

Capabilities for All?

From Capabilities to Function, to Capabilities to Control

Jessica Begon

Nuffield College, University of Oxford

jessica.begon@nuffield.ox.ac.uk

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Abstract: *The capability approach aims to ensure all individuals are able to form and pursue their own conception of the good, whilst the state remains neutral between them, and has done much to include oppressed and marginalised groups. Liberal neutrality and social inclusivity are worthy goals, yet I argue that Martha Nussbaum’s influential formulation of the capability approach, at least, cannot meet them. Conceptualising capabilities as opportunities to perform specific, valuable functionings fails to accommodate those who do not value, or cannot perform, these functionings. I therefore propose that the capability approach be modified, such that capabilities are conceptualised, instead, as opportunities to exercise control in certain central domains of our life.*

Keywords: Capability approach, autonomy, liberalism, perfectionism, neutrality, disability.

1. Introduction

The development of the capability approach has been motivated by a concern to ensure that *all* individuals have the substantive opportunity to lead a decent human life. By focussing on opportunities, or capabilities, the approach avoids “push[ing] citizens into certain valued ways [of life]”.¹ Thus, it aims to achieve the liberal goal of allowing individuals to autonomously form and pursue their own conception of the good. Further, its proponents claim that it better promotes this capacity for *every* person than alternative approaches. Thus, capability theorists oppose resourcism for failing to acknowledge that different individuals need different resource bundles to have the same opportunities, and oppose utilitarianism for ignoring the separateness of persons, and the right of each person to have the chance to lead a good life. Many capability theorists have also been at the forefront of efforts to include the concerns of oppressed and marginalised groups in the discussion about distributive justice,

¹ Martha Nussbaum, ‘Human Functioning and Social Justice: In Defence of Aristotelian Essentialism’, *Political Theory* 20 (1992): 202-246, p.225.

including women, sexual minorities, those in developing countries, and those with physical and cognitive impairments.

These are worthy goals, yet I argue that, as it stands, the capability approach has not been formulated in a way that ensures that it is fully inclusive, and neutral regarding the conception of the good to be pursued. Specifically, I will focus on Martha Nussbaum's influential formulation of the capability approach, and argue that her identification of centrally valuable functionings, and her conceptualisation of capabilities as *the opportunity to perform these functionings*, undermines the liberal neutrality and inclusivity of her approach.² I therefore propose that the capability approach be modified, and our understanding of capabilities broadened: we should have capabilities to *control* central domains of our life, rather than capabilities to function.

As a political liberal, although Nussbaum identifies central functionings – activities or states of being that are valuable in any human life – she “would not be prepared to commend [them] as law in the public realm”³. Thus, her approach (which I will outline in §2) aims to maintain state neutrality, and include those who do not share her conception of the good. Yet I will argue that she does not sufficiently insulate public policy from substantive judgements about the good, and that her understanding of capabilities as opportunities to function means that her approach is not appropriate to the lives and experiences of all (§3). Specifically, I will argue that individuals who do not value, or cannot perform, the functionings considered central by Nussbaum will either: be entitled (as a matter of justice) to opportunities they cannot actually exercise, and not to those that would enable them to pursue their conception of the good; or offered treatments that entail “expressive subordination”⁴ of their way of life. Neither of these alternatives is desirable.

Nonetheless, I do not believe these problems are endemic to all versions of the capability approach. Thus, unlike other commentators, my response is not to suggest that we abandon capabilities for resources,⁵ or abandon the extensive list of capabilities, which Nussbaum has championed, for a minimal, or ‘thin’, one.⁶ Instead,

² For simplicity I focus on Nussbaum throughout, but a similar criticism could be raised against any approach that understands capabilities as opportunities to perform valuable functionings.

³ Martha Nussbaum, *Sex and Social Justice* (Oxford: Oxford University Press, 1999), p.22

⁴ Martha Nussbaum, ‘Perfectionist Liberalism and Political Liberalism’, *Philosophy & Public Affairs* 39 (2011): 3-45, p.35

⁵ Ian Carter, ‘Is the Capability Approach Paternalist?’, *Economics and Philosophy* 30 (2014): 75-98

⁶ Rutger Claassen and Marcus Düwell, ‘The Foundations of Capability Theory: Comparing Nussbaum and Gewirth’, *Ethical Theory and Moral Practice* 16 (2013): 493-510; Ben Colburn, ‘Disadvantage, Autonomy, and the Continuity Test’, *Journal of Applied Philosophy* 31 (2014): 254-270

I argue that we should alter how capabilities are conceptualised: they should not be understood as opportunities to perform particular functionings, but as opportunities to exercise control in certain central domains of our life (§4). Individuals should not, then, simply have the opportunity to perform a 'valuable' functioning, or not. They should have the substantive freedom to form and pursue their own conception of the good, even when this involves functioning in ways that are widely considered disvaluable. By not specifying centrally important functionings but only *domains* of choice, this approach allows individuals to exert genuine control over central parts of their lives, regardless of the content of their choices. However, by identifying central domains, rather than simply valuing choice or autonomy *per se*, the approach does not slide into relativism.

2. Capabilities, Liberalism, and Perfectionism

Nussbaum's capability approach began as an Aristotelian project, committed to promoting a conception of human flourishing, and challenging culturally relativistic positions that suggested "no traditional practice ought to be changed"⁷. More recently, Nussbaum has embraced Rawlsian liberalism and political neutrality. As such, she is concerned to respect individuals' autonomy, and aims to avoid "being dictatorial about the good"⁸. Where certain functionings were once unapologetically defended as essential to a flourishing life, Nussbaum is now clear that her approach "does not rest on any single account of the good life"⁹.

Given Nussbaum's strident political liberalism, and her genuine concern to devise a theory of justice that includes groups that are frequently marginalised,¹⁰ criticising her approach for being perfectionist and exclusionary may seem misplaced. Certainly I am not suggesting that Nussbaum means to adopt a view of capabilities that excludes those whose conceptions of the good life are deemed defective or inferior.¹¹ However, I will argue that Nussbaum's reliance on the importance of certain functionings, and commitment to the capabilities *to perform these functionings*, threatens the neutrality and inclusivity of her approach. First, though, it is worth

⁷ Martha Nussbaum, 'Public Philosophy and International Feminism', *Ethics* 8 (1998): 762-796, p.768

⁸ Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, (Cambridge: Cambridge University Press, 2000), p.69

⁹ Eric Nelson, 'From Primary Goods to Capabilities: Distributive Justice and the Problem of Neutrality', *Political Theory* 36 (2008): 93-122, p.94

¹⁰ For example, disabled individuals and animals in *Frontiers of Justice*; and women and sexual minorities in *Sex and Social Justice*.

¹¹ See, for example, Nussbaum's 'Perfectionist Liberalism and Political Liberalism', for her defence of political, over perfectionist, liberalism.

outlining Nussbaum's account and the changes it has undergone, for those unfamiliar with the developments in her work.

