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Political Liberal or Comprehensive Capabilities?
A Critique of Nussbaum's Capabilities Approach

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Abstract

This project examines the capabilities approach as developed by Martha Nussbaum. Its question is whether Nussbaum's theory is best conceived as a version of political liberalism as she contends, or rather as a form of comprehensive liberalism that is culturally sensitive and pragmatically restrained.

Nussbaum's capabilities approach is a partial theory of justice that holds that citizens' equality should be measured in terms of capabilities, or opportunity-freedoms to be and to do. Its proposal is that citizens are equal in terms of their dignity, and that the dignity of each citizen is secured by ensuring they have the basic capabilities that make for a dignified life. In response to concerns that any such list of capabilities is paternalistic, Nussbaum argues that her list of basic capabilities is free of metaphysical grounding and conceived for political purposes only. It is thus her contention that her capabilities can be the subject of an overlapping consensus by reasonable people, and that her political conception abides by the basic principle of political liberal legitimacy that citizens should be able to endorse the principles that govern them.

Given Nussbaum's notion of reasonableness, however, there are reasons to object that her political conception is unjustifiably coercive on political liberal standards. Her responses to these criticisms – that they can be accommodated by means of her distinction between capabilities and functionings, and that support for her capabilities can be found in critics' standing beliefs and values – are shown to be unsatisfactory.

These failures entail that Nussbaum is unable to defend her capabilities approach as a version of political liberalism. Given Nussbaum's reformist agenda, however, and her need to secure capabilities as the condition of dignified life, I argue she should defend her theory as a form of comprehensive liberalism that is culturally sensitive and pragmatically restrained. On comprehensive liberal standards of respect and legitimacy, Nussbaum's political conception would not be justified by anticipated endorsement of her capabilities, but by the value of the capabilities themselves and because moral principle requires it.

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Introduction

The capabilities approach was first introduced by Amartya Sen in the 1970s and 1980s in a series of papers and monographs that diagnosed and criticized the shortcomings and failures of then standard approaches in welfare economics. Sen's objection was that too much attention was being paid to income levels in measuring development, and not enough to how those levels enable people's lives and allow citizens to participate in a range of important ways of being and doing. Over the past 30 years Sen's analysis has been expounded by economists, development activists, sociologists and philosophers, and has been adopted by the United Nations as the basis of its Human Development Index and Reports.

Today the capabilities approach is developing in two main directions. Whilst rooted in the same judgement that capabilities or 'substantial freedoms' are the proper evaluative space for considering questions of justice, these different formulations are distinguished by their proponents' different objectives and reasons for employing the approach. On the one hand, Sen continues to conceptualize the capabilities approach as a general system of evaluation that can be employed in a wide range of assessments of quality of life. Thus, Sen maintains that the approach's formulation must be broad to be versatile across contexts of evaluation. Martha Nussbaum, on the other hand, has developed the capabilities approach as a partial theory of justice with a prescriptive character and universalist pretensions. Her objective is thus to put forth a set of general principles that can be adopted as the constitutional bases of governments all over

the world.

Sen's and Nussbaum's formulations of the capabilities approach thus differ not just because of their different intellectual pedigrees (Sen coming from a background of economics and decision theory, Nussbaum from philosophy and constitutional law), but also because of their respective agendas. Indeed, their main point of difference, and the issue on which their theories substantially diverge, concerns whether or not in speaking of capabilities as the appropriate measure of justice a core set of capabilities must be specified. Sen believes justice requires no such privileged set, holding that the significant capabilities of any situation should be determined democratically by the individuals involved. Nussbaum holds that a theory of justice does require some specification of core capabilities if it is effectively and coherently to address issues of social justice.

Whilst recognizing Sen's contributions to the capabilities approach and his criticisms of alternative conceptions of justice, this dissertation examines Nussbaum's version of the capabilities approach and appraises its viability as a (partial) theory of justice. In particular, it assesses Nussbaum's defense of her theory as a species of political liberalism, by questioning its capacity to maintain a political liberal standard of respect given the substantive content of its claims about capabilities. Its conclusion is that Nussbaum's theory is best conceived not as a version of political liberalism as she contends, but rather as a form of comprehensive liberalism that is culturally sensitive and pragmatically restrained.

Chapter 1 investigates arguments for capabilities as the metric of justice given objections to welfarist (utilitarian) and resourcist (Rawlsian) alternatives. I

argue that because the capabilities approach avoids these shortcomings and is able to diagnose and address other problems that competing theories seem unable to recognize, its prospects are worth considering as a theory of social justice.

Chapter 2 examines the differences between Sen's and Nussbaum's formulations of the capabilities approach which differ primarily on the need to formulate a list of privileged capabilities. I argue that Nussbaum's version is the more compelling of the two given Sen's indictment on his own criticism of utilitarianism and problems with his notion of public reason. I anticipate objections however that Nussbaum's theory is based upon a particular conception of the good and may thus be paternalistic and culturally imperialistic.

Chapters 3-5 explore these concerns, and investigate whether Nussbaum can avoid them by conceiving her theory as a version of political liberalism as she contends, or should rather conceive her theory as a form of comprehensive liberalism given the substantive nature of her moral claims.

Chapter 3 introduces Nussbaum's formulation of the capabilities approach as modelled on Rawls' political liberalism. I explore the differences between Rawls' and Nussbaum's theories in terms of their context, scope, cultivation of sentiment and justification of political principles, all of which have bearing on the subsequent evaluation of the political liberal prospects of Nussbaum's theory. I then analyze two general objections raised against political liberalism (regarding its standard of political legitimacy and its conception of reasonableness), transcribe their implications for Nussbaum's theory, and introduce her responses to them via the capability-functioning distinction and her hermeneutics of critics'

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traditions. The chapter closes by raising concerns about Nussbaum's process of reflective equilibrium by which she formulates her list of capabilities.

Chapter 4 elaborates Nussbaum's claim that the capability-functioning distinction allows her to assert the substantive content of her list of capabilities yet respect people on a political liberal standard. In response I discuss how despite the distinction critics might nevertheless reject the capabilities whilst satisfying Nussbaum's ethical standard of reasonableness. Briefly, Nussbaum's notion of practical reason can require the realization and support of functionings that critics morally reprove. Nussbaum's response to these criticism, that critics' traditions can be interpreted to make them compatible with capabilities, is found wanting and dangerously paternalistic. The chapter closes however by suggesting that Nussbaum's theory can be formulated as a version of comprehensive liberalism, which culturally sensitive and pragmatically implemented can achieve Nussbaum's programme of social-political reform.

Chapter 5 develops this suggestion that Nussbaum's capabilities approach is best conceived as a version of comprehensive liberalism. This claim is strengthened by articulating the dilemma Nussbaum faces as a political liberal given her reformist agenda: to maintain a standard of political liberal respect she must either reduce the substantiveness of her list to what all reasonable people would be able to accept, or she must reduce the extensiveness of her list's application to those who are able to accept its full substance without being politically disrespected. I argue however that she can maintain both the substantiveness and extensiveness of her list by conceiving capabilities as basic

rights and entitlements whose political legitimacy is a function not of endorsement but basic moral principle. This would entail a different notion of political respect than Nussbaum currently advocates, but one I argue that is justified given the importance Nussbaum ascribes the capabilities, particularly if political implementation of the capabilities is mediated by pragmatic restraint and respect for the importance of traditions to critics. Finally, though my argument might be conceived as an exercise in apologetics, I offer reasons why a range of philosophical theories might endorse capabilities on substantive liberal grounds. The convergence of these plausible theories gives us reason to think that no matter which theory is ultimately correct capabilities have moral and political justification.

Chapter 1: Introducing the Capabilities Approach

The primary task of chapter 1 is to define the capabilities approach by showing how it differs from competing theories of justice, namely utilitarianism and Rawls' justice as fairness. It points to certain deficiencies with each competing theory and demonstrates that because the capabilities approach avoids or circumvents these problems, and appears to have resources to address other problems these theories seem unable to recognize, its prospects are worth considering as a theory of social justice.

1.1 Equality of What? A Primer

Capabilities theorists take historical inspiration from the works of Aristotle, Smith and Marx, but the single modern source to which they are most indebted is Sen's 1979 Tanner Lecture on Human Values "Equality of What?" In that lecture Sen criticizes approaches to justice that measure equality in terms of utility and a Rawlsian distribution of primary goods. In each case his claim is that the measure has serious limitations and that an alternative metric is required.

Sen's criticisms of utilitarian justice in "Equality of What?" are damning, but since the 1971 publication of Rawls' *A Theory of Justice*, utilitarianism had already lost its mantle as the default framework within which to conceptualize justice. Indeed, such was the influence of Rawls' work that by 1979 H.L.A. Hart had declared a transition in progress from "a once widely accepted old faith that some form of utilitarianism…*must* capture the essence of political morality," to a new faith in "a doctrine of basic human rights, protecting specific basic liberties

and interests of individuals" (1983,198).[1] In under a decade the scene had thus

changed from one in which utilitarianism was the prime theory of political justice

with which theorists had to contend, to one in which, in the words of Robert

Nozick, philosophers either had to "work with Rawls' theory or explain why not"

(1974, 183).

Sen's Tanner Lecture had the impact it did then not because of his

criticisms of utilitarianism since the doubts had been raised already,[2] but rather

because of his criticisms of Rawls' reliance on social primary goods as the

measure of political equality. Before examining the details of these criticisms,

however – both Rawls' and Sen's of utilitarianism, and Sen's of Rawls' social

primary goods – it is worth first investigating what exactly is meant by Sen's

question 'equality of what?' Doing so will better position us to see why Sen

thinks capabilities are the best metric for evaluating justice.

The subtext to Sen's discussion in his lecture, and indeed to most modern

discussions of justice, is the claim that any viable political theory must have

equality as its ultimate value. This thesis might be doubted, of course, given the

vociferous objections of conservatives and libertarians to those who are more on

the left. But the suggestion remains this is disagreement about what equality

requires,[3] not about equality itself, and that at the most abstract level all credible

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[1] Though it should be noted that some respected philosophers, such as R.M. Hare, continued to believe in the prospects of utilitarianism. (See for example Hare 1984.)

[2] Though Sen's criticisms go beyond Rawls' in applying not just to equality of welfare, but also to equality of opportunity for welfare. See Cohen 1993, 10.

[3] As Harry Frankfurt points out, equality *per se* is not a distinct political value; it becomes important only when it affects some important capacity, such as that for speech, self-respect, a life with dignity, or for relationships not predicated on hierarchy. Apart from its connection to such values it is a bare formal notion, and so one of the prime tasks of political theory is to provide for its substantiation (Frankfurt 1999).

political theories must be egalitarian in considering each citizen as entitled to equal concern and respect – what Ronald Dworkin refers to as the sovereign virtue of political community (2000, 1).[4]

As Sen puts this idea in *Inequality Reexamined*, "a common characteristic of virtually all the approaches to the ethics of social arrangements that have stood the test of time is to want equality of *something*" (1992, ix). The question 'equality of what?' thus concerns what that something should be, and Sen's suggestion is that differences between modern theories of justice can be understood in terms of their various proposals. As Sen points out, however, realizing equality along one measure of value will make for inequalities along others. Two theories may be egalitarian – such as libertarianism in terms of rights and liberties, and Marxism in terms of ownership of productive resources – but inegalitarian with respect to the values the other privileges and seeks to equalize amongst citizens. Since individuals will fare differently under different notions of equality, determining the appropriate measure of equality is essential if that equality is to be meaningful. Thus, as we consider the appropriate measure of political equality, human and social diversity should not be seen as a secondary complication to be dealt with ad hoc or extemporaneously, but rather should be present right from the beginning as a fundamental aspect of our interest in equality. As Sen cautions, "investigations of equality…that proceed with the

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[4] In many ways this statement depends upon the claim that only some form of liberalism is viable in modern societies. As Shaun Young puts this, "All forms of liberalism assume that, in at least some important respects, all men are *equal*…though liberal theorists' understanding of the source and character of man's equality has differed with the passage of time, the belief that all men are in some significant sense(s) inherently equal has remained a cornerstone of the liberal outlook" (2002, 39).

assumption of antecedent uniformity…miss out on a major aspect of the problem" (1992, xi).[5]

Given this, the presumption underlies this thesis that modern political debates about justice concern which values citizens should enjoy equally – not necessarily absolutely, but to whatever extent is allowed by other values which compete with distributive equality (Cohen 1993, 9). In the case of the capabilities approach, capabilities are claimed to be the proper focus of egalitarian commitment. Why capabilities theorists reject both utility and Rawlsian primary goods as appropriate measures is discussed over the next two sections.

1.2 Utilitarian Theories of Justice

In this section I discuss various objections raised against utilitarianism as a political morality. I start, however, with a general overview of utilitarianism as a theory of value in its various formulations. This will be helpful because the problem of adaptive preferences which is central to motivating the capabilities approach emerges initially as a critique of preference-satisfaction utilitarianism.

1.2.1 Utilitarianism as a Theory of Value

'Utilitarianism' refers not to a singular theory, but rather to a set of approaches to moral reasoning that have in common two major premises: an account of human welfare understood in terms of utility, and an instruction to maximize utility giving equal consideration to each affected party (Kymlicka 2002, 12) Utilitarianisms range from hedonistic forms that conceptualize utility

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[5] Ian Hacking (1996) points out that Sen never asks the question *equality for whom?,* whereas "in the past 'for whom?' was always in question, no matter how the question 'equality of what?' was answered." This indicates, Hacking says, Sen's humanist commitments.

in terms of pleasure, to more nuanced forms that focus on non-hedonistic mental states, to more subtle versions again that privilege the satisfaction of preferences currently held or ideally informed.

Utilitarianism is attractive as a theory of political morality because it conforms to our intuition that human well-being matters, and because its focus on consequences means we can determine empirically whether institutions and policies are just – if we want to know their success after all we merely look at their effects on citizens' utility. Indeed, it is in part because of its simplicity that historically utilitarianism has been so influential: since its early formulation by Jeremy Bentham and subsequent refinement by John Stuart Mill, utilitarianism has operated as a vehicle for social progress by challenging customs and traditions to justify themselves in terms of human happiness.

Utilitarians conceive equality in terms of each citizen's utility counting equally in the calculus of the greatest overall balance of utility over disutility, or least overall balance of disutility over utility: as Bentham is said to have put it, "everybody to count for one, nobody for more than one" (Mill, 60). The question at stake then is whether this conception of equality is adequate to what we think is demanded by the political equality of citizens. In what follows I address various criticisms of utilitarian political equality, but it is helpful first to elaborate different conceptions of utility in different formulations of utilitarianism conceived as a personal morality.

Classical utilitarianism as typified by Bentham and Mill holds that utility or well-being should be understood in terms of the experience of happiness or

pleasure. On Bentham's account pleasure is a singular value, whereas on Mill's account there can be gradations of pleasure, higher pleasures being worth more than lower pleasures as these emerge from and foster individuality and self-development.[6] In each case, however, the claim is that pleasure is the chief human good, that for the sake of which all actions and instrumental goods are pursued and have value.

A substantial problem faced by hedonistic utilitarianism however is that it is doubtful whether pleasure is the only thing we really find valuable in life. Difficulties and struggles that require perseverance can seem valuable regardless of what pleasures might derive from them, whilst some pleasures such as those in others' suffering might seem dubious sources of individual or aggregate well-being. In addition, the thought experiment of the experience machine provided by Robert Nozick casts decisive doubt for many upon the viability of hedonistic utilitarianism. In Nozick's thought experiment individuals have the option of plugging into a machine that can simulate any experience they wish. The machine can be programmed in advance to provide these experiences, can be exited and reprogrammed as the user desires, and can create those experiences in such a way that at the time the user is unaware of their simulation – they believe the experiences are actually happening. Nozick's question is whether to live the best life we should enter the machine. He argues the best life would not be lived in the experience machine, for the reason that pleasurable experience alone cannot constitute human welfare. In addition to pleasurable experiences, we also care

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[6] Given Mill's emphasis on self-development his ethical theory might better be conceived as combining elements of hedonistic utilitarianism and a eudaimonic conception of the good.

about our agency in the world (our actually doing things in addition to experiencing them) and developing ourselves into particular sorts of people (our character or manner of being in the world). He also suggests we might resist entering the experience machine since it limits us to a man-made reality, one no deeper or more significant than the human mind is able to imagine (Nozick, 42-45).

If Nozick is right about most people rejecting the experience machine – and it does seem many would have serious reservations – then not only does he confront hedonistic utilitarianism with a serious challenge, but all utilitarianisms that conceive utility in terms of valuable mental states. Indeed, pluralistic non-hedonistic mental state utilitarianisms are meant to provide for valuable experiences of difficulty and struggle which hedonistic utilitarianism is unable to accommodate (Kymlicka 2002, 14). However, the thought experiment of the experience machine applies just as much to an incommensurable range of valuable mental states as it does to pleasurable states only. The objections remain that agency is important not just the experience of agency, that it is important to be a sort of person and not just to have experiences, and that connection with a reality beyond the self's own creation is fundamental and important to what it means to be a human being.

The effect of Nozick's thought experiment is that many utilitarians now doubt the plausibility of a mental-state conception of utility, and offer instead a preference-based account that is more flexible and can address the sorts of reasons that might be given for being hesitant to enter the experience machine.

Preference-satisfaction utilitarianism differs from mental-state utilitarianism because utility is now understood not in terms of mental states but in terms of the satisfaction of people's preferences. One might then have a preference to experience a state or activity, but one might also have a preference to achieve that state or perform that activity and not just have the experience of doing so. The former as we have seen can be simulated by the experience machine, but the latter cannot since the state or activity would then not be actual as specified by the preference.

Preference-satisfaction utilitarians thus hold that utility is maximized by satisfying people's preferences whatever they may happen to be. In response to this, however, the challenge is raised that people's preferences can be satisfied yet to the detriment of their well-being. Inaccurate information, or a lack of information, can lead people to have preferences the fulfilment of which would not conduce (or not conduce best) to their well-being. Examples include wanting things that are clearly self-destructive, and inadvertently forming preferences for things one would have rejected had one better been informed. In the former case we might point to a love-sick teenager who purposefully sabotages himself unconcerned about the long-term consequences; in the latter case to someone pursuing a career path mistakenly thinking she will find it satisfying. In each of these cases it seems satisfying preferences would not improve well-being, and that to the contrary well-being would better be realized if these preferences were frustrated.

This criticism suggests that satisfying the preferences people currently

have is not most important in realizing well-being but rather satisfying

preferences well-formed. What it means to form a preference well is difficult to

spell out, but generally the suggestion is that preferences should be formed on the

basis of correct judgements in the context of full information. Such an optimal

context would rule out those preferences based on misinformation and poor

evaluation, but would allegedly capture people's accurate judgements as to what

their well-being comprises.

An informed preference view would bridge the gap between our actual

good and our preferences as conjectures about it. In simple preference

satisfaction our preferences serve as predictions about our good, yet when they

fail to work out their realization can diminish rather than augment individual well-

being. With full information, however, of our present situation but also of our

future, these predictions become more like determinations of our good, and it

consequently seems that satisfying as many of these as possible for all would

maximize overall utility (Kymlicka 2002, 15).

In many ways informed-preference utilitarianism is appealing.[7]

Practically it faces problems in that full information is never possible, and we

never really know how closely our actual preferences approximate the condition.

In terms of ideal theory though this may not be problematic – it may just be we

can never really be sure which actions are maximizing, and so the dictum would

follow that we should make our decisions as fully informed as possible. As we

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[7] As Mark Murphy observes, "there now appears to be a consensus among those defending [desire-fulfillment] theories that it is not the satisfaction of the agent's *actual* desires that constitutes the agent's well-being, but rather the satisfaction of those desires that the agent would have in…a 'hypothetical desire situation'" (1999, 247).

shall see, however, this too becomes difficult when considering the issue of adaptive preferences and trying to determine which adaptive preferences are legitimate. Even with a strong information requirement that decisions be made as fully informed as possible, some desires or preferences may perpetuate situations which ought to be determined unjust.

Moreover, informed-preference utilitarianism faces different sorts of problems that other forms of utilitarianism avoid. With other conceptions it is easy at least in principle to aggregate utility. If utility is understood as pleasure for instance and pleasures are all of a kind, then these need merely be aggregated and considered either as a sum total or average figure for the population considered. But how do we do this in the case of informed preferences which would seem to be incommensurable, and could be satisfied without individuals recognizing as much or perhaps even being alive?[8] In addition, there are dangers of paternalism in deciding what others would prefer. By severing people's actual experiences from the determination of how they should be treated, providing for people's ideally informed preferences could make them quite miserable given their actual standing preferences (Kymlicka 2002, 16-18).[9]

As things thus stand, informed preference-satisfaction seems the most promising form of utilitarianism, but for all that vague and dangerously paternalistic. Satisfaction of preferences seems important for well-being, but not just any preferences can matter since an evaluation of experience and lived life is

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[8] "If different persons have different preferences, there is obviously no way of getting interpersonal comparisons from these diverse preferences" (Sen 1999a, 68).

[9] Another way of putting this is to ask what normative authority idealized desires should have over non-ideal persons.

important also.[10] These various criticisms of particular versions of utilitarianism

aside, however, there are also objections raised against utilitarianism as an

approach to political morality in general – that is, as an approach that evaluates

political action in terms of optimal utility. What follows is an analysis of Rawls'

criticisms of utilitarianism in *A Theory of Justice*, and Sen's as assembled from his

various works. In each case we can consider objections to be levied against both

types of preference-satisfaction utilitarianism, though they would be telling

against other formulations also.

1.2.2 Rawls' Criticism of Utilitarian Political Morality

Rawls' criticism of utilitarianism proceeds from what he considers to be a

fundamental axiom of social justice, namely that "each person possesses an

inviolability…that even the welfare of society as a whole cannot override" (1972,

3). This serves as a critique of utilitarianism in that it disallows the sorts of

sacrifices of interests that utilitarianism as an aggregating morality can allow or

require. As a political morality, after all, utilitarianism is fundamentally

indifferent to the distribution of its good; it is only concerned with the sum

balance of utility or the average of this over a relevant population, depending on

its specific formulation.[11] Of course, indifference to distribution can make sense

when utilitarianism is conceived as an individual morality: individuals think

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[10] Some still advocate simple preference-satisfaction theories. Murphy for instance argues that
only the satisfaction of agents' actual desires contributes to well-being, and that no actual desire is
to be excluded from consideration on the ground that an agent would lack that desire in a
hypothetical situation of greater information (1999). The problem however is that this falls prey to
the objection of troublesome adaptive preferences to be discussed in more detail in Sen's criticism
of utilitarianism.
[11] Some formulations may allow for rights, but only as rights effect overall utility. Thus,
distributional indifference is still fundamental.

about how best to achieve their good realizing sacrifices might be necessary for the sake of overall gains. Writ large as a political morality, however, the dynamics of the utility calculus differ in the sense that sacrifices and benefits need not be borne or enjoyed by the same persons. Whereas in the individual case the same person suffers for the sake of their own gains, in the political case some may suffer but for the sake of gains to others. Society thus balances satisfactions and dissatisfactions, but whether the people who suffer are those who benefit is irrelevant to the final determination.

Rawls thus objects that according to utilitarianism "there is no reason in principle why the greater gains of some should not compensate for the lesser losses of others…[or] why the violation of the liberty of a few might not be made right by the greater good shared by many" (1972, 26). He concludes that by failing to take seriously the distinctness of persons, utilitarians defend a superficial political equality. If what is important after all is not so much each person's utility but how utility is effected overall, then the fact that each person's utility is weighted equally offers little real protection to each individual. Indeed, our considered convictions tell us persons have rights that should not be submitted to the calculus of social interests. Accordingly, this should prohibit us from trading harms against one for benefits to others, if those harms involve sacrificing basic rights we think justice should protect for all citizens equally.[12]

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[12] As Nozick puts this criticism, "there is no social entity with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has" (1974, 33).

Moreover, Rawls objects that utilitarianism fails to discriminate the mental states or preferences that constitute utility. As he says, should "men take a certain pleasure in discriminating against one another…then the satisfaction of these desires must be weighed in our deliberations" (1972, 30). This however seems objectionable: the satisfaction of such desires seems unimportant from the point of view of justice, regardless of how important they may be to their bearers. Why, after all, should someone's desire that somebody else not have access to some good on the basis of some characteristic such as gender or ethnicity have bearing on our consideration of how fairly and equally to distribute that good? The problem is that utilitarianism has few resources for determining which such desires or preferences should be excluded. Indeed, so far as utilitarianism is concerned, it is the overall balance of utility and disutility that determines just claims in the first place, and so before this calculation there can be no objection that the inclusion of certain preferences or desires is unjust.[13]

For Rawls, these two indictments of utilitarianism are sufficiently damning that we should look elsewhere for a viable theory of political morality.[14] He notes of course that these criticisms have been recognized before; but he also argues

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[13] This point is well drawn out by Dworkin's distinction between personal and external preferences (1977, 234 ff.). A personal preference is for one's own enjoyment of goods and opportunities, whilst an external preference regards the assignment of goods and opportunities to others. The difficulty this poses for utilitarianism is that if external preferences are counted along with personal preferences, then what each person rightfully is owed by justice is contingent upon how they are esteemed by others, and how their particular way of life is respected. This corrupts any claim of equal treatment because although the interests of each are claimed to count equally, the interests of some can be nullified by the interests of others that they not have those interests satisfied.

[14] A further criticism Rawls makes of utilitarianism is that he doubts whether a society ordered by utilitarian principles is likely to remain stable. It is too much to expect, he thinks, for the worst-off to acquiesce to their losses for the sake of overall utility, and instead he thinks they are more likely to resent and reject them. This concern for stability though present in *A Theory of Justice* takes more central role in Rawls' later work.

that critics' responses to them, and to the discrepancies between our ordinary

moral convictions and the implications of utilitarianism, have never entirely been

adequate. Indeed, responses have usually been "to settle for a variant of the

principle of utility circumscribed and restricted by seemingly ad hoc intuitionistic

constraints" (1993, xv). In place of this, Rawls wants to argue for a more

systematic response to utilitarianism that can capture its insights but avoid falling

prey to its defects. Importantly, then, Rawls does not oppose consequentialist

considerations altogether: "all ethical doctrines worth our attention take

consequences into account in judging rightness" (1972, 30). His problem is rather

with considering only consequences in the manner of the utilitarian typified by

Mill, who disputes "the pretensions of any theory which sets up an imaginary

standard of justice not grounded on utility" (1979, 58). Before considering Rawls'

alternative to utilitarianism, however, it is worthwhile looking at Sen's objections

too, as these feed into critique of his own theory.

1.2.3 Sen's Criticism of Utilitarian Political Morality

Like Rawls, Sen objects to the distributional indifference of utilitarianism

on the grounds that it fails to recognize the distinctness of persons and

countenances sacrificing individuals for the social good. He also objects that

utilitarianism fails to consider the content of individuals' desires or preferences

before including them in the utility calculus. In each case, Sen appeals to our

strong convictions that basic rights and liberties (not just utility information)

should help guide our egalitarian judgements, and he uses various case examples

to motivate these intuitions.[15]

Since these objections have already been discussed, however, I shall turn directly to Sen's third major criticism of utilitarianism, viz. that it fails to recognize mental conditioning and the problem of adaptive preferences. This is much different from the objections presented by Rawls, and since it will pose a major problem for Sen's own thinking about justice it deserves a full exploration.

The problem of adaptive preferences concerns troublesome adjustments of aspirations to possibilities, and applies to both actual and informed versions of preference-satisfaction utilitarianism (Elster 1983, 109). The problem proceeds from the observation that people form preferences in response to their life circumstances, by assessing what possibilities their situations afford in the context of a conception of what would make their lives go well. In this sense all preferences are adaptive, responsive as they are to people's natural and social and political realities. This becomes problematic however with individuals in deprived conditions. In such cases the worry is that to avoid the dissatisfaction of unrealized or unrealizable preferences, people often reduce their hopes or expectations to what they believe their circumstances can afford them. Believing their realistic possibilities to be limited, they find themselves satisfied by modest achievements or temporary respite from suffering as a way of coping with their situational shortcomings. This can be seen allegorically in Aesop's 'The Fox and the Grapes' in which a fox unable to reach a bunch of grapes spurns them as likely to be sour (Elster 1983). It can also be seen more distressingly in Sen's examples

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[15] Consider for instance Sen's well-discussed example of the 'pleasure-wizard' whose superior efficiency in producing utility would demand greater resources than less efficient utility producers (1980, 203-204).

of the battered slave, the broken unemployed, the hopeless destitute and the tamed

housewife, each of whom has little courage to desire more than their meagre

circumstances allow (1987, 11; 2009, 284).[16]

The problem for utilitarianism posed by adaptive preferences is that

people's perceptions and desires about their well-being may be too distorted by

harsh or coercive conditions to be reliable: when people compromise their wants

and desires this undermines their preferences as a guide to their well-being. To

put this in the form of an example, on the utilitarian standard the morally

significant differences between the preferences of a 'tamed housewife' and her

dominating husband are effaced, so that when both find their preferences realized

it may be claimed that justice has been satisfied. The objection is that the metric

of preferences is unable to recognize the housewife's oppression, and as such

must be inadequate to determining fairness.

Now in response it might be thought that informed-preference

utilitarianism can avoid these sorts of difficulties. The tamed housewife after all

need merely be presented with a full picture of her circumstances, informed of the

systemic nature of her oppression, and apprised of her life possibilities beyond

what she can conceive with her truncated imagination. We could, as John

Harsanyi puts it, remove the reasons for her erroneous factual beliefs, her careless

logical analysis, and the strong emotions that greatly hinder her rational choice, to

reveal the true preferences she would hold if she "had all the relevant factual

information, always reasoned with the greatest possible care, and were in a state

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[16] See also Claudia Card (1988, 115) on the misplaced gratitude of the powerless for ordinary
decencies and less abusiveness than was possible by those who wield power over them.

of mind most conducive to rational choice" (1999, 55).[17]

The problem with this however is that people living deprived lives are often not in a position to imagine such idealized conditions, nor to understand the systemic nature of their oppression. Not only after all do conditions of manipulation and oppression not conduce to 'rational' choices, they also do not conduce to the sort of educative process Harsanyi envisions as necessary for informed choice (Alexander 2008, 17). This is not to say of course that people must remain locked within their truncated views, unable to want more or to imagine greater possibilities than those currently framing their horizons. But it is to say that to awaken such consciousness can require a slow process of challenging and changing a whole range of fundamental assumptions about oneself and one's social possibilities, a process that often must be accompanied by substantial social and material support.

What emerges from this analysis is that even what appears to be the most promising version of utilitarianism faces serious problems as a political morality. Preferences alone do not seem sufficient given problems of adaptive preferences, and informed preferences face serious problems given the difficulty of establishing informed conditions.[18] What we ultimately get from Sen as such is a

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[17] Richard Brandt similarly advises that only desires which survive a process of 'careful cognitive psychotherapy' should be considered rational. (1972, 113) Peter Railton's version of this approach is to ask what a person with full information would want for herself in her actual situation of limited knowledge and imperfect rationality (1986, 16).

[18] Mark Stein argues that utilitarianism can accommodate troublesome adaptive preferences: "it is right to respect adaptive preferences; adaptation to oppression does indeed make it less morally urgent to alleviate oppression." (2009, 522) Stein overstates the force of his position, however, which is limited to the claim that it is be better to alleviate oppression in a society where there is no adaptation, than to alleviate oppression in a society where there is such adaptation. It does not follow from this though that adaptation to oppression is not a wrong to be redressed as possible. Thus, Stein's position is quite compatible with Sen's analysis that consequences are important

similar judgement to that we get from Rawls: that "the interesting question regarding [utilitarianism] is not the legitimacy of taking happiness to be valuable, which is convincing enough, but its *exclusive* legitimacy" (1987, 8). The problem is that utilitarianism neglects other concerns we think a political morality should address, such as the protection of certain rights and liberties and a stance on the acceptable content of preferences and the way these affect people's lives.

1.3 Rawls

These dissatisfactions with utilitarianism have led to investigations of other conceptions of political morality that avoid a strict dependence on utilitarian concerns. In this section we consider John Rawls' theory of justice which quickly established itself in the place of utilitarianism as the default position against which all other political theories were presumed to need justification. Under Rawls' theory an objective component is introduced into political morality by means of a notion of fairness.

Rawls' philosophy developed over the years, and the project of his later work in *Political Liberalism (PL)* is somewhat different from his early work in *A Theory of Justice (TOJ)*. In *TOJ* Rawls devised a political morality that he believed should be implemented in liberal democratic societies. Later however he became dissatisfied with this claim, believing it unjustifiably to favour at the political level one particular conception of the good at the expense of other conceptions reasonable citizens might hold. This bias he believed showed inadequate respect to reasonable citizens and might fail to secure political stability

though they should not count exclusively.

in a context of social diversity. In *PL* he accordingly sought to devise a meta-theory of political legitimacy that would accommodate the theory of justice as fairness he elaborated and defended in *TOJ*, but which would also be amenable to all reasonable conceptions of the good, and could be endorsed by citizens on different grounds from within their respective comprehensive conceptions.[19]

The evolution of Rawls' work makes it important to specify to which version of his theory one is referring when discussing such issues as political legitimacy and justification. But since the structure and content of the conception of justice that Rawls advocates in *PL* is essentially the political morality of *TOJ*, for current purposes his theory of justice can be discussed without worrying too much about such specifications (1993, 290).[20] In reviewing Rawls' position in this section I thus refer generally to Rawls' 'justice as fairness', and only specify his earlier and later works to avoid ambiguities that otherwise might arise in later discussion.

1.3.1 Rawls' 'Justice as Fairness'

Rawls' aim in his theory of justice is to secure as much as possible the

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[19] It should be noted that the term 'conception of the good' is not consistently understood and applied by theorists. Most agree it refers to controversial ideals about what constitutes a good life, but there is much disagreement over what else it might include: non-controversial claims (e.g., that health, safety, and freedom are good things), claims about justice and rights, etc. For a discussion of the ambiguity of the concept see Sher (1999, 37-44) and Chan (2000, 11-14).

[20] There are some differences between the political conception of justice as discussed in *TOJ* and elaborated in *PL*. The first principle of justice in *PL* says there should be a fully adequate scheme of equal basic liberties compatible with a similar scheme of liberties for all, not the most extensive scheme possible as in *TOJ*. *PL* also specifies which liberties are to be protected (freedom of thought and liberty of conscience; political liberties and freedom of association; freedoms specified by the liberty and integrity of the person; and rights and liberties covered by the rule of law), whereas *TOJ* speaks of protecting liberty in general. Lastly, Rawls adds in *PL* that his two principles of justice might be "preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties" (1993, 7).

right of individuals to pursue their different conceptions of the good on the basis of the fact of moral pluralism. Given moral pluralism, it is Rawls' contention that considerations of justice and political morality should be limited to what he calls 'the basic structure of society,' and should be so acceptable to citizens as not to impose on some a conception of the good they do not and cannot endorse.[21] The basic structure refers to the social and political institutions which determine the fundamental rights and duties of citizens and how social benefits and burdens are to be distributed. It thus consists of the "interconnected system of rules and practices that define the political constitution, legal procedures and systems of trials, the institution of property, the laws and conventions which regulate markets and economic production and exchange, and the institution of the family" (Freeman 2003, 3).[22] These institutions are of vital consequence for citizens because they deeply affect what sorts of people they can become and what sorts of possibilities are available in their lives. It is for this reason that Rawls says the basic structure is the primary subject of justice, and why the fundamental question of justice accordingly concerns the fairness of its organization (1972, 7).

