferers with the capability for good health, for example, as Chapter 1 discussed. [↑](#footnote-ref-307)
308. It is worth emphasising that most individuals with a different experience of life seem unlikely to reject the value of the central capabilities. As §5.3 will consider further, it is doubtful that even individuals who consider their life to be a flourishing despite experiencing chronic pain, for example, would suggest that freedom from pain is unimportant to human life is general. Further research would be required, however, to determine the extent to which this is true (see fn. 330). [↑](#footnote-ref-308)
309. Varieties of disability are acknowledged – Terzi, for example, suggests the social model is more or less appropriate in different cases – but there is little discussion of how they could be differentiated (L. Terzi, ‘The Social Model of Disability: A Philosophical Critique’, in *Journal of Applied Philosophy* 21:2 (2004), pp.141-157). [↑](#footnote-ref-309)
310. Terzi, ‘The Social Model of Disability’, p.141 [↑](#footnote-ref-310)
311. Terzi, ‘The Social Model of Disability’, p.142 [↑](#footnote-ref-311)
312. Thanks to Elizabeth Barnes for pushing me to clarify this distinction. [↑](#footnote-ref-312)
313. Barnes, ‘Disability, Minority and Difference’, p.338 [↑](#footnote-ref-313)
314. Barclay, ‘Disability, Respect and Justice’, p.155 [↑](#footnote-ref-314)
315. Barclay focuses on: Anderson, ‘What is the Point of Equality?’; and Pogge, ‘Can the Capability Approach be Justified?’. Indeed, these views are similar to Nussbaum’s in *Frontiers of Justice*, where she suggests many disabled individuals could “come up to a high level of functioning” (p.188) and achieve “full adult independence…if only public space could be designed to support them” (p.189). [↑](#footnote-ref-315)
316. An interesting example, of the blurred border between C1 and C2 disabilities are mobility impairments, such as paraplegia. Since these individuals seem to necessarily lack a central capability (mobility) without some form of assistance (such as a wheelchair), we may want to consider this a C2 disability. However, once the wheelchair has been provided the case falls into the C1 camp: they possess the central capabilities absent extrinsic biases, such as public buildings not being wheelchair-accessible. Clearer cases of C2 disabilities are those when we lack the technology to provide the lost capability in this way. [↑](#footnote-ref-316)
317. It is worth noting that the most common cause of dwarfism, achondroplasia, often causes chronic pain too. In such cases, we may either categorise the complete conditions as C2 (necessarily disabling), or distinguish the intrinsically disabling elements (chronic pain) from the contingently disabling (below average height). For simplicity, I will take dwarfism just to mean that individuals are below average height, and set aside commonly associated conditions. [↑](#footnote-ref-317)
318. Consider, for example, Colin Turnbull’s descriptions in *The Forest People* (New York: Touchstone, 1968). [↑](#footnote-ref-318)
319. Barnes, ‘Disability, Minority and Difference’, p.346 [↑](#footnote-ref-319)
320. Anderson, ‘What is the Point of Equality?’, p.333 [↑](#footnote-ref-320)
321. It may be argued that ‘overcoming the odds’ is an important part of the positive experience of disability, and that social stigmas are necessary for disabled individuals to feel they have triumphed (lived a flourishing life) in spite of them. Whilst overcoming the odds in this way may be a positive experience (that may increase well-being) a theory of justice should surely not allow, or insist, that individuals be mistreated, excluded or oppressed in order to give them the chance to experience overcoming this oppression. [↑](#footnote-ref-321)
322. This is contrary to received wisdom in analytic philosophy (for example, J. McMahan, ‘Causing Disabled People to Exist and Causing People to be Disabled’, in *Ethics* 116:1 (2005), pp.77-99; D. Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1986), pp.351-79), as well as the ‘common-sense’ view, according to which being disabled is a tragedy. It is not clear this view would be so widespread if we separated more clearly what it necessarily means to have a (C1) disability, and what it happens to mean to have one in our society. [↑](#footnote-ref-322)
323. Barnes, ‘Disability and Adaptive Preference’, p.2; p.18 fn. 13 [↑](#footnote-ref-323)