2.1 Nussbaum's Capability Approach

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 performing them.¹² Nussbaum's approach was novel in her willingness to identify a single, and universally valuable, list of capabilities. Initially, Nussbaum suggested that the contents of this list should be identified by considering 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?".¹³ Her answer to this question included the need for food and drink, shelter, mobility, sexual satisfaction, practical reason, affiliation, and play.¹⁴

These central features, Nussbaum argued, cannot be identified independently of human experience, yet "the deepest examination of human history and human cognition *from within*...reveals a more or less *determinate* account of the human being"¹⁵. 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. Thus, broadly, Nussbaum argued that such internal consideration of human nature, tested through discussion with others, will lead to an overlapping consensus on those functionings we can agree to be necessary to a flourishing life or, at a lower threshold, a minimally human life.¹⁶ She then argues that individuals

¹² Given the wide application of the approach, it is worth clarifying that my focus is the capability approach to distributive justice, and by 'capability theorists' I mean those who adopt capabilities as the metric of distribution.

¹³ Nussbaum, 'Human Functioning and Social Justice', p.206

¹⁴ Nussbaum, 'Human Functioning and Social Justice', pp.217-220. The current complete list of central capabilities are, in brief, 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) (Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge MA: Harvard University Press, 2011), pp.33-34).

¹⁵ Nussbaum, 'Human Functioning and Social Justice', p.207 (latter emphasis mine)

¹⁶ These thresholds roughly align with what citizens are entitled to from their government (the higher threshold), and what *all* humans are entitled to (the lower threshold) (e.g. Nussbaum, *Women and Human Development*, p.12; p.75; p.212). On some interpretations of Nussbaum's approach to capability identification, although she believes proceduralist, informed-desire accounts will *coincide* with her substantive good approach, such proceduralism does no serious justificatory work (Alison Jaggar, 'Reasoning About Well-Being: Nussbaum's Methods of Justifying the Capabilities', *The Journal of Political Philosophy* 14 (2006): 301-22, pp.309-320). If this is true, Nussbaum's approach is even more vulnerable to the charge of perfectionism. Thus, focussing on the overlapping consensus methodology is a more charitable interpretation.

should have the capabilities to perform these valuable functionings: “capability to function, not actual functioning, should be the goal of legislation and public planning”¹⁷.

This original, more explicitly perfectionist and Aristotelian formulation of 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, which she should avoid.¹⁸ Conversely, it was objected that if she was committed to a substantive view of flourishing she ought to be concerned with the functionings individuals actually performed, and so whether they *were* flourishing, not whether they had the capability to. Thus, that she should adopt, instead, a ‘functionings approach’.¹⁹

Nussbaum has moved in the direction suggested by the former line of criticism, and now emphasises how focussing on capabilities allows her to avoid imposing 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”²⁰. It would, Nussbaum argues, be “inappropriate for any particular comprehensive conception of ethical value to be endorsed by politics”²¹. 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”²², she only requires agreement on the answer for political purposes.

2.2 Nussbaum’s Central Capabilities: Opportunities to Flourish

Nussbaum is clear, then, that in the political realm we should not endorse or enforce a comprehensive conception of the good, but “allow...people plenty of liberty to

¹⁷ Nussbaum, ‘Human Functioning and Social Justice’, p.221

¹⁸ For example: Nelson, ‘From Primary Goods to Capabilities’; Carter, ‘Is the Capability Approach Paternalist?’; Séverine Deneulin, ‘Perfectionism, Paternalism and Liberalism in Sen and Nussbaum’s Capability Approach’, *Review of Political Economy* 14 (2002): 497-518; Rutger Claassen, ‘Capability Paternalism’, *Economics and Philosophy* 30 (2014): 57-73; Jaggard, ‘Reasoning About Well-Being’.

¹⁹ For example: Henry Richardson, ‘Some Limitations of Nussbaum’s Capabilities’, *Quinnipiac Law Review* 19 (2000): 309-332; Richard Arneson, ‘Perfectionism and Politics’, *Ethics* 111 (2000): 37-63; Marc Fleurbaey, ‘Capabilities, Functionings and Refined Functionings’, *Journal of Human Development* 7 (2006): 299-310; G.A. Cohen, ‘Equality of What? On Welfare, Goods, and Capabilities’, in: Martha Nussbaum and Amartya Sen (eds.), *Quality of Life* (Oxford: Oxford University Press, 1993): 9-29.

²⁰ Nussbaum, *Creating Capabilities*, p.90

²¹ Martha Nussbaum, ‘Aristotle, Politics and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan’, *Ethics* 111 (2000): 102-140, p.124

²² Nussbaum, *Creating Capabilities*, p.28

pursue their own conceptions of value”²³. Nonetheless, she retains a commitment to the value of certain functionings, which she considers “of central importance in any human life, whatever else the person pursues or chooses”²⁴. This may seem insignificant, as long as she promotes the *capability* to perform these functionings, rather than the functionings themselves. Yet I will argue that conceptualising capabilities as the ability to achieve certain valuable functionings will prove problematic, and threaten the neutrality and inclusivity of her approach. First, though, I will outline the textual evidence that supports this (relatively uncontroversial) interpretation of capabilities in Nussbaum’s approach.

Nussbaum’s perfectionist commitment to the value of certain functionings is suggested most clearly by her willingness to endorse paternalist policies in some instances. Whilst perfectionism and paternalism are, of course, distinct, paternalism (as interference with an individual for their own good, motivated by distrust of their ability to promote their own interests²⁵) is often grounded in a perfectionist understanding of the good life, which paternalism may be justified to achieve. First, then, Nussbaum is willing to sacrifice autonomy to ensure individuals actually function. She notes 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”²⁶. The functionings she considers sufficiently important to warrant being promoted directly are health, affiliation, dignity, and practical reason. For example, she notes that “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”²⁷. The value of this functioning is used to justify health and safety policies, and laws prohibiting risky activities, such as drug use.

Second, Nussbaum’s concern for functionings is apparent in her reluctance to allow individuals to give up the capability to perform certain functionings in the future, and protection of “crucial areas of empowerment”, even if the protected individuals do not recognise their value.²⁸ Nussbaum expresses concern for cases in which “adults,

²³ Nussbaum, *Women and Human Development*, p.55

²⁴ Nussbaum, *Women and Human Development*, p.74

²⁵ For example: Gerald Dworkin, ‘Defining Paternalism’, in: Christian Coons and Michael Weber (eds.), *Paternalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013): 25-38; Seana Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, *Philosophy & Public Affairs* 29 (2000): 205-250; Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), pp.73-107.

²⁶ Nussbaum, *Women and Human Development*, p.91

²⁷ Nussbaum, *Women and Human Development*, p.91

²⁸ Martha Nussbaum, ‘On Hearing Women’s Voices: A Reply to Susan Okin’, *Philosophy & Public Affairs* 32 (2004): 193-205, p.199

apparently without coercion, want to sign away a major capability in a permanent way”²⁹, and argues that we will ‘frequently’ consider interference justified to protect the capability. The practices she would prohibit on this basis include: voluntary enslavement, drug use, suicide, and female genital cutting (FGC). 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”³⁰. Thus, it seems clear that both capabilities and functionings are important. As Nussbaum puts it, “freedom has intrinsic value...[but t]he capabilities would be pointless and idle if they were never used”³¹. Further, the significance of the central functionings is suggested by Nussbaum’s assumption that people will come to value *functionings* (such as literacy or free speech) once they have experience of them.³²

In response to all these points, it may be objected that such examples are intended as illustrative rather than definitive of Nussbaum’s approach and, as such, it is unfair to focus criticisms on this element of her work. Yet I would contend, first, that 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. Second, I would emphasise that I do not criticise her for these specific policies (though, indeed, I would not endorse them), but for the commitments underlying them: the value of certain functionings. Even if Nussbaum were to jettison her paternalist policies, her approach would remain perfectionist for as long as the list of central capabilities is taken to represent opportunities to perform those functionings essential to a good life. Ultimately the important point is not whether she sometimes endorses forcing individuals to function or to maintain their capabilities, but whether she conceptualises capabilities as the ability to perform valuable functionings.