As Rawls understands equality it requires as fair a distribution of social primary goods as possible, on the basis of principles all citizens can agree to, where social primary goods are understood as "things that every rational man is presumed to want...whatever a person's rational plan of life" (1972, 62). More specifically, his general conception of justice states that "all social primary goods

[21] Note that this specific claim emerges from *PL*.
[22] Note that the question of the inclusion of the family in the basic structure has been a difficult issue for Rawls. On the one hand he recognizes the pervasive influence of the family on life prospects, but at the same time is hesitant to allow state intrusion into such a private institution.

– liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored" (1972, 303). The qualification placed on this, however, is that a set of 'basic' liberties is exempted from any such trade-off given their necessary role in pursuing a wide range of conceptions of the good, and their necessary role in the exercise and development of the two moral powers that define Rawls' conception of the person.

The two moral powers that define Rawls' conception of the person are our capacity for a conception of the good (which includes the capacity to form, revise and pursue a rational plan of life that gives life and its pursuits their meaning) and our capacity for a sense of justice (to understand and to act upon, and to act for the sake of principles of justice, which includes a commitment to reciprocity or a willingness to cooperate with others on terms of cooperation that are fair). These two powers are essential to our basic moral and rational agency in the world, and consequently to compromise them would be to compromise a citizen's status as a free and equal person. Indeed, it is primarily because of its failure to protect individuals' two moral powers that utilitarianism fails as a political morality. Because of this, liberties basic to respecting and securing the two moral powers – political liberties such as the right to vote and to be eligible for public office, freedoms of speech and assembly, liberty of conscience and freedom of thought, freedom of the person and the right to hold property, and freedom from arbitrary arrest and seizure – are given lexical priority over all other social primary goods and can only be restricted for the sake of advancing one another (1972, 61). Thus,

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whereas unequal holdings of income or non-basic liberties might be permitted on Rawls' scheme should this benefit the least advantaged, these same sorts of trade-offs are impermissible with basic liberties. Rawls would not allow for example the restriction of access to public office or voting rights to improve the economic situation of any including the least well-off – even if this were agreed to – given the compromise of the person such exchanges would entail.

Stated formally, then, Rawls' two principles of justice read as follows, (1) taking lexical priority over (2), and (2a) taking lexical priority over (2b):

1.   Each person has an equal right to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

2.   Social and economic inequalities are to satisfy two conditions:

        a) they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; *[the fair equality of opportunity principle]*

        b) they are to be to the greatest benefit of the least advantage members of society. *[the difference principle]* (1993, 5-6).[23]

The question, however, is why does Rawls think that these are the most appropriate principles by which to regulate and organize the basic structure of society: why should social primary goods be the appropriate measure of equality? We have already seen how Rawls' conception of the person plays a role in

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[23] As mentioned in fn. 20 these principles are formulated slightly differently in *TOJ*.

justifying the lexical priority of the first principle of justice, but in addition he offers two further arguments. The first is based upon our 'considered convictions' about equality of opportunity, which Rawls at the time took to be the prevailing ideology concerning distributive justice; the second is based upon what terms of political justice would be agreed to under a 'veil of ignorance' about one's personal and social circumstances. In each case the claim is made that reasonable people would endorse Rawls' principles of justice over other alternatives available in the philosophical tradition.

With regard to our considered convictions, Rawls says that we are inclined to think that each person should be guaranteed a set of basic rights and liberties which should not be compromised by the interests of the state or other individuals. As Kymlicka discusses this, the assumption that civil and political rights should have a basic priority is widely shared in our society, to the point that "the idea that people should have their basic liberties protected is the least contentious part" of Rawls' theory (2002, 54).[24] It is this after all that is behind Rawls' rejection of utilitarianism given its failure to protect the inviolability of persons, and its failure to place normative limits on the content of citizens' claims to resources.

But this, Rawls thinks, cannot be enough. Not compromising citizens' basic rights and liberties might make for equality of opportunity,[25] but this equality remains unfair if social conditions put people in unequal positions of competing for those opportunities. Thus, even if citizens face no formal barriers

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[24] "Disputes between Rawls and his critics have tended to be on other issues" (2002, 56).
[25] Rawls discusses this in terms of 'careers open to talents' (1972, 72 ff.).

(such as overt discrimination on the basis of sex, race or religion) that prevent

them from occupying social offices and positions, this does nothing to prevent

inequalities informally arising by other means. For instance, social and economic

inequalities that accrue over generations can make the social class of one's birth

determinative of one's life prospects, as can one's native or lack of native talents.

The appealing idea behind equality of opportunity is that people's fates should not

be decided by circumstances they have no control over but should rather be a

function of how they decide to live their lives (2002, 59). The problem, however,

is that equality of opportunity formally understood pays scant attention to more

systemic inequalities which can be just as marginalizing as those more overt. As

Rawls says, "the most obvious injustice of the system of natural liberty [formal

equality of opportunity] is that it permits distributive shares to be improperly

influenced by these factors so arbitrary from a moral point of view" (1972, 72).

The point here is that once we are "troubled by the influence of either

social contingencies or natural chance on the determination of distributive shares,

we are bound, on reflection, to be bothered by the influence of the other" (1972,

74-75). The solution to this is to accept not formal but fair equality of

opportunity, which requires that society's institutions be so arranged that "those

who are at the same level of talent and ability, and have the same willingness to

use them, should have the same prospects of success regardless of their initial

place in the social system" (1972, 73). In addition, since even talent and ability

are matters of undeserved fortune, those who are successful in occupying higher

social offices and positions do not thereby merit a greater share of social

resources.[26] Instead, greater shares can be permitted only if these redound to the

benefit of the least advantaged, such that inequalities of these sorts enable the

least well off to pursue their own conceptions of the good better than they would

be able to under more equal distributive arrangements. Only as this is so, Rawls

thinks, can the least advantaged accept the principles of justice governing them,

which is essential to their treatment as free and equal citizens and to the political

legitimacy of the basic structure.

This comprises the first argument Rawls provides for the justification of

his principles of justice. But importantly he intends it only as preparatory for his

second argument, so that the two principles, "especially the second one, will not

strike the reader as too eccentric or bizarre" (1972, 75). As Kymlicka reads

things, however, this first argument in fact is more basic since the second

argument is based upon the convictions Rawls appeals to in the first, and

admittedly is contrived by him to yield principles that accord with those

convictions (2002, 69).[27] Still, it is the second argument which is more widely

discussed given the usefulness of its thought experiment in testing for the

presence of domination in individual and social relationships (Hampton 1997,

163).

Rawls' second argument is based upon a model of an initial fair choice

situation in which representative parties of groups of citizens choose the

principles of justice from a position of ignorance about their natural and social

circumstances. This situation is referred to as the 'original position', and the 'veil

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[26] "There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune" (1972, 74).
[27] See also Nagel (1989).

of ignorance' behind which it places representatives prevents them from selecting

political principles on the basis of personal interests. Thus, in deciding the

principles of justice, parties are ignorant of their class status and social standing,

their natural assets, abilities, strength and intelligence, and their psychological

propensities and conception of the good; and are to base their determinations only

on a general knowledge of economics and sociology and politics, on assumptions

of mutual disinterest and an absence of envy, and on a model of self-interested

reasoning in which each seeks as many social primary goods as possible for

herself, knowing that the more of these one has the more likely one will be able to

realize one's conception of the good whatever it might turn out to be (1972, 93).

These restraints are built into the terms of bargaining as reflecting our considered

convictions of the requirements of justice and fairness.

As such, the idea of the original position is to establish which principles of

justice would be accepted by free and rational persons not knowing what positions

they might hold in society, nor what social and natural advantages they might

enjoy (1972, 13). By being stripped of this knowledge of their personal interests

parties are forced to be impartial in deciding how the basic structure should be

organized. Accordingly, the principles they decide upon should be fair to all: no

one after all would choose principles that might disadvantage them on emerging

from under the veil, and placed in this position representatives will choose, or so

Rawls believes, his two principles of justice as most appropriate for governing the

basic structure.

Why this is so is easy enough to see with Rawls' first principle. The basic

structure after all determines each person's prospects, and not to be guaranteed basic rights and liberties could seriously limit one's pursuit of one's conception of the good should one's interests not align with those of parties in power. With regard to the second principle, however, one might question why self-interested rational agents would accept the maximin strategizing that underlies the difference principle, rather than risk a lower socio-economic status in return for greater possible wealth and authority. Why, in other words, would representatives in the original position not be willing to accept social and economic inequalities that do not redound to the benefit of the least advantaged, given the greater enjoyment of primary goods that might be thereby possible?

The answer to this is found in Rawls' suggestion that since we do not know what position we will hold in society on emerging from under the veil of ignorance it is best not to ascribe any probabilities to possibilities. This is in contrast to Bayesian theory which ascribes equal probabilities in situations of uncertainty, in which case taking gambles might be more defensible. Given the thickness of the veil, however, Rawls' position is that probability assignment of any sort is groundless. And due to the great magnitude of what is at stake, coupled with the non-negotiability of the decision to be made, it is surely better to be conservative and only allow social and economic inequalities on the terms specified by the difference principle. It would be too irresponsible, he thinks, to accept even a small risk of dreadful prospects for oneself and one's descendants in return for a better chance of wealth and authority (Freeman 2003, 17-18).

Importantly, however, Rawls holds this position because he claims two

other conditions also hold. First, he thinks representative parties will care little

for what they might gain above the maximin stipend given its sufficiency for most

conceptions of the good. That is, he thinks the choice singled out by the maximin

strategy will be an acceptable alternative that parties can live with. Second, and

complementary, he thinks the rejected alternatives have outcomes we could not

live with and would refuse to accept. Thus, since his two principles of justice

ensure citizens the rights and resources to exercise their rational capacities in

pursuit of a wide range of conceptions of the good, whereas alternatives such as

utilitarianism offer no security on rights and liberties and/or no guarantee of their

meaningful exercise, representatives he thinks would choose his principles even

though this might entail some opulent conceptions of the good turn out to be

unviable.[28]

Given this setup we can see that the original position plays a similar role

in Rawls' theory to the role played by the state of nature in classical social

contract theories, with the important distinction that Rawls does not maintain that

any actual situation must resemble the original position (1972, 121).[29] Instead, he

conceives it only as a frame of mind that can be entered into at any time by simply

observing restrictions on arguments.[30] At the same time, since Rawls thinks his

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[28] It might be questioned whether we should accept the (non-)probabilistic reasoning that justifies
the maximin argument. Why after all should we feel bound by the difference principle if in the
original position it is justified in ignorance of probabilistic outcomes, yet in actual life we have
some probabilistic knowledge of outcomes? (Nagel 1989, 11-15)
[29] This helps Rawls avoid the sorts of objections levied at social contract theories by Hume, whose
criticisms were taken as so devastating to the viability of social contract theory that they led to
their demise in political philosophy in favour of other models of political justice, until Rawls
himself revived contractarianism two hundred years later. (See Hume 1969.)
[30] Because of this, even Dworkin admits the usefulness of the original position as a heuristic
device, despite his contention that hypothetical contracts do not supply independent arguments for
the fairness of enforcing their terms (1977, 151). If we agree with Dworkin, one might give

restrictions on arguments are fair, he thinks we should accept the principles

chosen in the original position as representing our actual commitments. Indeed,

he believes they represent the outcome of his method of reflective equilibrium,

which progressively justifies our convictions and the principles we formulate to

explain them, through a process of revising each in terms of the other as we

evaluate those revisions' mutual implications. The restrictions Rawls thus builds

into the original position reflect deep convictions he thinks we have that certain

reasons – such as facts about people's lives unrelated to their basic moral equality

– should not be relevant to our thinking about justice.[31] As the restrictions that

define the original position reflect those deep convictions, and as the two

principles of justice emerge from their terms given parties' motivations as defined

by their two moral powers, we should feel bound, Rawls thinks, to see them as the

standard by which to evaluate and guide the development of our actual institutions

(1972, 21). Whether Rawls is correct in this, however, or whether his two

principles best reflect our deep convictions, depends on his ability to respond to

his critics. Though his critics of course argue from a number of methodological

positions,[32] our focus will be on criticisms raised by Sen and other capabilities

theorists.

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greater authority to Rawls' first argument for his principles of justice based on our considered
convictions. Note that in appealing to those considered convictions one can still make use of the
process of reflective equilibrium appealed to in the original position.
[31] It should be noted that different original positions could be designed in accordance with
different deep convictions about justice, but that Rawls thinks his assumptions capture better than
any alternatives the reasonable restrictions that should be placed on arguments about justice.
[32] For an overview of criticisms made from communitarian and perfectionist perspectives see
Mulhall and Swift (1996).

1.3.2 Sen's Criticism of 'Justice as Fairness'

Sen's objection to Rawls' theory of justice proceeds from his more general criticism of resource-based theories that our concern should not be so much with the distribution of resources but with what individuals are able to do with those resources. In "Equality of What?" he focuses this objection on Rawls' choice of social primary goods as the appropriate metric of justice, but elsewhere he applies it to other resourcist views.[33] Primary goods are an improvement on utility, Sen admits, in that they introduce objective criteria into assessment of well-being, which circumvents the problem in preference-satisfaction utilitarianism of determining which preferences are legitimate and deserve to be satisfied. In addition, the difference principle addresses the problem in utilitarianism of expensive tastes, in which those who are satisfied only by the consumption of expensive goods are thereby entitled to greater distributions of resources than others more modestly satisfied.

Sen contends however that an equal division of primary goods fails to account for individuals' variations in capacity to convert those goods to ends, which in turn affects their ability to pursue their respective conceptions of the good. Compare for example an individual in a wheelchair with an individual who faces no such mobility problems: providing each with an equal division of primary goods neglects the fact that the person in the wheelchair requires more material and social resources to achieve the same ends as the non-disabled person.

This problem Sen says arises not just with the physically disabled as in this example, but pervasively given the heterogeneity of individuals in terms of

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[33] For instance Dworkin's theory (1992, 33-34).

their health, longevity, climatic conditions, location, work conditions, temperament and even body size. On each of these issues people differ in their needs and accordingly in the primary goods they require to satisfy them. An equal provision of primary goods as such does not treat people equally in a way that matters for Sen, since primary goods are but means whose effectiveness is determined by circumstances. If people were basically very similar, Sen says, then an index of primary goods might be a good way of determining advantage. But because of the widespread and real differences between human beings, an approach that determines equality in terms of an equal distribution of primary goods is inadequate and leads to a "partially blind morality" (1980, 216).[34]

In response it should be emphasized that Rawls does not think we should ignore the special requirements of groups like the mentally and physically disabled altogether. As 'hard cases' they might not meet the circumstances of justice that define the bargaining situation of the original position, since by lacking the normal range of physical and psychological capacities they may fail the reciprocity condition that parties must mutually benefit from cooperation as part of the motivation of formulating the principles of justice. But they can be accommodated Rawls says at the 'legislative stage' of his theory once the veil of ignorance has been cast off, and the prevalence and extent of their disadvantages are known and the costs of accommodating them can be assessed in terms of overall governmental expenditure (Alexander 2008, 40).[35] Rawls does not thus

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[34] As Arneson puts this, "to focus on primary goods is to focus on a means of uncertain significance: this is to focus on what does not ultimately matter" (2013, 188).
[35] It should be noted that in his later restatement of *A Theory of Justice* Rawls amends his position saying that if possible the disabled should no longer be left to the legislative stage, but that *justice*

think that the disabled are unworthy of political consideration, but he does think

that certain simplifications are necessary in order to get his theory off the ground.

For this reason he devises his theory for 'normal' cases first – those full and active

participants in society who would be 'fully cooperating' over the course of their

adult lives – and only if it shows promise does he think it worthwhile to re-

examine its terms to see how they might be extended to include 'non-normal'

cases (1980, 546).[36]

On the terms of Rawls' project this exclusion of the disabled can make

sense: the severely intellectually disabled lack the two moral powers that

characterize parties in the original position, on the basis of which they formulate

principles of justice having reason to expect others will agree to abide by them

and will contribute to them over the course of their adult lives. But this response

Sen thinks is nevertheless insufficient, since as mentioned it fails to take seriously

the inter-individual differences between people that arise within even the 'normal

range' of capacities.[37] The intellectually and physically disabled, in other words,

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as fairness should rather be extended to include them in the original position: "the question
concerns the weight of these duties [towards the severely handicapped] when they conflict with
other basic claims" (2001, 176; cf. Robeyns and Brighouse 2010, 4). Rawls himself has not
systematically pursued this idea, but others have, including for instance Henry Richardson.
Richardson (2006) argues that reciprocity does not play a fundamental role in the original position
which can be modified to accommodate disability concerns by changing parties' knowledge and
psychology and the list of goods they care about. As Richardson does this, however, the criticism
is made that he has to detach Rawls' theory too much from the social contract tradition that accepts
the Humean circumstances of justice and understands mutual advantage as the goal of the contract
(Nussbaum 2006c, 495). It might also be noted that Richardson's position that reciprocity is not
central to the original position aligns with Jean Hampton's analysis (1980), though he diverges
from her conclusion that Rawls' theory consequently is not a social contract theory.

[36] See also Robeyns 2009, 109.

[37] As Nussbaum says, this is also problematic in that Rawls' general position neglects that care for
dependents in society is "a major part of the work that needs to be done in any society, and in most
societies is a source of great injustice. Any theory of justice needs to think about the problem from
the beginning, in the design of the most basic level of institutions, and particularly in its theory of
the primary goods" (2003a, 53).

are but an example Sen uses to demonstrate his argument that primary goods are too inflexible a metric to attend to individuals' true variations. It is because of this that Sen alleges an element of fetishism in Rawls' framework, claiming "Rawls takes primary goods as the embodiment of advantage, rather than taking advantage to be a *relationship* between persons and goods" (1980, 216).[38] Now this allegation might be too strong given Rawls' discussion of the worth of liberty, and his admission that the more primary goods one has the more useful are one's basic liberties and the greater are one's capacities to pursue one's chosen ends (1972, 204). But it does highlight the fact that whereas Rawls accepts an index of primary goods as an accurate enough estimation of the worth of basic liberties, Sen rejects their adequacy given his belief in widespread and serious differences in individuals' abilities to direct resources to ends. Indeed, whereas Rawls maintains that "citizens' needs and requirements are sufficiently similar for an index of primary goods to serve as a suitable and fair basis of interpersonal comparisons in matters of political justice" (2001, 170), Sen rejects this, thinking citizens' needs and requirements can differ considerably and not just in exceptional cases, and importantly for reasons that are morally arbitrary (Lowry 2009, 229-230). As Sen says, "interpersonal variability in the conversion of primary goods...introduces elements of arbitrariness into the Rawlsian accounting of the respective advantages enjoyed by different persons; this can be a source of

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[38] "The behavioural constraints related to perceptions of legitimacy and correctness can strongly affect the relationship between primary goods and the freedoms that can be generated with their use. If women are restrained from using the primary goods within their command for generating appropriate capabilities, this disadvantage would not be observed in the space of primary goods. It is not clear how these constraints, many of which are implicit and socially attitudinal, can be incorporated within the framework of the 'external' category of primary goods" (Sen 1995, 265).

unjustified inequality and unfairness" (1990, 112).

1.4 The Capabilities Approach

Given this criticism, what Sen thinks is needed is a way to conjoin welfarist concerns with a concern for social primary goods so that people's different needs are more adequately taken into account. We need to be concerned with primary goods as means, but we must also focus more directly on individuals' levels of need satisfaction. With this as the goal Sen introduces the notion of basic capability equality,[39] which he sees as a natural extension of a concern with primary goods but with the focus shifted to people's capacity to use those goods in the context of their particular circumstances. Since what is most important to people is the actual living they can achieve, questions of justice and equality should focus on their truly effective opportunities to realize what activities or states they have reason to value.

In considering capabilities as the concern of justice we should be clear to distinguish capabilities from functionings. Capabilities as mentioned are the effective opportunities people have to realize activities or states. In this sense they are opportunity-freedoms. Functionings on the other hand are particular realizations of capabilities, or the particular beings and doings of people's lives. The distinction is important because by emphasizing capabilities proponents do not mean to require the pursuit of particular lives, but instead are concerned to ensure that particular lives can be pursued if individuals so choose them. To have a capability then one need not realize it in any particular way, nor even in any way

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[39] Note this is not the same as complete capability equality.

at all. The capability to be nourished for example can be enjoyed by someone fasting, but is not enjoyed by someone who does not eat (or does not eat sufficiently) because of the dearth of food available due to famine or discrimination. In neither of these cases is there the functioning of being nourished, but only with fasting is there capability: the former situation but not the latter is thus acceptable since fasting is a choice not to realize an effective opportunity. What capabilities theorists thus seek in general is to ensure these types of capabilities to citizens for all of the important dimensions of life. The difficulty of course is determining these dimensions, and the differing positions of Sen and Nussbaum on this issue will be discussed in chapter 2. Briefly, however, Sen's position is that important capabilities are to be determined democratically by consulting local populations, whereas Nussbaum maintains the need for more objective oversight and argues for a list of centrally important capabilities that should be guaranteed to all individuals, though with the stipulation that the form these capabilities take can and should be specified by local populations.

But notwithstanding how important capabilities are determined, securing them for citizens will require primary goods as all-purpose means, but importantly much more than this to ensure the absence of structural constraints that impede important capabilities. This is important because on a capabilities framework the scope of justice is much broader than in justice as fairness, which is limited to the basic structure of liberal democracies and to the principles of political justice. Indeed, for capabilities theorists the concerns of justice extend beyond national boundaries (and perhaps even species boundaries (Nussbaum 2006a)) and apply

not just to social institutions but to the ethos and practices of societies as well: as Robeyns puts it, "justice applies everywhere" (2011). With this broader scope of concern capabilities theorists believe they can diagnose a broader range of injustices than Rawlsians, but also believe that they are better equipped to remedy those injustices by attending more specifically to the various impediments that limit people's lives, since not all of these can be addressed under the strictures of the basic structure and Rawls' terms of political justice. Indeed, capabilities theorists claim that the usefulness of the capabilities approach has been demonstrated already by development activists as they have applied it to various injustices around the world (Deneulin and Shahani 2009). Be this as it may, it remains to be seen how philosophically sound are their ideas and how best they might be theorized.

1.4.1 Rawlsian Challenges

Philosophically speaking, though the capabilities approach faces a number of problems as we shall see in subsequent chapters, there are two main criticisms raised by Rawlsians which should be mentioned before we continue. The first criticism is that the capabilities approach must be based upon a particular comprehensive conception of the good since it must differentiate capabilities and identify some as more important or valuable than others. The objection is that this is disrespectful and coercive since not all citizens will be able to endorse that particular conception and as such will be imposed upon unfairly by the state (Sen 1990, 112). The second criticism is that the capabilities approach lacks a publicity criterion which Rawls claims is essential for any theory of justice (Rawls 1988,

255; cf. 1972, 133, 454). The idea here is that in order for people with different conceptions of the good to come to agreement on political principles, the conception of justice must be public in the sense that the necessary information to make a claim of injustice must be easily accessible and verifiable by all citizens. This is rooted in the basic claim that full knowledge of the basis of coercive laws is a condition of respecting citizens as responsible moral and rational agents. (Freeman 2007, 187) The allegation then is that the capabilities approach fails in this and consequently is unstable, since capabilities as opportunity-freedoms are too hard to measure and assess in a public fashion, and require prohibitive amounts of information much of it difficult to obtain.[40]

To each of these criticisms capabilities theorists respond. With regard to the first criticism, Sen argues that in fact the capabilities approach need not endorse any particular view of the good since which capabilities are selected as most important or valuable should be decided by public reasoning and democratic deliberation. Every society should do this on the basis of its history and particular social circumstances, and thus concerns about disrespect and coercion can be avoided. Similarly, Nussbaum argues that the capabilities approach can be defended as a version of political liberalism using arguments similar to those Rawls employs in his later philosophy: a list of capabilities can be endorsed by reasonable citizens from within their own comprehensive conceptions of the good, and as such the state can avoid imposing on citizens controversial political principles. Moreover, since the focus of the capabilities approach is on "the actual

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[40] In *Law of Peoples* Rawls writes that a focus on capabilities and effective freedoms that does not make simplifying assumptions about citizens "calls for more information than political society can conceivably acquire and sensibly apply" (1999a, 13 fn. 3). Cf. Clark 2005, 6.

freedom of choice a person has over alternative lives that he or she can lead," and

not on any particular life, both Sen and Nussbaum believe they can avoid

objections of paternalism (Sen 1990, 114). The capabilities approach after all is

concerned with capabilities as opportunity-freedoms and not with functionings as

particular realizations of those freedoms. As such it is concerned only with

ensuring individuals the social and political space to pursue what lives they deem

important.[41]

   With regard to the second criticism concerning the publicity criterion, the

response offered is two-fold. First, with regard to the allegation that the

capabilities approach requires prohibitive amounts of information to make

interpersonal comparisons of well-being, capabilities theorists can respond that

from Rawlsians this objection can hardly be decisive. This is because if justice is

the first virtue of a society as Rawls claims (1972, 3), then although generally

speaking the less information required by a theory of justice the better, if securing

justice requires more information then this simply is a hardship we have to accept.

It cannot be claimed that a theory requiring less information is better if certain

(available) information it does not require is pertinent to treating people justly. As

Brighouse and Unterhalter put this, "if justice can be done only in ways that are

not transparently monitorable, it is better to achieve justice than to refrain because

the methods one must employ are not susceptible to full public scrutiny" (2009,

58).

   With regard to the second part of the criticism that the information

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[41] In chapter 2 I shall take up these different responses by Sen and Nussbaum and defend
Nussbaum's formulation of a list of central capabilities. In chapters 3-5 however the strength of
this anti-liberal challenge will re-emerge in light of critique of Nussbaum's political liberalism.

required to make interpersonal comparisons must be publicly verifiable,

capabilities theorists can respond with two strategies for assessing the capabilities

of each person, each of which they claim can rely upon publicly verifiable

information. The first strategy is to measure a person's capabilities directly by

making inferences from their particular functionings. This has obvious

limitations, of course – a lack of functioning could indicate a lack of capability,

but also a decision not to realize that capability[42] – but it can be supplemented by

means of the second strategy. On the second strategy we estimate an individual's

capability inputs and determinants (including the basic structure of the

individual's society, their interactions with others, and their range of resources

broadly defined), scrutinize these in the context of social, environmental and

personal conversion factors, and then if any of these factors lowers the conversion

of resources into valuable capabilities we have an objective basis for providing

extra resources or other social goods or devising remedial policies (Robeyns

2008b, 409-410).[43] This might require of course a more detailed analysis of

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[42] As Uyl and Rasmussen (2009) note, when people choose not to realize certain capabilities, or when they realize them in very limited ways, it can be difficult to know whether they in fact have the capability but have chosen not to realize it, or if in fact they lack the capability altogether. Or, as Wolff and De-Shalit put it, "functionings are more or less observable; capabilities are not, at least in any straightforward manner" (2007, 63). This points to the problem raised by some critics that the capabilities approach should be more concerned with functionings than capabilities (e.g., Arneson 2010).

[43] For a possible model of how this might work consider Wolff and De-Shalit's 'inter-sectoral' approach in which capabilities holdings and needs would be assessed through a 'hierarchy of abstraction' (2007, 94 ff.). Under such a system detailed and complex information is needed to address individual cases regarding particular capabilities, whilst at more general levels less specific but broader cross-capability information is required to determine good policy. For example, on the front line of capability 'sectors' doctors, nurses, teachers and social workers need detailed information of particular cases to make good capability assessments and decisions for particular individuals. At administrative levels on the other hand, hospital managers and school administrators need less specific information to make strategic decisions, but broader information regarding the general needs of the capability sectors that fall under their jurisdiction, and how addressing these needs would affect sectors falling under others' jurisdictions. The idea is that at higher levels more and more intersections of capabilities sectors must be considered, compiling

individuals' circumstances than is required in justice as fairness, but the

information is claimed to be publicly accessible and publicly verifiable.[44]

1.4.2 The Promise of the Approach

Whether these responses are convincing of course is an ongoing question

in the literature, and in later chapters we will evaluate more specifically the

allegation that the capabilities approach presumes a particular conception of the

good. Many philosophers agree however that the capabilities approach has

identified important lacunae in Rawls' primary goods account, though there is

disagreement over how substantial these lacunae are, and how devastating they

are to the Rawlsian framework. Indeed, some Rawlsians believe that justice as

fairness can accommodate capabilities theorists' concerns, whereas other

philosophers believe the problems are just too fundamental for the framework to

be able to do this (Anderson 2010, 263; Wolf and De-Shalit 2007, Chapter 1).

The literature reflects these exchanges, and though I do not intend to rehearse its

details – I am more interested in determining how viable the capabilities approach

might be made, rather than arguing for it as a necessary or complete replacement

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data for the broader determination of policy.
[44] Capabilities theorists might also respond *tu quoque* to Rawlsians. As Robeyns (2008b, 410)
points out, it is far from straightforward to publicly assess whether the basic structure meets the
fair equality of opportunity principles, given how difficult it is to estimate the influence of social
norms, prejudices and stereotypes on behaviours. Rawls wants to limit his theory to the basic
structure, and to devise his theory within the context of a well-ordered society in which there is
full compliance with the principles of justice. But in the real world this ignores the problem of
systemic oppression of minority groups that is one of the primary motivations of the capabilities
approach. Once Rawls' idealizing assumptions are removed and his theory is called upon to
address actual injustices, the suspicion arises that the publicity criterion may prove as troublesome
for *justice as fairness* as Rawls claims it to be for the capabilities approach. This is part of Sen's
general criticism of ideal theory as developed in *The Idea of Justice*, and forms part of Walzer's
direct criticism of Rawls that his principles of justice may be logistically bloated (1981, 392).

of *justice as fairness*[45] – I would agree with capabilities theorists that there are compelling reasons for thinking about justice in terms of capabilities. Indeed, in what follows I take the argument between Thomas Pogge and Sandrine Berges to demonstrate the promise of the capabilities approach, and for the sake of expediency consider their exchange to be representative of the broader debate taking place in the literature. The point is to use this example to propose that it is worthwhile considering the capabilities approach as a theory of social justice, and worth the effort of trying to resolve the various difficulties to be discussed in the following chapters.

Briefly then, Pogge (2002) argues that resource-based theories (such as Rawls' *justice as fairness*) can accommodate capabilities theorists' criticisms and that capabilities theorists are attacking a straw-man. Berges (2007) on the other hand retorts that capabilities are better suited both to assessing and to remedying injustice. The discussion focuses on school-aged girls in Britain and Turkey and concerns their equal right to free education. The problem posed by Berges is that whereas the British girl will automatically avail herself of her right to free education, the Turkish girl will likely not due to a number of systemic impediments: education for women is undervalued in Turkish culture, educational

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[45] Many theorists argue there can be room for more than one singular approach to theorizing justice. Nussbaum herself says that we may view her development of the capabilities approach "as an extension of or complement to Rawls' theory...[W]e should recognize that [her] alternative approach has significant strengths...while we also continue to pursue and develop orthodox contractarian theories." Nothing would be less in the spirit of the capabilities approach "than the wholesale rejection of theories that have illuminated so much about core issues of social justice." (2006a. 69) See also Brighouse and Unterhalter: "we suspect the two approaches are complementary: each has advantages over the other when considering particular contexts. Working out more precisely the relationship between the two approaches is an important project" (2009, 58). See also Katzer: "Her capability approach…should be viewed as being in close alliance with other approaches, not as being in contrast to them" (2010, 74).

resources are scarce, her family may be poor and need her help at home, etc.

Pogge however contends that a good resource theory can provide for these issues:

the right resources after all must include not just financial or material handouts,

but also institutional structures such as decent accessible schools and reliable

affordable transportation. Moreover, what material resources are to be distributed

should be distributed not just between household heads but within families to

ensure that an equitable share goes to both male and female members.[46] With

these structures in place access is provided for and it would be surprising if girls'

attendance did not correspondingly increase.

　　　For Berges, however, relying on this contingency cannot be enough.

Studies show that girls in traditional areas lack freedom to go to school not just

because of infrastructure and money, but because of the cultural importance of

girls remaining at home and living a pious and modest life and helping mothers

with chores.[47] For Berges, then, the notion of access that Pogge puts forth is

questionable: it is unclear how access to resources in the way that matters can be

measured without looking beyond their distribution. Either access refers only to

access in principle, which is too weak if parents refuse to let their daughters attend

school; or it refers to access in practice too, which means checking to see whether

each child is able to avail herself of her right. This latter seems what we want,

Berges says, but at this point it looks like assessing capabilities. The point then

for Berges is two-fold. First, resources not effective in improving what a person

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[46] This is a change we see between the early and late Rawls.

[47] "...asking about capabilities leads us to notice all sorts of inequalities women and girls suffer inside the family: inequalities in resources and opportunities, educational deprivations, the failure of work to be recognized as work, insults to bodily integrity" (Nussbaum, 2011d, 33).

can do are worthless even if they could be used for such improvement in principle. Second, shifting the focus from a fair distribution to what each person needs to have a full range of important capabilities offers more satisfactory solutions. After all, by asking what girls need to take advantage of their right to free education, we address parental concerns and fears and can encourage them to value their children's education.[48]

Now it should be noted in fairness to Pogge that he does not objurgate the capabilities approach altogether since he does think it offers a useful heuristic for determining the best list of goods to be distributed, and is a useful touchstone for revising distributional criteria. But Berges' argument is that it does more than this since it provides both a broader and more helpful paradigm for understanding our concerns with justice, and for evaluating and redressing the systemic impediments that hinder people's lives. As Anne Phillips puts this, the deeper claim of the capabilities approach "is that in focusing attention on what people are enabled to do and be, it highlights the social, political, and cultural constraints that can be as devastating in their effects on people's lives as the level of resources at their command" (2002, 398).

As mentioned, I do not want to pursue the back and forth of these debates, but this example should demonstrate the potential power of the capabilities approach. By looking directly at what people can do with their lives, and

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[48] Brighouse and Unterhalter discuss this same point, arguing that how well policies enhance citizens' well-being will not be revealed by mere resourcist measures. Instead, "the resourcist has to appeal at a more fundamental level to some sort of capabilities" (2009, 56-7). So also Breena Holland: contemporary efforts to address Rawls' separation of political and civil freedoms from their material, social and economic prerequisites "make progress with some aspects of Rawls's theory, but…they do this by adopting the concepts descriptive of human capabilities, which therefore only illuminates why a capabilities approach to justice offers a better framework for dealing with questions about the distribution of…goods and harms" (2008, 409).

focusing questions of justice on their limitations, we can address a wide range of

obstacles people face, many of which may be deeply structural and difficult to

address in terms of primary goods and in terms of the design of the basic

structure.