324. Helen Keller, in Barnes, ‘Disability and Adaptive Preference’, p.15 [↑](#footnote-ref-324)
325. Helen Keller, in Barnes, ‘Disability and Adaptive Preference’, p.15 [↑](#footnote-ref-325)
326. My own version of the capability approach is, perhaps, better placed to accommodate their experiences in this way. Although the functionings Nussbaum specifies can be broadly construed, there are still cases (as Chapter 3 discussed) in which the specification of central functionings will lead to individuals being excluded, counted as less than human, or compelled to lead ways of life they do not endorse. [↑](#footnote-ref-326)
327. Although preferences for C1 disabilities are not justice adaptive, they may be well-being adaptive. For example, a deaf person’s preference for a life without music may be well-being adaptive, just as our own preference for the music of our particular culture may be. We may be unconscious of the reasons for holding this preference, and our well-being may improve if we were to repudiate this preference and have experience of the alternative. However, since such adaptations are not a matter of justice they are not our concern here. [↑](#footnote-ref-327)
328. It may be pointed out that the government does provide reconstructive surgery for severe facial disfigurement. However, it seems to be the psychological effects that they are compensated for, and these are an extrinsic consequence of disfigurement. If the psychological effects could be avoided by changing our response to, and treatment of, such people, no doubt they would no longer be entitled to this surgery. [↑](#footnote-ref-328)
329. As §3.1 discussed, Khader argues that many supposedly ‘adaptive preferences’ are, in fact, rational, so should not be classed as such. Since she only understands adaptive preferences as well-being adaptive, she cannot accommodate the idea of preferences that are both rationally formed and (justice) adaptive. [↑](#footnote-ref-329)
330. Research into the preferences of individuals with disabilities tends to focus on their assessment of how well their own life is going (for example, H. Breivik *et al.*, ‘Survey of Chronic Pain in Europe: Prevalence, impact on daily life, and treatment’, in *European Journal of Pain* 10:4 (2006); O. Gureje *et al.*, ‘Persistent Pain and Well-Being: A World Health Organisation Study in Primary Care’, in *The Journal of the American Medical Association* 280:2 (1998); A. Stewart *et al.*, ‘Functional Status and Well-being of Patients with Chronic Conditions: Results from the Medical Outcomes Study’, in *The Journal of the American Medical Association* 262:7 (1989)). It would be interesting to investigate whether those who judge that C2 conditions, such as chronic pain, do *not* detrimentally affect their well-being would allow this view to colour their definition of a flourishing life. I am not, however, aware of any research that considers this question. [↑](#footnote-ref-330)
331. It is worth noting that this discussion of adaptive preferences may apply to cases other than disability. For example, trans\* (i.e. transgender or transsexual) individuals: another case of a single label being used to capture a broad range of experiences. We can distinguish cases that parallel C1 disabilities, in which individuals wish to present, and be accepted, as a different gender to that associated with their external genitalia, or do not wish to identify as either of the traditional genders; as well as cases that parallel C2 disabilities in which individuals experience body dysmorphia, and desire a surgical solution to their feeling that they have been born in the wrong body. The former cases are only disabling (capability depriving) in societies that subscribe to strict gender binaries, and in which individuals who subvert these face stigmatisation, ridicule and violence. Feeling you have the wrong body, on the other hand, may necessarily involve capability loss. Drawing this distinction can demonstrate the insult of suggesting the need for a cure in the former case (where social structures are the problem), whilst acknowledging its necessity in the latter. Further, our focus should be on whether an individual possesses the central capabilities, and not the extent to which their trans\* identity is ‘intrinsic’ to them (as on Barnes’s view). [↑](#footnote-ref-331)
332. See fn. 327 [↑](#footnote-ref-332)
333. Nussbaum, *Creating Capabilities*, p.185 (my emphasis) [↑](#footnote-ref-333)
334. Mill, *On Liberty*, p.77 [↑](#footnote-ref-334)