Finally, a similar interpretation of Nussbaum is adopted by other commentators. Ian Carter, for example, presents three possible readings of Nussbaum, which he considers paternalist to different degrees. Even on his third, least paternalist, interpretation, functionings remain of central importance:

What matters...is that people enjoy certain specific capabilities, not that they enjoy capability *as such*, and in order to identify such specific

²⁹ Nussbaum, *Women and Human Development*, p.93

³⁰ Nussbaum, *Women and Human Development*, p.87

³¹ Nussbaum, *Creating Capabilities*, p.25

³² For example: Nussbaum, ‘On Hearing Women’s Voices’, p.199; Nussbaum, *Women and Human Development*, p.87; pp.152-54.

capabilities we shall still need to refer to a list of *independently specified functionings*.³³

Rutger Claassen and Marcus Düwell have also raised concerns regarding Nussbaum's "very expansive list of capabilities"³⁴. Their scepticism concerns whether her Aristotelian methodology justifies her normative conclusions, but the important point for my purposes is that they understand the capabilities as opportunities to perform the *functionings* essential to a human life.³⁵

I do not suggest that Nussbaum is disingenuous about her concern for capabilities, nor that she is really concerned to promote functionings (despite occasional anomalous policy proposals). My objections to her theory depend only on her attaching some value to specific functionings, identifying central capabilities on the basis of the value of these functionings, and conceptualising capabilities as opportunities to perform (or not) these particular functionings. I will not defend this interpretation further here, but will now consider its implications.

3. Inclusivity, Universalism, and Choice

The plausibility of Nussbaum's approach depends on individuals sharing a view of the opportunities necessary for a dignified human life. How will she respond, then, to cases, in which some do not choose, do not value, or cannot perform, a central functioning? In particular, to those who consider their lives fully dignified, though they lack the capability to perform a functioning Nussbaum considers central. In the face of such disagreement, one response is to remove the offending capabilities from the list, though this may be unsatisfactory if they are essential to other lives. Alternatively, Nussbaum may insist on the value of the capability to perform these functionings, despite the views of those unable to do so. It is a *capability*, after all, so no one will be compelled to function. However, this response will also prove unsatisfactory. First, providing the capability to perform a specific function will mean that those who wish to perform other forms of functioning will not be entitled to state assistance. Second, the justification of these capabilities – on the basis of agreement on the value of the underlying functioning – will entail the expressive subordination of those who cannot perform, and do not value, this functioning. It is

³³ Carter, 'Is the Capability Approach Paternalist?', p.91 (latter emphasis mine)

³⁴ Claassen and Düwell, 'The Foundations of Capability Theory', p.506

³⁵ They propose that we should, instead, follow Gewirth in protecting only those capabilities essential for 'agency'. Serena Olsaretti ('Endorsement and Freedom in Amartya Sen's Capability Approach', *Economics and Philosophy* 21 (2005): 89-108, p.94) also assumes all capability approaches *must* specify particular valuable functionings.

for this reason I argue capabilities should be conceptualised instead as the ability to *control* certain domains of our life.

3.1 *Failing to Choose or Value Functionings*

Before considering cases that threaten the neutrality of Nussbaum's approach, I will consider those cases that she *is* able to handle, and thus also show how my approach differs from other superficially similar critiques. First, then, are cases in which individuals choose not to perform a central functioning, either occasionally (for example, fasting), or more permanently (for example, celibacy). Nussbaum insists her approach "says nothing against" such decisions.³⁶ This is true of the examples on which she focuses in which functionings are necessarily or contingently in conflict, and someone chooses not to perform one functioning *for the sake of another*. For example, for a celibate monk, a failure to function in one way (sexual satisfaction) may be necessary for another functioning he values more highly (spiritual fulfilment). Functionings which are not inherently incompatible may also conflict in particular circumstances. For example, in Scanlon's case of someone who prefers help building a temple to being decently fed, a conflict arises between religious functioning and nourishment.³⁷ Nussbaum values both, and may consider it permissible to sacrifice one for the other in such circumstances (though she would insist that justice requires that the individual be enabled to achieve both).

More troubling are cases in which someone chooses to give up a central for a non-central functioning, 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. It is not clear that Nussbaum would have 'nothing to say' against these choices and, as §2.2 considered, is willing to advocate policies that disincentivise, or even prohibit, such choices. Yet these cases are not deeply problematic for her theory: though the individuals *prefer* a non-central functioning, they may still value the central functionings. Presumably, if nourishment and health could be achieved alongside thinness and drug-use the above individuals would prefer this. Thus, whilst such cases seem to goad Nussbaum into paternalist policies, they do not threaten the possibility of an overlapping consensus on the central capabilities.

Other commentators have argued that individuals who *will* threaten this overlapping consensus are those that do not value the central capabilities. Eric Nelson, for

³⁶ Nussbaum, *Women and Human Development*, p.87

³⁷ T.M. Scanlon, 'Preference and Urgency', *Journal of Philosophy* 72 (1975): 655-669, pp.659-660

example, argues that the following cases would be “excluded from...[Nussbaum’s] ‘overlapping consensus’”:

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).³⁸

In a similar vein, Claassen and Düwell give the example of a ‘Humourless Warrior’:

Apart from other normal human features, two things are peculiar about him: he utterly lacks the capacity for humour...He is also aggressive...[and is] predisposed to using physical force against others.³⁹

Claassen and Düwell’s concern is twofold: Nussbaum does not explain why the Warrior does not get his capability for aggression protected and enabled as a matter of justice, like the central capabilities; and nor does she explain why the Warrior must fund others’ capabilities for humour and play, given that he considers these functionings valueless. Nelson also shares this second concern, noting that even those who consider sex to be sinful may be “required to fund somebody else’s Viagra”⁴⁰.

It should be noted first, that Nelson somewhat mischaracterises the nature of Nussbaum’s overlapping consensus – as an agreement on what “we all want an *entitlement* to”⁴¹. Nussbaum, in fact, seeks agreement on the functionings essential to a dignified life. Having established the centrality of these functionings for a dignified human life, she *then* argues that everyone should be entitled to the opportunity to perform them. A libertarian, for example, may agree that humans need to be nourished, and so can be part of the overlapping consensus on the importance of this functioning for a dignified life, even if they do not consider individuals to be entitled to the capability for nourishment. Similarly, if Nelson’s Christian Scientists agree on the importance of health, the fact that they disapprove of blood transfusions would not lead to their exclusion.