1.4.3 Between the Ideal and the Actual: What Must a Capabilities Theory Look Like?

If we do take the capabilities approach to be promising, however, there is a

further problem regarding ideal and non-ideal theory that is worth mentioning

before proceeding. The question is what guidance do we require from a useful

theory of justice, and is the capabilities approach capable of providing that

guidance?

The issue of ideal and non-ideal theory is relevant insofar as it has recently

been suggested that the fundamental difference between Rawls and Sen lies in the

different kinds of theory that each is pursuing (Robeyns 2011). Rawls is more

concerned with ideal theory in the sense that he thinks our theorizing should start

from a conception of perfect justice, and only then and from that conception

address the actual problems of society. As he says, it is only by starting with the

ideal of a just society that we can identify injustices as deviations from that ideal

and accordingly can devise solutions (1972, 8). On the other hand, Sen and many

capabilities theorists are more concerned with non-ideal theory in the sense that

they think unjust practices and institutions can be rectified or improved directly

without the mediation of a conception of a perfectly just society.[49] For non-ideal

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[49] Theorists like Walzer have a different objection to Rawls' type of ideal theory – that it ignores "the particularism of history, culture, and membership." By constructing ideal situations in which

theorists, the actual concerns people have about injustice – hunger, discrimination, illiteracy, etc. – can be advanced without knowing the entirety of what justice requires, simply by asking which of different available options would improve situations of injustice in the world. We can know how to improve the problems of the world, they claim, without having to know how to improve it to perfection (Sen 2006, 9; Sen 2009, 9; Sen 2010, 243-246; Robeyns 2008a, 341).

Part of what this difference points to is an underlying question regarding the appropriate relationship between ideal and non-ideal theory – a question that is beginning to be recognized as a serious but neglected issue in the literature.[50] Most political philosophers writing in the wake of *TOJ* followed Rawls' lead in prioritizing ideal theory, and so much of the literature of the past forty years has focused on developing and debating the merits and justification of ideal principles of justice (Robeyns, 2008a, 341).[51] Recently, however, this presumption of priority has been challenged by those who question the application of ideal principles to non-ideal circumstances. The objection they raise is that by idealizing the world to make general claims about it ideal theory risks oversimplifying complexity that deserves and needs to be recognized. The subsequent danger is that by representing the complexity of the world inadequately, ideal principles when applied to actual situations are ineffectual and may even be harmful. Thus, unless ideal theorists can explain how to bridge the

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to determine the demands of justice, theory detaches from choices people have made already and that are embodied in their culture's understanding of social benefits and burdens (Mulhall and Swift, 131-132, quoting Walzer 1983, 5).

[50] A special edition of *Social Theory and Practice* (Vol. 34, No.3, July 2008) was recently devoted to exploring these questions.

[51] See Sen (2009, 4-8) for a brief historical overview of ideal ('transcendental institutionalism') and non-ideal ('realization-focused comparison') approaches to reasoning about justice.

gap between ideal theory and guidance of action, their theory is suspected by non-ideal theorists of being an intellectual indulgence.

The question at stake then is in what way and to what extent does ideal theory present a distorted picture of the world in order to make general claims about it? As we have seen, capabilities theorists believe that Rawls' generalization of a normal range of conversion abilities is a distortion too far. It enables the formulation of a set of simple principles, but these principles fail to do justice to individuals once applied back to them in the non-ideal world.[52] The differences between people are too fundamental and pervasive to ignore, and so eliding them in ideal theory problematically misrepresents things.

By condemning Rawls' ideal however Sen is unable to guide actual decision-making in the comparative approach he advocates as an alternative. Now Sen does this purposefully, of course, since he believes ideal or 'transcendental' theory is neither sufficient nor necessary to advance justice in the world. It is not sufficient because the best or right theory tells us nothing in itself about how we should choose between non-best alternatives, and it is not necessary because we can rank two non-best alternatives without needing to appeal to a superlative third – as he says by way of analogy, "we may...be willing to accept, with great certainty, that Everest is the tallest mountain in the world...but that understanding is neither needed, nor particularly helpful, in comparing the heights

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[52] As Sen says in *The Idea of Justice*, "even if we do accept that the choice of basic social institutions through a unanimous agreement would yield some identification of 'reasonable' behaviour (or 'just' conduct), there is still a large question about how the chosen institutions would work in a world in which everyone's actual behaviour may or may not come fully into line with the identified reasonable behaviour" (2009, 68).

of...Kanchenjunga and Mont Blanc" (2006, 219-225).[53] Indeed, Sen goes even

further by saying that a perfectly just society may not only be an implausible

starting point for a useful theory of justice, it may also be an implausible

endpoint. Even if we developed a full schema of comparisons between possible

non-ideal options, this still would not amount to picture of perfect justice since

there would likely still remain information gaps and irresolvable and

incommensurable judgements of value.

In response however we may ask how exactly Sen thinks we can make

comparative assessments without some notion of ideal theory to guide us. As

Stemplowska contends, advancing justice requires both ideal and non-ideal theory

because justice unlike height is a complex value that can involve

multidimensional comparisons. So whilst it is true that some judgements about

justice might be sufficiently simple not to need ideal theory for guidance – the

wrongness of sex slaves or child soldiers might be examples – this cannot be so in

all cases. In more difficult cases where comparisons are more complicated and

different aspects of justice cut across one another ideal guidance is both important

and necessary (2008, 336). A case in point is deciding between medium-term

policies that advance gender equality or childcare but the one only at the expense

of the other. We need to be able to think about the different values at play in such

cases and which are more important when they conflict with one another, and

thinking about ideal justice helps us do this. Ideal theorists after all not only think

about what an ideally just society might look like, but they do this providing

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[53] "The main task is to get things right on the comparative judgements that can be reached through personal and public reasoning, rather than to feel compelled to opine on every possible comparison that could be considered" (Sen 2009, 243). See also Runciman and Sen (1965, 554-562).

reasons for their conceptions and it is on the basis of those reasons that we make judgements in difficult cases (Swift 2008, 373-374).

As Sen defends his comparative methodology however he thinks we can make the necessary comparisons between non-ideal options by appealing to public reason and democratic deliberation. Indeed, he thinks that "a theory of justice must have something to say about the choices that are actually on offer, and not just keep us engrossed in an imagined and implausible world of unbeatable magnificence" (2009, 106). But Sen's approach to public reason and democratic deliberation is unconvincing in many situations given the systemic oppression and discrimination of minority groups and the problem of adaptive preferences. The problem is that public reason through democratic deliberation can make comparisons which sustain or exacerbate unjust social arrangements, and can do this under the guise of advancing justice if there is no conception of an ideal by which to judge and restrain its output. What this suggests is that we need a way to hold public reason to account, and an advantage of ideal theory is that it provides a way of doing this by reflecting on the different aspects of justice and giving reasons for supporting an ideal conception of it. A standard is presented, and to the extent that arrangements fail to exemplify that standard we know not only that improvements are necessary but have some sense of how to produce them.

In chapter 2 we investigate these issues further as part of the evaluation of the divergence between Sen and Nussbaum over the need for a singular privileged set of capabilities that all states must guarantee their citizens to be just.

Nussbaum's outcome-oriented approach that privileges a list of central

capabilities provides both a response to the limitations of Rawlsian justice and an

ideal that is needed to adjudicate public reason. As we shall see however it does

so by presuming a conception of the good which is problematically controversial.

Chapter 2: Defining the Capabilities Approach

Having established in chapter 1 that the prospects of the capabilities approach are worth considering, chapter 2 considers and evaluates the different versions of the theory as developed by Sen and Nussbaum. It argues that Nussbaum's version is more promising philosophically on the basis of Sen's own criticism of utilitarianism and the need for normative criteria to constrain the exercise of public reason, but points out several problems with Nussbaum's theory that arise from her formulation of a list of capabilities. Primary among these is the question of whether Nussbaum's list can enjoy widespread agreement as she claims, or is rather based upon a particular conception of the good that is controversial and paternalistic. This in turn raises the question whether Nussbaum's version of the capabilities approach can be justified as a form of political liberalism as she contends, or is better theorized as a form of comprehensive liberalism. Investigation of this latter question is the subject of chapters 3-5.

2.1 The Capabilities Approach

Determining which capabilities are valuable is clearly important for a theory which understands equality in terms of capabilities.[1] Not all capabilities are equally important after all, and some are clearly trivial. As Bernard Williams points out in his commentary on the capabilities approach, the creation of a new

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[1] It should be noted that neither Sen nor Nussbaum advocate complete capability equality. Sen's claim is that capabilities are the space in which questions about social equality and inequality are best discussed, not that the approach demands "social policies aimed entirely at equating everyone's capabilities" (2009, 232). Nussbaum's position is that "a threshold is more important...than the notion of full capability equality"; discussion of the viability of thresholds she thinks can be deferred until the "nowhere-realized standard" of getting all citizens above that threshold is achieved (2000a, 12).

washing powder is the creation of a new capability to use that washing powder,

but also the negation of the capability to choose from only the pre-existing range

of washing powder options. As Williams says though, "all this is obviously a

trivial multiplication of capabilities, and it is not going to count. But how do we

decide what does count as a significant extension of capabilities?" (1987, 98)

Though Sen and Nussbaum agree that the prime mandate of justice is to provide

individuals with a range of capabilities to be and do, their main point of difference

and the issue on which their theories substantially diverge concerns this question

of how to specify capabilities. Nussbaum believes justice requires a

predetermined privileged set of capabilities that all states must guarantee their

citizens to be just, whereas Sen believes it does not.[2]

2.2 Determining Capabilities: Sen and Public Reason

As Sen considers the determination of important capabilities his argument

is that they ought to be decided by individuals and local populations; to do

otherwise, he says, is to risk being dogmatic in deciding what people should value

and how they should conceptualize their lives. The reason for this is Sen's belief

that in all societies there is deep disagreement about moral and political issues

even after critical reflection. This might be evident enough in multicultural

societies which are characterized by a multitude of different groups and

comprehensive conceptions, but it is also the case in so-called 'traditional'

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[2] There are other less important differences in the manner Sen and Nussbaum develop their
different versions of the capabilities approach. For instance, Nussbaum's distinction between
basic, internal, and combined capabilities has no parallel in Sen; and while Sen distinguishes
between well-being and agency, and between freedom and achievement, Nussbaum believes these
distinctions are captured as aspects of the capability-functioning distinction (Nussbaum 2000a, 12-
14).

societies which are always marked by traditions of resistance and dissent. To think otherwise, Sen suggests, and to presume their uniformity, is to fall prey to a communitarian blindness that postulates the social norms and values of the powerful as representative of the interests of the culture as a whole.[3]

Because of this, it is Sen's contention that to insist on agreement on every serious moral or political issue is "quite close to being a demand for tyranny" (2011). Sen is thus resistant to fixed lists of important capabilities on two related grounds. Not only does he find it difficult to see how "exact lists and weights would be chosen without appropriate specification of the context of their use," but his commitment to democratic processes makes him unwilling "to accept any substantive diminution of the domain of public reasoning" (2005, 157).[4] Thus, not only should capabilities be determined contextually in accordance with varying circumstances (capabilities might be important in some cases after all, but in others less important or not important at all[5]), but choosing capabilities can itself be a valuable exercise insofar as social pluralism requires negotiation for political ends to be fair. Indeed, how to choose and order important capabilities should be decided by those who will be subject to their terms in light of their

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[3] In his Isaiah Berlin lecture (2011, 42.25) Sen observes that most differences lie not between cultures (east and west, Christian and Muslim, Hindu and Buddhist) but within the same society.
[4] As Alexander points out, Sen's emphasis on the importance of democratic processes emerges from his work on famines (2008, 148). "Democratic governments...have strong incentives to undertake measures to avert famines...It is not surprising that no famine has ever taken place in the history of the world in a functioning democracy...be it economically rich...or relatively poor..." (Sen 1999a, 1; see also 2009, 342-345).
[5] This can depend upon one's purposes in considering capabilities (is one evaluating poverty, specifying basic human rights, seeking a measure of human development, etc.), but also on the particular features of situations, be these social, political, environmental or technological. For example, whereas the capability for long-distance communications might not have been important in the pre-internet age, today it might be emphasized along with or as part of an effort to reduce poverty and deprivation. Similarly, the capability to be well-nourished might take priority when people are dying of hunger in their homes, but the freedom to be sheltered is more important when people are well-fed but lack protection from the elements (Sen 2005, 158-160.).

varying and possibly conflicting interests, and the fact that gains for some may represent losses for others. To insist on fixed lists, then, irrespective of what citizens either do or might come to understand and value, would be to deny their self-determination by imposing upon them a particular ideal. This would be even more problematic were the elements of the list not just fixed but ordered, so that some would always take priority over others regardless of context and demand.[6]

Despite the pluralism that leads Sen to reject fixed lists, however, he maintains nevertheless that consensual political decisions and social stability are possible. As he says, "it is hard to live in a society without understanding each other, but it is surely not an impossible social task to co-exist and co-prosper without agreeing" (2011, 17.50). Indeed, it is Sen's position that in fact most public decisions probably work this way,[7] and it is because of such successes that Sen defends a social choice approach to justice that forswears the need for complete unanimity in justifying public policy decisions. All that is necessary, he thinks – and indeed all he claims is possible – is to look for intersections between individuals' complete or incomplete orderings of justice, and to base public policy on those congruences accordingly. Thus, what Sen thinks is required instead of fixed lists and the presumptions of cultural homogeneity they must be based upon, is an appeal to public reason that is attentive to the role and significance of capabilities in context, and which allows individuals and societies to determine important capabilities for themselves.

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[6] As Sen says, "There is sometimes a temptation not only to have one fixed list, but also to have the elements of the list ordered in a lexicographic way" (2004, 80).

[7] Through agreement on some policies but not others, perhaps, or offering different reasons in support of same policies.

The notion of public reason was first introduced by Kant, but was developed by Rawls in *Political Liberalism* to refer to the way in which constitutional democracies should formulate their plans, prioritize their ends, and accordingly make decisions about basic questions of justice (1993, 212-213).[8] Rawls' idea is that political decisions should be justified on the basis of public values and standards all reasonable citizens can be expected to accept and not on the basis of controversial private convictions. Only in this way, he thinks, can determinations of justice be fair.[9] This requires however not just recognition of the fact of pluralism, but a duty of civility to respect that pluralism given that informed individuals reasoning well can nevertheless disagree about questions of the good.[10] By means of public reason then – by justifying political claims on terms others can accept despite disagreement on underlying questions of substance – an 'overlapping consensus' can be reached on political decisions

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[8] Kant argues that reason allows us to hold different beliefs from one another, whilst also requiring that we preserve a public sphere in which we can hold different views: "Many affairs which are conducted in the interest of the community require a certain mechanism through which some members of the community must passively conduct themselves with an artificial unanimity, so that the government may direct them to public ends, or at least prevent them from frustrating those ends" (1998a, 463). It should be noted however that Rawls' public reason is more like Kant's private reason, which is limited by the official role of the reasoner (as a clergyman, for instance who must reason always within a framework to a particular end). Public reason for Kant instead refers to the unbounded reasoning of someone who holds no official role, and can address the concerns of any human being. This for Rawls is more like what is allowed in one's private life rather than one's public (Fleischacker 2013, 151).

[9] Rawls' later discussions of civility add a proviso that one may invoke one's comprehensive conception to defend political principles "provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support" (1997, 776).

[10] This respect for reasonable disagreement proceeds from recognition of what Rawls calls the 'burdens of judgement', a set of factors which explain why "our conscientious attempt to reason with one another" should result in pluralism not agreement under free institutions. These factors include the complexity of evidence, disagreement about the weights of considerations relevant to judgements, vagueness of concepts and their different interpretations, the affect of life experience on assessment of evidence, the complexity of normative considerations, and a pluralism of values not all of which can be realized but which require decisions as to their priority. Citizens recognizing these factors recognize "the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life" (1993, 56-57).

which provides for social stability as each endorses those decisions from their own point of view and on the basis of their own private comprehensive conceptions.

As Sen takes up public reason, he maintains this aim of arriving at judgements that can widely be shared despite the fact of pluralism, but disagrees with Rawls that public reason is only exercised in constitutional democracies. Indeed, Sen rather understands public reason most basically to involve "the opportunity for citizens to participate in political discussions and so be in a position to influence public choice" (2003, 28). He accordingly identifies public reason in a wide range of political and cultural settings, and because he understands democracy to concern fundamentally the exercise of public reason dismisses claims that encouraging democracy globally is a form of Western imperialism.[11]

For Sen, then, the promise of public reason in determining important capabilities lies in its connection with two basic social practices: "the tolerance of different points of view (along with the acceptability of agreeing to disagree), and the encouragement of public discussion (along with endorsing the value of learning from others)" (2003, 31). Each of these practices allows for a wide range of voices to be heard through open debate. Consequently, agreements through public reason as to which capabilities are important will reflect citizens' diverse

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[11] By understanding democracy in terms of public reason (and not unduly narrowly in terms of public balloting, which "can be thoroughly inadequate on its own"), Sen widely identifies its history in non-western contexts: India, China, Japan, Korea, Iran, Turkey, the Arab world and "many parts of Africa" are all mentioned (2009, 327-328). As he says, "the apparent Western modesty that takes the form of a humble reluctance to promote 'Western ideas of democracy' in the non-Western world includes an imperious appropriation of a global heritage as exclusively the West's own" (2009, 35).

values and self- and social understandings. Only by consulting public reason in this way is social progress possible and political legitimacy attained, both of which are effectively denied if we insist on a 'fixed forever' list of important capabilities (Sen 2005, 160).[12]

2.2.1 Criticism of Sen

In contrast to Sen, Nussbaum believes that a list of important capabilities that applies across cultures is necessary if the capabilities approach is to address injustice effectively. Accordingly, Nussbaum believes there to be much more substantive agreement between people on moral and political issues than Sen, though she proclaims in spite of this a strong recognition of the fact of social diversity. Indeed, Nussbaum's claim is that there is such widespread agreement on the basic conditions of a life of human dignity that a global list of important capabilities can be devised without fear of cultural imperialism. These conditions she refers to as "provisionally nonnegotiable points" (2000b, 120), and she defends them on the basis of what she says are "years of cross-cultural discussion" with researchers and subjects representing both Western and non-Western traditions (2000a, 76; 2011a, 101-102).

Now Nussbaum does not propose a 'fixed forever' list since she thinks any list should be open to revision; but she does allege that Sen's approach to determining capabilities is inadequate on two general grounds. First, though Sen argues that political equality is best understood in terms of capabilities, he fails to

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[12] As Qizilbash notes, Sen does not explicitly mention legitimacy, but "a concern with it is, no doubt, one reason that Sen is centrally concerned with public reasoning and democracy in his recent writings" (2007, 178).

discuss what levels of equality are required for individuals to be treated justly (2003a, 36). Thus, though he admits that "an observation of *inequality* can yield a diagnosis of *injustice* only through some theory (or theories) of justice" (1995, 260), he neglects to provide that theory beyond an outline of how to think about it – he provides, that is, little sense of the extent to which the important capabilities determined by public reason ought to be equalized.

This criticism however is situated in the more fundamental worry Nussbaum has that public reason can be susceptible to the same problem of adaptive preferences that leads Sen to reject preference-satisfaction utilitarianism (2003a, 47). The problem with adaptive preferences, recall, is that preferences can be unreliable as a guide to well-being because people often reduce their wants and desires to what they believe their circumstances can afford them. In saying this however a word of caution is required, since not all adaptive preferences are problematic and there are cases in which they can be quite appropriate. Certain aspirations for instance may be beyond one's natural talents, or beyond what reasonably can be expected of the world to accommodate: should one have the preference to be the world's best endurance athlete, or to indulge an opulent lifestyle far beyond one's means, then changing these to something more realistically achievable is not submissive acquiescence but sensible acceptance of limitations. Instead then, the sorts of adaptive preferences which raise moral concern are those involving adjustments to and acceptance of bad or dubious circumstances. Of course, there can be a certain survivalism or pragmatism to such adaption if it allows one to cope with dire limitations or constraints that seem

intractable. But when judgements of justice are based upon such preferences, and the limitations and constraints are in fact not intractable, then matters are more troublesome as attention is shifted from rectifying bad circumstances simply because people can devise mechanisms by which to cope with them. Any solution to the problem of adaptive preferences however seems to require determining what treatment and conditions people have a right to expect for their lives. This accordingly requires some substantive conception or ideal theory that focuses upon what is good for people.

Sen however seems to think that we remove the problem of troublesome adaptive preferences "by moving from the utilitarian emphasis on desire to his own approach's emphasis on the *valuation* of capabilities." (Nussbaum 1987, 39) The question however is why should we think Sen's valuational procedure – his appeal to public reason – is any less corruptible than desire or preferences? As Nussbaum says, "just as people can be taught not to want or miss the things their culture has taught them they should not or could not have, so too they can be taught not to value certain functionings as constituents of their good living, where their culture has an interest in, or cannot avoid, denying them access to these functionings" (1987, 39).[13]

Nussbaum's worry, to put this in other words, is that relying on public reason as the arbiter of important capabilities can exacerbate systemic problems by legitimating troublesome adaptive preferences. This can be seen in most cases of oppression and deprivation perhaps, but is demonstrated well by Sen's own

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[13] Note this 'cannot' might be understood in terms of inability to value aspects of good lives if central to the survival of a culture (or to its identity) is suppression of that aspect. Consider for instance cultures based upon castes or moral hierarchies between types of people.

research on gender inequality.[14] Sen argues that the tolerance of gender inequality

is closely related to notions of legitimacy and correctness. In family behaviour, he

says, "inequalities between women and men (and between girls and boys), are

often accepted as 'natural' or 'appropriate'," and "sometimes the operational

decisions relating to these inequalities (e.g. providing more health care or

nutritional attention to boys *vis-à-vis* girls) are undertaken and executed through

the agency of women themselves" (1995, 260). Sen goes on to observe that there

is "empirical evidence that...deprived groups such as oppressed women in deeply

unequal societies...fail to acknowledge the facts of higher morbidity or mortality

(even though these phenomena have an objective standing that goes beyond the

psychological perception of these matters)" (1995, 263).

The problem is that in societies in which minorities accept their

subjugation appealing to public reason is unlikely to help recognize and redress

injustices done to them. Public reason itself can be compromised due to the

systemic nature of domination, and invoking it may serve only further to

normalize unjust inequalities. If personal values are thus subject to influence by

accustomed social conditions, then, as Sumner puts it, "if there is a problem here

for theories which interpret welfare in terms of felt satisfaction or preference,

there is equally a problem for a theory which assigns the same constitutive role to

valuation" (1996, 66). As Nussbaum concurs, "to say that education for women,

or adequate healthcare, is not justified just in case some nation believes that it is

not justified seems like a capitulation to subjective preferences, of the sort that

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[14] One can also see the extended treatment of systemic gender inequality in Nussbaum's *Women and Human Development* – in particular her discussion of Vasanti and Jayamma (2000a, 112-113, but also throughout).

Sen has opposed throughout his career" (2003a, 47).

What Nussbaum thinks is required instead is an objective valuational procedure "that will have the power to criticize the evaluations of functionings that are actually made by people whose upbringing has been hedged round with discrimination and inequity" (1987, 39).[15] One way in which to do this, she thinks, and yet still remain sensitive to self-determination, is to devise an open-ended and abstract list of important capabilities that is cross-culturally relevant, but whose particulars can be specified locally by public reason. The capabilities she proposes are thus prerequisites of leading a satisfactory human life, though their realizations as functionings in particular lives (including their possible non-realization) would remain within the province of personal decision.

2.2.2 Public Reason Reconsidered

Before we go on to discuss the details of Nussbaum's list, it might be said in defense of Sen that his emphasis on the constructive role of democracy, and the importance he ascribes public participation and discussion, can address some of Nussbaum's concerns. As Sen argues after all,

> political and civil rights, especially those related to the
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> guaranteeing of open discussion, debate, criticism, and dissent, are
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> central to the process of generating informed and considered
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> choices. These processes are crucial to the formation of values and

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[15] As Wolff and De-Shalit observe, because "individual valuations might be liable to distortion, false consciousness, or the result of limited experience and thus ignorance of the real nature of various alternatives…philosophical input is needed too: the philosopher cannot merely abdicate responsibility to democratic politics" (2007, 99).

priorities, and we cannot, in general, take preferences as given

independently of public discussion, that is, irrespective of whether

open interchange and debate are permitted or not (1999b, 10).

Sen's position is that democratic freedom can be used to enhance social justice

and achieve a fairer and better politics, though he does advise that this process "is

not automatic and requires activism on the part of politically engaged citizens"

(2009, 351). The question, then, is to what extent do political freedoms, civil

rights and democratic choice aid in the determination of important capabilities and

avoid the sorts of problems Nussbaum worries arise with adaptive preferences?

Engaged citizens exercising democratic rights and freedoms are clearly

well-positioned to challenge the traditional institutions and values that are often

the source of systemic inequalities and troublesome adaptive preferences. In

addition, by importing into public reason Adam Smith's notion of an 'impartial

spectator', Sen suggests that 'distant voices' from outside a society can help to

avoid the "possible parochialism of local reasoning shaped by the influence of

established conventions and limited informational frameworks" (2006, 237).

Thus, in determining what justice demands through public discussions, we should

invoke the judgements and consider the experiences of external others who have

no stake in the outcomes of our decisions (2009,130). This does not require of

course that public reason be respectful of every external argument, but we should,

Sen says, aim in our deliberations to "benefit from the insights that come from

differently situated impartial spectators" (2002b, 468).

Sen is surely right that the selection of capabilities through public reason,

especially when informed by external views, is less likely to be distorted by the sorts of conditions that give rise to troublesome adaptive preferences (Qizilbash 2007, 180). At the same time, however, he admits that "the opportunity [democracy] opens up has to be positively grabbed in order to achieve the desired effect" (1999a, 155). This suggests though that absent the conditions for the effective exercise of democracy the opportunities it provides are not likely to be realized: discussion, debate, criticism and dissent must be substantively informed to be capable of transforming systemic problems.

There are times when Sen does discuss the substantive conditions that make for meaningful democratic engagement. We see this for example when he says that "[political] participation requires knowledge and basic educational skills," so that "denying the opportunity of schooling to any group – say female children – is immediately contrary to the basic conditions of participatory freedom" (1999a, 32-33). But despite this and other such claims,[16] Sen never formally endorses as capabilities the necessary conditions for public reasoning to be effective. Thus, though he maintains that it is "crucial to safeguard the conditions and circumstances that ensure the range and reach of the democratic process" (1999a, 158) – suggesting as means to this end basic education, economic independence, and "social and economic changes that help individuals to be participating citizens" (1999a, 281) – he never actually requires that these conditions be guaranteed as capabilities. Indeed, his solution to social arrangements that fail to address such problems as undernutrition, persistent

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[16] E.g., the importance of "the guaranteeing of free discussion and uncensored distribution of news and fair comment" (1999b, 10).

illiteracy, and inequalities in gender relations – all clearly social inequalities that "seriously interfere with the equality of political participation" (Drèze and Sen 2002, 10) – is simply more of the same: "deeper analysis and more effective use of communication and political participation – in short, fuller practice of democracy" (1999a, 154). Sen may be right that fuller practice of democracy is ultimately the solution to addressing these problems, but fuller practice is surely a substantive not extensive notion and comes about by guaranteeing or institutionalizing its preconditions, not by hoping it will come about if just given enough time and opportunity.[17]

Sen's failure to guarantee the conditions for effective public reasoning also has bearing on the usefulness of his supplementing it with the views of impartial spectators. Distant voices are meant to counter the parochialism inherent in troublesome adaptive preferences as we consider what those with no immediate stake in our decisions might think of them. But what contribution can distant voices make to public discussion if the people who most need to hear what they say are unable critically to engage them? In other words, without the sorts of functionings that would guard against troublesome adaptive preferences in the first place, what confidence should we have that mere exposure to other perspectives should remedy the deficiencies their absence give rise to – especially if, as in many cases of adaptive preferences, the marginalization of certain groups benefits elites who have an interest in maintaining that marginalization? Indeed, it seems that the reforms Sen hopes for through exposure to distant voices must

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[17] For Nussbaum's assessment of the "puzzling tension" between the way Sen speaks of certain capabilities as if they are central and non-negotiable, and his refusal to endorse any account of central capabilities, see 2003a, 43-44. (See also Claassen 2011, 507 fn. 7.)

already have occurred for that exposure to be effective (Forman-Barzilai 2010, 153).

As Shapiro considers Sen's conception of public reason and the 'open impartiality' he claims it incorporates, problems arise because it operates on the model of an "academic seminar writ large, where the best argument wins" (2011, 1259). But though this model might be appropriate to public reasoning in constitutional democracies where the substantive exercise of basic rights and liberties is guaranteed,[18] what reason do we have to think it appropriate to societies in which these capabilities are not so secure? Furthermore, what reason do we have to think that societies should be so eager to receive and deliberate the viewpoints of outsiders? Why, that is, should we expect societies which engage in public reasoning in the way Sen describes, and by which he gets traction for his claim that democracy is a global phenomenon (viz. in terms of opportunity to participate in political discussions), to have such wide commitment to ethical objectivity as to be motivated to reach the most defensible political-ethical judgements?[19] After all, distant voices by their very nature lack democratic legitimacy and so are not always welcomed by democratic publics (Shapiro 2011,

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[18] Indeed, this might not even be enough in these societies. As Peter Evans warns, modern market processes constitute an impediment to the deliberative preference formation that Sen says is essential to the expansion of capabilities. As Evans says, "The process of preference formation that flows from modern distributions of economic power is the antithesis of the public discussion, argument, and open communication that Sen considers consistent with enhanced capability...One doesn't need a Foucauldian view of culture in order to appreciate the power of the various 'empires of Coca-Cola or MTV' to promote preferences and priorities different from those that arise from individuals autonomously deciding what they 'have reason to value'" (2002, 58).

[19] Meant in Putnam's sense of 'ethics without ontology' – as appealing to objective claims about ethics that do not presuppose ethical ontology, or a metaphysics of 'what ethical objects exist' (Sen 2009, 41-42).

1259).[20] As such, societies that encourage their citizens to participate in political discussions, and to tolerate different points of view, need not thereby be expected to extend that consideration to the views of strangers beyond their own boundaries. Indeed, it is for this very reason, and the political legitimacy at stake in it, that Rawls confines his own employment of public reason to the internal machinations of constitutional democracies.

Now all this said, of course, Sen might be right that external voices can play a role in addressing troublesome adaptive preferences. But for external voices to be effective in this way, it would seem that citizens must already be guaranteed certain basic capabilities by which to properly engage and critique them. And even if there were such guarantees, much more would need be said about the role of impartial spectators than Sen ever provides. Sen never tells us which voices we should listen to, what makes for impartiality, and to whose satisfaction external views should be deliberated by public reason. In response to this he might claim that such specifications are not possible independently of knowing what issues are at stake and which populations are discussing them. This seems fair enough, and would seem to emerge from his critique of ideal theory as discussed in chapter 1. But at the same time it seems some guidance should be forthcoming. There are after all abundant distant voices that might be heard, not all of which can be considered by public reason, and not all of which may be as enlightened or tolerant as Sen might hope – indeed, some might be quite repugnant or might bulwark existing injustices (Clare and Horn 2010).

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[20] As Shapiro suggests, at the core of Sen's open impartiality is a tension with the democratic process he intends it to advance, a tension he never investigates nor even appears to notice (1260).

Furthermore, if there is an unavoidable plurality of impartial viewpoints such that some social disagreements are likely to remain intractable (as Sen claims in his rejection of ideal theories of justice), then what exactly does the impartial spectator do for us? The impartial spectator can occupy any of these impartial viewpoints, but appears to move us no further along because of it. Without more substantive definition the impartial spectator appears to be a device that seems "least helpful where it might be needed most" (Rehn 2010, 257). What seems to be needed as such is some normative basis for determining which impartial voices are worth hearing and some procedural sense of how these should be evaluated. As Clare and Horn put this in their assessment of Sen's open impartiality, we need a way to make "judgements about the relevance of perspectives...before considering those perspectives in their full detail" (2010, 79).

The main problem then with Sen's concepts of democracy and public reason is that in being non-ideal they actually seem overly idealistic, lacking proper accounts of how to deal with political power and struggle (Stewart and Deneulin 2002, 63-64).[21] As Srinivasan understands this, Sen's failure adequately to specify how to safeguard "the egalitarian functioning of critical democratic processes is directly linked to the absence of a substantive position on justice." Indeed, this so "undermines his deep notion of equality and commitment to substantive freedom" that what is needed is a reassessment of his 'silence' on the substantive content of justice as it relates to social and political processes, and a determination of "what justice minimally requires of democracy in the first place"

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[21] See also Deneulin and McGregor: Sen "fails to take a realistic account of the often disruptive influence of power dynamics," particularly with regard to questions of meaning formation (2010, 503).

(2007, 466-467).

In summary then, and as Robeyns observes, "beyond stating in general terms that some democratic processes and public reasoning should be involved [in the identification of important capabilities], Sen has never explained in detail how such a selection could and should be done" (2011, 3.2). He might say that "it is the people directly involved who must have the opportunity to participate in deciding what should be chosen," instead of acquiescing to local political or religious elites, or foreign or domestic cultural experts (Sen 1999a, 31-32). But he has little to say about the possible range of procedures by which valuational issues are to be resolved or by which information on valuations is to be obtained. He provides little guidance, to put this otherwise, about the democratic procedures for identifying capabilities, and how to weight or prioritize capabilities once selected.[22]

2.3 Determining Capabilities: Nussbaum and List Formation

Insofar then as Sen seeks to avoid ideal specifications of the conditions that make for effective public reason and democratic engagement, he finds himself vulnerable to the same sorts of problems regarding adaptive preferences he diagnoses in utilitarianism, and which he has voiced so passionately in his policy work on development issues. As we shall see with Nussbaum's theory, however, by including on her list of important capabilities the conditions necessary for effective political engagement, she can provide, or so she believes,

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[22] In *Creating Capabilities* Nussbaum says that Sen has not yet offered any detailed account of how democratic procedures should address structural issues. As she further criticizes, "too frequently...the word 'democracy' is insufficiently defined" (2011a, 177-178).

for the conditions of meaningful and effective public reasoning. Furthermore, by requiring that citizens hold capabilities to threshold levels she claims she can provide guidance in deciding how important capabilities ought to be implemented.

Nussbaum's argument is that to address injustice effectively a set of central capabilities must be specified and guaranteed to all citizens to minimal threshold levels. Only as this is achieved, she thinks, is the dignity of human beings provided for, which ultimately is what political equality should be based upon: "it is the *equal dignity* of human beings that demands recognition" (2006a, 292). In claiming this, however, Nussbaum says she can still recognize Sen's point that the capabilities approach can have application in ways that do not require a list of central capabilities. As she says, "all sorts of capabilities suggest interesting comparisons across nations and regions, and [with these comparisons] there is no reason to prescribe in advance" (2011a, 29). But insofar as we are concerned with justice, she says, as clearly Sen is given his criticisms of Rawls and utilitarianism, some specification of capabilities is necessary given the problem of adaptive preferences and the conditions of effective public reason to counter it.[23]

As Nussbaum develops her version of the approach then her aim is to devise a list of capabilities which if denied to certain threshold levels make "a life not worthy of human dignity" (2011a, 31). Now dignity of course is a vague

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[23] As Eric Nelson puts it, Sen's arguments against lists "would be quite compelling if Sen had limited his use of the capability approach to measuring welfare in particular situations...But that is not where Sen leaves his argument. He has repeatedly made clear that capabilities ought to be given the role of primary goods in the Rawlsian analysis of distributive justice." As Nelson goes on to say, "if capabilities are to be the basis of redistribution – if they are truly 'entitlements'...then Sen must tell us what they are. None of the reasons for his declining to provide such a list is compelling when seen in this light...[If] capabilities are going to determine the social minimum that the basic structure of society must ensure to all citizens, we must know which are to be included" (2008, 104, 106).

concept, and it can be difficult to specify what exactly it means. Nussbaum argues however that the idea of human dignity has "broad cross-cultural resonance and intuitive power" (2006a, 72), and her approach as such is to appeal to her readers to "consider that certain ways of life that human beings are forced to lead are not fully human" (2004, 197). Indeed, she thinks dignity is recognizable "as the idea that lies at the heart of tragic artworks...[of] human beings...having worth as an end, a kind of awe-inspiring something that makes it horrible to see [them] beaten down by the currents of chance" (2006a, 72-73). The fact that we are able to respond to tragic tales from other cultures, she thinks, and can find dignity's form in both religious and secular contexts, indicates the universal credibility of the notion.[24]

By appealing to dignity Nussbaum's purpose is to get traction on the idea that just as there are certain functionings without which we would say there is an absence of human life, so there is a "truly human way" of performing those functionings such that if one 'merely' performs them one's life lacks dignity. The general conception she has in mind is one in which people shape their own lives "in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world." Accordingly, Nussbaum situates herself in a

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[24] This appeal to judgements about human nature that figure in myths and stories as justification for the capabilities approach Nussbaum refers to as 'internal essentialism'. Internal essentialism is the method of justification Nussbaum applies primarily in her early work: it is an approach that maintains that "the deepest examination of human history and human cognition *from within* reveals a more or less determinate account of the human being, one that divides its essential from its accidental properties." This requires "an evaluative inquiry into what is deepest and most indispensable in our lives [but] need not presuppose an external metaphysical foundation" (1992, 207-208). It thus differs from 'externalist essentialism' which seeks to validate evaluative judgements about human beings by reference to external facts which can be validated scientifically. In her later work Nussbaum appeals much more to the method of overlapping consensus she borrows from Rawlsian political liberalism, though as Claassen and Düwall point out she does not appear to discard this earlier strategy altogether (2013, 8). For criticism of justifying capabilities by myths and stories see Katzer (2010, 69).

broadly Aristotelian-Marxist framework which holds that "a life that is really human is one that is shaped throughout by [the] human powers of practical reason and sociability" (2006a, 72).

Now importantly, because she claims dignity is such a basic notion and so widely recognized,[25] Nussbaum's claim is that the capabilities essential to dignity are prepolitical in nature as opposed to legal or institutional: they belong to us on the basis of our existence as human beings alone (2006a, 285).[26] From this two things follow. First, Nussbaum aligns herself with the human rights and natural law traditions (2003a, 36 ff.; 2000a, 29 ff.), and thereby gives herself basis for claiming that states that fail to guarantee these entitlements to their citizens are unjust, no matter how opulent they otherwise might be.[27] Second, Nussbaum contends her central capabilities can be the subject of a broad overlapping consensus amongst people who otherwise have very different conceptions of the good (2000a, 5). She believes, that is, that despite disagreements about what it means to live a good life, we can agree that dignity requires that individuals be able to realize her list of capabilities as they choose, subject to them respecting others' capabilities. Indeed, Nussbaum finds support for this in the very objection raised by her critics that her list is paternalistic: if the list is objected to as imposing particular ideals, and as showing too little respect for people's freedom to decide their lives for themselves, then this merely shows support for at least one universal value, "the value of having the opportunity to think and choose for

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[25] "…the idea of what human beings need for fully human living is among the most vivid intuitive ideas we share" (2006a, 279).

[26] For the ramifications of this for the disabled see Nussbaum 2006a, Chapter 3.

[27] As Nussbaum says, it is "a widely shared understanding of the task of government...[that it] has the job of making people able to pursue a dignified and minimally flourishing life" (2011a, 32-33).

oneself" (2000a, 51). It is in this way that Nussbaum thinks universal values are

compatible with a respect for pluralism, so that all that remains is to determine

which freedoms and choices are most significant and deserve protection by the

state in the form of central capabilities.

Accordingly, it is Nussbaum's position that securing her central

capabilities can be construed as a political project that can be pursued

independently of questions about their metaphysical status. She seeks a "theory

of human being that goes beneath politics" (1998, 284). What is most significant,

she says, is that people can agree that the capabilities are important; it is not so

important their full reasons why, which likely have to do with their particular

conceptions of the good and the importance they ascribe to (choosing) particular

functionings. As a result, Nussbaum endorses Rawls' project of political

liberalism but with capabilities rather than primary goods as the object of an

overlapping consensus.[28] Remembering then that Nussbaum says her list of

important capabilities is not fixed but tentative and open to revision in the light of

criticism or new evidence,[29] her latest version of the list reads as follows (2011a,

33-34):

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[28] It should be noted that Nussbaum does not require that an overlapping consensus must already
be present in society. Instead, she requires "only that there be a plausible path to that endorsement,
such that, over time, it is not unreasonable to suppose that society could arrive at that consensus."
She further believes that she can show "that most of the major comprehensive doctrines in modern
societies could, over time, come to support the principles [she endorses]" (2011a, 90-91). This
claim is further developed, and its plausibility investigated, in Chapters 3 and 4.

[29] Her claim is it is likely to undergo further modification in the light of criticism (2006a, 76).
Doubts about Nussbaum's transparency regarding this are raised in Jagger (2006) and Clark
(2013), and discussed more completely in Chapter 3.

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 assaults, 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 human beings, 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 nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination 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 being,

exercising practical reason and entering into meaningful relationships of mutual

recognition with others.

Now importantly, and as we have seen, Nussbaum only requires that these

capabilities be guaranteed to basic threshold levels; she does not say, *pace*

Dworkin (2000, 301-302), that all must be held by all individuals equally.[30] And

indeed, what justice requires above these thresholds she defers from speculating,

admitting that her theory of justice is partial and compatible with several different

accounts of distribution above these minimal requirements. Threshold levels

already impose "a taxing and nowhere-realized standard," and so it is reasonable

to focus on these minimal levels first and only subsequently consider what justice

might require beyond them (2002a, 12).[31]

In addition, it should be noted that the capabilities are described in an

abstract way and as such need further specification. But this should be done,

Nussbaum says, by each society on the basis of local interests and circumstances

(2002a, 79). Thus, it follows that the list can have 'multiple realizations' as

different societies can differently specify the list but all in a manner concordant

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[30] For a discussion of which capabilities must be held equally and why, see Nussbaum 2006a,
Chapter 5, Section iv.
[31] It should be noted that some commentators think this poses serious problems for Nussbaum's
position. Arneson (2006) in particular believes that Nussbaum's 'sufficientarianism' is
implausible, arguing that injustices can result above thresholds, and that giving more to those
already above the thresholds sometimes can be more important than giving to those below them.

with human dignity. This is important as it helps to protect diversity and

pluralism, but also because it maintains a minimal account of social justice that

avoids falling prey to a full-blown relativism.[32]

2.3.1 List Thresholds and Adaptive Preferences

What follows from this framework is that much of the credibility of

Nussbaum's account depends not only upon the selection of important

capabilities, but also upon how local specifications of the capabilities and their

thresholds are determined just or unjust. After all, the capabilities could be

interpreted so narrowly, or their thresholds placed so low, that the list could

become effectively meaningless. How are these then to be regulated to maintain

the robustness Nussbaum needs to effect the social change she deems necessary,

and to avoid the problem of adaptive preferences that beleaguers Sen's

formulation of the capabilities approach?

To start with, it should be recognized that Nussbaum says the thresholds

must be sufficient to ensure human dignity. They must be set at "that dividing

line between human and truly human lives," and it is the responsibility of

governments to ensure that all citizens are at or beyond them. As this is so, we

can understand the list as primarily concerned with what Nussbaum calls

combined capabilities. Combined capabilities are a combination of *internal

capabilities* – developed states of the person that enable them to exercise

functionings – and the external conditions that allow for their exercise. So for

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[32] Claassen observes this makes Nussbaum's position both philosophical and democratic: the most
fundamental choices about important capabilities are made philosophically, but their specifications
are left to the democratic process (2011, 497).

example, one can have the internal capability to engage in political discourse due to adequate educational and literacy levels, but not the combined capability due to policies that forbid free speech. Similarly, should appropriate political policies be in place but not the internal capabilities by which to take advantage of them, then the combined capability is lacking. In each case there is a failure of justice. This means that since governments must be concerned to provide combined capabilities they must be concerned with freedom both positively and negatively conceived: governments not only must ensure citizens are not impeded from exercising their capabilities by the state or private associations, they also must ensure citizens have the internal, material and social resources needed to take advantage of their non-impeded freedom (2002a, 71).[33]

In addition, we must also recognize Nussbaum's claim that although each of the capabilities is separate and non-reducible, so that each at its threshold is necessary for dignity, they are nevertheless related in complex ways. Thus, though one cannot make up for the lack of one capability by providing larger shares of others, the capabilities can be promoted by means of one another. For example, promoting literacy can help to promote both control over one's environment and the effective right of political participation (2002a, 81).[34] Particularly important in this regard, however, and important for the issue of troublesome adaptive preferences, are practical reason and affiliation. These two

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[33] As Nussbaum notes in *Frontiers of Justice*, this can mean requirements for non-governmental institutions as well, such as multinational corporations, NGOs, and international bodies such as the UN, ILO, and World Court (2006a, 306-324).

[34] For an elaboration of various ways many of Nussbaum's central capabilities can be seen to be interconnected see Wolff and De-Shalit (2007), particularly Chapter 3, and the notions of 'fertile functionings' and 'corrosive disadvantage' as discussed in Chapters 7 and 8.

capabilities are special in the sense that they "organize and suffuse" all the others

making their pursuit 'truly human'. The general idea here is that when each of the

capabilities is present in a form that is commensurate with human dignity

practical reason and affiliation are 'woven' into them (though in saying this

Nussbaum does not mean these other capabilities are merely instrumental to the

ends of practical reason and affiliation). Indeed, the very having of each

capability is valuable for Nussbaum such that having the capabilities makes for a

dignified life, regardless of how one realizes them as particular functionings. As

such, practical reason and affiliation are meant to constrain the shape of principles

and policies designed to ensure enjoyment of the other capabilities (2011a, 39;

2002a, 82).

This means that exercising practical reason and critically reflecting on how

one's life should unfold requires the capacity to choose and order functionings in

the areas of each of the other capabilities. The effective use of practical reason, in

other words, requires a dimension of control over the other capabilities, and

something similar to this is the case with affiliation: when the capabilities are

available in a way that respects human dignity, they are available in a way that

recognizes the importance of others' respect for our own self-respect. This can

involve such things as recognizing the importance of privacy in health care, or

ensuring non-exploitative relationships in the workplace. In each case, the

capabilities must be available so that in all relationships there is mutual respect of

humanity (2002a, 82).

Returning to our questions then of how Nussbaum can maintain the

robustness of her thresholds, and avoid falling prey to the problem of adaptive

preferences, Nussbaum's solution is the capabilities themselves. Indeed, with

regard to adaptive preferences she says that "a habituated preference not to have

any one of the items on the list (political liberties, literacy, equal political rights,

or whatever) will not count in the social choice function, and an equally

habituated preference to have such things will count" (2002a, 149). As Nussbaum

thus understands adaptive preferences they are problematic when they result from

narrowed opportunities and limited exposure to possibilities – when they result, in

other words, from a lack of capabilities in important areas of human life. But if

important capabilities are secured to appropriate threshold levels, and this means

being able to exercise practical reason unimpeded by external or internal obstacles

in a manner involving respect of one's own and others' humanity, then there is no

reason to be concerned about preferences which otherwise might be thought to be

limiting. Indeed, Nussbaum's position is that if the capabilities are held in the

robust way she requires, then such cases as Sen's tamed housewife cease to be

problematic: either such decisions are just not likely to be made, since people

generally avoid such life choices in the context of real alternatives;[35] or if they are

made they are made on the basis of genuine opportunity to do otherwise in which

case such choices should be respected.[36]

     With regard to local specifications of capabilities and thresholds, on the

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[35] Nussbaum's examples of Vasanti and Jayamma described throughout *Women and Human Development* (2000a) are meant to demonstrate this.
[36] As Nussbaum says, "an emphasis on the capabilities does not in any way preclude the choice to live a traditional hierarchical life, and is indeed intended to protect that opportunity" (2002a, 236). Her example of Hamida Khala, who values purdah but is keen to oppose its mandatory enforcement, is meant to demonstrate the importance attached to choice by those who have capabilities yet support traditional ways of life (2002a, 238).

other hand, and the danger they may be interpreted so narrowly or set so low as to become meaningless, Nussbaum's solution is to rely upon her thick vague conception of the good and to be unapologetic about the valuative grounding of her theory. As she says, her approach "goes directly and forthrightly to the good (and the right), taking an unambiguously clear stand on the need for these items" (2002a, 149).[37] The thickness of her conception refers to the notion of the human being she endorses, whilst vagueness refers to the compatibility of this notion with a variety of moral, religious and philosophical doctrines. Together, these aspects allow her to maintain that only specifications in keeping with her conception of the human being are acceptable whilst allowing for a plurality of ways this can be done. The question at this point then is how plausible is Nussbaum's thick conception of the good, how is it elaborated to determine appropriate thresholds, and is it so thick that its vagueness is undermined and the pluralism it is meant to provide for compromised?

2.3.2 Allegations of Paternalism

In response to these worries Nussbaum emphasizes that the elements on her list emerge from cross-cultural exchange and dialogue and that her conception of the person has widespread support (2002a, 76). At the same time, however, she anticipates the allegation that her list is based upon too comprehensive a

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[37] It should be noted that the phrase "thick vague conception" was used by Nussbaum in her earlier work (1990, 217). In her more recent writings she has turned from this terminology and speaks instead about "thin universalism" – but the basic idea appears to remain the same. As she says in *Frontiers of Justice*, "a highly general idea of human flourishing and its possibilities does figure in the approach," though "it is not a single idea of flourishing" (2006a, 182). In her "Perfectionist Liberalism and Political Liberalism," she speaks of "a thin and abstemious view" that abstains from controversial metaphysical, epistemological and comprehensive ethical claims, but nonetheless has "moral content...acceptable to all the major comprehensive doctrines" (2011b, 36).

conception of the good and accordingly is paternalistic. In defence she thus

emphasizes that her list is sensitive to cultural difference in six different ways.

Some of these have been mentioned already, but bear repeating for the sake of

completeness.

First, she says that the list is open-ended and subject to ongoing revision

and rethinking. Thus, should there be disagreement with the list, either in terms

of the presence or absence of elements, these criticisms must be considered and

debated. Second, by only describing the elements on the list in a general and

abstract way she provides both room and requirement for local deliberation and

specification. Societies can thus understand and specify the capabilities

differently in terms of their cultures and histories, as is the case for example with

free speech restrictions which are appropriate in Germany but might not be in the

United States. Third, she conceives the list as a free-standing 'partial moral

conception' which is introduced for political purposes only, and is accordingly

free from metaphysical grounding. The list can thus be agreed to by people with

different conceptions of the good, and can be supported from within a variety of

religious, secular and metaphysical doctrines. Fourth, since the appropriate target

is capabilities not functionings, the list has built-in protection of pluralism. The

list does not require after all that people realize the capabilities in any particular

way, only that they have the freedom to choose if and how to realize them. Fifth,

the major liberties that protect pluralism (freedom of speech, freedom of

association, freedom of conscience) are included on the list, meaning they enjoy a

central and non-negotiable place. And sixth, Nussbaum maintains a strong

separation between issues of justification and issues of implementation. Thus,

although she believes the list is justified as a good basis for political principles

around the world, she forbears from advocating intervention into the affairs of

states that fail to recognize them (though encouragement and persuasion are

permissible) (2003a, 42-43; 2006a, 78-80).

2.4 Concerns with Nussbaum's Theory and the Strategy Going Forward

In evaluating the prospects of Nussbaum's theory we should see that by

incorporating objective criteria into her approach she appears to sidestep many of

the issues that pose problems for Sen's formulation. By employing substantive

not just formal devices she offers a solution to the problem of adaptive

preferences, but by providing for local specification of the capabilities claims to

do so without losing connection to preferences altogether as often happens with

other objective conceptions of the good.[38] Thus, she maintains the importance of

ideal theory, but believes she can accommodate Sen's appeal to public reason as

the connection that facilitates its real-world implementation.[39]

At the same time, however, introducing these objective criteria raises

serious questions for Nussbaum's theory. Nussbaum's aim is to provide a theory

which respects diversity but avoids relativism by means of the regulative notion

of dignity. Dignity is claimed to require each of the capabilities on her list, and

Nussbaum thinks there can be widespread acceptance of these capabilities both on

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[38] One way of putting this is that her theory carves a middle ground between subjective welfarism, which reduces the good to desire but is unable to criticize unjust desires, and Platonist accounts which understand the good to exist independently of desire, but which can thereby alienate an individual from the desire for their own good (2006a, 116-117).

[39] With regard to this Nussbaum says that each nation should set thresholds at aspirational not utopian levels. What this means will thus differ as each country's social-historical background and social-economic standing differ (2011a, 42).

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the basis of their intuitive appeal and on the basis of agreement about the requirements of practical reason and affiliation as their architectonics. Indeed, enjoyment of her capabilities is a necessary condition for the achievement of any conception of the good life: as she says echoing Rawls, "it is always rational to want [the central capabilities] whatever else one wants. If one ends up having a plan of life that does not make use of all of them, one has hardly been harmed by having the chance to choose a life that does" (2002a, 88-89). This agreement on the importance of the capabilities as mentioned however needs only be political, meaning that people need not agree on their reasons for thinking them important, and that supporting the capabilities is part and parcel of citizens valuing each other's political equality. This is essential in order to render the state neutral with respect to controversial conceptions of good, and not to dragoon individuals into particular ways of life they do not endorse: "we understand that respect for one's fellow citizens as equals requires not building the state on the ascendancy of any one particular comprehensive doctrine of the purpose and meaning of life, however excellent" (2011b, 22). Thus, there can be definite moral content to political principles, but only in terms of equal respect for citizens as they exercise their practical reason to live dignified lives in the way they see fit.

But is Nussbaum's list of capabilities and her aversion to prescribing functionings as neutral as she claims? By endorsing a set of capabilities claimed important independently of people's valuations of them she is vulnerable to charges of cultural imperialism. Thus, the question is whether Nussbaum's universalism is as thin as she presumes, thus making it amenable to political

liberal legitimacy, or rather makes such substantive demands that it more properly

is defended on comprehensive liberal grounds. In the following chapters I

investigate Nussbaum's claim that her theory can be defended as a version of

political liberalism despite the substantive nature of her list and the criticism she

acknowledges that it currently lacks overlapping consensus. Chapter 3 frames the

issue by examining Nussbaum's conception of her theory as a version of political

liberalism modelled on Rawls' formulation. It then elaborates differences

between their formulations, and explores what problems they face in common.

These differences and common problems are then examined in chapters 4 and 5 to

cast doubt on Nussbaum's claim that she can assert the moral substance of her

theory on a political liberal standard of respect and legitimacy.

Chapter 3: The Capabilities Approach as a Political Liberalism

We saw in chapter 2 that a privileged set of capabilities must be guaranteed all citizens if the capabilities approach is to function as a viable theory of justice. We also saw that Nussbaum believes she can justify the state endorsing such a list of capabilities on political liberal grounds. Chapter 3 examines how Nussbaum develops her capabilities approach as a form of political liberalism on the basis of Rawls' later theory and considers their various differences. It then analyses a series of problems asserted of Rawls' political liberalism, transposes these problems to Nussbaum's formulation, and introduces Nussbaum's solution to them by means of the capability-functioning distinction. The chapter closes by questioning Nussbaum's formulation of her list in consultation with others, and identifies a tension, to be resolved in chapter 4, between the process of reflective equilibrium that Nussbaum says is the method for morally determining the list of capabilities, and the overlapping consensus that is meant to justify it politically. We will then be in a position to investigate whether Nussbaum's capabilities approach can function as a form of political liberalism as she claims, or rather makes substantive claims that better identify it as a form of comprehensive liberalism.

3.1 Comprehensive Liberalism and Political Liberalism

"Liberals believe in liberty" states a classic definition (Gaus and Courtland 2010), meaning liberals value liberty as primary amongst political values, and place the onus on those who would limit individuals' freedom, including the state, to justify their doing so. The straightforwardness of this characterization however

belies the multiplicity of forms that liberalism can take depending on how liberty and justifiable limitation are construed, particularly given the other concern of liberalism to secure each citizen's political equality. Different understandings of the requirements of freedom result in different formulations of what individuals owe one another and what the state as a political authority owes its citizens. Permutations of liberalism thus abound,[1] and in speaking of 'liberalism' it is consequently important to specify to which form or group of forms one is referring.

To this end it is possible to categorize the development of liberal theory into three historical phases (Young 2002, 27-29). First is the early modern liberalism of Hobbes, Locke and Spinoza, in which the freedom of the individual is held necessary to secure the conditions of self-preservation. For these early liberals, individual liberty was realized by means of a social contract in which individuals would forgo certain natural rights in exchange for the establishment of political institutions that would protect them from each other's egoistic and irrational impulses, which unconstrained would threaten their lives, liberties and possessions. This form of liberalism remained prominent until its general demise with the arguments of David Hume, who cast doubt on social contracts given the implausibility of true consent when most citizens have little choice in acquiescing to state power. This early form of liberalism thus gave way to the comprehensive liberalism which develops primarily with Mill, and which emphasizes not self-preservation but self-development or self-fulfillment as the goal of liberal political

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[1] Consider for instance egalitarian, economic, social, rights-based and perfectionist forms.

institutions. This late modern group of theorists no longer argues from a hypothetical state of nature in which self-preservation is in doubt, but rather seeks to identify what liberties must be secured and protected for individuals to live good lives.[2] To this end, the focus has been upon what rights are necessary to facilitate individuals realizing their freely chosen visions of the good life, which are now generally identified as the traditional liberal freedoms of speech, religion and conscience. The third phase, contemporary political liberalism, is a recent offshoot of this second, but differs in that political liberals believe the socio-political diversity of modern societies precludes the possibility of a regulatory framework that would realize all conceptions of the good. Instead, political liberals seek the widest accommodation of different conceptions of the good, and the most reliable form of political stability, by distinguishing public and private concerns and seeking consensus only on a framework for resolving conflicts at the political level.

Comprehensive and political liberalism can be distinguished more directly in terms of their different answers to questions about when citizens, political principles and political norms can be said to be reasonable or legitimate. For comprehensive liberals, liberal political commitments cannot adequately be defended or elaborated except by invoking the deeper values and commitments associated with some overall or 'comprehensive' philosophy. Thus, "they relate liberal commitments in political philosophy to some vision or conception of what

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[2] The development of individuals' faculties was also a concern of Spinoza and Locke, "but to the extent that its satisfaction is believed to help secure an 'acceptable' life and thereby facilitate socio-political stability…it is a means to an end (e.g., self-preservation), and not, as it is for modern liberals, an end in itself (e.g., self-fulfillment)" (Young 2002, 28).

matters in life and of the human person and its place in the world" (Waldron, 91).

Depending then on what comprehensive liberals appeal to in order to justify their

political commitments – be this an overall theory of value, an ethical theory, an

epistemology, or a metaphysics of the person and society – they defend policies

which encourage these commitments in individuals' public and private lives. The

political legitimacy of these comprehensive appeals does not rely upon the

endorsement of citizens themselves. They are claimed right or good or true

regardless of citizens' standing beliefs and values, and as such the state is claimed

justified in regulating both public and private institutions and cultures to promote

them. The nature and extent of this promotion however is justified differently by

different theorists as some support legal interventions that prohibit non-ideal

behaviours, whereas others support only the state's active encouragement and/or

discouragement of particular activities and choices, both on normative and

pragmatic grounds.[3]

In response to this, however, the objection is raised that by basing political

principles upon a particular conception of the good, comprehensive liberals fail to

treat equally those citizens who have good reason to reject that conception.

People can and do reasonably disagree about the good[4], and so for the state to

institutionalize even a sound particular conception is to treat unfairly individuals

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[3] It should be noted that the terms comprehensive liberalism and perfectionist liberalism are
sometimes used interchangeably. However, as Nussbaum points out this can be misleading, since
a doctrine can be comprehensive without being perfectionist. A deterministic or fatalistic doctrine
like astrology, for instance, "could hardly be described as perfectionism, since it held that our fates
are all fixed by our stars and it makes no sense to think of ourselves as pursuing a good life."
[4] See Rawls' 'burdens of judgements' mentioned in chapter 2 for his complete list of reasons
reasonable people can disagree. Note that political liberals need not invoke the epistemic
uncertainty of the burdens of judgement but can simply say that respecting citizens means not
imposing political principles upon them.

who reasonably reject it. In effect, such people are treated as second-class

citizens, as normative principles they do not or cannot accept regulate the political

and non-political institutions under which they live and by which they structure

and conceptualize their lives.

Taking this objection on board, political liberals argue that the plurality of

reasonable conceptions of the good in modern societies precludes the possibility

of a voluntary public consensus on "any conception of justice that seeks to

regulate all political and nonpolitical behavior according to the tenets of a single

comprehensive doctrine" (Young 2002, xvi). We can thus understand political

liberals to be driven by an ideal of political legitimacy characterized not by claims

to truth or absolute moral value, but by the political equality of citizens and the

importance of being able to endorse governing political principles. Accordingly,

rather than seek widespread agreement on disputed moral or metaphysical claims,

or being willing to impose such claims upon a normatively disparate citizenry,

political liberals seek instead a consensus amongst reasonable citizens who can be

persuaded that liberal political arrangements are the best way to respect equal

citizenship and to achieve social stability (Sandel 1998, 190). As such, political

liberals seek to limit the application of their political policies to the political

domain alone. They are concerned that liberal values be realized in the political

sphere to the end of equal citizenship, but are not concerned, unlike

comprehensive liberals, with justifying those values on the basis of a particular

theory of what human life is like or what constitutes its value.

3.2 Rawls' Political Liberalism

As Nussbaum develops her version of the capabilities approach she specifically states that "John Rawls' work has been of the utmost importance, particularly in convincing me that the view ought to be expressed as a type of political liberalism" (2011a, 124).[5] Accordingly, it is helpful to elaborate Rawls' version of political liberalism in order to contrast it with Nussbaum's later formulation of her theory.

Rawls' later political theorizing is driven by the need to achieve political stability in the context of reasonable pluralism. As he poses the motivating question of *Political Liberalism*, "How is it possible for there to exist over time a stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines?" (1993, 4) This concern with stability emerges from Rawls' dissatisfaction with his argument in *A Theory of Justice*. In his earlier work he argued that political stability is achieved in a society characterized by *justice as fairness* by citizens accepting their conceptions of the good as best realized by acting in accordance with the principles of justice. In *A Theory of Justice* this congruence between the right and the good was supposed to follow from the fact that citizens' conceptions of themselves as free and equal persons in the original position entails a Kantian self-understanding in which agents are only free when they act independently of their particular histories and circumstances and in accordance with the dictates of reason. As Rawls states the paradigm underlying this argument, "the most stable conception

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[5] See also *Sex and Social Justice*: "Any universalism that has a chance to be persuasive in the modern world must, it seems to me, be a form of political liberalism" (Nussbaum 1999, 9).

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of justice…is presumably one that is perspicuous to our reason, congruent with our good, and rooted not in abnegation but in affirmation of the self" (1972, 436). Since Rawls believed citizens would prioritize autonomy in their self-conceptions, he believed they would give privileged place to its requirements in their comprehensive doctrines, which would mean abiding by the principles of justice as necessary and sufficient means to this end.[6] Since following the principles of justice as determined in the original position would mean affirming their most fundamental selves, Rawls thought it reasonable to expect that citizens would follow the principles of justice, which accordingly would secure the stability of the basic institutions of society over time.

The problem with this argument however, as Rawls later came to realize, is that presuming citizens' highest interest to be in advancing their self-conceptions as free and equal persons, and that this requires acting on the principles of justice as determined in the original position, presumes a controversial ideal of personhood that conflicts with many comprehensive conceptions. Indeed, it relies upon a Kantian sense of autonomy that invokes controversial metaphysical and moral commitments that not all reasonable people can be expected to hold. As such, Rawls' argument for stability in *A Theory of Justice* in effect builds into the original position a substantive conception of the good. This consequently makes his argument appealing only to those who already accept such an ideal, and leaves him unable to explain why citizens who reject the

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[6] This emits from our "desire to express our nature as moral persons" which is equivalent to the desire to act justly: "The desire to act justly and the desire to express our nature as free moral persons turn out to specify what is practically speaking the same desire" (1972, 574, 572).

priority of Kantian autonomy would or should feel compelled to abide by the principles of justice at the expense of (other) important aspects of their comprehensive doctrines.

Importantly, then, for Rawls political respect and reliable social stability only obtain when citizens believe they have good reason to abide by the principles of justice that govern society's basic institutions. Without this belief, there is no reason why citizens should feel compelled to sacrifice their private interests to the demands of public justice, apart from unjustifiable (and possibly untenable) coercion. In other words, unless public right aligns with private good, there is no reason why citizens should be relied upon to abide by the principles of justice, since they would see no advantage to prioritizing a commitment to it if they feel that abidance would compromise their comprehensive doctrines and they believe they can get away with doing otherwise. Rawls' argument thus goes astray in *A Theory of Justice* with the normative presumption that all citizens will understand themselves in Kantian fashion: the 'practical identity' between the desire to act justly and the desire to express our nature as free moral persons fails. In fact, it is quite unreasonable to expect all citizens to share this self-understanding in a modern society of diverse comprehensive conceptions (1972, 572). What Rawls thus seeks to provide in *Political Liberalism* is an alternative argument for how stability is possible in a democratic society, which does not attribute transcendent status to autonomy nor depend upon any other controversial metaphysical or moral conception to maintain it. What he seeks is a justification for *justice as*

fairness that is political not metaphysical, and which accordingly is concerned

with the issue of legitimacy as opposed to the issue of justice.[7]

The way in which Rawls comes to believe he can achieve this stability is

by starting from the proposition that democratic societies are comprised of a

plurality of competing and irreconcilable conceptions of the good as the

"inevitable long-run result of the powers of human reason at work within the

background of enduring free institutions" (1993, 4). Indeed, "to see reasonable

pluralism as a disaster he says "is to see the exercise of reason under the

conditions of freedom itself as a disaster" (1993, xxiv-xxv). From this acceptance

of the inevitability of pluralism, the question is how can there nevertheless be

agreement on a single set of principles of justice that does not depend upon either

the threat of political oppression or the strategic compromise of a *modus vivendi*,

neither of which is claimed to result in stability, or at least not stability of the right

sort.[8] In response, Rawls' approach is to appeal to the notion of reasonableness

that emerges in a democratic public culture to mediate simple pluralism, and to

the notion of an overlapping consensus which depends upon citizens

distinguishing public and non-public reasons and values in accordance with an

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[7] As Rawls warns, the uniformity in fundamental moral and political beliefs presumed in *A Theory of Justice* and in such comprehensive political conceptions as utilitarianism "can be maintained only by the oppressive use of state power" (1993, 37). This 'fact of oppression' cannot be legitimated, and as such Rawls sees need to introduce a distinction missing in his earlier work between the aims of moral and political philosophy, where political philosophy "must be concerned, as moral philosophy need not be, with practical political possibilities." This means that political philosophy must try "to uncover, and to help to articulate, a shared basis of consensus on a political conception of justice drawing upon citizens' fundamental intuitive ideas about their society and their place in it" (1987, 24-25).

[8] 'Stability of the right sort' refers to stability secured not by threat of sanctions or strategic compromise, but by "sufficient motivation of the appropriate kind," namely the desire to act justly (1993, 143-44).

accepted duty of civility. His approach is thus politically constructivist in the sense that it avoids commitment on ontological and metaphysical questions and to claims of truth or correctness about moral worldviews (Bagnoli 2011).

The notion of reasonableness is essential for Rawls in understanding how citizens in democratic societies can achieve public agreement on a single conception of justice to regulate the basic structure. Most basically, it allows Rawls to discriminate those comprehensive conceptions that must be represented and respected by fair political principles from those that need not. Reasonable conceptions, despite their differences, share the commitment that the use of state power to enforce a single comprehensive conception of the good is unacceptable. Unreasonable conceptions, on the other hand, not only proclaim but one valid conception of the good but allow for the legitimate public suppression of all other doctrines. In effect, this distinction between reasonable and unreasonable conceptions allows Rawls to distinguish between a simple pluralism of all competing comprehensive conceptions in society and a reasonable subset that excludes those unreasonable. It is only the latter, Rawls says, to which political principles need be responsive: unreasonable conceptions should not be suppressed if possible, but only reasonable conceptions need politically be accommodated on terms their adherents can accept.[9]

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[9] It should be noted that in addition to this ethical criterion about recognizing the possibility of reasonable disagreement Rawls also provides certain "theoretical criteria" for doctrines to qualify as reasonable: a reasonable doctrine (i) is an exercise of theoretical reason that covers the major religious, philosophical and moral aspects of human life in a more or less consistent and coherent manner; (ii) is an exercise of practical reason that gives instruction how to weigh values and what to do when they conflict; (iii) normally belongs to or draws upon a tradition of thought and doctrine, and therefore tends to evolve slowly in light of what from its point of view it sees as good and sufficient reasons (1993, 59). As many commentators have pointed out, however, these

Rawls claims this distinction between reasonable and unreasonable conceptions is not only possible but viable in formulating a political conception of justice for democratic societies. This is because democratic societies are characterized by a public culture that holds at the most fundamental level that all citizens are free and equal in virtue of their two moral powers (their capacity for a conception of justice and their capacity for a conception of the good[10]) and accordingly ought to relate to one another on terms of cooperation acceptable to all (1993, 34). Accordingly, given their recognition of the evils of coercion, reasonable citizens recognize the importance of each person being able to endorse the political principles that govern them, and acknowledge the 'burdens of judgement' which explain how people can disagree about the good despite not exhibiting any deficiencies in reasoning.[11] Indeed, because they admit themselves limited in what claims they can justify to others, reasonable citizens are able to distinguish between their public and non-public reasons and values. Their public

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theoretical criteria pose problems by excluding many doctrines affirmed by citizens who would not impose their views on others (even believing them to be correct), including many Rawls himself would think reasonable and would want to include. Thus, astrology and new age religions, but also traditional Judaism and many strands of Christianity that emphasize grace or the Trinity might be excluded by the theoretical criteria, given their failures to consistently or coherently cover the main aspects of human life, or their demands to accept mysteries that in principle are not graspable by human reason (Nussbaum 2011b, 25-31). For this reason many Rawlsian political liberals believe that the theoretical criteria are not in fact in keeping with deeper spirit of Rawls' project, and that reasonableness should be understood on the ethical criterion of non-imposition alone. Nussbaum herself advocates only an ethical notion of reasonableness as will be seen in chapter 4.