Second, even those who do not value a particular functioning *may* appreciate its significance in others’ lives. Descartes, Hobbes, and the Humourless Warrior may not

³⁸ Nelson, ‘From Primary Goods to Capabilities’, p.99

³⁹ Claassen and Düwell, ‘The Foundations of Capability Theory’, pp.496-497

⁴⁰ Nelson, ‘From Primary Goods to Capabilities’, p.100

⁴¹ Nelson, ‘From Primary Goods to Capabilities’, p.103

much like laughter, but may nonetheless be willing to acknowledge its value in other human lives, and so agree it deserves a place on the list of central capabilities (though they may never use it). There is a plurality of reasonable conceptions of the good, and we can agree that it is important to enable others to pursue their goals, even when we do not share them. If we accept our fellow citizens are free and equal, and possess the two moral powers, we should not attempt to police the use they make of their capabilities, or resent funding activities we do not value (as §4.2 will argue).

For this case to threaten Nussbaum's approach, then, it is not enough to say that Descartes, Hobbes, and the Warrior do not value this capability in their own life, we must also show that they do not think it could be essential to any reasonable conception of the good. This goes beyond the cases as Nelson and Claassen and Düwell describe them. However, let us assume that, in at least some cases, this is psychologically plausible, and would not render these individuals unreasonable, in Rawls's sense, such that they would be legitimately excluded from a political liberal overlapping consensus. If this were possible, these cases *would* threaten the possibility of consensus on the capabilities as Nussbaum describes them, though I argue that they can be accommodated by my own approach (§4.1).

3.2 Asexuality, ASC, and Exclusion

In most of these cases, then, Nussbaum can formulate a plausible response. However, some individuals do not merely choose not to perform a functioning, but may be incapable of performing it. Many such individuals consider their lives to be fully flourishing nonetheless, and so would dispute the inclusion of the opportunity to perform this supposedly necessary functioning on the list of central capabilities: it cannot be an essential component of a decent human life if they can live one without it. I will consider asexual individuals, and those with Autistic Spectrum Conditions (ASC), to demonstrate how Nussbaum's list of capabilities (*when conceptualised as opportunities to function*) can be exclusionary. Both, I will argue, are cases in which an individual cannot perform a central functioning, and yet claim to have a flourishing life in their absence. Thus, they could never be part of a consensus on the centrality of these functionings.

First, then, I will consider asexuality. Nussbaum includes "having opportunities for sexual satisfaction" as part of the capability for bodily integrity.⁴² This implies a bias

⁴² Nussbaum, *Women and Human Development*, p.78. One solution for Nussbaum, here, might be to remove this functioning from the specification of the capability for bodily integrity. Yet this would be

in favour of active forms of sexual expression: sexual *satisfaction* is important to human life, so we ought to have the opportunity to achieve it. Yet asexual individuals lack all sexual desire, and so do not value sexual satisfaction.⁴³ Indeed, in at least some cases, it seems they will be *incapable* of sexual satisfaction. Asexual individuals are, typically, physically capable of performing sexual acts, but their complete lack of desire means they cannot be said to derive sexual satisfaction from them. This functioning requires *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 be the subject of an overlapping consensus. Thus, though an asexual individual may choose (voluntarily) to perform a sex act to achieve some other end, such as the satisfaction of another's sexual or emotional needs, they cannot choose to perform the *functioning*, since they have failed to achieve what is uniquely valuable about it – a satisfying sexual experience.

Second, some individuals with ASC are seemingly unable to perform at least some elements of the supposedly central functionings of affiliation, and forming emotional attachments. Consider Nussbaum's description of the former capability, which requires being able "to recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another"⁴⁴. This seems incompatible with the experiences of many individuals with ASC, who have difficulty with social interaction, communication, and expressions of empathy. Yet, as the thriving 'neurodiversity' movement make clear, many individuals with ASC do not consider themselves worse off as a result: "They do not want to be cured. They want to be understood"⁴⁵. Similarly, asexual individuals are rightly offended by those who consider their sexual orientation a pathology that requires therapy or hormone treatment to 'fix' it. As one asexual person comments, "there's nothing to fix because we're not broken"⁴⁶.

If Nussbaum relies on an overlapping consensus to identify her list of central capabilities, then deep disagreement on the centrality of one of them raises a dilemma: either she must remove the capability for the disputed functioning from

unsatisfactory since it *is* central to many human lives, and in those cases *should* be enabled as a matter of justice.

⁴³ See, for example, *AVEN (Asexuality Visibility and Education Network)* (www.asexuality.org); *Asexuality Archive* (www.asexualityarchive.com).

⁴⁴ Nussbaum, *Creating Capabilities*, p.34

⁴⁵ Mike Stanton, 'What is Neurodiversity?', *Action for Autism* (2006). Available at: <http://mikestanton.wordpress.com/my-autism-pages/what-is-neurodiversity/>. Accessed: 17 July 2014

⁴⁶ Anon., 'Asexuality: Myths, Misconceptions and Other Things That Are Just Plain Wrong', *Asexuality Archive* (2012). Available at: <http://www.asexualityarchive.com/asexuality-misconceptions-and-mistakes/>. Accessed: 18 July 2014

her list, or remove the dissenting individuals from the group who forms the overlapping consensus. Nussbaum does not claim that her list is the subject of a current consensus, but that it can be the subject of a potential future one, once individuals have experienced the functionings she considers central.⁴⁷ Thus, the point is not that some people currently dispute her list (she may, perhaps, brush aside the celibate, the misanthrope, and the warrior on this basis), but that for as long as people are asexual, or have ASC, and see their condition as part of a flourishing life rather than an obstacle to one, then there can *never* be a consensus on her list. We are not asking individuals to agree that activities that they do not much value or enjoy are essential to others' reasonable conceptions of the good. Rather, we are asking individuals to agree that the ability to perform a functioning of which they are incapable is essential to any dignified life.

My concern, here, is not that of Arneson who 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”⁴⁸. He continues: “[j]ustice according to the capability approach obligates society to ‘help’ [people] in ways that do [them] no good by [their] own lights”⁴⁹. The ‘ultimate ethical concern’ of capability theorists is *not* straightforwardly individual quality of life: if it were, they would be welfarists.⁵⁰ Rather (on Nussbaum’s version at least) the goal is to ensure that individuals have the substantive opportunity to perform those functionings necessary to a dignified human life. Not all individuals will value these opportunities, and having these opportunities will not necessarily increase their welfare, but capability theorists would argue that they are entitled to them nonetheless. For example, capability theorists would consider it unjust to deny someone the capability to vote, even if they do not value, or wish to exercise, it.

Yet in the case of asexual and autistic individuals, the capabilities do not just ‘do them no good’. It is central to the concept of capabilities that they are not merely the absence of interference, but provide individuals with ‘real’ or ‘substantial’

⁴⁷ “[T]he preference for the central human capabilities is not merely habitual or adaptive, but has much more the unidirectional structure of preferences formed by learning” (Nussbaum 2000a, 152).

⁴⁸ Arneson, ‘Perfectionism and Politics’, p.60

⁴⁹ Arneson, ‘Perfectionism and Politics’, p.61

⁵⁰ It might be objected here that on some versions of the capability approach (notably Sen’s) the ultimate concern *is* quality of life. However, this is not Nussbaum’s focus, and nor should it be the focus of any capability theorist who wishes their approach to remain distinct from welfarism (and, as I have argued elsewhere, the capability approach to distributive justice need not and should not collapse into welfarism (Jessica Begon, ‘Athletic Policy, Passive Well-Being: Defending Freedom in the Capability Approach’, *Economics and Philosophy* 32 (2016): 51-73)).

freedoms,⁵¹ and we cannot be provided with the substantive opportunity to do something of which we are incapable. A celibate monk can be provided with the opportunity for sexual satisfaction – no laws or social stigma prevent his performing this functioning, and he understands the nature of the opportunity – though he chooses not to exercise it (and, for him, this choice is valuable and significant). Yet as long as an individual is asexual, they cannot achieve the functioning of sexual satisfaction, and so cannot have this capability. The same point applies to those with ASC who may struggle to form emotional attachments, engage in social interaction, or imagine the situation of another. Why should it be a requirement of justice, and a necessary constituent of dignity, that we have an opportunity for a functioning that is unachievable?