[10] More specifically, citizens are viewed as free and equal in three senses: when they (i) possess a moral power to have and revise a conception of the good; (ii) possess valid claims against others and institutions to advance their conceptions of the good; (iii) are able to take proper responsibility for their ends and regulate them according to the tenets of political justice (1993, 30-35).

[11] The burdens of judgement obtain due to such factors as the complexity of evidence, disagreement about the weights of considerations relevant to judgements, vagueness of concepts and their different interpretations, the affect of life experience on assessment of evidence, the complexity of normative considerations, and a pluralism of values not all of which can be realized but which require decisions as to their priority (1993, 56-57).

reasons are those "that all citizens can reasonably be expected to endorse in light of their common reason" (1993, 140), and are thus those appropriate to debating the political principles that should govern the basic structure. Their non-public reasons are those internal to their comprehensive conceptions on which they have no reason to expect the agreement of others, and which consequently have no place in public justification.

For Rawls, then, it is essential that citizens accept the limitations implied by this distinction if they are to be able to justify political authority yet maintain a sphere of freedom in which to disagree about matters unrelated to basic justice and constitutional essentials. By circumscribing what reasons citizens should appeal to in debating political issues, they are able to hold different comprehensive conceptions yet nonetheless respect each other's political equality. Exercising this 'method of avoidance' in refusing to ground political principles in controversial doctrines provides a way citizens can fulfill their 'duty of civility' to one another, by justifying the laws and policies they advocate in terms of non-alienating values and commitments. Importantly, however, in order to explain both the justification of the political principles they endorse and why a society based upon them can be stable, each citizen's reasons for supporting the principles of justice must be endorsed from within their own comprehensive conception. Each citizen must be able to affirm the political principles on the grounds of their private beliefs, since otherwise they would be treated unfairly by, and would not be morally committed to, the public conception of justice. Indeed, they would endorse it only for strategic reasons, and could not be trusted to subordinate their

private interests to the needs of justice should these result in conflict.[12] Indeed,

should the values of one's comprehensive conception conflict with the political

principles one believes should be amenable to all reasonable citizens, Rawls says

that for the sake of stability primacy must almost always be assigned to the

political principles. And it is plausible this will happen he thinks because

"political values are very great values and hence not easily overridden: these

values govern the basic framework of social life – the very groundwork of our

existence – and specify the fundamental terms of political and social cooperation"

(1993, 139). In addition, the very notion of reasonableness requires that one be

prepared to act on the terms of social cooperation, "even when this runs contrary

to [one's] own narrower interests, provided that others are similarly willing"

(1993, xliv). Without a preparedness to do this, after all, no conception of the

good can reliably be pursued, since any stability would be in terms of a *modus*

vivendi compromise that may be overturned any time a shift of balance in power

makes the current compromise irrational for any party involved.

The political conception of justice agreed to by reasonable citizens is thus

conceived as a module that fits into each person's comprehensive doctrine, and is

consequently conceived as freestanding in the sense that it is not derived from or

part of any substantive metaphysical, religious or moral presumption (1993, 144-

145).[13] Indeed, by being amenable to all reasonable conceptions of the good the

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[12] Although the conception of justice is strictly political, it "is affirmed as a moral conception and citizens are ready to act from it on moral grounds" (1993, 168). Citizens support it for its own sake and on its own merits, though its claims are limited to basic structure of society only (1993, 147-8, 11).

[13] Though this should not be taken to mean that it is fully normatively neutral. Rather, it is neutral

political conception of justice achieves an overlapping consensus of support from

all reasonable citizens. Citizens endorse its principles on different grounds in

accordance with their private doctrines, but since all promulgate that endorsement

in abstract terms there is general agreement as to why the principles are fair and as

to what they demand. Essentially, then, these principles are those familiar from

justice as fairness as specified in *A Theory of Justice*, and include a list of basic

rights, liberties and opportunities; an assignment of special priority to these; and

measures for ensuring all citizens have adequate all-purpose means to make

effective use of their freedoms (1997, 774). Citizens should thus accept these

principles as those that best protect individuals' freedom and equality and should

act to perpetuate that protection into the future.

3.3 A Family of Reasonable Liberal Conceptions of Justice

Although Rawls defends political liberalism as the only political theory

appropriate to diverse democratic societies, he does not think its only conceivable

form is his *justice as fairness* politically conceived. As he says, "there is a family

of reasonable liberal conceptions of justice": political liberalism "has many

forms, depending on the substantive principles used and how the guidelines of

inquiry are set out" (1993, xlviii, 226). What this means is that accepting political

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only with respect to reasonable doctrines, and as such maintains the goods of permissible
comprehensive conceptions and a well-ordered society. Furthermore, Rawls claims the political
conception to be neutral only with respect to its aim, which is not to be arbitrarily biased in favour
of any particular comprehensive doctrine; he does not claim it to be neutral in terms of its effect or
influence on the longevity or likely survival of different reasonable comprehensive conceptions.
As he says, "it is surely impossible for the basic structure of a just constitutional regime not to
have important effects and influences as to which comprehensive doctrines endure and gain
adherents over time; and it is futile to try to counteract these effects and influences, or even to
ascertain for political purposes how deep and pervasive they are" (1993, 194).

liberalism does not entail accepting "a particular liberal conception of justice down to the last details of the principles defining its content" (1993, 226). Instead, it means accepting certain general principles as required if political authority is to be justified in a context of diversity. In particular, it means accepting that citizens share in political power as free and equal, and that as reasonable and rational they have a duty of civility to appeal to public reason to justify political authority. Beyond these commitments, however, political liberalism is silent – it does not require all the particulars of *justice as fairness* as spelled out in terms of Rawls' principles of justice, though it is Rawls' contention that *justice as fairness* is the most egalitarian and plausible interpretation of liberalism's fundamental concepts (Wenar 2012).

Political liberalism *per se* as such is a theory about political legitimacy more than a theory about justice. It does not require conformity to a single conception of justice since "it does not specify the terms of equality beyond what is essential to a political constitution" (Estlund 1996, 68). Thus, so long as a political constitution guarantees a set of equal civil and political liberties to each citizen – namely "liberty of conscience and freedom of association, and the political rights of freedom of speech, voting and running for office" (Rawls 1993, 228) – then the standard of legitimacy is met. These liberties are characterized in more or less the same manner in all free regimes – they allow of "modulo relatively small variations" (1993, 228) – but beyond this governments can be differently structured constitutionally, and the principles covering social and economic inequalities can vary also. These variations will reflect how justice is

conceived, but they do not bear on the question of legitimacy, which is the primary concern of *Political Liberalism.*

Despite Rawls' claim then that *justice as fairness* is the most reasonable liberal conception of justice he can accept the legitimacy of other conceptions even if he may not think them most just. It is on these terms consequently that we should understand Nussbaum's claim that her theory addresses justice better than Rawls' but is also best conceived as a version of political liberalism: she accepts after all the freedom and equality of citizens and believes in the importance of public reason, but she rejects Rawls' index of primary goods and the difference principle as minimally required by justice, advocating instead her list of capabilities as determined by the conditions of human dignity. In so doing, Nussbaum accepts Rawls' principle of equal liberty which he maintains is the essential standard of legitimacy in any conception of political liberalism, but disagrees as to what justice and equality further demand within that common framework.

Nussbaum's recent endorsement of political liberalism means that her conception of the capabilities approach has changed over the years, from an early comprehensive formulation that emphasized an Aristotelian form of flourishing as necessary to the good life (1990), to her current formulation that "relies on the idea that an overlapping consensus of the reasonable comprehensive doctrines can emerge over time to support and sustain the [approach as a] political conception" (2006a, 388). Whereas before she thus presented her list as based on an "internal-essentialist…account of the most important functions of the human being" (1992,

214-215) – an account that in part investigated what it is to be human by evaluating whether or not we agree with judgements about human nature that figure in myths and stories (Claassen and Düwell 2013) – she now presents it as an ideal for the modern world, a set of constitutional guarantees people can agree upon as centrally important in any human life "whatever else the person pursues or chooses" (2006a, 74). She thus no longer embraces a comprehensive theory of human nature that is ethical if not metaphysical, but rather conceives her capabilities approach as "a specifically political theory that is only partially comprehensive" (1998, 284 fn. 11).[14]

But how specifically does Nussbaum conceive her theory as a version of political liberalism, and how does it differ from the Rawlsian model on which she claims to base it? Exploring these questions will help elaborate Nussbaum's conception of the capabilities approach, and set the stage for determining the legitimacy of her claim that it functions as a political not comprehensive liberalism.

3.4 Nussbaum's Political Liberalism

Nussbaum says her theory is politically liberal because although she specifies her list of capabilities as necessary to a dignified life she understands them as "specifically political goals and presents them in a manner free of any metaphysical grounding" (2002a, 5). Her approach is thus not to ask what makes

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[14] Though it should be noted that Nussbaum's original formulation may still form the basis of her private view which would form part of her overlapping consensus: "it is not ruled out that a philosopher who is a political liberal might also offer arguments out of his own comprehensive doctrine" (2003c, 33). For some indication of how Nussbaum's ethical doctrine differs from her political doctrine, see 2007, 125-126 and 2003.

for an optimal society but rather what makes one minimally just, and to then identify the basic political commitments that would be necessary to achieve that end. The list of capabilities provides the basis for this political conception of justice, and is to be "the object of a political overlapping consensus among people who otherwise have very different comprehensive views of the good" (2002a, 105).

Importantly, then, and in keeping with what Charles Larmore describes as the "abiding moral heart of liberal thought" that the basic principles of political association "should be acceptable to those whom they are to bind" (1999, 605),[15] Nussbaum believes that people's reasons for accepting her list can differ as each can accept the components of the list, and the notion of dignity underlying it, on the basis of different ways of incorporating that notion and the list into their various ways of understanding the world. The list, Nussbaum thinks, "put[s] no doctrinal obstacles to winning allegiance to itself" (Rawls 1993, 40), can be acceptable to a wide variety of religious and secular doctrines, and as such can receive the widespread support that is necessary for political legitimacy. Because of this, the state can support and enforce the list without rendering itself sectarian or non-neutral, since "each citizen will interpret its metaphysics

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[15] Though note that classical liberals like Mill and Kant believe that endorsement of comprehensive liberal principles is possible by all once inherited deference to traditional authorities is overcome, and utility or reason recognized as of central political and moral importance. Of course, Rawls and Nussbaum claim weaker standards than this, in that both want to avoid overthrowing traditional sources of authority in order to attain allegiance to political principles. Rawls does this by means of the notion of the public culture, but because Nussbaum eschews reliance on the public culture to justify the capabilities her position may turn out to be more akin to Mill and Kant than to Rawls.

differently…understanding the core values in terms of the rest of her comprehensive conception" (Nussbaum 1998, 284).[16]

Similar to Rawls, then, Nussbaum's motivation for conceiving the capabilities this way stems from her concern about paternalism and the importance of the state not imposing on citizens' lives: people should be as free as possible "to pursue the good (whether religious or ethical) according to their own lights, so long as they do no harm to others" (2002a, 59). It is because of this that Nussbaum believes capabilities rather than functionings are the proper currency of political justice and why capabilities are best conceived in political liberal terms. To see how this is so, consider how comprehensive liberals such as Mill and Raz claim to provide the proper space for freedom by prioritizing the value of autonomy: they encourage the functionings of self-direction and self-government as necessary to ensure individuals can pursue the good as they conceive it, and they deem the autonomous pursuit of those ends as constitutive of their value (2011b, 3).[17] But in fact, Nussbaum says, comprehensive liberals fail to achieve as wide a range of freedom as possible, since not everybody endorses the functioning of autonomy as a contributive or constitutive good in their comprehensive conceptions. Comprehensive liberals are thus accused of putting themselves in the questionable position of protecting individuals from undue

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[16] For instance, with regard to men and women's equality as citizens, "a Muslim will be likely to interpret this idea in terms of her religion's view of human nature, according to which men and women share a single essential nature. A comprehensive Millean liberal will also interpret the political idea in terms of an idea of the natural equality of all human beings. Other citizens, however, may attach the political idea to a different conception of human nature, or to no such conception" (Nussbaum 1998, 284).
[17] Though it should be noted that Raz does not believe all forms of autonomous behaviour to be good – autonomy only has value when used in pursuit of valuable projects.

interference by the state and other citizens by having the state assert a personal ideal. For those who value autonomy this poses no problem; but for those who do not it does pose problems, since public institutions will then have the putative superiority of autonomy "woven through them, in a way that marginalizes or demotes other views" and expressively subordinates dissenters (2011b, 20-21, 35).

Comprehensive liberalisms thus go astray according to Nussbaum because they value particular functionings not all citizens can endorse and as such elevate a concern for a controversial good over the political respect that is due all citizens. By consequence they are unable to accommodate the full diversity of reasonable comprehensive doctrines. Indeed, in contrast to historical forms of liberalism which have seen no problem with establishing the state on comprehensive values, Nussbaum says "we see more clearly today, and we understand that respect for one's fellow citizens as equals requires not building the state on the ascendancy of any one particular comprehensive doctrine of the purpose and meaning of life, however excellent" (2011b, 22). What this entails for Nussbaum is that upholding political respect should be the primary objective of political theorizing: political respect is due all citizens who respect other citizens as equal, and it is because we respect persons that "we think that their comprehensive doctrines deserve space to unfold themselves, and deserve respectful, nonderogatory treatment from government" (2011b, 33). Indeed, Nussbaum so values political respect that she thinks "one can get to political liberalism through respect alone, without alluding

to the special difficulties of judgment," or what Rawls refers to as the 'burdens of judgement' (2011b, 20).[18]

The best way in which to show this political respect, Nussbaum believes, is in terms of the core capabilities understood as an expression of the requirements of human dignity. These provide a standard of value that can be the basis of political agreement, but a standard sufficiently thin to be agreeable to a wide range of comprehensive doctrines. Citizens are not asked to realize the capabilities in any particular way, but only to agree that in a democratic society the capabilities specify those areas of life in which citizens must be free to exercise choice if they are to be adequately politically respected. And indeed, Nussbaum says those citizens who would reject certain capabilities as necessary to their comprehensive conceptions can concede nevertheless their political importance: such individuals can recognize how essential the capabilities are for common life in a diverse society, and are asked "to take [them] on for political purposes, little though [they] will use [them] in the rest of [their lives]" (2006b, 1325). Thus, for example, though the state might be required to ensure capabilities for adequate nourishment and leisure and sexual expression, by not requiring these as functionings no burden is imposed upon ascetics and workaholics and celibates. Similarly, though the Amish might think it wrong to participate in politics, and some religious groups might resist the idea of a free press as necessary to their comprehensive conceptions, such people can still

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[18] Part of Nussbaum's reason for this is that she wants to ensure respect for religious citizens who "think that faith is a very good basis for their views, in fact the best basis" (2011b, 32).

support these capabilities as goods for others or as something about which it is good to have choice in a democratic society (2006a, 183).

As such, the capabilities provide for pluralism in terms of how and whether citizens realize them as functionings, but also in terms of how capabilities are conceptualized above the minimal threshold more broadly. The list after all "is not a complete theory of justice…[but] gives us the basis for determining a decent social minimum in a variety of areas" (2006a, 75). Thus, the list says nothing about what justice requires above the social minimum, and is compatible with a number of different paradigms. In addition, there is further provision for diversity in that the thresholds are to be set and the capabilities are to be specified in accordance with each country's history and traditions. It thus aims to provide for as wide a diversity of reasonable conceptions as possible, whilst remaining morally anchored by a notion of dignity that has broad intuitive appeal but is differently expressed in different cultures around the world.

3.5 Differences between Rawls' and Nussbaum's Political Liberalisms

It is on these grounds that Nussbaum thus sees her capabilities approach as a version of political liberalism, and as an improvement upon Rawls' formulation given the greater versatility of the capabilities as compared to Rawls' index of primary goods.[19] A number of differences present themselves however between

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[19] To recall, Nussbaum's list is claimed more comprehensive and dynamic than Rawls' index of primary goods for three reasons: (i) individuals vary in their ability to transform primary goods into functionings; (ii) though resources might be evenly spread, hierarchical structures often prevent individuals from making use of those resources; (iii) the choice of a conception of the good is not always free, and so remaining neutral may validate structures of oppression (Deneulin 2002, 9).

Rawls' and Nussbaum's political liberalisms, which in chapter 4 will lead us to question the capacity of reasonable citizens to endorse the capabilities on a political liberal understanding of respect. These differences regard (i) the context of the application of each theory, (ii) the scope of application within that context, (iii) the role of cultivation of sentiment, and (iv) the ways in which political principles are legitimated or justified to citizens.

3.5.1 Context

To take the issue of context first, for Rawls political liberalism is appropriate to those societies whose public cultures were shaped by the 16th and 17th centuries wars of religion that culminated in the crisis of Christendom's dissolution, and ultimately resolved in the 'Great Separation' of the legitimacy of political principles from divine revelation. This socially and politically transformed western Europe such that social unity and concord no longer depended upon the centripetal influence of theocracy or civil religion, but instead made possible respectful and non-coercive political justice that was neutral with respect to comprehensive philosophical, religious and moral doctrines. Out of these changes, Rawls contends, the modern understanding of liberty of conscience and freedom of thought was born, which were institutionalized through the devolution of monarchical powers and the formulation of constitutional principles to protect basic rights and freedoms (1993, xxvii-xxiv). These developments funded the heirs of western society with the moral resources necessary to achieve stability in spite of diversity. The ideas behind them have slowly and implicitly come to form over time the fundament of our various comprehensive conceptions,

since in their various ways our doctrines draw upon, respond to and are moulded by their content. Political liberalism consequently is possible for Rawls because the liberal commitments it depends upon are "familiar and intelligible to the educated common sense of citizens generally" (1993, 14). We are committed to its principles already in our standing commitments, and political liberalism may simply be seen as articulating these commitments at the level of theory (1993, 38 fn. 41). "We start…by looking to the public culture itself as the shared fund of implicitly recognized basic ideas and principles…[and] formulate these ideas and principles clearly enough to be combined into a political conception of justice congenial to our most firmly held convictions" (Rawls 1993, 8). As Rawls thus says when asked how pluralism is possible on his theory, "I give a historical answer, I don't give a theoretical answer" (1999b, 621).

For Rawls then "the success of liberal constitutionalism came as a discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist society" founded on the "successful and peaceful practice of toleration" (1993, xxv). For Nussbaum, however, this possibility is not limited to societies of western provenance because she understands the capabilities to be written in each culture as an expression of human dignity. Indeed, her claim is that "the human personality has a structure that is at least to some extent independent of culture, powerfully though culture shapes it at every stage" (2002a, 155). The universality of human dignity, consequently, and its universal cultural recognition, entails that the capabilities can be appealed to everywhere, most obviously perhaps in liberal democracies but also far beyond. As such,

Nussbaum sees the conditions of her political liberalism as universal not

contingent. Rawls may limit his theory to western societies that trace their history

to the Reformation, and may only speak of societies outside that context in terms

of how to conduct respectful international relations with them (Rawls 1999a). But

for Nussbaum there is a multiplicity of genealogies to appeal to in justifying the

capabilities to different peoples, and consequently Rawls' model of the

overlapping consensus provides "an excellent basis for further thought about

quality of life in the international arena" (2002a, 67).

Indeed, Nussbaum says that "if we hold that a political tradition of

relevant ideas is a necessary basis for political liberalism, we ought to hold that

this condition is fulfilled by…many if not most of the existing constitutional

democracies of the world, all of which have traditions, longer or shorter, of

committing themselves to similar ideas" (2006a, 303). Variations of political

liberalism can thus be seen historically in the Moghul and Ottoman Empires, and

presently in the constitutional democracies of India, Bangladesh, South Africa,

Turkey and Japan.[20] Furthermore, Nussbaum argues regarding those nations that

are not liberal constitutional democracies that political liberal ideas are relevant to

them as well: "there is nowhere in today's world where ideas of human rights,

human dignity, human equality, and fair terms of cooperation are not widespread"

(2006a, 303-304). Indeed, it is Nussbaum's contention that there is hope for an

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[20] This may be questionable. In the case of the Ottoman Empire, for instance, the *millet* system
which allowed each religion to govern its own affairs and punish its own members worked
peacefully only so long as non-Muslim groups accepted their politically subordinate position
within the Empire. "But when Christians and Jews questioned their subordinate position, the
Qu'ran no longer supported their place in Muslim society, and what toleration they had from the
Muslim majority evaporated." As this is the case, the Ottoman Empire may have resembled more
of a *modus vivendi* than a political liberalism (Dees 1999, 678).

overlapping consensus on the bases of her capabilities in "any nation living under

modern conditions in a world characterized by a world culture of human rights.

People need only draw on the ideas inherent in that world culture, whether or not

their own nation currently exhibits the structure of a constitutional democracy"

(2006a, 304).[21]

3.5.2 Scope

In addition to this difference in context, Nussbaum and Rawls also differ

in terms of the scope of application of their theories, or the way in which they

make sense of political liberalism's public-private distinction. For Rawls, the

ambit of public reason is limited to the basic structure and constitutional

essentials. It is by drawing a line between such political and non-political matters

that reasonable citizens are able to isolate their political commitments within their

broader comprehensive doctrines and reach an overlapping consensus with one

another. Thus, though Rawls admits that even reasonable people may disagree on

"matters of the first significance" (matters such as abortion and capital

punishment which concern basic rights), such discrepancies over the

interpretation and application of political values is mitigated by citizens'

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[21] It should be noted that because of the substantive moral foundation of the capabilities in the notion of human dignity, Nussbaum's theory may not fall prey to Samuel Scheffler's criticism of political liberalism that "it cannot give any nonliberal society a reason why it should become liberal. It simply has nothing to offer to those societies that may be attempting, in the face of considerable opposition and without the benefit of any significant democratic tradition, to develop liberal institutions for the first time and which look naturally to the liberal philosophers of the democratic west for what is literally 'moral support'" (1994, 19). At the same time, however, it may well flounder in advocating the capabilities on Hampshire's criticism that "justice and fairness…first require that there should exist respected institutions for adversarial argument, and equal access to them, accepted manners in negotiation, and entrenched rules and habits of advocacy, a full ritualization of public conflicts." (1993) Societies which lack a public culture defined by these institutions may well have difficulty implementing Nussbaum's ideas.

fundamental acceptance of democratic principles and the requirements of political respect for one another (1989, 238).

For Nussbaum, on the other hand, and because of the substantive role played by dignity in her theory, the public realm is much more expansive than for Rawls and permits much deeper intervention by the state and other bodies to overcome impediments to citizens' capabilities. For instance, whereas Rawls is not prepared to advocate state intervention in private associations, and takes a diffident stance towards the family given his dual understanding of it as part of the basic structure but at the same time pre-political, Nussbaum is much more reformist. As she says, "all human associations are shaped by laws and institutions" (2002a, 263), and "there is no institution that, as such, has privacy rights that prevent us from asking how law and public policy have already shaped that institution, and how they might better do so" (2002a, 245). To continue the example then, Nussbaum sees the state as present in the family from the start; through its laws it constitutes the family structure and defines "what this thing *is* and controls how one becomes a member of it" (2002a, 263).[22]

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[22] Rawls' position on families is nuanced and difficult to understand. In the revised edition of *A Theory of Justice* the family is part of the basic structure and is thus an institution to which the two principles of justice apply by definition. In "The Idea of Public Reason Revisited', however, he says that the principles do not "apply directly to the internal life of families" (1997, 788-789). This latter claim portrays families as more like voluntary associations such as churches and universities or business firms and labour unions, which are not regulated in their internal governance by the principles but which nonetheless are constrained by them. As Nussbaum understands these two claims, "Rawls is clearly torn between the idea that the family is so fundamental to the reproduction of society and to citizens' life chances that it must be rendered just, and the equally powerful idea that we cannot tolerate so much interference with the internal workings of this particular institution" (2002a, 273). His solution is to "try to make the external constraints tough enough to deliver genuine equality to women as citizens" (2002a, 274), yet without interfering with any traditional gendered division of labour within families, "provided it is fully voluntary and does not result from or lead to injustice" (Rawls 1997, 702). Nussbaum's position on this however is that this stops short of what justice requires, since "it is difficult to

Indeed, because dignity and integrity are central social goals for Nussbaum they must be protected "no matter where the threat to them is located," and no matter which institutions this requires us to scrutinize (2002a, 245). Nussbaum is consequently prepared as a matter of justice to support public policies that amend problematic private institutions and the negative social mores and comprehensive doctrines that underpin them.

This accordingly opens up a whole host of avenues for state intervention that Rawls would likely not sanction, particularly with regard to the family given its profound influence on the formation of capabilities and with regard to the social status of women and minorities in general. Thus, for example, Nussbaum advocates changing divorce laws and property laws to give more rights to women, and supports public education initiatives that help women resist gender inequality and that change men's perceptions of their role within the family (2002a, 276-282). Rawls would likely oppose such state initiatives on the grounds they endorse a particular conception of the good. For Nussbaum, however, "the central capabilities always supply a compelling interest for purposes of government action" (2002a, 280). The onus thus is on those who would oppose such policies to argue that they constitute unjustified intervention and that the central capabilities are in fact protected better by the state's non-involvement.[23]

know whether anything children do in the family could be described as 'fully voluntary,' and of course this is true for very many women also, especially those without independent sources of material support" (2002a, 274).

[23]Even when Rawls and Nussbaum agree on the limits of government intervention their reasoning is usually different. Whereas Rawls for instance would argue it is wrong for the state to mandate the equal division of domestic labour or decision-making in the household, he would so on the grounds of the wrongfulness of interfering with the internal workings of a particular institution that is deemed (at least partially) to exist apart from the state. Nussbaum on the other hand

However, when there is little immune from the principles of justice it is unclear what remains of a political conception of liberalism. As Ruth Abbey puts this, "what does a purely political liberalism demarcate if its principles penetrate all (or most) aspects of life?" (2007, 17)[24] This problem will be returned to in chapter 4 when we see how difficult it may be for many to endorse a political conception based upon the capabilities given the deep intrusion into private life that securing them might entail.

3.5.3 Cultivation of Sentiment

In addition to these differences between scope and context, Nussbaum's theory also differs from Rawls' in terms of its dependence upon cultivating citizens' sentiments in order to secure long-term stability. Now Rawls of course invokes a political psychology to explain the stability of his political conception, as reasonableness requires "a particular form of moral sensibility," namely citizens' "desire for its own sake" of a social world based upon the idea of reciprocity (1993, 50-54). Thus, if the transition from a *modus vivendi* to a constitutional consensus to an overlapping consensus is to be accomplished, citizens must desire to recognize and be recognized by each other as fully cooperating members of society, and this sense of justice must be nurtured (Wenar

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opposes such intervention because she believes the capabilities and liberties of each person should be protected for citizens regardless of context, and that such divisions of labour and decision-making are permissible as deliverances of the capability of practical reason

[24] As Abbey further asks: "How can liberal principles remain strictly political while applying to a putatively non-political entity such as the family? Once the family becomes the subject of justice, it is impossible to confine concerns with freedom, equality, independence, and rights to the strictly political realm" (2007, 6). It should be noted that Abbey makes her remarks in reference to the quasi-political status of the family in Rawls' theory.

1995, 48-49).[25] But Nussbaum "demands a great deal more" of citizens in terms of sympathy and benevolence if her public conception based on capabilities is to be both possible and stable over time (2006a, 409). Indeed, whereas Rawls situates reasonableness between altruism and simple self-interest, and believes there implicit commitment to reasonableness in the public cultures of those societies to which he says his theory applies, Nussbaum says we need to "build a public culture that puts altruism and the relief of misery at its core," and admits that the capabilities approach "needs to have a great deal to say about how and why altruistic motivations arise…and how we might cultivate helpful sentiments in a socially propitious way" (2011a, 96-97). As such, much of Nussbaum's theory depends upon cultivating and fostering particular conceptions of persons and of human relations in terms of the capabilities: she requires an ethos of justice to ensure that people are treated justly within political institutions. In particular, the practical viability of her theory requires organizing the family and child development, schools and public education, and social norms, public rhetoric and the arts in ways conducive to a public culture that is informed by and supports the capabilities (2011a, 97; 2006a, 413-414).

To put things directly, what Nussbaum's theory seems to entail is the promulgation by the state of a particular social ethos in any institution or association in which the formation or maintenance of the capabilities is affected or

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[25] A constitutional consensus obtains when liberal principles of justice reluctantly accepted on *modus vivendi* grounds are progressively accepted within citizens' comprehensive doctrines, so that they come to accept for their own sake the principles of a liberal constitution. An overlapping consensus follows when liberal principles become shared more deeply, particularly in terms of the importance of respect for individuals, and apply more broadly to the basic structure (1993, 158-168).

determined: she requires an ethos of justice and not just institutions of justice.[26]

Thus, it is not just that institutions and associations are to be regulated by the state

to ensure that citizens are not deprived of their capabilities; they are also to be

regulated to ensure that citizens develop the attitudes needed to sustain a public

culture of concern for the dignity of others as understood in terms of securing

their capabilities. Now Rawls admittedly also requires a change in sentiments if a

change in current distributive practices is to be realized in accordance with the

difference principle: as he says in *A Theory of Justice*, "moral sentiments are

necessary to insure that the basic structure is stable with respect to justice" (1972,

458).[27] But Nussbaum seems to require a much more major overhaul of our

social and moral commitments, both locally and globally considered, despite her

claim that the commitments she endorses are implicit in traditions all over the

world and emerge from a shared notion of dignity. The depth of this implicitness,

however, particularly given Nussbaum's global ambitions for her theory, may

represent a significant divergence from Rawls' theory that undermines her claim

she can appeal to people's standing beliefs and values in justifying the

capabilities. This worry about implicitness is further elaborated in 3.5.4.

3.5.4 Justification of Political Principles

Whereas Rawls believes that the conditions for stability are implicit in the

public culture and need but be cultivated in order to achieve it, Nussbaum holds

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[26] To this end she conceives the demands of justice in a similar way to Cohen (2001).
[27] See also *Political Liberalism* for an account of the importance of the virtues of political cooperation, including tolerance, reasonableness, fairness, being ready to meet others halfway (1993, 157).

that these conditions must be engineered as much as cultivated on the basis of a

much different picture of who we are and what political society may be (2006a,

414). Indeed, it is for this reason that Nussbaum's justification of her political

conception in terms of an overlapping consensus involves an idea of acceptability

which is understood *in posse* not *in esse* (2006a, 163). In saying this Nussbaum in

effect defers endorsement of her political conception to the future, though in

doing so she claims to follow Rawls who denies "that such an 'overlapping

consensus' on basic political principles…must already be present in society."

Instead she says (still following Rawls) that "we require only that there be a

plausible path to that endorsement, such that, over time, it is not unreasonable to

suppose that society could arrive at that consensus"; this is "very different from

claiming that society must already have such a consensus" (2011a, 90-91; 2006a,

301).[28]

The way in which Nussbaum puts this however distorts her difference

from Rawls in terms of how political principles may be justified to citizens. For

Rawls, as we have seen, citizens are expected to endorse the political conception

on the grounds that its political values are a close entailment of many or most of

their comprehensive views. As Rawls says in *Political Liberalism*, "political

liberalism looks for a political conception of justice that we hope can gain the

support of an overlapping consensus of reasonable religious, philosophical, and

moral doctrines in a society regulated by it" (1993, 10).

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[28] "…we do not have to show that the consensus exists at present; but we do need to show that
there is sufficient basis for [consensus] in the existing views of liberal constitutional democracies
that it is reasonable to think that over time such a consensus may emerge" (2006a, 388).

Political values are thus not presented as identical with individuals' private values or beliefs as in the case of political theology or simple majoritarianism, but as sufficiently close that citizens may endorse them as the outgrowth of their standing private commitments or by understanding them as the more general articulation of their private values. In neither case however are these adjustments or abstractions taken to undermine or compromise the substance of citizens' private views. Instead, citizens are simply expected to recognize them as expressing ideals they implicitly hold (Klosko 2009, 28). For Nussbaum, on the other hand, political values are presented as acceptable to citizens on the basis of a possibly much more distant entailment of their comprehensive commitments, which it turns out they may have to be convinced of by arguments which prioritize certain elements of their standing views as starting points.

Given this, endorsing political values may require of Nussbaum's citizens that they change certain of their central values or beliefs about the world, though never in such a way it is intended that they feel alienated from their overall conceptions of the good and the world and the identities they have formed thereon. That Nussbaum sanctions this sort of endorsement can be seen in her claims about the substantive good of the capabilities and her admission that it may take some generations for some people to be able to come to endorse certain principles. It should be noted however that this method of justification differs from that which is based upon unconstrained philosophical reasoning that determines political principles on the basis of fundamental premises. In such justification citizens' beliefs or values are inconsequential to the legitimacy of

political values, since these are justified on the basis of truth or morality and not on the basis of citizens' endorsement. This sort of justification is associated with the comprehensive liberalisms of Kant and Mill, which as we have seen face criticism precisely on the grounds they too little heed the endorsement constraint and the importance of citizens being able to accept governing principles in order to be respected politically.[29]

On the basis of this framework of forms of political endorsement we can understand Nussbaum's project as driving a third option between Rawls' political liberalism on the one hand and unconstrained philosophical reasoning on the other. Given her universal ambitions for her theory, but also its normative grounding in dignity which is always locally and culturally informed, it is necessary she thinks to be allowed more laxity in justification than is permitted by mere appeal to public culture, but also more than is permitted by the rigours of philosophical method. Political principles must not be too limited by contingent practices and beliefs, but they must also not be established without attending to the importance of cultural historicity. Thus, though cultural beliefs and traditions are not sacrosanct for Nussbaum they are also not irrelevant to political justification.

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[29] It should be noted of course that not all who are perfectionist about the good need be perfectionist or coercive about their politics: perfectionist ideals such as autonomy may militate against the imposition of other perfectionist ideals, and imposition itself may be seen as counter-productive to the end perfectionist ideals are meant to serve. On this latter point, the counter-productiveness can be due to the alleged incompetence of state bureaucracies to promote the good, or to the fact that individuals will not derive value from valuable activities if manipulated or coerced into practicing them. As Kymlicka puts this latter point, "No life goes better by being led from the outside according to values the person does not endorse" (2002, p. 216). These issues will be discussed further in chapter 5 where I argue that the capabilities approach should be defended as a pragmatically constrained comprehensive liberalism.