3.3 Cures, Justification, and Neutrality

One response may be that such individuals *can* be provided with these capabilities if we were to make ‘cures’ available. Whilst these are not always possible, we could imagine a situation in which there were treatments available such that asexual and autistic individuals could be enabled to have the full range of functionings. If such cures existed then we may think these individuals can possess the capability: they are able to function if they choose to undergo the cure. Indeed, Nussbaum’s discussion of disability in *Frontiers of Justice* suggests she may endorse such a response. She is rightly critical of the role that social institutions and biases play in causing various impairments to be disabling, and insists that nearly all individuals can perform the central functionings “if only public spaces could be adequately designed to support them”⁵². However, when institutional change is insufficient to provide individuals with the capabilities, she argues “we could cure [a] condition...because it is good, indeed important, for a human being to be able to function in these ways”⁵³.

The problem with this approach is not that treatments are offered, but the basis of their justification. Many autistic and asexual individuals would find the suggestion

⁵¹ For example: Nussbaum, *Creating Capabilities*, p.21; Amartya Sen, *The Idea of Justice* (London: Penguin, 2009), p.231; Ingrid Robeyns, ‘The Capability Approach’, in: Edward Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2011). Available at: <http://plato.stanford.edu/archives/sum2011/entries/capability-approach/>. Accessed: 21 August 2014).

⁵² Martha Nussbaum, *Frontiers of Justice*. (Cambridge, MA: Harvard University Press, 2006), p.189

⁵³ Nussbaum, *Frontiers of Justice*, p.193. Nussbaum is discussing, here, Eva Kittay’s daughter Sesha, who is “‘severely-profoundly’ mentally retarded” (Eva Feder Kittay, ‘At the Margins of Moral Personhood’, *Ethics* 116 (2005): 100-131, p.127). She remains undecided on whether the view would also entail “engineering away” Down’s syndrome, or Asperger’s, or blindness and deafness, and refuses to “speak clearly against” this possibility (Nussbaum, *Frontiers of Justice*, p.193).

that their life is lacking something ‘good and important’, and that a cure is an appropriate response to their condition, deeply offensive. However, many others may welcome such a cure. Given this heterogeneity it may seem that making a cure available, but not forcing anyone to undergo it, is the right approach: everyone has the capability to function, and they can choose whether they make use of it. Yet a problem arises if the justification for the provision is that performing the functioning is good and important, and, indeed, necessary to a dignified life. The fact that people are allowed to live an undignified life does not side-step the insult. The objection, then, is not that a cure is offered, but that a cure is thought *necessary*: individuals need the opportunity to be rid of their condition in order to lead a dignified human life.⁵⁴

It seems Nussbaum herself would object to such justifications, which, in her terminology, would constitute ‘expressive subordination’: “subordination that consists in being publically ranked beneath others”⁵⁵. Consider, for example, two justifications that we could offer to a reasonable atheist for the provision of the capability for religious expression. One states that engaging in religious expression is a good and important human functioning, and the opportunity to engage in this functioning is essential to a dignified human life. The second acknowledges that this is a functioning that forms part of *some* reasonable conceptions of the good, and consequently that the opportunity to engage in it is one that individuals should be entitled to. Here, though, the opportunity is not justified on the basis of the universal value of the functioning.

If capabilities are understood as opportunities to perform particular valuable functionings, then the former justification is offered. The latter justification is more compatible with liberal neutrality, since it avoids grounding its justification for cures and treatments in the importance of particular functionings, and will be offered when capabilities are understood as domains of control, as I suggest they should be. We may value such control, 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

⁵⁴ The idea that such functionings are essential to a human life, and that those who cannot perform them are consequently less than human is, sadly, not uncommon. For example, a survey of attitudes towards asexuality concluded that “sexual desire is considered a key component of human nature and those lacking it are viewed as relatively deficient, less human and disliked” (Hodson and McInnis in Dominique Mosbergen, ‘Battling Asexual Discrimination, Sexual Violence and ‘Corrective’ Rape’, *The Huffington Post*. Available at: http://www.huffingtonpost.com/2013/06/20/asexual-discrimination_n_3380551.html?1371733068. Accessed: 22 July 2014). Further, as one asexual person notes, “[w]e are perceived as not being fully human because sexual attraction and sexual relationships are seen as something alive, healthy people do” (Decker in Mosbergen, ‘Battling Asexual Discrimination’).

⁵⁵ Nussbaum, ‘Perfectionist Liberalism and Political Liberalism’, p.35

may be essential to their flourishing, though the functioning of sexual satisfaction is not. Further, I will argue that this approach is better able to be the subject of an overlapping consensus amongst those who cannot perform, or do not value, supposedly central functionings, and provides a wider range of opportunities, such that all individuals are given opportunities they can reasonably possess and value.

4. Modifying the Capability Approach

In providing this modification of Nussbaum's approach, I aim to demonstrate that developing a theory of distributive justice that is inclusive of individuals with atypical preferences, needs, or values will not require either culling the list of capabilities, or abandoning the capability approach in favour of resourcism or welfarism. Rather, we should simply change how capabilities are conceptualised: not as opportunities to perform specific valuable functionings, but as opportunities to exercise control over certain central domains of our life. I will conclude by considering some potential objections to this approach.

4.1 Capabilities to Control

Given that my focus is on how capabilities should be conceptualised, I will not critique the basic methodology of identifying the central features of a dignified human life through internal consideration and interpersonal discussion, which can result in an overlapping consensus amongst individuals with otherwise diverse conceptions of the good. What I question is what it is we should to come to a consensus *on*. We should not ask 'which *functionings* are essential to a dignified human life?', but 'which *domains* ought people have control over if they are to lead a dignified human life?'. In other words, rather than providing specific opportunities, we enable individuals to form and pursue their own conception of the good in specific parts of their lives.

What difference would this change in the overlapping consensus make? It would mean that our reason to include capabilities – for example, 'the opportunity to be nourished' – would not be due to agreement on the importance of a functioning (being nourished) but due to the importance of this domain (choosing how, or if, we are nourished). This will make the overlapping consensus more inclusive of those with different conceptions of the good, as well as altering the structure of the resulting capabilities. Capabilities would no longer be the chance to perform (or not) a particular functioning, but the substantive opportunity to function in whatever way we 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, or to choose not to achieve it. It would be the opportunity to control our bodily health, and have the substantive power to determine and achieve the functionings we prefer (even if they are not widely considered 'healthy').

By asking individuals to agree on central domains of control, then, we can derive a specific list of capabilities without a specific conception of a flourishing life. As well as avoiding the insulting justifications for capability provision discussed above, this approach is better able to include individuals who do not value central functionings in the overlapping consensus, and enables them to function in non-standard ways.