To see how Nussbaum understands the workings of this process we can use two examples as demonstration. Consider the religious examples of Luther and Calvin in the historical case and figures like Abou El Fadl and Ramadan in the modern. Luther and Calvin stood firmly within their faiths yet reinterpreted political theology so that believers could adapt their substantial positions without feeling themselves apostates. As Mark Lilla (2007) writes:

> They called back Christians to the fundamentals of their faith, but in a way that made it easier, not harder, to enjoy the fruits of temporal existence. They found theological reasons to reject the ideal of celibacy, and its frequent violation by priests, and thus returned the clergy to ordinary family life. They then found theological reasons to reject otherworldly monasticism and the all-too-worldly imperialism of Rome, offering biblical reasons that Christians should be loyal citizens of the state they live in. And they did this, not by speaking the apologetic language of toleration and progress, but by rewriting the language of Christian political theology and demanding that Christians be faithful to it.

Today in the context of Islam Abou El Fadl and Ramadan are doing something similar. By speaking from within the community of the faithful they give believers theological reasons for accepting new ways as authentic reinterpretations of their faith.[30] What this results in is a convergence on liberal

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[30] "The problem very often is that the Muslims themselves neglect and ignore their own

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values though from a tradition that does not identify with the trajectory of western

Enlightenment. As Lilla observes, "Figures like Abou El Fadl and Ramadan

speak a strange tongue, even when promoting changes we find worthy; their

reasons are not our reasons." But for political liberals it is positions that count,

and reasons only matter insofar as they are reasonable and not didactically

imposed upon others. For Nussbaum indeed if reasons can be found to support

the capabilities, even if located obliquely within people's traditions, then it seems

capabilities-based principles can justifiably be encouraged (if not implemented) at

the level of political policy.[31] Importantly, however, it seems this can be the case

even if citizens who are of those traditions do not presently accept or endorse

them. The example of the Nordic countries in which gender equality has come to

be accepted over time, though was not immediately following policy

implementation, demonstrates to Nussbaum that we should rely upon not

informed-desire but substantive good to justify policy, though with the hope and

expectation that the good and desire will ultimately converge in the long-term

(2002a, 165).[32]

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tradition….We have to reconcile ourselves with our past in order to come with a diversity of new
visions for the future…I would say that this neglectfulness towards history and tradition is a
problem within the Muslim universe of reference as much as it is for Christianity and Judaism and
all the other great philosophies and religions" (Ramadan and Hitchens 2010, 1.18.00-1.19.40).
See also Abou El Fadl 2002.

[31] Note that Nussbaum maintains always a role for democratic endorsement of the capabilities, and
warns that it would be inconsistent for a defender of the capabilities approach to seek an
implementation strategy that bypassed the deliberations of a democratically elected parliament
(2002a, 104). As investigated in 4.3, this means any concerns regarding politically instituting the
capabilities must relate to respect of and protection of minorities.

[32] Nussbaum's claim about convergence between informed-desire and substantive good depends
upon the ideas that (i) "the human personality has a structure that is at least to some extent
independent of culture" and (ii) that "people who once learn and experience [the] capabilities don't
want to go back, and one really can't make them go back" (2002a, 155, 152). Capabilities are
substantively good independent of culture, and we desire them once we experience them both for

The problem with these sorts of examples, however, is that they give little indication of the appropriate balance between on the one hand locating possible cultural resources in terms of which citizens can support political principles, and on the other hand moulding citizens' standing beliefs and values in order to effect their eventual endorsement of the capabilities. In other words, Nussbaum gives us little sense to what extent endorsement must already be able to become actual to justify supporting her moral principles as politically respectful. This of course is the problem she faces in charting a middle course between Rawls and Kant or Mill: close entailment of political principles from standing beliefs and values may be too close to allow for critique of current arrangements, but when is distant entailment too far, and when does divergence from actual standing views compromise political liberal respect?[33] Though these questions are raised here to indicate a significant difference between Rawls and Nussbaum on the issue of justification of political principles, answers to them will not be explored until chapter 4 when a series of objections are raised against Nussbaum's claim that democratically instituting the capabilities would be respectful of those who would reject them, despite her claims their worldviews can be made compatible with her capabilities.

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ourselves and for others as part of the capability of affiliation, even if initially we might have opposed them. In addition to the Nordic case of men over generations accepting a political conception that treats women as equal citizens, Nussbaum also gives examples of women coming to value capabilities for literacy, health and political liberties (including freedom from domestic violence) that they dismissed before exposure to them, and men showing more respect for these women and their capabilities (after initial periods of suspicion and resentment) as social circumstances changed to promote them (2002a, 152-153, 287-288).

[33] To some extent Rawls faces this too, since there are questions as to what constitutes a close entailment. But since Rawls appeals to the 'familiar' common sense of liberal public culture his footing is on firmer ground.

3.6 Criticisms of Political Liberalism

These then are some of the main differences between Rawls' and Nussbaum's political liberalisms which will inform the investigation of chapter 4. Before proceeding however it is helpful to consider two major objections that are made of political liberalism in general to see what these imply for Nussbaum's theory. Doing so will clarify the commitments of Nussbaum's theory, making it easier to evaluate its prospects as we go forward.

3.6.1 Standards of Political Legitimacy

One of the major criticisms made of political liberalism concerns its justification of the state's coercive power on the basis of citizens' assent alone. Essentially the question is why are claims of truth secondary to the legitimacy of the political conception? For Rawls, as we have seen, the answer is because of the fundamental importance that citizens be able to endorse their governing principles, recognizing reasonable disagreement about the good and the importance of respect to securing social stability and unity over time through consensus on constitutional policies. This may suggest however that the truth-value of the political conception is extraneous to its justification. The political conception may or may not be true, but the fact of diversity, coupled with respect for the burdens of judgement, means that governments should not be guided by veridical considerations if citizens' freedom and equality is to be respected. People may make judgements of truth in their private lives, but they should endorse values politically on the basis of their reasonableness alone as a matter of basic respect. Rawls' theory accordingly is described as having 'shallow'

foundations, since "it starts not with general moral truths but with the givens of our common culture, which it takes as facts, irrespective of their validity or truth" (Raz 1990, 8).

For some critics however such shallow foundations and agreement alone cannot constitute justification. Agreement is adjudged too contingent a standard since the fact of diversity does not entail that no conception of the good is correct. Instead, what justifies state power must be some claim to truth or morality. Joseph Raz for instance says "there can be no justice without truth" (1990, 15), whilst for Michael Sandel "the justice of laws depends on the moral worth of the conduct they prohibit or protect" (Sandel 2005, 122). Indeed, these critics claim that on a political liberal standard not only will unreasonable citizens be coerced by the state given their rejection of the political conception as wrong, but reasonable citizens may also claim coercion since although they accept the general terms of the political conception they may disagree about its particular interpretation and consequently feel oppressed by its application (Voice 2011, 142).

Political liberals respond to this objection however by claiming it rests on a misunderstanding. The very nature of the overlapping consensus means that reasonable citizens do in fact accept the political values as true from within their own comprehensive conceptions. Indeed, the political conception is only capable of becoming the object of an overlapping consensus insofar as it is constructed as if it had been derived from any reasonable conception of the good. This is the novelty introduced by political liberalism and why Rawls thinks it differs from a

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modus vivendi: a *modus vivendi* involves acceptance of political principles on the basis of negotiation, whereas in an overlapping consensus the principles are endorsed on the grounds of their reasonableness and amenability to truth. There does then exist a place for truth in political liberalism, though reasonable citizens must only expect its partial articulation in the political conception, and will not seek more than this given the importance they ascribe to political equality with others and their acknowledgement of the fact of reasonable disagreement.

As Estlund discusses this objection, the mistake critics make is conflating truth with legitimacy. For those such as Raz the authority of a political conception is based on its truth alone. But as Estlund argues truth is but one possible legitimating standard, though he concedes that other prospective standards should themselves not be "too far from the truth" (Estlund 1996, 274). Thus, although the political conception may not be 'truly' just in the sense of completely articulating the truth, it nevertheless can be 'fully' just and legitimate due to its acceptability to all reasonable citizens.

However, one can accept this distinction between legitimacy and truth and still have doubts about the viability of political liberalism. This is because of the requirement that citizens must give primacy to the political values in their comprehensive conceptions in order for stability to be possible. The problem, to put this more directly, is that in the case of tension between their political and other commitments, citizens must support the conception of justice with greater conviction than all other dimensions of their comprehensive doctrines. But this means that the degree of stability of the overlapping consensus is directly related

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to the depth of its members' affirmation of the political principles: unless they endorse political values as "supremely normative" an overlapping consensus will not be possible (Freyenhagen 2011, 328). Political liberals argue this poses no problem because reasonable citizens voluntarily make this concession given their notion of respect, and since doing so does not require them to compromise adherence to their non-political values. Indeed, in prioritizing political principles they simply endorse their own comprehensive conceptions.

But an overlapping consensus alone cannot guarantee this prioritizing of political values, because agreement on the principles of justice does not imply an absence of conflict over their interpretation or application. Indeed, all consensus entails is that conflict does not go "all the way down" (Voice 2011, 152). It does not mean that citizens are necessarily committed first and foremost to the reasonable amongst all other values, such that in the case of conflict it will always take precedence. It does not mean, as Michael Huemer puts it, that reasonableness necessarily has "preemptive normative force" (1996, 393). This means though that consensus affords the possibility that reasonable citizens disagree over what they commit themselves to in espousing political liberal values. In the abstract they may nominally agree to the same values, but the fact that they have different reasons for doing so means they may have very different ideas as to how those values should be realized. Depending how those values in fact are realized their support for the political principles may well be outweighed by their greater concerns for the rest of their comprehensive conceptions.[34]

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[34] As Shaun Young puts this point, "if certain components of one's comprehensive doctrine are

As demonstration of this point, consider the example of two people being committed to freedom of expression as an essential component of a reasonable conception of justice. One is a libertarian who rejects all forms of censorship, and the other is a social democrat who believes that hate speech legitimately can be suppressed. Both thus endorse the same political value from within their respective comprehensive conceptions, but this does not mean both will countenance its eventual realized form. They may do should they be committed most fundamentally to reasonability or democratic procedures, but this cannot be concluded from the fact of consensus alone. Indeed, and as Huemer argues, "if some comprehensive doctrine conflicts with the dictates of [*justice as fairness*] (or of any other political theory), no countervailing values can ever be brought to bear on the side of [*justice as fairness*] that would impress the adherent of that comprehensive doctrine" (1996, 384). Thus, when political values are realized in a way contrary to someone's comprehensive commitments, they may well withdraw their support from the overlapping consensus.[35]

Anne Phillips warns about these disparate allegiances that when the overlapping consensus "papers over profound differences in belief, its effects can

affirmed with a greater strength than the political conception of justice (or any of its constituent values), then it is quite possible that a change in personal circumstances or a shift in the distribution of political power will produce a situation in which the adherents of reasonable doctrines may come to believe that it is morally *right* or *necessary* to withdraw their support for the existing conception of justice and try to enforce society-wide adherence to their own comprehensive views" (2002, 139-40).

[35] Another example is the debate over gay marriage. Different theorists believe a commitment to political liberalism entails: (i) the abolishment of marriage as a legal category (Munoz-Dardé 1998.); (ii) the permissibility of gay marriage in addition to heterosexual marriage (Wellington 1995); (iii) that there should be no restrictions on the civil union of any 'network' of individuals who care for each other (Brake 2010); (iv) that gay marriage but not heterosexual marriage is contrary to political liberal commitments because of the state's interest in the orderly reproduction of society (O'Brien 2012).

be pretty feeble" (2002, 400). Rawls himself recognizes this problem and concedes that "political good, no matter how important, can never in general outweigh the transcendent values – certain religious, philosophical, and moral values – that may possibly come into conflict with it" (1988, 275).[36] But Rawls believes that those whose comprehensive doctrines enable them to be part of an overlapping consensus are unlikely ever to be confronted with a situation that forces them to abandon their membership. Even in the case in which political values are realized in a way contrary to their comprehensive doctrines, reasonable citizens will continue to affirm reasonable agreement since political values are "very great values and hence not easily overridden" (1993, 139). Moreover, he speculates that citizens "might very well adjust or revise those [comprehensive] doctrines rather than reject those [political] principles," on the grounds of what the principles "accomplish both for themselves and those they care for, as well as for society at large" (1993, 160).

The gamble Rawls thus makes is that reasonable citizens in the face of conflict will maintain their support for the political conception since they believe it provides the best foundation for public agreement that can secure the conditions that enable all reasonable people freely to pursue their conceptions of the good. His position is that agreement on fairness of procedure will always take precedence over disagreement about fairness of result (Hampshire 1993). But if this is not to become a mere *modus vivendi*, it would seem that citizens increasingly have to integrate the political conception into their comprehensive

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[36] Rawls also acknowledges that for many "the true, or the religiously and the metaphysically well-grounded, goes beyond the reasonable" (1993, 153).

doctrines in terms of privileging respect. After all, "no one accepts the political conception driven by political compromise," and indeed Rawls says "these adjustments or revisions we may suppose to take place slowly over time as the political conception shapes comprehensive views to cohere with it" (1993, 171, 160 fn. 25). But to what extent does this indicate that the stability of the political conception ultimately depends upon a transcendent commitment to reasonability or the unlikelihood of other values significantly or frequently outweighing one's sense of procedural fairness? As Stuart Hampshire observes, Rawls' presumption that political values will normally outweigh whatever non-political values conflict with them is a meta-claim that "conveys a very substantial and definite moral point of view, putting the duties owed to basic institutions that are just ones ahead of all other human commitments." This ruling, Hampshire goes on to say, "brings political liberalism, supposedly not itself a comprehensive morality, into direct conflict with many comprehensive moralities that are likely to flourish in a modern democracy" (1993).[37] The result is that citizens are as likely to withdraw or qualify their support for the political conception as they are to adjust or revise their comprehensive doctrines.[38]

Translating this problem to the capabilities approach, the question is whether Nussbaum presumes too strong a commitment to the central valuation of the capabilities in each citizen's comprehensive conception, such that citizens will

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[37] William Galston says that Rawls' assertion that the characteristic values of the political are very great values and hence not easily overridden "sounds suspiciously like…going beyond the political" (2009, 116 fn. 20).
[38] See Huemer 1996. Edwards also suggests that people who initially accept reasonableness may well come to reject it as a trump political value as they freely and equally pursue the central ideas of their own comprehensive doctrines (2012, 427).

continue to support the capabilities even if certain functionings they enable are inimical to the rest of their comprehensive doctrines. Though Nussbaum may be right that practical reason is valued in all forms of life, she requires it to be exercised in the mode and scope of each of the other capabilities. The concern then is that the endorsement she requires of practical reason in its architectonic modality may be quite contrary to citizens' other moral convictions, so that requiring their most fundamental commitment to be to the exercise of practical reason in this very particular way is too controversial to expect widespread agreement. I assess this and its ramifications for Nussbaum's theory in terms of capability development and surrender below (3.7.1), and then again in chapter 4 in terms of her claim that citizens can be expected to willingly endorse capabilities they have no interest in realizing. But first we must consider another problem faced by political liberals, namely the problem of determining what being reasonable means in the first place.

3.6.2 The Problem of Reasonableness

In addition to the problem that political liberals may require that citizens privilege reasonableness in their comprehensive conceptions, there is a further difficulty in knowing what being reasonable requires.[39] As we have seen, reasonableness is important to the political conception because it functions as the standard that regulates political obligation and delineates the political and non-political realms. By limiting political claims to what they can reasonably expect each other to accept, reasonable citizens make sure not to introduce into political

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[39] See Young 2002 Chapter 6 for a discussion of this point.

arguments divisive private convictions. Only by doing so, political liberals claim, can citizens respect each other as free and equal and is political stability possible in a context of social diversity.

This means however that without a clear sense of what it means to be reasonable citizens may have trouble knowing what respect they owe others, and how and when they should censor their private convictions in participating in political discourse. Thus, if there is trouble identifying the scope of the reasonable, there is not only the danger that citizens are required to give priority to reasonableness in their comprehensive conceptions, but that in doing so they may give priority to different commitments since they may not all agree what being reasonable entails. Political liberals thus need a thick conception of the reasonable since otherwise they may fail to insulate the political from the non-political realm, and by admitting private convictions into the political conception would see their theory flounder where they claim it most compelling. As Hampshire voices this concern, "the problem of public versus personal morality remains…because the separation between the political domain of overlapping consensus, and the private domain of protected moral diversity, superficially so attractive, is precarious and unstable" (1993).

To see how this is the case, recall that reasonable people want to cooperate with others on terms those others can accept. Thus, they follow the 'method of avoidance' in applying the principle of toleration to philosophy itself and refrain from grounding political claims in controversial doctrines. The question then is what is it reasonable to expect others to accept, and how can there be general

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agreement on any answer? For Rawls, the answer is found in the public culture

which is characterized in part by acknowledgement of the burdens of judgement.

Together, these notions presume a basis of shared values and agreement on

fundamental issues, and entail the appositeness of political agnosticism on moral,

religious and philosophical commitments: reasonable citizens by recognizing the

burdens of judgement admit good reasons others may disagree with them, and

accordingly bracket their commitments to controversial issues in their arguments

for political principles. However, though the burdens of judgement are supposed

to encourage self-restraint in making political claims, and thus function as a

source of political stability, individuals formally can accept them yet disagree as

to their substantial implications. They may, that is, recognize that evidence can be

complex and conflicting; that the weight to be attached to evidence can be

contestable; that concepts are vague and subject to hard cases; and that our

judgements are imponderably but decisively and differently influenced by the

whole course of our individual moral experience – but they may disagree as to

when each of these factors is relevant or the extent of each of the discrepancies

they describe. Thus, citizens may believe themselves to be reasonable in their

presumptions about what others can accept, but it may be that what one person

presumes straightforward is controversial to another or deemed difficult or vague,

or that what one rejects as the peculiar life or moral experience of another is

presumed by that other to be common to all.

Now Rawls of course thinks there is sufficient overlap in the public culture

that the burdens of judgement will not cause such problems or at least will not

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cause them significantly, since what they entail will be similarly presumed by all reasonable citizens who can also try to convince one another of the bounds of the reasonable through public exchange. But as we shall see this may be more complicated in the case of Nussbaum's theory given the richness of her notion of human dignity and her need for all citizens to agree on each capability as well as its scope to secure it. Indeed, the diversity of societies, both internally and globally, means agreement on the capabilities alone is not enough. The bigger difficulty may be not in securing agreement on the capabilities as abstract or highly general norms, but rather on the thresholds and specific range of functionings that define each capability as requiring political protection and support. We turn now to discuss in more detail how these two problems faced by political liberalism apply to Nussbaum's theory.

3.7 Implications for Nussbaum's Capabilities Approach

The two challenges posed to political liberals are first that they require reasonable citizens to privilege their commitment to reasonableness in their comprehensive conceptions, and second that they presume all citizens will understand what it means to be reasonable in a sufficiently similar way. Should political liberalism fail on either of these challenges, any overlapping consensus would be endangered as citizens would prioritize their non-political over their political commitments, or introduce into the political conception of justice their private convictions thinking they warrant acceptance from others who hold contrary comprehensive commitments. Translating these two problems to Nussbaum's theory, we must ask first whether Nussbaum requires of each citizen

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too stringent a commitment to the capabilities in their comprehensive conceptions, and second presuming acceptance of the list, whether there is sufficient agreement amongst reasonable citizens as to the appropriate scope of each capability and the range of functionings that deserve political protection. Indeed, though Nussbaum might be right that all conceptions of the good involve the exercise of practical reason, does dignity really require the exercise of practical reason in the area of each capability? Furthermore, is it the case that all reasonable citizens can agree that the capabilities should be guaranteed to particular threshold levels, and can endorse this as part of their conception of the good in the manner of an overlapping consensus?

3.7.1 Privileging Commitment to Capabilities

For Nussbaum as we have seen political respect is shown citizens by treating them as equals and ensuring they have the capabilities to pursue their lives as they choose. And, as we have also seen, the capabilities that matter are those central to human dignity, the most important of which are practical reason and affiliation. These two capabilities organize and suffuse all the others and make their pursuit truly human: when each of the capabilities is present in a manner commensurate with human dignity, practical reason and affiliation are 'woven' into them (2011a, 39). To exercise practical reason as such requires the capacity to choose and order functionings in the areas of each of the other capabilities, whilst exercising affiliation requires the ability to engage in the other capabilities in a manner involving mutual respect of humanity (2002a, 82). However, Nussbaum's claim that dignity requires that each capability be held to

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threshold levels, may presume too substantive a commitment to each architectonic capability in each person's comprehensive conception. Indeed, this can be seen in the fact that Nussbaum's position seems to require that citizens value each capability as more important than the particular functionings they value, if those particular functionings would entail the loss of a broader range of capability freedom. To see this we look at Nussbaum's rejection of exchanges of below-threshold levels of one capability for higher levels of others, and more extremely in her rejection of voluntary permanent surrender of the capabilities.

We begin to see the implications of privileging capabilities over functionings by examining how Nussbaum disallows individuals choosing below-threshold levels of one capability in exchange for above-threshold levels of others. Her reason for this is that "the list is, emphatically, a list of *separate components*. We cannot satisfy the need for one of them by giving a larger amount of another one" (2002a, 81). Nussbaum's intention here is to avoid cost-benefit trade-offs that might legitimate for instance, exchanging political liberties for economic gains; she wants to avoid situations "in which citizens are pushed below the threshold in one of the central areas" (2002a, 81). But though this makes sense in the case of state action, her position gives her problems accepting such trade-offs when made voluntarily by individuals. Indeed, she seems to require commitment to threshold levels of all the capabilities even though exchanges of this sort might better enable the realization of one's private convictions or personal goals. Yet it seems one thing for the state to sanction such trade-offs in people's lives, and quite another for individuals to make those

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decisions themselves, particularly if the capabilities they would trade do not concern traditional liberties such as freedom of expression or conscience.

The reason for Nussbaum's strong stand on this issue is her insistence that threshold levels of the capabilities represent "the level above which not just mere human life, but *good life*, becomes possible" (2006a, 181). But if it be in accordance with one's conception of the good, why should one not be permitted to sacrifice certain capabilities for the sake of others? Is there really "waste or starvation" in such lives? (2011d, 27)[40]

To see the depth of Nussbaum's commitment here consider further her claims about children and the (voluntary) permanent surrender of the capabilities. Nussbaum's general position is that the focus of justice should be on capabilities not functionings, and that individuals should have the opportunity to choose how and whether to realize capabilities in light of their own conceptions of the good. The case is different with children, however, given the importance of certain functionings to the development of mature capabilities. Certain levels of education, health, emotional well-being and bodily integrity can all be required for children regardless of their own or their parents' preferences, given their long-term impact on their development into adults with meaningful capabilities who thus lead dignified lives (2006a, 89-90). But just as Nussbaum requires certain functionings of children, she constrains the capabilities of adults even when their forms of realization would affect only agents themselves. She thus may accept

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[40] Some opine on this issue that "Nussbaum's list implausibly attributes equal value to all of the ten central functioning capabilities from 'life' and 'bodily health' through to 'play' and 'a relationship with other species'" (Page 1999, 13).

choosing military or traditional lives which by their nature constrain the exercise of practical reason, but she rejects in most cases the validity of free choices to permanently surrender capabilities. Thus, not only is elective slavery condemned "even if we think the person to be of sound mind," but most forms of voluntary capability surrender including those regarding health, bodily integrity, sexual expression and practical reason. In such cases she argues interference is justified in order to protect the capability (2006a,93-94; 2011a, 26).

These examples demonstrate the primary importance Nussbaum attaches to the exercise of practical reason in the area of each of the other capabilities: children are required to fully develop practical reason, and adults are prohibited from forfeiting it or compromising morally important spheres of its practice. Now Nussbaum claims not to care so much how each of the capabilities is realized,[41] since all that counts for her politically is the continuing capacity to realize each capability as a range of possible functionings. It is for this reason there is no tragic waste if a person chooses not to realize a capability whereas there is tragic waste if they are unable to do so, and why choosing continually not to realize a capability is on firm moral footing (presuming no problem with adaptive preferences) whereas choosing permanently to surrender a capability is almost always morally suspect. For example, there is no objection to persistently choosing celibacy, but choosing castration would likely warrant interference unless justified as necessary to protect other capabilities (which would thus constitute a tragedy in need of its own solution) (2002a, 71).

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[41] 'So much' because some functionings are necessary to secure capabilities.

All this indicates that if individuals are not to feel imposed upon by the political conception they must value capability freedoms they will choose not to exercise, even though this might impede them from realizing what functionings they prefer. That is, there must be a commitment to the freedom to exercise practical reason in the sphere and scope of each capability in question, even when there is no commitment to realizing that capability as any particular functioning. Valuation of the capability, and more specifically of the capacity to exercise practical reason and affiliation in the full sphere of that capability's political protection, must be a basic and overriding commitment of a worldview that is not imposed upon by a political conception defined by Nussbaum's capabilities.

3.7.2 Agreement on the Scope of Capabilities

We see then that Nussbaum's political conception requires valuation of each capability even when this valuation might compromise chosen functionings. We also see that to accommodate diversity, agreement on the political conception must consist of an overlapping consensus in which each citizen supports the capabilities on the basis of their own comprehensive conceptions. This means that citizens can differ in their reasons for supporting the capabilities, because they can be incorporated into a variety of different worldviews and can thus promote a variety of different conceptions of the good.[42] However, because the capabilities can be realized in many different ways, and because not all of these functionings may be amenable to the private convictions of all citizens who

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[42] For example, a Muslim may support women's political equality on the basis of men and women's shared single metaphysical essential nature, whereas Jews and Christians may support political equality despite believing women have a different essential nature from men (2002a, 76).

politically support the capabilities,[43] citizens must maintain a fundamental

commitment to the value of exercising practical reason within the range of

permissible realizations of each capability, and not just its exercise to the end of

preferred functionings. That is, they must value the freedom to realize the range

of each capability with more conviction than they value the particular

functionings they favour, else their membership in the overlapping consensus

could be contingent on others not realizing what they deem dubious functionings.

Instead, they would argue for more limited political protection of each capability

in keeping with the range of functionings they can countenance on the basis of

their comprehensive doctrines, and would only accept political protection of

functionings beyond that range as a strategic compromise or *modus vivendi*.

This indicates how dependent Nussbaum's theory is on either substantial

agreement as to the range of functionings deemed necessary for human dignity

(the scope of each capability to be protected) or the importance citizens must

ascribe to the exercise of practical reason *per se*. As with Rawls, however, either

of these options suggests a narrowing of membership in the overlapping

consensus, since participants will only sign on to the political conception if either

the range of each capability is curtailed to what is consistent with what they

privately accept, or they are comprehensively committed first and foremost to the

value of the exercise of practical reason as per the range of each capability, above

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[43] Examples might include homosexual marriage as a function of affiliation, abortion as a function
of bodily health and bodily integrity, pornography and sadomasochistic practices and religious
dress in schools as functions of senses, imagination, and thought – all issues quite prevalent in
today's 'culture wars' in the west, not to mention such conflicts in non-western countries such as
that over homosexuality in places like Uganda.

and beyond their valuation of the particular functionings they would realize in each case.

Now these worries might seem mitigated by the role of the public culture in political liberalism. For Rawls, after all, the values of the political conception are meant to be implicit in the public culture, and so the conception presupposes some general agreement on the range or scope of its political values. Similarly, we see Nussbaum proclaiming that the general articulation of the capabilities in her theory will be specified more directly by each different culture, since what is universal in her theory is only "a starting point: each nation must and should describe the capabilities it pursues more concretely, using their own history and traditions as a guide" (2011d, 29). Thus, the idea seems to be that each nation's public culture will be sufficiently homogeneous to arrive at a general agreement as to which specifications of the capabilities justice requires.

At the same time, however, Nussbaum is eager to emphasize the heterogeneity of cultural traditions (2002a, 48 fn. 33), and admits a lack of consensus in many of the places she believes her list should preside. Indeed, she says that her theory requires only a reasonable path to overlapping consensus, and that Rawls' emphasis on public culture in his theory is best conceived not as part of the definition of political liberalism, but as a "related practical observation" intended to "help us assure ourselves that such a conception can be stable for the right reasons" (2003, 31-32). Accordingly, Nussbaum disavows the need to locate the ideas of her political conception in current political cultures. Thus, although she says she follows Rawls' lead in needing only to show that the ideas

of the capabilities approach "can over time gain adherence (for the right reasons)," and that this requires only "that the requisite ideas be embedded [in society] in some form" (2006a, 301), it is important to recall that Nussbaum conceives this embeddedness of ideas in a much different manner than Rawls. Indeed, whereas Rawls can be said to harvest his political values in the top soil of citizens' comprehensive commitments, Nussbaum seems willing to excavate hers from their depths. As she says, "the ideas of the capabilities approach do have deep roots of many kinds in many cultures," though citizens may not endorse them without further persuasion and argument (2003c, 31). Thus, whilst Rawls' citizens can endorse political values as a close entailment of their standing commitments, for Nussbaum this entailment may be much more detached. "In the short run [and because of the problem of adaptive preferences] we should not be dismayed if our own moral convictions, which we believe justified by a good moral argument, do not find an echo in the preferences of people who deliberate, even under good conditions" (2004, 200).

Yet if the public culture cannot be relied upon to justify the capabilities and moral convictions must be appealed to instead, then the solution of appealing to the public culture to determine the appropriate scope of each capability – the range of functionings to be politically protected – is currently unavailable. Indeed, it turns out that any preferences expressed in the public culture are dependable for Nussbaum only if they already agree with hers, or if she first has license to pursue substantive policies that would mould them over time to converge with her moral convictions. The unreliability of the existing public

culture however means there is potentially a very serious problem for Nussbaum.

Even if she can establish support for the capabilities as general norms within

citizens' comprehensive conceptions, their disagreement as to what those general

norms require may be sufficient to undermine the political capital any overlapping

consensus might make possible. To put this more directly, though she may

establish support for each capability, determining their measure in terms of

thresholds may prove a task too much. As critics have voiced this concern with

political liberalism in other formulations, it may be that "the likely outcome is a

withdrawal into a highly general abstract realm of agreement that fails to resolve

actual disputes" (Bell 2012).

3.8 Loading the List

In chapter 4 I examine how Nussbaum thinks she can solve these problems

(regarding the priority of reasonableness and the question of what it means to be

reasonable) by means of the capability-functioning distinction, her notion of

distant entailment, and her hermeneutics of critics' traditions. Before turning to

discuss these issues, however, it is helpful to note once again that Nussbaum does

admit that her theory is "explicitly and from the start *evaluative*, and, in particular,

ethically evaluative" (2006a, 181). Both the capabilities she identifies as

fundamental to human life (thought, perception, attachment, etc.) and those she

claims constitute a good human life (those same elements held to an appropriate

threshold) are chosen selectively: "some things that human beings can be and do

(cruelty, for example) do not figure on the list" (2006a, 182). She claims however

that this evaluative basis presumes only a thin conception of the good that is

metaphysically and epistemologically neutral. As has been suggested however her conception of practical reason seems far from thin, and in closing this chapter it is helpful to go back and briefly examine Nussbaum's methodology in formulating her list. This can help us see how the thickness of her theory may have come about and how it may be making substantive demands that compromises its credentials as a political liberalism.

Because of the problem of adaptive preferences, Nussbaum says preferences play only an ancillary role in her theory, operating only as a cross-check on independent arguments for the list of capabilities (2002a, 152; 155). As she says, "while not dismissing desire…we had better take our stand squarely in the camp of the substantive good" (2002a, 166). The primary basis for her list as such is the notion of dignity which she claims is "among the most vivid intuitive ideas we share" (2006a, 279). The harmony between her list and this intuition is supposed to represent a state of reflective equilibrium as the ongoing refinement of the list through discussion with others further specifies and delineates what constitutes this universal intuition.

But given that Nussbaum's 'good moral argument' is primarily a reference to an intuitive notion of dignity and is not meant to appeal to any divisive metaphysics or epistemology, we might wonder how robust that argument turns out to be. Indeed, we need to ask about Nussbaum's evaluation of claims in the process of defining dignity, because of concerns about the representativeness of those she involves in formulating the list, and because she sometimes gives primacy to her own intuitions in the face of disagreement with others, yet other

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times seems willing to reject capabilities she admits she would rather include. We shall only briefly discuss these issues to flag them for later discussion, but how representative are those whose intuitions contribute to the formulation of the list, and how are we to understand these apparently discordant decisions about which elements should be included in the case of disagreement, that at times seem to indicate an overriding commitment to ideals and at others a commitment to public endorsement?

3.8.1 Concerns About Representativeness

To start with the issue of representation, we can ask why, if informed desire offers only ancillary support to her theory, Nussbaum's intuitions about dignity are more reliable than those of others she dismisses? Nussbaum's response might be that since she enjoys the capabilities herself she likely has more adequately informed desires (2002a, 161), and she does in fact claim that the list is the result of years of cross-cultural dialogue and exchange with a broad range of other individuals whose support affirms her intuitions (2002a, 76). However, and as Alison Jagger has pointed out, Nussbaum's colleagues in developing the list may well be an exclusive group of elites who do not represent their broader cultures. Nussbaum's claim is that she draws "both on the results of cross-cultural academic discussion and on discussions in women's groups themselves designed to exemplify certain values of equal dignity, non-hierarchy, and non-intimidation" (2002a, 151). As Jagger says, however, "anyone who asserts the existence of a consensus that is morally significant must pay attention to questions of inclusiveness and representation." Nussbaum's failure systematically to do this

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means "she has no warrant for claiming that the individuals with whom she has spoken or corresponded represent a broader cross-cultural consensus." Consequently, this "undermines the plausibility of her assertion that her list of capabilities expresses values that are widely accepted across the world"; we have no guarantee she is not simply projecting her "own ideas on to other people and simply rationalizing [her] own pre-existing values" (2006, 312-313, 318).

David Clark supports this critique of Nussbaum's project when he says "there are no safeguards or checks for agreeing lists of capabilities. In particular, there is no assurance that everyone's intuitions will be consulted or that social inequalities (including privilege, intellect and power) will not affect the pursuit of reflective equilibrium in ways that are hard to detect" (2013, 176). Moreover, any claim about being well-situated to determine the capabilities on the basis of already enjoying them seems circular and to beg the question. As Nussbaum herself recognizes of those with full capabilities, "people living under a just regime will still on occasion be ignorant or hasty; they may also be intimidated or envious" (2002a, 161). Even if her list would be chosen by someone suitably situated, why does she believe that she and her colleagues are not subject to these fallibilities?[44]

3.8.2 Conflicting Intuitions

Turning to the issue of discordant decisions, despite Nussbaum's claims about collaboratively adjusting and refining her list there are times when she

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[44] As Clark says, "we cannot dismiss the possibility that Nussbaum herself may be a victim of false consciousness (along with many other scholars)" (2013, 180).

maintains a place for capabilities in the face of opposition from others with whom she has discussed the list's formulation. The capability regarding *other species*, for instance, which was proposed by Scandinavian but opposed by South-East Asian participants, remains on the list on the basis that Nussbaum "personally remain[s] strongly of the belief that it does have a role," with the consolation offered to those who disagree that capabilities are the goal not actual functionings (2002a, 158). At the same time, however, Nussbaum also relates that she only came to include non-discrimination on the basis of sexual orientation as part of the central capability of *affiliation* subsequent to the Indian screening of Deepa Mehta's film *Fire*. This film, which portrays a lesbian relationship between two women who have been oppressed in traditional marriages, provoked discussion in the Indian media of sexual orientation that led to "a public recognition by feminists and other liberal thinkers of the important links between these issues and women's full equality." Because of this, Nussbaum now thinks it "no longer premature to add this item to a cross-cultural list that is expected to command an overlapping consensus," though she maintains she always saw a place for it as part of the right to non-discrimination on the basis of sex (2002a, 79-80 fn. 84, 292).