First, individuals with different preferences can agree on the value of having choice and control, without needing to agree on what it is best to choose. For example, by focussing on 'control of, or choice in, matters of sexual expression' – rather than Nussbaum's 'opportunities for sexual satisfaction' – a religious conservative, a free-love hippy, and even Nelson's celibate, could all agree that this is important. This is true, too, of Hobbes, Descartes, and the Humourless Warrior, discussed in §3.1, who do not see any value in the capacity for laughter and play, but can agree on the importance of controlling this part of our life. In all such cases, these groups would, of course, have radically different views 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 these domains of our life.⁵⁶

More importantly, even those who cannot have a capability of Nussbaum's sort – because they cannot perform a functioning – may possess, and value, such control. For example, asexual individuals cannot possess the capability for sexual satisfaction (as long as they are asexual), and may resent the offer of therapies designed to allow this experience. They can, however, exercise, and value, the capability to control their sexuality and sexual life: this is exactly what asexuality advocacy groups, such as AVEN, campaign for. This may, for example, involve education programmes to allow for the wider recognition of asexuality as a sexual orientation. Similarly, individuals with ASC, who cannot form emotional attachments or engage in social interactions in the way that Nussbaum describes, can still value having control over this area of their life. Indeed, the existence of the neurodiversity movement suggests that many with ASC do strongly value such control, and wish to have their needs in this domain accommodated, rather than being enabled to function in a neurotypical way.

⁵⁶ 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 (§4.2)) and not the proper use that should be made of this control.

Yet it might be objected that even if a range of options is provided, the definition of domains of control, and the justification of their inclusion in the list of central capabilities, must still involve some reference to functionings, and thus leave the approach vulnerable to the criticisms I raise for Nussbaum. It is true that we can only pick out the important domains of control by reference to the valuable functionings that individuals may pursue in this domain. For example, control over sexual expression matters because the various functionings achievements that this expression could entail matter. However, the domains do not need to be defined simply as a list of functionings, which have been predetermined to be important. Just as Nussbaum emphasises that the list of capabilities is “open-ended and humble”, and open to revision,⁵⁷ so the same can be said of the *contents* of the domains of control. What these domains entail should be determined in consultation with those with a variety of experiences, preferences, needs, and abilities, and should be revised as necessary to include further functioning experiences within the domain that can be shown to be valuable. Further, the very inclusion of a multiplicity of functioning achievements within the domain avoids the central, and problematic, assumption underlying capabilities to function: that *specific functionings* are taken to be valuable, or even necessary, to any human life.

An example may illustrate this point. Consider deaf and/or blind individuals, who arguably lack Nussbaum’s capability to ‘use the senses’, since they cannot achieve the functioning of hearing and/or sight.⁵⁸ These individuals can, nonetheless, possess and value control over their sensory experience, and the ability to achieve other sensory functionings (some of which may be shared by hearing and sighted individuals, and some which may not). Allowing for a range of goals in this domain would mean that we would not *just* focus on, for example, the provision of cochlear implants, and so making available the ability to perform the functioning identified as valuable (hearing). Instead, individuals would be entitled to the resources they need to have the sensory experience they want, as well as control over their ability to function in other domains, which may be restricted if accommodation for their impairment is limited. For example, education in an appropriate medium, translators and guides, Braille books and keyboards, audible and visible traffic signals, and so on. There need be no suggestion that the ability and opportunity to perform specific functionings (hearing, seeing), and *only* these functionings, are important or essential to a decent life.

⁵⁷ Nussbaum, *Women and Human Development*, p.77.

⁵⁸ For further discussion of this case see Elizabeth Barnes, ‘Disability and Adaptive Preference’, *Philosophical Perspectives* 23 (2009): 1-22; Jessica Begon, ‘What are Adaptive Preferences? Exclusion and Disability in the Capability Approach’, *Journal of Applied Philosophy* 32 (2015): 241-257.

A further worry, here, might be that control seems to require that individuals have a range of options to choose from, and that in at least some of the above cases individuals' impairments may seem to restrict their option sets. In response, it should be emphasised that few impairments leave individuals with only one functioning option in a domain. Whilst it is true that asexual individuals cannot achieve sexual satisfaction, this does not imply that there is only one form of sexual expression open to them. Indeed, the asexual community is a diverse one, in which some choose to engage in various forms of sexual relationships (although they themselves cannot experience sexual desire or satisfaction), some engage in romantic but non-sexual relationships (and may identify as hetero-, homo-, or bi-romantic), and some engage in neither sexual nor romantic relationships. The diversity of potential functioning achievements is even more apparent amongst ASC individuals, as their very emphasis on neuro*diversity* makes clear. Further, it is worth noting that all individuals will be unable to perform some functionings, and so lack certain experiences: non-asexual individuals do not know what it is like to live without sexual desire, neurotypical individuals have not experienced living with ASC.

Thus, individuals who are unable to exercise the central functionings, and instead pursue non-standard functioning achievements, will still have a range of options available to them. They are able to form their own conception of what constitutes valuable functioning within a domain, and choose to pursue this. In none of the cases I discuss, then, do we have reason to think that individuals are rendered unable to exercise control over a central part of their life simply because they cannot perform, or do not value, one of Nussbaum's central functionings.⁵⁹

There are, then, two benefits to my version of the capability approach, which should be distinguished. First, it allows individuals to be included in the consensus on the central capabilities without having to acknowledge the value of a functioning they cannot perform, and which they lead a dignified life without. This means that when cures and treatments are offered they are not justified on the basis that they are necessary because a life lacks something 'good and important' unless we can perform this functioning.⁶⁰ Rather, they are offered because the functioning is one valuable

⁵⁹ It may, of course, be possible to artificially limit someone's choices, such that they only have one option in a domain but, as I have argued elsewhere (Begon, 'Athletic Policy, Passive Well-Being'), this is impermissible.

⁶⁰ It is preferable to refer to 'treatments' rather than 'cures' (*contra* Nussbaum (fn.53)) to encapsulate the fact that a treatment need not eliminate an impairment, and to avoid the insulting implication that an individual would be objectively better-off if they chose this option.

option amongst many, that may be essential to *some* reasonable conceptions of the good.

This then leads to the second benefit: those with non-standard preferences and functioning capabilities are not simply provided with the opportunity to be ‘normal’ – the capability to perform the functioning deemed valuable. Instead, they are provided with the less specific freedom to determine, and pursue, their own goals within a specific domain. This may include the availability of treatments, but this is not *all* that would be offered (as the above examples demonstrate). Providing individuals with control, without predetermining the proper use they should make of this control, better captures the capability approach’s central concern to ensure that everyone has space to form and pursue their own conception of the good. If we are to respect autonomy, and treat individuals as the origin of ends, we must allow them to *control* their bodily health, their sexual satisfaction, their emotional attachments, and so on, and to choose the ends that *they* wish to pursue in these domains.

Whilst I have focussed on arguing that providing individuals with such capabilities for control constitutes an improvement on existing versions of the capability approach, it is worth noting that the same may also be true of resourcist or primary goods approaches.⁶¹ Valuable resources or primary goods are usually identified on the basis of particular valuable functionings they enable. Indeed, it is unclear how we could determine the value of resources but by the extent to which they allow individuals to promote their ends. Resourcists, then, tend to determine individuals’ distributive entitlements on the basis of what they need in order to have the “ability to promote *typical or standard human ends*”⁶².