This indicates however that Nussbaum sometimes is willing to override opposition to her intuitions about dignity but at others is prepared to acquiesce to it. Though in saying this we should notice that the situations of the two examples differ. With the first (*other species*), disagreement exists at the stage of reflective equilibrium in which Nussbaum and her colleagues are involved in the process of

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determining which capabilities are necessary to human dignity. With the second

(*sexual orientation as part of affiliation*), the disagreement is between those who

determine the capabilities as the basis of dignity under conditions conducive to

reflection (equal respect, freedom from intimidation, capacity to learn about the

world, and security against want (2002a, 152)), and those who are expected to

accept policies based upon those determinations. But clearly something odd is

going on here. Preferences are supposed to offer only ancillary support to the

capabilities, so why does the possibility of future overlapping consensus act as a

criterion for a capability's being on the list if its purpose is to delineate the

conditions of human dignity? The success of Mehta's film in India has somehow

qualified non-discrimination on the basis of sexual orientation as an element to be

included on a universal list of capabilities. Somehow, the substantive good the

list is based upon has become subject to the opposition of those who presumably

have not gone through Nussbaum's "lengthy process of normative reflection"

(2001b, 137). Indeed, had Mehta not screened her film, or had the media

discussions not happened as they did, would this have meant that non-

discrimination on the basis of sexual orientation would not be a requirement of

dignity, that before the screening discrimination on these grounds was not morally

problematic? We need to reconcile this with Nussbaum's insistence that the

capability regarding *other species* should be included on the list, despite

resistance even from those who apparently are well situated to reflect on the

conditions of dignity.

To push this issue further, greater support for non-discrimination on the basis of sexual orientation amongst Indian feminists and liberals implies nothing about support for the issue outside India.[45] This raises questions about why the weight of India's prospects for future overlapping consensus on the issue should justify inclusion of an element on a list which is intended to apply universally. It also says nothing about opposition in India to the issue, which raises questions about why the support of feminists and liberals is sufficient to convince Nussbaum that an overlapping consensus can be expected in the future. Why, after all, should the support of feminists and liberals take precedence over the popular opposition of traditionalists – why should not prospective consensus on the illegitimacy of homosexuality be taken to exclude non-discrimination on the basis of sexual orientation from the list of capabilities?

The issue fundamentally at stake here concerns the relationship between moral and political justification in Nussbaum's theory: how does Nussbaum reconcile the process of reflective equilibrium by which she determines her list of capabilities, with the overlapping consensus by which citizens are said to be able to endorse them? In chapters 4 and 5 I investigate these issues and argue that given her standard of moral justification she is unable to claim the political liberal legitimacy she presumes. In chapter 4 I set the stage for this argument by

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[45] Apart from the association claimed with women's issues in general which do stand as a worldwide concern. But then, as Nussbaum herself points out, feminists in India can be quite divided in their primary concerns due to different deep intuitions about the cause of women's subordination: for some the essence of feminist concern is a critique of sexual domination, whilst for others the essence is a critique of economic dependency. Nussbaum presumes the interrelatedness of these concerns and argues each critique supports the other, but as she also points out it is quite possible to be "intensely homophobic and yet vigorously feminist" (2002a, 290-95).

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showing how neither the capability-functioning distinction, nor Nussbaum's interpretation of critics' traditions, are sufficient to uphold her own notion of respect, such that critics have good reason to feel disrespected by a political conception based upon the capabilities. Instead, she is better off conceiving her theory as a form of comprehensive liberalism sensitive to individuals' standing beliefs and values and constrained by pragmatic calculation.

Chapter 4: Respect Through the Capability-Functioning Distinction

In chapter 3 we saw that Nussbaum defends her capabilities approach as a form of political liberalism on the grounds that its ideas are embedded in different cultures around the world and can gain adherence over time in the form of an overlapping consensus. We also saw that because she makes the substantive notion of dignity central to her theory, her political liberalism differs from Rawls' in terms of context, scope, cultivation of sentiment and justification of political principles. Because of this, although Nussbaum's political liberalism is subject to similar objections as Rawls' regarding the prioritization of reasonableness in comprehensive conceptions and the interpretive problem of what it means to be reasonable, it responds to these problems differently. In particular, whereas Rawls defends his principles against these objections by claiming that the commitments they presuppose are "familiar and intelligible to the educated common sense of citizens generally" (1993, 14), Nussbaum justifies her principles by teasing out citizens' commitments to them from more deeply within their various historical and cultural traditions. However, since these commitments she identifies may inform citizens' educated common sense to varying degrees of significance, and accordingly may be more or less integral to their actual identities and self-understandings, the worry arises that Nussbaum may be invoking more controversial substantive ideas than she acknowledges.

To put this concern more directly, though Nussbaum's intention is to legitimate the capabilities by presenting them as emerging from or as compatible with citizens' standing beliefs and values, she may have to dig so deeply and

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selectively in their traditions to find them that it may be difficult for some citizens

to endorse them without significantly altering their actual commitments. The

subsequent concern is that the legitimacy of Nussbaum's capabilities may

flounder on citizens' alienation from the very values Nussbaum appeals to as

immanent in their cultures and traditions.

In this chapter I investigate this worry further, and argue that on a political

liberal standard Nussbaum's theory is inadequately respectful of people who do

not already accept the capabilities, and that her attempts to justify them politically

to critics fail to take their objections seriously. Consequently, her political liberal

theory is open to the charge of failing its own standard of respect. I argue that if

Nussbaum wants to maintain her position that the capabilities are the basis of a

dignified life, and that the freedoms they represent are objective goods that all

ought to enjoy on pain of injustice if they do not, then she would do better

advocating them directly by promoting them as state-sponsored ideals on a

comprehensive liberal understanding of political legitimacy and respect.

4.1 Respect on the Basis of Standing Beliefs and Values

As we have seen, central to liberalism is a concern with political

legitimacy, and essential to the idea of political legitimacy is the idea of political

respect. Political liberalism holds that reasonable citizens must be able to endorse

the political principles that govern them lest those principles be coercive and

reduce them to second-class status. As we have also seen, however, Nussbaum

diverges from other political liberals on the requirements of political legitimacy.

For Rawls, political principles are justified when citizens can reasonably be

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expected to endorse them as the implicit articulation of their standing beliefs and values[1]; similarly, Larmore holds that legitimacy must make reference to the actual consent of the governed and what citizens "already believe in" (1996, 135). Nussbaum however believes that the human personality has a structure that at least partially is independent of cultural influence, and that on this basis she can identify a universal conception of human dignity that is manifest in a wide range of cultures and traditions. She thus believes that the capabilities as the condition of dignity have basic moral justification, but can politically be justified to citizens who might resist them as implicitly articulated in their various cultures and traditions, and consequently as the more distant entailment of their standing beliefs and values. This, she believes, is sufficient for her capabilities approach to meet the requirements of political liberal legitimacy.

This does not mean of course that endorsement plays no role in the moral justification of Nussbaum's principles. Not only does endorsement play an ancillary role in the sense that people's actual preferences act as a cross-check on moral arguments for the capabilities, reassuring proponents that those arguments are on track. But the political liberties which are central to Nussbaum's theory require the political institution of any capabilities to be established by the deliberations of democratically elected parliaments, meaning popular endorsement is a moral constraint built into the theory.

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[1] The exercise of political power is "proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational" (1993, 217).

Yet it remains the case that for Nussbaum the moral justification of her principles in terms of their endorsement is secondary to their moral justification in terms of the notion of dignity. Democratic outcomes do not take priority over the independent determination of the correctness of the capabilities. This is because for Nussbaum any adequate theory of justice must be outcome-oriented not procedural. Political principles that (systemically) fail to provide for the conditions of dignity are inadequate on Nussbaum's standard regardless of how they were formed and regardless of their popular support (2004, 200-201).[2] It is this criticism after all that substantiates Nussbaum's concerns about adaptive preferences, and constitutes her objection that social contract theories through their presumptions of equal power and mutual advantage are unable to include certain minority groups from the start as equal subjects of justice.

This focus on outcomes that correspond to independently determined moral principles allows Nussbaum to avoid the objection made of political liberalism that an overlapping consensus does not guarantee substantive correctness, but at the risk of undermining Nussbaum's claim to be a political liberal. Indeed, Nussbaum thinks she can morally justify the capabilities without relying on individuals' standing beliefs and values, but then believes she can politically justify their implementation by claiming it is possible to accept them on the very basis of those standing beliefs and values. Because of this, the capabilities are claimed not problematically impositional since endorsement is possible on the grounds of what people already accept. But there is a tension that

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[2] For example, Nussbaum says that were a majority in India to vote to replace the pluralistic constitution by declaring India a Hindu state, "we ought to say 'What the majority desires here is wrong'" (2004, 201)

arises when the reflective equilibrium that determines the capabilities does not readily concur with what agreements can be reached more immediately by the public justificatory device of an overlapping consensus.[3] How then do we reconcile Nussbaum's claim to political liberalism with the fact that while the moral justification of the capabilities is not beholden to individuals' standing beliefs and values, their political justification is beholden in the sense that individuals must be able to reason from them to accept her principles on their grounds?

Nussbaum responds to this problem in part through a mandate to mould the public culture through policies that make the capabilities appear more amenable to people's standing beliefs and values. We see this for instance in her recommendations that international agencies and nongovernmental organizations use the capabilities model within nations that have not yet embraced it; that capabilities become the basis for international treaties and other documents that may be adopted by nations and incorporated into national as well as international law; and that politicians advocate (though not necessarily impose) her capabilities as the basis of national or local policy (2002a, 103-104). In addition, we see it as the reason she seeks support for the capabilities in cultural resources that may lie quite distant from individuals' standing beliefs and values, and why she says disproving her theory requires not contesting current consensus on the capabilities, but showing that the conception she endorses "could not be

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[3] For elaboration of this uneasy balance in Nussbaum, and an argument that it is *prima facie* difficult to see how these two methods of justification may be reconciled, see Claassen and Düwell 2013, 8-9. As Claassen and Düwell point out, in her later material Nussbaum has become less and less shy in admitting that intuition plays a foundational role in her theory.

reflectively endorsed by citizens who have gone through the lengthy process of normative reflection" (2001b, 137). Nussbaum's position after all is that as universal there should be traces of the capabilities manifest in all cultures, and that by identifying these manifestations people can embrace the capabilities as authentic expressions of their traditions or heritage. This, combined with the fact that she says exposure to or experience of the capabilities results in their value being recognized,[4] entails that she believes that with enough time the capabilities will enjoy widespread endorsement. Her strategy consequently is to play the long-game on consensus, and not to cater to contrary preferences apart from considering how they might be co-opted for the purpose of securing eventual endorsement.[5]

But in playing this long-game does Nussbaum maintain the sort of respect that is expected of a political liberal? Does she focus too much on moral substance and prospective endorsement, and not enough on standing beliefs and values? In response to allegations that her theory is a form of comprehensive not political liberalism (Barclay 2003, 17-23), Nussbaum retorts that it "(a) eschews reference to controversial metaphysical and epistemological doctrines even in the context of articulating the basic principles of justice themselves, and (b) does so for reasons of mutual respect, in the light of the fact of reasonable disagreement" (2003c, 39). Indeed, as we have seen Nussbaum rejects the assertion of political

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[4] "[P]eople who once learn and experience these capabilities don't want to go back, and one really can't make them go back" (2002a, 152). See also the case of Hamida Khala (2002a, 236-238).
[5] As she says, "to the extent that actual practices are relevant, they are relevant only insofar as they embody people's normative judgments, judgments that they are prepared to defend reflectively. Thus the fact that someone somewhere does not follow the capabilities list is neither here nor there" (2001b, 136). Also: "I believe that in the short run, we should not be dismayed if our own moral convictions, which we believe justified by a good moral argument, do not find an echo in the preferences of people who deliberate, even under good conditions" (2004, 200).

truth by comprehensive liberals regardless of citizens' standing beliefs and values, and rather believes that political principles must be constrained by the content of individuals' worldviews in the sense that they must be compatible with them. This, she says, is enough to make her theory politically liberal. As William Nelson emphasizes, however, political liberalism is committed to the ideal that "principles are adequate only if they should be accepted by all reasonable persons on the basis of beliefs and values they *already hold*" (2002, 212). Only thus is there political respect. Given Nelson's characterization, the question is what counts for Nussbaum as compatible with standings beliefs and values? If people can claim good reason to reject the capabilities, is Nussbaum right that politically instituting them nevertheless would not be disrespectful if she maintains that traces of support can be found in those individuals' standing beliefs and values, such that in time they can come to reflectively endorse them? To put this more succinctly, is Nussbaum right to claim that democratically instituting the capabilities would be respectful of those who reject them, given that respect need not be fully constrained by people's standing beliefs and values, but can exist as a function of what might be reasoned to on the basis of those existing commitments?

4.2 Institutions Required to Support the Capabilities

In 4.3 I offer reasons why critics might question Nussbaum's explanations that the implementation of the capabilities need not be disrespectful even to those who would reject them. In 4.4 I then revisit her conception of respect to query how best to conceive it should Nussbaum maintain (in spite of the problems I

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raise) the legitimacy of implementing political principles based on the capabilities. First, however, it should briefly be mentioned some of the political and social institutions and policies that Nussbaum says would be necessary to satisfy minimal thresholds of the capabilities, however they be locally specified. This will elaborate some of the concerns raised in 3.5 regarding the scope of Nussbaum's theory and its cultivation of sentiment, and should give some indication of how deeply entrenched may be some of the principles and policies she expects people to support and why they might have reason to reject them.

We have seen that Nussbaum intends the capabilities to be established by the deliberations of democratically elected parliaments, but to this she adds that they ought to be entrenched beyond majoritarian whim by supermajoritarian policies (2011a, 73). Furthermore, the capabilities are to be protected politically by a series of mechanisms and institutions, including separation of powers and judicial review, federalism or decentralisation, independent administrative agencies to protect health and the environment, and mechanisms to detect and prevent corruption in government and business (2006a, 311-312). With regard to the law, legal education and the training of law enforcement officers should be tailored to the protection of citizens' capabilities, and with regard to disability and aging she says "the public sphere needs to support family and medical leave and in-home nursing care," and needs to "find some reasonable way of addressing the politically tricky issue of care at the end of life." Workplaces she says must become more flexible, and there needs to be greater reciprocity between men and women: to this end "new conceptions of masculinity" are needed. Finally, in

addition to provision of compulsory primary and secondary education, there must also be "ample support and encouragement for higher education" and for "skills associated with the humanities and the arts" (2011a, 152-156).

The thickness of these parameters go some way to explaining why Nussbaum thinks all nations fail to meet minimum thresholds required in order to secure human dignity (Roberts 2013, 5). This thickness however also provides reason why many might have reason to reject the capabilities as we see in the following arguments.

4.3 The Capability-Functioning Distinction: Respecting those who Reject the Capabilities

Given the democratic restraints in Nussbaum's theory any concerns regarding politically instituting the capabilities must relate to the protection of minorities, where this is understood as anyone who does not side with the implementation of the capabilities or their particular specifications or thresholds. Indeed, Nussbaum herself demonstrates concern about this issue when she discusses the danger in majoritarian politics of expressive subordination, and presents a number of arguments why those who might resist the capabilities are nevertheless not discriminated by them and in fact can be expected to support them. Many of these arguments revolve around the capability-functioning distinction, which as discussed in chapter 3 Nussbaum thinks citizens will accept because of the deep value they ascribe to practical reason in their comprehensive conceptions. There are reasons however to think that these arguments fail, with the result that Nussbaum's theory may not afford political liberal respect to those

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citizens who have reason to reject capabilities-based principles but are reasonable in the sense of not wanting to impose their views upon others.

Indeed, in each of the following cases we can understand parties to be reasonable on Nussbaum's understanding of the concept since as we have seen she presents it as an ethical notion only: it has no epistemic aspect as we see in Rawls, for whom a reasonable comprehensive doctrine must be an exercise of theoretical reason that (i) "covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner"; (ii) gives instruction on how to weigh values when they conflict; and (iii) "normally belongs to, or draws upon, a tradition of thought and doctrine" that evolves "slowly in the light of what from its point of view…it sees [as] good and sufficient reasons" (Nussbaum 2011b, 25 ff.).[6] Indeed, a reasonable citizen for Nussbaum is simply someone who maintains a serious commitment to equal respect for persons as a political value, which essentially is a matter of not trying to co-opt political mechanisms and institutions for the sake of one's own ends or to impose one's worldview upon others. Accordingly, in each case of rejecting the capabilities to be discussed, we see that critics need have no proselytizing agenda and can simply not wish to enable or support activities or behaviours they disagree with or otherwise reject. This seems commensurable however with respecting in Nussbaum's sense the political equality of others, given that critics

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[6] Note that the quotations come from Rawls 1993, 59. Nussbaum's point here is that though Rawls may employ these criteria to elaborate what is involved in recognizing the burdens of judgement, they are unnecessary to the notion of respect: comprehensive doctrines that do not meet them are still deserving of respect, as she says many interpreters of Rawls (e.g., Burton Drebon) implicitly accept.

can maintain that the state should respect and guarantee in the relevant aspects the equal negative freedom of all.

4.3.1 Criticism: Dubious Functionings, Tacit Consent, and Presuming the Conditions of a Good life

Nussbaum says that instituting the capabilities would not impose on those who reject them because of the capability-functioning distinction that sets the stage for choice but never compels any functioning (2002a, 87-88). Because the capabilities concern opportunity freedoms only, the claim is that even citizens who have no interest in realizing the possibilities they enable will be able to support them. The associated functionings may not be part of their comprehensive conceptions, but they can accept that freedom of choice in these matters is valuable for their society, and so they are not disrespected by majorities instituting the capabilities and requiring them to support them as opportunity-freedoms (2006a, 183). As Nussbaum says, "if one ends up having a plan of life that does not make use of all of them, one has hardly been harmed by having the chance to choose a life that does" (2002a, 88-89).[7]

This prioritizing of commitment to capabilities over functionings was discussed in chapter 3, where it was anticipated that Nussbaum would respond to this criticism in terms of the capability-functioning distinction. We now see however there are problems with the presumption that capabilities do not impose

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[7] "Can one hold this and yet believe that the associated functionings are not valuable? I see no reason why not. First of all, an area of freedom can have value even for a person who decides not to use it, because the decision not to use it is a real choice only against a background of freedom. Second, we know that we live with others. In the society I envisage, we respect those others as equals, even when they disagree with us. So we will seek principles that don't simply allow us to get on with the lives we prefer; we will want them to have equal freedom" (Nussbaum, 2013, 11-12).

on those who reject them because it is capabilities not functionings that are the focus of political principles. First, and as John Clark and Eric Nelson point out, traditionalists and religious believers would resist many of the central capabilities on the grounds that certain functionings they enable – such as abortion or homosexual marriage or sadomasochistic practices – are blasphemous or immoral (Clark 2009 and Nelson 2008). Such individuals might agree that there should be no prohibition of such behaviours since good choices require the capacity to do otherwise; but they need not support the social toleration of that behaviour, and likely would not support its enablement through the cultivation of the social bases of the combined capabilities. Indeed, such individuals would likely reject socially and politically fostering what they regard as wrong choices, even secure in the knowledge there is no expectation that they realize those functionings themselves. Support might be more forthcoming were the capabilities conceived negatively in terms of duties of non-interference; but the whole point of the capabilities approach is to recognize the influence of external conditions upon agency, and to provide for the affirmative ability to engage in spheres of activity deemed important by the political community. Thus, though Nussbaum may be right that capabilities critics – whether ascetics or celibates, misanthropes or workaholics, the Amish or Christian Scientists or Roman Catholics – need not realize capabilities inimical to their worldviews, they must nevertheless support both politically and socially (including financially) the realization of those capabilities by others. As Nelson puts this, "even if I myself consider sex to be sinful, I am required to fund somebody else's Viagra" (Nelson 2008, 100).

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Indeed, Nussbaum's claim that the capabilities are not just of instrumental value but "have value in themselves, in making the life that includes them fully human," entails that people who accept the list on the basis of very different views about the good life must nevertheless all agree as to what makes their lives fully human. She allows that there may be disagreement about what makes human lives good, but that disagreement must always be premised upon more fundamental agreement as to what makes human lives human and the conditions of any good human life. Consequently, her claim that the list says "nothing about what makes lives go well in general" is doubtful (2006a, 297). It does describe the general conditions of any good life, and abstains only from particular judgements within those conditions. Yet this provides further reason to suspect that those who reject certain capabilities as important to their own lives will reject Nussbaum's reassurance that the capability-functioning distinction means they will not feel imposed upon by the state. In endorsing the capabilities after all, and enforcing their thresholds, the state affirms at the most basic level what makes citizens' lives fully human, and defines a necessary condition of their goodness since the thresholds represent "the level above which not just mere human life, but *good life*, becomes possible" (2006a, 181). But if this is so, how are those who reject the need for the capabilities in their lives – or at least the full range of politically protected functionings that define each capability – supposed to respond to the state's stand on the definition and goodness of lives in general, particularly since were they to accept the capabilities the state would not admonish them for refusing to realize their associated functionings? Must they

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accept that the fullness and goodness of their lives depends upon them accepting freedoms others might value but which they see no value in and would abstain from choosing to exercise?

Indeed it seems they must. Nussbaum's theory seems to require that private reactionaries be public liberals whose denunciations of functionings in private are matched by a willingness to foster both the social and personal conditions for the exercise of those functionings by others (Clark 2009, 591). And although this might seem initially implausible – and suggest that the capability-functioning distinction is ill-equipped to avoid expressively subordinating those who reject the capabilities as necessary in their lives, or to convince them that the state does not reject their lives as defective or wasted or tragic in some capacity – Nussbaum nevertheless thinks it is reasonable for us to have this expectation of citizens.

Her reason for this is the fact that these citizens live in a democratic society (2006a, 183). Indeed, of those who reject certain capabilities altogether, or who would only accept a much more limited range of functionings than the full range of the capability politically protected, Nussbaum says that because they choose to live in a pluralistic democracy they can be presumed not just to accept the values of the public culture because they derive protection and stability from them, but actually to affirm them. As she says, "they do after all think that these values are very important political values, even though the associated function is one they will not use"; it is not an implausible reconstruction of their thinking "to ascribe to them the thought that a dignified life for a human being requires these

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capabilities – which include, of course, the right not to use them" (2006a, 184-185).

This conclusion however is too hasty and begs the question in favour of political liberal respect. Difficulties of exit and a possible paucity of exit destinations, particularly given Nussbaum's global ambitions for the capabilities approach, casts doubt upon the presumption that the mere presence of a group's existence in a society entails their affirmation of that society's public values. Indeed, Hume's classic objection to the notion of tacit consent seems to apply as much to Nussbaum's claim here as it did to the social contract theorizing he aimed it. Locke argued that voluntarily residing in a territory and benefiting from the support and structure of society is sufficient to infer tacit consent to that society's political principles. In response, Hume argued that moving to another society can involve such extraordinary costs – financial, social, familial, etc. – that any such inference is dubious. As he says, "We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her" (Hume 1969, 156).[8] Consequently, it seems as reasonable if not more plausible to take Nussbaum's critics at their word, and to presume that they tolerate rather than tacitly accept the capabilities and bear them on *modus vivendi* grounds.

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[8] "Should it be said, that, by living under the dominion of a prince which one might leave, every individual has given a *tacit* consent to his authority, and promised him obedience; it may be answered, that such an implied consent can only have place where a man imagines that the matter depends on his choice…Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires?" (Hume 1969, 155-156).

4.3.2 Criticism: Predisposing Functionings

In addition to being suspicious of the capability-functioning distinction

because it may require them to support activities they disapprove of, critics may

also be suspicious of certain capabilities because of what they may consider their

insidious effects upon their capacity to abstain from certain forms of functioning.

To explain, consider the fact that the possibility of individuals exercising the

capabilities requires the development of their internal faculties. Nussbaum says

that human beings have certain basic or latent capabilities (e.g., the capability to

develop language), which when nurtured make for internal capabilities (developed

states of the person), and which in turn when combined with appropriate social

conditions (the availability of books and literature) make for the combined

capabilities required by dignity (the freedom to exercise literacy). Developing

internal capabilities however may make it difficult for citizens not to acquire a

positive comportment towards realizing particular associated functionings. This

might not seem particularly worrisome in the case of literacy, but in other cases it

might be more controversial. As such, and despite Nussbaum's reassurances

regarding the capability-functioning distinction, citizens may have reason to resist

certain capabilities because their political implementation may predispose their

choices or their children's choices in the future.[9]

Consider for example the capability of bodily integrity, which Nussbaum

says includes "having opportunities for sexual satisfaction and for choice in

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[9] As Dees discusses such latent effects in a different context, "suppressing a minority religion
might help save the children of the recalcitrant even if it does not change the heretics themselves"
(1999, 674).

matters of reproduction" (2006a, 78). Opportunities for sexual satisfaction would clearly rule out female genital mutilation, but they might also require a particular education about sex and a particular valuation of it. To see this more clearly consider the issue from the reverse perspective: if one is brought up to see sex as shameful or dirty or primarily as dutiful (and perhaps some forms of sex including homosexual sex as sinful), does one have the capability for sexual satisfaction in Nussbaum's sense? If this seems unlikely, then it seems that ensuring the capability for sexual satisfaction would require being able to appreciate its value.[10] But this seems to place valuational requirements on the internal aspect of the combined capability: without an internal state that values sexual satisfaction in some manner it seems difficult to see how one can have the genuine capability for it. As this is so, traditions or cultures suspicious of sex – who see its liberalization as a pathway to moral corruption or even damnation – have reason to distrust a capability regarding it. This is particularly so given Nussbaum's claim that "exercising a function in childhood is frequently necessary to produce a mature capability" (2002a, 90), and because children brought up according to its auspices will be unlikely to develop or allowed to maintain what their parents regard as an appropriate conception of it.

This issue seems generalizable with regard to other capabilities which involve the development of skills through education. For instance, a necessary condition of people having capabilities to enjoy recreational activities (*play*) or to produce self-expressive religious, literary and musical works (*sense, imagination,*

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[10] This ability to appreciate value might be connected to the description of the architectonic capability of affiliation, which involves being "able to imagine the situation of another and to have compassion for that situation" (2002a, 79).

and thought) seems to be that they actually engage in various forms of their associated functionings. But then if engagement in childhood needs to be robust in order for the future mature capability to be viable, choices will ultimately be tilted in favour of those associated functionings later on. Hence, a necessary condition of having many capabilities is that one exercises them into functionings at the same time, with the likelihood that one will continue to choose or be disposed to realize those functionings in the future.

All this casts doubt upon Nussbaum's claim that the free choice of the capabilities entails they need not be realized in any particular fashion, including any fashion at all. Although she claims not to push individuals into particular functionings – "once the stage is fully set, the choice is up to them" (2002a, 87-88) – the very staging of that choice seems to entail more than just guaranteeing it, for the manner of the guarantee seems to direct individuals into particular decisions as to what types of functionings are worthwhile. Despite her claims then to its openness and non-controversiality, Nussbaum's position seems to demand that citizens cultivate certain characteristics and make particular choices. Consequently, those who resist the capabilities will be unlikely to be reassured by Nussbaum's statement that they will not be affected or harmed by having the chance to choose a life that does not involve them.[11]

Now Nussbaum might respond to this objection in terms of the difference between neutrality of justification and neutrality of effect, claiming that she need

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[11] As Claassen also points out, the training for many capabilities may extend beyond childhood, since capabilities as robust opportunities depend upon abilities and skills one can lose if one does not practice them: "they require regular re-training over the course of a lifetime to prevent their loss." The substantive question then is whether the capability has been acquired, not whether childhood has ended (2013, 11-12).

not show that her "core ideas put no strain on any comprehensive doctrine" (2001a, 903). What is important she would say is that political principles are justified without reference to any controversial doctrine, not that their implementation does not affect the exercise or continuance of people's private practices. Furthermore, since she claims as justification for the capabilities the very fact that exposure to them makes people more likely to want to exercise them, that capabilities predispose people to certain functionings might be taken as confirmation of her claim that the capabilities respond to something universal and objective about us.[12]

Critics however might challenge this response as begging the question of nature over nurture. If Nussbaum argues that a disposition to exercise the capabilities in certain ways indicates or reflects the human personality independent of culture – that such a disposition in fact supports her justification of the capabilities as transcending cultural relativism – then the criticism seems open she is making controversial presuppositions about human nature and is not being metaphysically abstemious as she claims (2006a, 391; 2002a, 83). Those who reject certain capabilities will claim that cultivation into the valuational requirements of holding them amounts to a cultural education that should not be branded metaphysically neutral or basic. Indeed, it would be claimed that the disposition to act on the capabilities is a result of what is familiar not natural, and that Nussbaum's own admission that culture shapes personality powerfully at every stage supports this (2002a, 155). Though the objectivity of desires such as those for food and health might be accepted by critics as reliably subject to

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[12] See for instance the case of Hamida Khala (2002a, 236-238).

empirical demonstration, capabilities such as those regarding sexual satisfaction would be claimed far more morally loaded and less amenable to impartial demonstration. Indeed, critics might argue further that urges for sexual satisfaction represent an aspect of our nature which ought to be restrained as part of an ethically evaluative theory of human nature.[13] Why, they would thus ask, do capabilities theorists get to decide what counts as natural as opposed to cultural, and what counts as positively as opposed to negatively natural, in setting the ethical premises from which capabilities theorizing begins?

4.3.3 Criticism: Moral Hierarchies and Political Inequality

We see then a number of reasons capabilities critics might reject the capability-functioning distinction, but Nussbaum herself over time has narrowed which groups she thinks can be accommodated by the distinction. In a paper written shortly after her turn to political liberalism, Nussbaum emphasizes how distinctly she conceives moral and political commitments, arguing that an individual's comprehensive views that defend the moral inequality of persons should be respected "*provided that* this person is prepared to sign on to (and genuinely, not just grudgingly, affirm) the political doctrine that [all] are fully equal as citizens" (2001a, 901). To demonstrate her point, she introduces an example in which two Presidents – one a comprehensive liberal, the other a political liberal – speak at a religious university which asserts a doctrine that women are ethically inferior to men. In the comprehensive liberal scenario the

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[13] Recall that Nussbaum defends her theory as ethically evaluative from the very start, explaining that "some things human beings can be and do (cruelty, for example) do not figure on the list" (2006a, 81-2).

university is accused of teaching a doctrine at odds with the "self-evident and deep metaphysical fact that men and women are equal." Though the President does not threaten to curtail the university's speech, he informs them that their doctrine is unreasonable and "not part of the group of doctrines that wins respect from [the] basic political order" (2001a, 902). In contrast, the political liberal President proclaims that if the university affirms and teaches the civic equality of men and women, and abides by laws regarding sexual harassment and discrimination sincerely and not just on *modus vivendi* terms, then the state has no business pronouncing on the values of its private teachings. Instead, it should treat the university and its doctrines with respect, and never characterize it as second-class or unreasonable. Of the two, Nussbaum says, the latter is the more respectful and morally nuanced response, in part because "the test of our liberalism lies not in the way we deal with views that we like, but in the way we deal with what makes us uncomfortable or even angry" (2001a, 902).

However, after a series of exchanges with Susan Okin, Nussbaum appears to have retreated from this position.[14] For Okin, private teachings of inequality are incompatible with equal political respect because, using the example of women, "'metaphysical' attacks on the full humanity of women are not distinct from 'political' attacks on their equal citizenship"; "there is no way of separating out and isolating women's political equality from all the other aspects in which women are unequal in a sexist society" (2004, 1561-1562). As such, Okin argues there is no reason to believe that those who proclaim moral inequality pay anything more than lip service to the notion of political equality, and that their

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[14] Though it is not clear how consistently. See for example 2013, 20.

claims to accept the political conception will not be sincere but strategically made

on *modus vivendi* terms only. In response to this, Nussbaum now admits "it is

very difficult to know what forms of metaphysical differentiation are truly

compatible with full equal respect," and admits that such differentiation is likely

to have some effect on equal citizenship, particularly given the influence of such

doctrines on children (2011c, 9). As she goes on to say, though not every case of

metaphysical differentiation entails political unreasonableness, when that

differentiation takes the form of a moral hierarchy "there will be much strain" on

the private doctrine and groups will often react by modifying their comprehensive

metaphysical views (2011c, 10-11).

Nussbaum's new position then is that in the case of groups like the

Southern Baptists (the case study of her original example) or Islamic

fundamentalists who maintain moral-metaphysical hierarchies, any affirmation of

the political conception is suspect and likely made for strategic purposes only.

Consequently, acceptance of the capability-functioning distinction seems

legitimate for Nussbaum only if a person's moral commitments are commensurate

with political equality in a deep or thick way: individuals privately must be

committed to moral equality if their private teachings are not to be suspected of

upsetting or compromising the protections of the political conception.[15] Thin

commensurability in terms of a *modus vivendi* compromise is unacceptable, and

such hierarchical metaphysical views will inevitably face the 'strain' Nussbaum

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[15] For example, Jews and Christians may support men and women's political equality despite
believing women have a different essential nature (2002a, 76).

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speaks about in terms of state oversight or intervention to ensure that private practice does not undermine individuals' equal political status.

Given this, however, it is interesting to ask what becomes of others under Nussbaum's conception who privately condone only a limited range of a capability's protected functionings yet nevertheless publicly affirm the political conception. That is, what happens to those who believe in the moral and metaphysical superiority of some way of life, and espouse and encourage as much in their private capacities denigrating those who disagree, but who also proclaim the political freedom of others to live their lives differently? Is that promulgation to be taken as genuine and sincere, or is it to be doubted as grudging acceptance of compromise and the need to accommodate others? As examples of this, consider a Protestant's declaration that her religious views are morally superior to Catholicism, or a parent teaching her children a neo-Nazi ideology.[16] Given Nussbaum's misgivings about Southern Baptists' affirmation of the political conception, should this carry over to these examples too? Can she accept that private denunciations of Catholicism or other ethnic groups, and teaching the superiority of Protestantism or white supremacy, are commensurable with accepting the political equality of Catholics and non-whites respectively?