Thus, just as standard versions of the capability approach only enable individuals to perform specific valuable functionings, so primary goods approaches only enable individuals to perform specific valuable ends. As such, it will exclude those whose ends are atypical. Indeed, resourcism may seem even more vulnerable to objections deriving from human diversity when we consider the oft-rehearsed worry that it focuses on ‘means’ rather than ‘ends’, and so fails to take into account differences in individuals’ conversion capacities (ability to convert resources into functionings).⁶³

⁶¹ I will not enter into the details of the resourcism/capability approach debate here. For an overview, see Harry Brighouse and Ingrid Robeyns (eds.), *Measuring Justice: Primary Goods and Capabilities*. (Cambridge: Cambridge University Press, 2010).

⁶² Thomas Pogge, ‘Can the Capability Approach Be Justified?’, *Philosophical Topics* 30 (2002), p.34.

⁶³ For example, Elizabeth Anderson, ‘Justifying the Capabilities Approach to Justice’, in: Brighouse and Robeyns (eds.), *Measuring Justice*: 81-100; Amartya Sen, ‘Justice: Means versus Freedoms’, *Philosophy & Public Affairs* 19 (1990): 111-121; Amartya Sen, *Development as Freedom*, (Oxford: Oxford University Press, 1999), pp.35-53.

This means, both, that individuals are only entitled to the resources needed to pursue standard ends, and that they are only entitled to the *amount* of resources standardly needed to achieve these ends; and thus excludes both those with non-standard ends, and those who need more resources than the standard to pursue their goals.

In response, it might be suggested that resources are, in fact, much better placed to allow individuals to pursue whichever ends they choose than capabilities. For example, Ian Carter has argued that to treat a person as an end-in-themselves we must value their freedom *non-specifically*, in the sense that an individual's freedom should not depend on the content of their choice.⁶⁴ Liberal neutrality, he argues, would be best achieved if individuals were, as far as possible, given resources (cash) to pursue whichever capability they wish, rather than a specific capability (for example, via an operation to enable basic mobility).⁶⁵ He calls this promoting 'capability as such'.

However, it is central to the capability approach that individuals are entitled to specific capabilities (however identified), and not 'as many capabilities as possible', or 'whichever capabilities they would prefer'. I agree with Carter that more emphasis should be placed on "freedoms-to-dysfunction"⁶⁶ (though such normatively-loaded language is problematic), but this is not the same as 'freedoms-to-do-anything'. We should, then, be offered various healthcare options (not just an operation that allows us to function 'properly'), but this need not mean that we are entitled to equivalent cash with which to buy a Stradivarius or go to the Fun House.⁶⁷ It is for this reason that I argue that our focus should be on control in central domains, as opposed to merely capability or autonomy 'as such'. Yet, I have argued, this restriction of the domains in which government assistance is warranted need not exclude those who pursue atypical ends or value non-standard functionings. A focus on specific

⁶⁴ Carter ('Is the Capability Approach Paternalist?', pp.92-93) insists that capability theorists deny that freedom has content-independent value, though Pettit has argued for understanding freedom in the capability approach as content-independent (Philip Pettit, 'Capability and Freedom: A Defence of Sen', *Economics and Philosophy* 17 (2007): 1-20; a modification I accept (Begon, 'Athletic Policy, Passive Well-Being')).

⁶⁵ Carter, 'Is the Capability Approach Paternalist?', p.96. Whilst in this example individuals are given a single good (cash) rather than a range, insofar as primary goods are taken to be things that every rational person will want, whatever their goals, then Carter's focus on all-purpose-means seems compatible with the approaches of Rawls, and Rawlsians, such as Pogge.

⁶⁶ Carter, 'Is the Capability Approach Paternalist?', p.92

⁶⁷ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, (Cambridge, MA: Harvard University Press, 2000), p.61; Elizabeth Anderson, 'What is the Point of Equality?', *Ethics* 109: 287-337, p.332. Welfarists and some resourcists may dispute this, but therein lies the distinctiveness of the capability approach. I provide a more complete defence of this position elsewhere (Jessica Begon, (unpublished ms.), 'Needs, Desires, and Disadvantage: Determining Distributive Entitlements for Disabled Individuals').

capabilities, then, can be compatible with the provision of non-specific freedom if they are capabilities to control, not capabilities to function.

4.2 *Objections to the Modification*

To finish, I will consider some potential objections. These are, briefly, first, that I still make too many assumptions about what is valuable in human life, and so unjustifiably rule out some conceptions of the good. Second, that I make too *few* assumptions about what is valuable, and so will allow individuals to make deeply harmful decisions, and, indeed, promote and support such 'bad' functionings. Finally, that there is no significant difference between Nussbaum's view and my own.

First, then, although this approach makes fewer value assumptions than Nussbaum's, it may be objected that it 'writes-in' a commitment to autonomy, and forces choice on those who do not value it. For example, a religious conservative might agree that human sexuality is important, but vehemently disagree that our choices in this domain should be open, limited by nothing but a concern for the consent of, and potential harm to, others. They may object even more to being expected to fund others' choices in this domain.

In response, I can only say that a commitment to autonomy is a necessary feature of most liberal positions and, given that I am mounting an internal critique of Nussbaum, I will not attempt to defend liberalism to non-liberals. Insofar as the capability approach is understood as a liberal approach, then, the value of autonomy must be assumed. That this is incompatible with the values of illiberal and intolerant individuals should not necessarily concern us. First, though individuals are provided with the capacity to set and pursue their own ends in certain domains of their life, they are not forced to choose autonomy-centred goals. It is compatible with the approach to allow individuals to use the control they are provided to choose a way of life that makes little active use of this control.⁶⁸

If the concern is, instead, that individuals will resent allowing, and indeed enabling, others to have such control, then I would follow Nussbaum, who frequently notes

⁶⁸ We might worry that we would still express expressive subordination of those who chose a non-autonomous life. However, autonomy is important only as a means to the end of allowing individuals to pursue their own conception of the good. There need be no assumption that individuals should choose a life involving autonomy, or maintain their autonomy over time. Perfectionist liberals may object to this approach for just this reason (for example, Clare Chambers, *Sex, Culture, and Justice: The Limits of Choice*, (State College, PA: Pennsylvania State University Press, 2008), pp.159-202). However, liberal neutrality requires that choices are not limited, or ways of life deemed worse, on the basis of their content.

that it is self-subverting to tolerate the intolerant, or to defend “strongly nonrelativistic” local norms out of a commitment to relativism.⁶⁹ Further, political liberalism only requires that individuals be enabled to pursue their own conception of the good, not that they are enabled to force this conception on others (however much they would value the chance to do so). For this reason, 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”⁷⁰. Thus, individuals are allowed the opportunity to pursue their conception of the good in domains of their *own* life, but denied the opportunity to limit others’ freedoms, through act or omission. This is consistent with Nussbaum’s political liberalism, and I will not defend this commitment further here.

An alternative objection may be that rather than assuming too much, the approach assumes too little: by providing individuals with relatively abstract opportunities, and allowing them to function as they wish, the approach has no recourse against individuals making ‘bad’ choices. Further, it may support or even promote such choices. Nussbaum allows exceptions to her commitment to promoting capabilities (§2.2) out of concern that individuals may misuse them, and even give up their future capabilities. Claassen and Düwell are further concerned that Nussbaum’s capability approach may justify supporting ‘dark’ capabilities.⁷¹ In their discussion of the *Humourless Warrior*, they note that cruelty and aggression are actual human abilities, and that Nussbaum cannot successfully distinguish the abilities that exert a ‘moral claim’ to be protected and developed from those that do not. They argue that we should distinguish the morally required and permissible capabilities from the morally bad capabilities (such as cruelty and aggression). Then, within the former category, we should identify those that are “weighty enough” to “deserve political protection”, though they do not yet say “how and when” such judgements should be made.⁷²

In response, it should be pointed out, first, that the capability approach will not allow individuals to develop and exercise capabilities such that they inhibit the capabilities of others. A central concern for both Nussbaum and Sen is the separateness of persons, and they vehemently oppose utilitarian approaches that aggregate individual interests. We can assume, then, that any version of the capability approach will not allow someone to exercise their capabilities in such a way that it causes someone else to fall below the specified capability threshold of some other capability.

⁶⁹ Nussbaum, *Women and Human Development*, p.49

⁷⁰ Nelson, ‘From Primary Goods to Capabilities’, p.102

⁷¹ Claassen and Düwell, ‘The Foundations of Capability Theory’, pp.495-498

⁷² Claassen and Düwell, ‘The Foundations of Capability Theory’, p.497

Thus, the Warrior would not have his capacity for aggression enabled if this requires the provision of a stream of victims on which to exercise such aggression.

Leaving aside cases of harm to others, then, should we be concerned that this approach may promote 'unvirtuous' functionings? Should the Warrior be provided with outlets for his aggression? Should individuals be allowed to use their control over their health to undergo non-essential, and seemingly harmful, medical procedures, such as FGC or the voluntary removal of a healthy limb? I do not deny that my approach would allow for these conclusions, but I consider this a benefit of a liberal, anti-perfectionist, anti-paternalist approach, and a failure of Nussbaum's account that she does not reach these conclusions.⁷³ We may not like the Warrior, but that does not justify our preventing him exercising the capability for aggression on willing participants – for example, through sports such as boxing or martial arts, or on masochists.

Whether such functionings would be supported and 'politically protected' may depend on the function that aggression serves for the Warrior, and which domain of control it would fall under. It may be part of his capability for sexual satisfaction, and I would certainly support safe and consensual BDSM being protected by governments: for example, decriminalisation of these practices.⁷⁴ If this is part of his capability for play and recreation then, again, this may warrant some governmental support: for example, tax breaks for martial arts clubs. There seems unlikely to be a consensus on the centrality to a dignified human life of control over aggression for its own sake, so this is unlikely to be a domain of control in its own right.

I follow Nussbaum (and most theorists of justice) in acknowledging that we must distinguish between those goals and domains that are a concern of justice and those that are not. My objection to Nussbaum is that *within the domains that are a concern of justice*, she supports some conceptions of the good and not others. To point out, then, that my approach will support and protect various non-standard conceptions of the good is not to critique my approach but to state it (and one of its primary

⁷³ I am certainly not suggesting that FGC as it is currently practiced – forcibly, against young girls, in unsterile conditions – should be permitted. Rather, I contend that if the procedure *was* chosen voluntarily, by consenting adults, then political liberals should not interfere with this self-regarding decision. (Nussbaum attempts (unsuccessfully) to maintain that political liberalism is consistent with a ban on FGC (Nussbaum, *Sex and Social Justice*, pp.118-129). Clare Chambers sees the need for such a ban as one reason to abandon political liberalism (Chambers, *Sex, Culture, and Justice*, pp.159-202).)

⁷⁴ See, for example, David Archard, 'The Wrong of Rape', *The Philosophical Quarterly* 57 (2007): 374-393, p.378, for a discussion of the consequences of criminalising this practice. As with other sexual functionings it is unlikely to require much positive support, and if the Warrior cannot find a willing partner, the government would probably not be obliged to provide one. I will not, however, consider the details of how such capabilities should be operationalised as policy, here.

attractions). The aim of my approach is to ensure that we have substantive support not just to perform a functioning – for example, to be healthy – and the chance not to perform it. We should also have the substantive opportunity to be what is ‘unhealthy’ on many views: to live with ASC or deafness or blindness; to amputate a limb; to engage in sexual activities that leave bruises or scars, or engage in no sexual activity at all. Many may reject such strident liberalism, but a liberal is what Nussbaum sets out to be, and this is not achieved with mere capabilities to function. Where Nussbaum is unwilling to allow individuals to sacrifice their capability for health, I would argue for policies that support their ability to perform these supposedly unhealthy acts.

This brings us to the final objection, which is that despite such disagreements, my approach is no different from Nussbaum’s own. Whilst Nussbaum talks of capabilities to function perhaps she ultimately has in mind something more like the capability to control these parts of our life, as I suggest. Certainly I take my proposal to be consistent with the central commitments of Nussbaum’s approach, yet it is not clear that she could straightforwardly accept my modification. First, she would need to abandon the policies, which appear throughout her work, that promote functionings rather than capabilities, or protect the abilities to perform certain functionings. Thus, for example, she could not remain committed to a ban on voluntary FGC. Nor could she suggest that impairments such as ASC or Down’s syndrome should be cured, and that individuals with these conditions should be enabled, as a matter of justice, to function ‘normally’ (i.e. perform the central functionings). Second, she would need to abandon the language of valuable functionings, and of capabilities as the ability to perform these functionings. She would also need to abandon the idea that “an implicit theory of value” must be used to identify those preferences that should be included in the overlapping consensus.⁷⁵

Despite the prevalence of these commitments throughout her work, it may still be maintained that my understanding of capabilities can be seen as an interpretation of Nussbaum’s work rather than a modification of it. Whilst this does not seem plausible to me, I need not object: nothing hangs on whether the label of interpretation or modification is applied to my approach. What *does* matter is that the currently prevalent (indeed, near universal) interpretation of capabilities is as opportunities to perform valuable functionings, and that this interpretation leaves the capability approach vulnerable to the charge that it excludes those who cannot perform, or do not value, these functionings. Whether interpretation or modification,

⁷⁵ Martha Nussbaum, ‘Symposium on Amartya Sen’s philosophy: 5 Adaptive preferences and women’s options’, *Economics and Philosophy* 17 (2001): 67-88, p.74

capabilities should be understood as opportunities to exercise control, and redistributive policies designed with this in mind.

5. Conclusion

Individuals who cannot perform, or do not value, the functionings Nussbaum considers central undermine the possibility of an overlapping consensus on her list of capabilities, since this asks them to agree that performing a functioning of which they are incapable is necessary to a dignified life. Further, providing capabilities to function to these individuals involves the insulting offer of cures (so they can function 'normally'), and does not provide them with the substantive opportunity to pursue those functioning they do value, when these differ from the norm. Yet this should not lead us to abandon our focus on capabilities, or to sacrifice the more exotic or unusual capabilities, on which agreement may seem difficult. Instead, capabilities should be understood as opportunities to control certain domains of our life, remaining neutral regarding the proper use that should be made of such control. This includes those who cannot perform the 'normal' functionings in this domain, and provides them with something they can possess, and reasonably be expected to value: the substantive opportunity to form and pursue their own conception of the good, however much this deviates from what we think a normal human life should be like.

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