The response might be made that so long as the Protestant and white supremacist are reasonable in the sense of not wanting politically to impose their beliefs upon others those private beliefs are no reason for public concern. Indeed,

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[16] This latter example is based on a recent Manitoba case in which a declared 'white nationalist' sent her daughter to school with Nazi symbols drawn on her skin. Both the child and her brother were taken into custody by child welfare services, out of concern the mother's conduct might harm their emotional well-being and put them at risk.
(http://www.cbc.ca/news/canada/manitoba/story/2008/07/10/swastika-child.html)

as Nussbaum says in a recent paper, so long as individuals with prejudicial private doctrines "are prepared to accept the fully equal worth of fellow citizens who have other affiliations (which has not always been the case with racial or religious groups!), they can join the overlapping consensus" (2013, 20). But if the Southern Baptist's doctrine is not excused when he says this same thing given the lack of distinction between 'metaphysical' attacks on humanity and 'political' attacks on citizenship, this also should apply to the Protestant and neo-Nazi. Women may not be able to change their biology whereas Catholics at least may change their beliefs, and so it might be claimed that the Protestant's attack is not as fundamental as the supremacist's, and thus can be bracketed from having political connotations. But if someone's religious beliefs or ethnic background are essential to their identity then it seems that a Protestant's denunciation of Catholicism or a Nazi's denunciation of non-whites should be seen as similarly fundamental and consequently in need of regulating or as forfeiting right to political respect.

If this is the case though it seems possible an even a wider range of people will be disqualified from the capability-functioning distinction than Nussbaum seems to have conceded with her exclusion of those who believe in hierarchical metaphysical differentiation. Indeed, the general problem with Nussbaum's concession to Okin is that it may extend to any private view whose core content falls short of the full political conception. If a private view teaches that only a limited range of a capability is important – whether this be in terms of a subset of a capability's protected range of functionings, or in terms of an entire capability

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being rejected from the list of capabilities – then just as teaching the inequality of

men and women may compromise what individuals are able to support publicly,

so these other private teachings may also threaten the full establishment of the

capabilities in question. As this is the case, however, any private view that fails to

assert the entirety of the full political conception may be disqualified from being

reasonable and consequently not entitled to political respect. But this then belies

Nussbaum's claim regarding the pluralism of her theory, by undermining the

versatility supposedly offered by the capability-functioning distinction, and by

compromising the distinction that is supposed to exist between a private and

political conception of justice.

4.3.4 Criticism: Dignity Through Functionings – Paternalistic Intervention and the Freedom of Practical Reason

At this point we have several reasons to doubt what the capability-

functioning distinction can deliver, with the fallout that Nussbaum may presume

too strongly that people will assert her political values as central in their

comprehensive conceptions. We can further challenge Nussbaum's claim though

that her theory respects people on a political liberal standard by examining

another way the distinction breaks down. We do this by looking at the importance

she attaches to central functionings that enable wider capabilities.

Capabilities are the focus of Nussbaum's project, but she says functionings

are sometimes an appropriate focus for public policy to the end of securing them.

We have already seen how this can be the case with children, as "exercising a

function in childhood is frequently necessary to produce a mature adult

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capability." But it can also be the case with adults Nussbaum says, particularly

with regard to bodily health and integrity. Functionings in these areas are said to

have such value in themselves, "independent of choice, that it is not unreasonable

for government to take a stand on [their] importance in a way that to some extent

(though not totally) bypasses choice." In general, "the more crucial a function is

to attaining and maintaining other capabilities, the more entitled we may be to

promote actual functioning in some cases, within limits set by an appropriate

respect for citizens' choices" (2002a, 90-92).

Nussbaum's general position thus is that the state can require some

functionings of citizens given their importance to protecting human dignity. It is

rather unclear how to understand this, however. To start with, if functionings of

bodily health and integrity are so important they justify paternalistic intervention

– if these have value 'independent of choice' – then what is to stop this argument

being extended to (all the) other capabilities? After all, Nussbaum understands

the capabilities as separate and non-reducible and forced trade-offs between them

as tragic. Indeed, this suggests that if the capabilities do not have equal inherent

value in human life, they at least have such contributive value that a life without

each of them to threshold levels fails the condition of goodness.[17] Thus, if

paternalistic intervention is justified in the case of bodily health and integrity, why

not also with knowledge or mental health or leisure, all of which seem as central

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[17] Claassen and Düwell note that it is not enough for Nussbaum simply to say that conflicts
between the capabilities are tragic, but that she needs to admit that some capabilities are more
important than others. (2013, 14). Arneson similarly argues that without an objective ranking of
the capabilities the whole project fails (2010, 10). See also Wolff and De-Shalit who cast doubt
that securing thresholds for capabilities regarding relationships with other species, for instance, are
as important as securing thresholds for capabilities regarding bodily health or control over the
environment (2007, 93).

to sustaining the other capabilities and making good choices regardless of one's way of life (Deneulin 2002, 12).

Indeed, this same issue can be investigated more directly in terms of the notion of dignity. Although Nussbaum's notion of dignity is somewhat nebulous, from what we do understand of the concept all the capabilities are essential to it: they comprise its content such that lives denied them to threshold levels are tragic and less than 'fully' human. But then if functionings can be promoted to protect human dignity, and dignity is constituted by the holding of the capabilities, then promoting functionings to protect dignity means promoting functionings to protect the full range of all the capabilities. Now central to all the other capabilities as we have seen is the capability for practical reason – the capabilities are only present when practical reason is 'woven' into them (2011a, 39). To promote dignity then seems to involve promoting the functionings that support the exercise of practical reason in the areas of each capability; it involves promoting the formation of a conception of the good and engagement in critical reflection about the planning of one's life in the areas of each capability on the list. Not only is it unclear then how extensively the state might be justified in requiring functionings of citizens to secure their practical reason and accordingly their dignity; but the question also arises how this practical reason differs from autonomy as traditionally promoted by comprehensive liberalism, and why Nussbaum thinks those who have reason to reject autonomy as a comprehensive value would be willing to endorse her conception of practical reason.

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In response to the allegation that practical reason is but autonomy by another name (Barclay 2003), Nussbaum is keen to emphasize that the choice basic to practical reason should be understood "not in terms of a comprehensive liberal idea of autonomy, but in terms of an idea of respect for diversity of persons and their comprehensive conceptions" (2000b, 129). More specifically, her claim is that whereas autonomy as a value is controversial in the sense that it (i) positively claims worthwhile lives require the actual functioning of forming a conception of the good and engaging in critical reflection, and (ii) negatively claims this functioning has no ultimate divine origin or justification, practical reason as a capability involves no such claims, and so is amenable to a far wider range of comprehensive conceptions and is more respectful as a basis for political principles. Indeed, autonomy is said to have a specific Western history that connects it with Enlightenment ideas about the place of religion in human affairs, which makes it inimical to religious believers who deny that human reason alone can be sufficient for ethical conclusions (2003c, 40-41).[18] The thinner idea of practical reason, on the other hand, which says nothing about the ultimate source of moral authority and is only required as a capability not a functioning, can be accepted by most believers.

Now Nussbaum is free to define her terms as she wishes, and if she can distinguish practical reason so that the state can endorse it yet maintain political liberal respect for its citizens then her political conception will become that much more compelling. But for this to be the case she must define her terms so that

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[18] Nussbaum develops this argument on the basis of Jerome Schneewind's *The Invention of Autonomy* – see particularly chapter 23.

those unable to accept autonomy as a political value will be able to accept

practical reason. If these distinctions fail, then doubt is cast upon Nussbaum's

claim that the state's endorsement of practical reason is more respectful than its

endorsement of autonomy.

We can question however whether Nussbaum's understanding of practical

reason really is uncontroversial unlike autonomy as she contends, and whether

opponents of autonomy as a comprehensive value have rejected it on the basis of

its secular and contributive value presuppositions, or rather because of the ends to

which it has been directed, which is a charge that also would indict practical

reason. Nussbaum distinguishes practical reason from autonomy on the grounds

that the freedom comprising autonomously chosen ends gives value to those ends,

and that autonomy presumes atheistic commitments, in each case unlike practical

reason. That is, in the case of autonomy but not practical reason the freedom of

free choice contributes value to the end chosen, and in the case of autonomy but

not practical reason there is a rejection of divine source to one's ends or moral

authority. But despite Nussbaum's claim that these differences enable

endorsement of practical reason by those who reject autonomy, we see by the

earlier arguments of this chapter many would still have trouble accepting practical

reason.

We begin to see why by challenging Nussbaum's claim that practical

reason (unlike autonomy) entails no rejection of divine sanction to moral

reasoning and as such is more amenable to securing political support. But are

people who reject autonomy as a political value any more likely to accept the

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same extensive freedom of choice presumed by practical reason, if the freedom of the latter is conceptually absent explicit or implicit atheistic commitments? Indeed, Nussbaum's claim that autonomy is atheistically construed, and that any state endorsement of it is compromised accordingly, is both philosophically and empirically dubious. Although autonomy as a concept might have a Kantian genealogy there are plenty of ways of conceiving autonomy that need not invoke or make reference to Kantian ideas.[19] Moreover, it seems unlikely that the general person's objection to autonomy is informed by a denunciation of Kantian Enlightenment philosophy. It seems implausible to suggest such persons would be satisfied by Nussbaum's claim that the practical reason supported and promoted by the state is theistically indifferent to the ultimate origin or moral authority of decisions.

Nussbaum may be right of course that more people would be able to support the state's endorsement of free choice should it carry no implicit or explicit atheistic connotations. But equally it seems the case that many would still reject free choice on the basis of the content of decisions being made regardless of theistic or atheistic connotations. Indeed, we saw earlier that traditionalists and religious believers might have reason to reject many capabilities on Nussbaum's

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[19] For Kant, a person is autonomous only if their will is self-ruling, meaning it must be "efficient independently of alien causes determining it," where alien causes refers to the agency of others as well as the laws of nature. Kantian autonomy thus refers to a will which is in accordance with laws that only have their source in the will itself (1998b, 285). Autonomy however might also be understood more simply as a life lived in accordance with reason which tends to result in attaining goods and avoiding evils; as a condition of control over one's urges and impulses; as self-government in the sense of exercising one's will on the basis of good reasons; as being able to answer for the reliability of one's beliefs; or as displaying means-end reasoning and exercising critical appraisal of one's adopted ends. Those who reject autonomy as a comprehensive value might have any of these conceptions in mind, and since all of these could be synonymous interpretations of practical reason Nussbaum's notion would be subject to similar rejection. These conceptions of autonomy in turn are attributed to: Robert Ladenson; M.J. Meyer and J.M. Cooper; George Sher; John Benson; and Lawrence Haworth (Colburn 2010, 7).

list on the grounds that certain functionings they enable – which require everyone's political, social and financial support – are blasphemous or immoral. This however seems a rejection of ends, not a rejection of the contributive value that freedom is supposed to impute to those ends. For such people what matters is behaviour, and their unwillingness actively to support free choice when conceived as the exercise of practical reason might be just as strident as their rejection of free choice when conceived in terms of autonomy. Indeed, opposition to both ways of conceiving free choice might be based upon the same reasons: traditionalists might see custom as having authority over all matters, and so would reject the freedom to choose that defines both autonomy and practical reason on the same grounds. Alternatively, opposition might be grounded in different reasons though rooted in the same worldview: religious believers might reject autonomy because it entails valuing independence from divine authority, but then reject practical reason as epistemically unreliable due to our fallen nature or its inferiority compared with divine wisdom or revelation. In the former case where opposition is based on same reasons Nussbaum's shift to practical reason does not solve any problems. In the latter case though the shift does avoid problems that autonomy poses for believers, it nevertheless falls prey to equally difficult problems in that by supporting it believers would be violating different sorts of commitments they take to be fundamental to their identities and self-understandings.

4.4 Deferred Endorsement and Interpreting Traditions

Given all these reasons parties might reject Nussbaum's capabilities despite the capability-functioning distinction, yet also meet her standard of reasonableness in not seeking to impose their beliefs upon others, the question is whether the threat such parties may feel from the implementation of the capabilities is consistent with their being politically respected on a political liberal standard. This question is important because Nussbaum might respond that each of the objections raised is made at cross-purposes to the particular conception of respect she employs. On her conception, she might say, though the capability-functioning distinction is important in securing the support of those who reject the capabilities, it is not vital to defending the moral and political legitimacy of the capabilities themselves. Indeed, for Nussbaum the moral legitimacy of the capabilities is a function of their securing the conditions of dignity, whilst their political legitimacy is a function of people being able to accept them after appropriate reasoning and reflection on their standing beliefs and values. Thus, the failure of the capability-functioning distinction need neither compromise respect nor indicate the untenability of the capabilities as morally important values. Instead, it represents only a setback in convincing critics that the capabilities are the best basis both morally and politically for society's governing principles.

Indeed, as we have seen Nussbaum conceives her project as carving a middle path between comprehensive liberalism and Rawlsian political liberalism, with the result that political respect on her conception is a matter neither of simply

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deriving political principles from true and unrestricted philosophical method, nor

of basing them upon what citizens can endorse as the implicit articulations of their

standing beliefs and values. Thus, whereas comprehensive liberals say respect

allows us to assert the truth of political principles regardless of what people

believe, and Rawlsian political liberals say we must eschew transcendent truth

and be constrained by people's standing beliefs and values, Nussbaum says she

can respect people by asserting political principles as a more distant entailment of

their standing beliefs and values, by going beyond their current worldviews but

only insofar as it can be shown they are compatible with what is culturally

distinctive about them.

4.4.1 Between the Will and the Intellect

By taking this middle path we can understand Nussbaum to be trying to

integrate what Patrick Neal following Joseph Raz refers to as the will and intellect

models of respect. Neal observes that the history of liberalism can be read as a

debate over whether we best respect persons by respecting their will or by

respecting their intellect. The view that we should respect the will holds "it is

sometimes more important for a person to choose freely than to choose correctly,"

whereas the view that we should respect the intellect holds we should respect

"*reasonable* choices of individuals, rather than necessarily their brute empirical

choices" (1997, 154, 155). Each model has an attractive feature, particularly

when seen against the unattractive feature of the other. The will model is

attractive because it demands equal respect for people's choices and proscribes

coercion based upon the truth or alleged truth of anyone's conception of the good.

Its tolerant and non-judgemental character however is compromised by the fact that agreement and order seem impossible if we insist upon respecting will pure and simple: political decisions are too tenuous if any dissension is able to veto them, particularly as that dissension may regard how others choose to live their lives and not just how one chooses to live one's own. The intellect model provides a solution to this, in that only reasonable choices are required to be respected with the possibility of consensus thus provided for. But then the question arises whether what defines reasonable consent as reasonable is not simply their foundation on sound or true principles, in which case it seems the notion of consent is normatively superfluous (if not pragmatically so), and reasonableness accordingly can be rejected for truth as the standard of political legitimacy.

As Neal understands this tension we seem to be in a position of being able to live neither with nor without the will model. "To endorse it is to remove the possibility of consensus, in the name of inclusiveness; to deny it, and affirm instead the intellect model, is to purchase consensus at the price of inclusiveness" (1997, 155). But if this is the case then what are we to do: integrate the two models or bite the bullet and choose one?

Nussbaum as we have seen wants to opt for integration, since she is worried both about the problem of adaptive preferences (a failing of the will model) and denigrating and expressively subordinating citizens who are willing to live without imposing their views upon others (a failing of the intellect model) (2011b, 38). Indeed, she wants a system that secures the conditions of dignity

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non-imperialistically, and she believes that her version of political liberalism –

which seeks out elements in critics' worldviews on the basis of which they can

support the capabilities without abandoning their cultural identity – is able to

achieve this. But the non-imperialism of Nussbaum's theory is suspect from a

political liberal viewpoint in the sense that that the integration she seeks is always

premised on the priority of her intellect model commitments: choices count only

as they are consistent with the capabilities, acceptance of which is a condition of

one's dignity. As this is so, Nussbaum aligns herself not with political liberals

who emphasize the will model, but with comprehensive liberals who prioritize

substantive commitments via the intellect model, and argue that objections of

critics can be overridden by more important considerations of truth or basic value.

To see how this is the case, consider that everything Nussbaum says about

deferred endorsement implies that people are only disrespected by the imposition

of her principles if endorsement is impossible without abandonment of their

cultural identities after appropriate reflection on their standing beliefs and values.

Respect requires only that citizens be able to accept the capabilities in an

unspecified long-term sense, which allows for any number of changes in self-

understanding over time, including those due to the influence of a public culture

that changes in lockstep with the social and political encouragement of a

capabilities-friendly mindset. Indeed, only when such acceptance is impossible,

and there is divergence between the substantive good of the capabilities and

informed desire for them, does Nussbaum admit the principles may be

problematic and there may be reason to go back and re-evaluate the list (2002a, 165).[20]

In conjunction with this, since the very notion of future possible endorsement indicates current non-acceptance, it is others in the interim who assess whether critics should be able to endorse the capabilities without compromising their integrity. Given that the political legitimacy of the capabilities is a function of reflective endorsement, it is up to proxies to find interpretations of critics' worldviews that are commensurable with the capabilities and will allow respectful and non-imperialistic implementation of the political conception.

The problem with this however is that these proxies are now placed in the position of determining which aspects of worldviews are essential to critics' integrity or self-understandings; they become the arbiters of what counts for cultural identity and what for cultural imperialism, in terms of what views people could and could not accept without giving up their cultural identities. Indeed, Nussbaum's method allows that opposition to the capabilities can be countered by reassurance that others have determined there can be both endorsement of the capabilities and integrity of identity. In effect, proponents tell critics to whom justification is offered that the justification is valid, and that in time and after

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[20] Though how long she is prepared to let the experiment run before going back to revisit things she gives no indication. This finds a parallel in Rawls when he says that "the repeated failure to formulate the procedure [of reflective equilibrium] so that it yields acceptable conclusions may lead us to abandon political constructivism," and that "the struggle for reflective equilibrium continues indefinitely" (1993, 96 fn. 8; 97). In each of these cases Rawls does not tell us what we are left with if we have to abandon political constructivism (i.e., if the project does not work out) and for how long we should adjust the model as we search for a unity of ideas. To what extent, the reader asks, does Rawls' project depend upon a certain faith in the inevitable progress of reason to resolve itself ever more consistently and coherently?

appropriate reflection they (or their descendants) will be able to find the political conception compatible with their standing beliefs and values.[21] In the meantime they must accept any burdens as justified by the substantive moral notion of dignity and the compelling interests of the state, secure in Nussbaum's faith they are not being politically disrespected and one day will understand things better. The onus is thus placed on critics to prove they will not in time and after appropriate reflection be able to accept Nussbaum's principles and maintain at the same time their sense of who they are, and that it follows from this incompatibility not that their worldview is flawed but that the list of capabilities needs changing. They would have to do this for instance by arguing that proxies' interpretations of their traditions are in fact as antagonistic to their self-understandings as wholly orthogonal worldviews, and that the views they do assert deserve respect if they do not seek to impose them upon others. Indeed, if they reject those interpretations, they would argue, why should principles claimed commensurable with them be any less imperialistic than principles based upon other worldviews that could not even pretend to be rival interpretations of the traditions that define their identity?

As such, the question becomes pointed as to how exactly Nussbaum conceives her endeavour of interpreting traditions whilst also maintaining the sort of non-imperialism which is supposed to differentiate her theory from comprehensive liberalism. Indeed, this recalls the question (4.1) of how Nussbaum's notion of compatibility between political principles and standing beliefs and values fares on Nelson's characterization of political liberalism as

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[21] See Nussbaum's example of women's political equality in the Nordic countries (2002a, 165).

committed to the ideal that "principles are adequate only if they should be accepted by all reasonable persons on the basis of beliefs and values they *already hold*" (Nelson 2002, 212). In what manner is this consistency construed, and can it be defended on political liberal terms?

4.4.2 Non-Imperialism Through Cultural Interpretation: The Failure of Nussbaum's Hermeneutics

It seems there are two ways Nussbaum might try to defend the compatibility of her political conception with the standing beliefs and values of those who presently reject the capabilities. One possibility would be for her to claim the prerogative to identify the authentic core of critics' traditions – what Steven Wall refers to as their 'identity-constituting commitments' – and to reassure them those commitments can be maintained in conjunction with an affirmation of the capabilities. Another possibility would be to claim that though she is not identifying the authentic cores of traditions, enough elements of traditions would be preserved under her theory that cultural distinctiveness remains: though the elements critics identify as most important to their self-understandings will not be protected, enough other elements will survive (Wall's 'peripheral commitments') that their cultural sources of meaning will still be available (Wall 2012).[22] In either case Nussbaum's position would be that critics'

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[22] One might also refer to Wall's *Liberalism, Perfectionism and Restraint* in which he distinguishes 'resistible' and 'irresistible' symbolic beliefs, wherein the latter are beliefs one cannot revise or abandon without giving up one's "deep and settled convictions" about what is important, whilst the former are beliefs one can revise or abandon without such great cost (1998, 89-90).

claims to the contrary, their identities can survive within her political

conception.[23]

If these two options fail, however, then either Nussbaum's hermeneutical

endeavour will have to be abandoned, or it will have to be justified differently

than by claiming that compatibilities it delivers between people's cultural claims

and her political conception make the latter non-imperialistic. And this is

important because both options do indeed fail, since either way of interpreting

traditions takes too little account of cultural members' self-understandings.

Concerns regarding cultural imperialism are grounded in individuals' subjective

experiences and their understanding of how practices and traditions are self-

defining. Indeed, this is one of the central factors that differentiates racial and

cultural identity: racial identity depends more upon inherent natural properties

that can be determined and ascribed by others, whereas cultural identity is much

less transparent and based more upon phenomenology and self-interpretation of

experience (Cantens 2009, 170). Any suggestion then by Nussbaum she could

identify cultural groups' identity-constituting or peripheral commitments,

sufficient to allow outsiders to judge their actions to be non-imperialistic despite

members' claims to the contrary, seems based upon an unlikely essentialist view

that understands cultural identity as based upon objective and externally

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[23] Consider for instance Nussbaum's reference to the Indian Buddhist Emperor Ashoka in the 3rd century B.C., whose teachings included reverence for other religions as a way to honour one's own: such an individual might be held up as representing either true Buddhist values or a deep Buddhist value that is preserved within a capabilities political framework (2002a, 195). As another example consider Nussbaum's invocation of Rabindranath Tagore as representing Bengali humanism and "what is finest in the [Hindu] tradition" (2002a, 45).

identifiable properties that sufficiently define culture and determine cultural

membership (Cantens 2009, 180).

Now surely any compelling theory of cultural identity will maintain a

place for properties that demarcate the belonging of insiders and outsiders. But

just as surely there must also be space for groups to determine such identity and

membership for themselves. Developing such a theory is not necessary for our

purposes however since all that is required is to accept that cultural identity has a

non-externalist dimension that fails to be respected by a willingness to override

objections from critics that their traditions are not compatible with the

capabilities. As this non-externalist dimension obtains, there is little reason to

think Nussbaum would not be imperialistic in proclaiming the continuity of

people's identity in the face of their subjective determinations to the contrary.[24]

If this is right, then as mentioned Nussbaum's project of interpreting

traditions must either be abandoned or justified in some other fashion, since it

fails as an effort to reconcile political liberal respect with objections of cultural

imperialism. Indeed, given these criticisms her endeavour to present traditions as

compatible with capabilities now ceases to look like political liberalism at all:

there is too much distance from Nelson's 'holdings' or Hampton's sense of

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[24] For one attempt to combine elements of essentialism with eliminativism (the view that cultural groups are entirely socially constructed entities that have no basis in reality), and which allows substantial determinations of cultural identity to come from within groups themselves, see Cantens' *property realism*, discussed in "On the Metaphysics of Cultural Identity" (2009). It should be noted also that Nussbaum's attempt to interpret critics' traditions seems in violation of what Rawls refers to as the method of conjecture in public discourse, by which "we argue from what we believe…are other people's basic doctrines…and try to show them that, despite what they may think, they can still endorse a reasonable political conception that can provide a basis for public reason." As Rawls warns, however "it is important that conjecture be sincere and not manipulative" (Rawls 1997, 786-787). It is doubtful how sincere Nussbaum's methods are.

'implicitness' of beliefs and values.[25] Instead, her project looks more like a

comprehensive liberalism restrained by pragmatic calculation in determining how

best to implement the political conception. In 4.5 we see how such an

understanding of the capabilities approach would make sense of some previous

puzzles, and then in 4.6 begin to sketch what a pragmatic comprehensive

liberalism might look like.

4.5 Clarifying Previous Puzzles

In chapter 3 the issue was raised that at times Nussbaum seems willing to

override opposition to her intuitions about dignity but at other times is prepared to

acquiesce to it. There thus seemed to be a tension between her moral justification

of capabilities via reflective equilibrium, and her political justification of them via

an overlapping consensus. Conceiving her interpretation of tradition however as

the operation of a pragmatically constrained comprehensive liberalism, we find

ourselves well placed to understand this puzzle that was deferred for later

explanation.

In 3.8.2 it was seen that only subsequent to the Indian screening of Deepa

Mehta's film *Fire* did Nussbaum include on her list non-discrimination on the

basis of sexual orientation as part of the central capability of *affiliation*. The film

she said led to such discussion of sexual orientation in the Indian media and

amongst feminists and liberals that she now asserts it "no longer premature to add

this item to a cross-cultural list that is expected to command an overlapping

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[25] In seeking an overlapping consensus that is not a mere *modus vivendi* "the primary task of a
political philosopher is to find metaphysical reasons implicit in each party's belief system to
support ideas as right in the consensus" (Hampton 1989, 805).

consensus," though she maintains she had always seen a place for it on the list as part of the right to non-discrimination on the basis of sex (2002a, 79-80, fn. 84, 292). The question however was asked why, if preferences are supposed to offer only ancillary support to the capabilities, the prospects of consensus act as a criterion for a capability's inclusion on the list given that its purpose is to delineate the conditions of human dignity. How, that is, has the notion of dignity on which the list is based suddenly become subject to the opposition of those who presumably have not gone through Nussbaum's "lengthy process of normative reflection"? (2001b, 137) Furthermore, why does the weight of India's prospects for future overlapping consensus on sexual orientation justify inclusion of the capability when the list is intended to apply universally? Surely there is much opposition elsewhere.

Understanding Nussbaum as defending a comprehensive liberalism restrained by pragmatic calculations, however, we now see that though the substantive good of her theory does not vary with political climate, the same cannot be said of her willingness to articulate the full requirements of that substantive good. Indeed, Nussbaum seems to pick her battles in elaborating or restraining capabilities claims in accordance with the receptiveness of those she is addressing and believes she needs to convince. Essentially, she deems it unwise to encourage or instantiate policies regarding elements of the list that do not currently or imminently enjoy such support that popular discussion would result in their widespread endorsement. She does not want to promulgate prematurely a political conception that is too morally loaded to be presently accepted, even

though she contends its moral substance is correct. Indeed, her willingness to delay elaboration of the list until the climate is more sympathetic – when there is better chance of her ideas being accepted as non-imperialistic – indicates that her previous silence on sexual orientation should be seen as due to pragmatic reticence and not to a change in normative position.

Consequently, though she is prepared to advocate non-discrimination on the basis of sexual orientation in India, there is every chance she might not be so prepared in a place like Uganda or Zambia. Indeed, we see this same dynamic in her reticence to promulgate the intrinsically valuable capabilities of sentient animals given the deep obstacles she would face in securing widespread consensus. She admits that as a matter of ideal theory much of our treatment of non-human animals is morally problematic, but she also says that as a matter of current implementation she does not favour advocating full abidance by those moral claims (2006a, 404). Thus, though she admits she may have to be considered theoretically a comprehensive liberal on this issue (2003c, 43-44), we can also imagine her advocating limiting human liberties to secure animal capabilities in some parts of the world, but refraining from doing so in less receptive areas (2013, 671). This shows again the extent to which Nussbaum may only partially anchor her moral-political claims in people's standing substantive commitments, but also how she would be willing to appeal to or invoke these commitments as she deems them expedient to her moral-political ends

4.6 Comprehensive Liberalism Pragmatically Restrained

I have argued that to Nussbaum's critics her justification of her political conception can appear as a set of nominal overtures within which they must struggle to maintain their identity. At the very least after all it would require them to alter their structure of valuation and their current self-understandings, by requiring them to privilege valuation of difference within their comprehensive conceptions above whatever they currently prioritize and see threatened by the implementation of the capabilities. As argued in 3.7, her political conception would in effect require them to value the free exercise of practical reason in the sphere of each capability as of primary value in their comprehensive conceptions.

Now Nussbaum as we have seen expects long-term convergence between the substantive good of the capabilities and citizens' informed desire for them. As we have also seen, however, due to the problem of adaptive preferences commitment to the substantive good of the capabilities must take precedence in guiding policy, yet due to the unspecified lengthiness of reflective endorsement it is unclear when (if ever) failure of desire for the capabilities can count as a reason against them. Indeed, regarding those who presently desire something other than Nussbaum's political conception, the best we can hope for seems their *modus vivendi* acceptance of the capabilities in the short term with eventual endorsement after sufficient socialization.

To get to this future however Nussbaum needs to get people on board with her project, for as we have seen many would object to the capabilities on the basis of the compromise they entail for their worldviews, and even a *modus vivendi*

amongst such critics would not be sufficient without a countervailing critical mass that supports the capabilities. Indeed, her primary concern is to get people to adopt the capabilities because of their basic moral value; but also because without sufficient support any political programme based upon them will be unstable and require coercive enforcement, which aside from worries about disrespect will also likely be unsuccessful insofar as the prospects of her theory require of citizens an ethos of justice. As this is the case, we see that Nussbaum's attempt to find manifestations of the capabilities in critics' traditions is better justified as a pragmatic effort to convince them that the capabilities do not represent an alien and thus imperialistic normative framework.

In response then to the hermeneutical question of how much and what sort of cultural distinctiveness must be preserved under a capabilities framework for Nussbaum's political conception to be justified, Nussbaum's best answer is basically as much or as little as is needed to secure enough support to avoid instability. Indeed, because the capabilities have independent moral justification it is overlapping consensus that ultimately counts going forward, and so the maxim of Nussbaum's method might be (paraphrasing Jean Hampton) to achieve political consensus on the capabilities by taking advantage of any ideology or device that could be used to gain others' acceptance of it, no matter how boneheaded or illogical (1989, 807). As we saw in 4.6, this might mean revealing the full requirements of the capabilities only gradually over time in accordance with cultural receptiveness, as understating the changes required by the political conception might be the best course of action if this would be more expedient in

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securing its acceptance. What this also means however is that although

Nussbaum is concerned about protecting the interests of minorities, should they

reject the capabilities this resistance can be overlooked unless they pose a long-

term threat to social stability. It might be preferable if they can endorse the

capabilities now, of course, and to this end Nussbaum can seek amenable

evidence in their traditions and could prefer using rhetoric, emotional appeals and

socialization techniques than coercion to secure their support.[26] But should that

evidence not be found convincing by critics and should endorsement thus not be

forthcoming, then given Nussbaum's commitment to the capabilities ignoring

their protests and implementing principles anyway should be seen justified for the

same reason given standardly by all comprehensive liberals: because the

importance of moral principle requires it.

4.7 Looking Forward

It might be said in response to this analysis that any political theory that

either fully or partially incorporates substantive commitments will result in less

than universal consent, and that accordingly the best that can be hoped for is that

inevitable imposition by the state will be minimal. Furthermore, it might be

argued that a comprehensive conception of Nussbaum's capabilities approach

fares better on this standard than rival comprehensive alternatives, since

maintaining the capability-functioning distinction and interpreting traditions

(perhaps even when critics' support is not necessary to the capabilities'

implementation) make her more accountable to critics' standing beliefs and

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[26] This language is taken from Hampton (1989, 807). Hampton argues that insofar as acceptance
is what counts, not proof of truth, logical argumentation may not be the best means.

values. Indeed, these methods may well be claimed more likely to lead to eventual endorsement of the capabilities than straight-forward advocation of a comprehensive standpoint, as also is argued by those who see reason to distinguish support for a perfectionist ethics from support for a perfectionist politics (Rossi 2010, 34-35).

In the closing chapter I shall employ these ideas to substantiate the suggestion that Nussbaum's theory is better conceived as a version of comprehensive liberalism. First however I shall specify the dilemma she faces as a political liberal given her reformist agenda to secure human dignity, and show that by conceiving her theory as a comprehensive liberalism she can maintain both the substantiveness and extensiveness she needs from her theory. I shall then develop the idea that by incorporating into a comprehensive liberal presentation of her theory a central concern for cultural sensitivity and pragmatic restraint she can avoid many of the problems she associates with comprehensive liberalism.

5: A Comprehensive Liberal Capabilities Approach

Chapter 5 elaborates the suggestion made in chapter 4 that Nussbaum would better present her theory as a version of comprehensive liberalism constrained by cultural sensitivity and pragmatic calculation rather than as a version of political liberalism. By doing so she would be able to maintain the respect for members of different cultures she sees as the strength of political liberalism but without having to compromise the substantive nature of her list. Indeed, a cautious comprehensive liberal presentation of her theory would allow Nussbaum to maintain the universality of her list's application but without the sort of imposition she associates with cultural imperialism.

First I shall rehearse Nussbaum's opposition to comprehensive liberalism and the reasons she finds political liberalism more respectful. I shall then show how the arguments of chapter 4 entail that on a standard of political liberal respect she cannot maintain both the substantiveness and extensiveness she claims for her theory, given the inability of so many to endorse the capabilities and at the same time maintain their sense of cultural identity. Finally, I shall argue that by conceiving the theory in comprehensive liberal terms she can maintain both the substantiveness and extensiveness of her list, yet by being cautious in its implementation retain at the same time a robust notion of respect for those who disagree with the list's constitution.

5.1 Opposition to Comprehensive Liberalism and Endorsement of Political Liberalism

Nussbaum is opposed to comprehensive liberalism because modern societies are sufficiently diverse that any promulgation by the state of some particular moral ideal would be unacceptable to many of their internal communities. Autonomy, self-realization, moral pluralism and other such perfectionist values are sufficiently controversial that for comprehensive liberals to insist that states should be built upon any of them would be disrespectful to large proportions of their citizenries.

Comprehensive liberalism thus faces a strategic problem of stability in that the dissatisfaction and dissent of too many citizens may threaten its institutions. More fundamentally for Nussbaum however comprehensive liberalism faces a problem of respect: by emphasizing certain moral ideals over others it morally differentiates citizens. "When the institutions that pervasively govern your life are built on a view that in all conscience you cannot endorse, that means that you are, in effect, in a position of second-class citizenship" (2011b, 35). Indeed, even if the state is tolerant of those who dissent from its ideal, it still expressively subordinates those who disagree with it by implicitly ranking and ordering their comprehensive doctrines as less valuable through its values and policies.

In contrast to this, political liberalism prescinds from any public ranking of comprehensive doctrines by not promoting any particular form of life as an ideal. This, Nussbaum deems, is more respectful. Indeed, even if we believe some comprehensive doctrine to be true, she says, we best show respect for people not by advocating that doctrine politically but by basing political principles

on a thin and abstemious view that abstains from controversial metaphysical, epistemological and comprehensive ethical claims. Although such an abstemious view inevitably will have some moral content, "the hope is that [it] will be acceptable to all the major comprehensive doctrines" as a module that can attach to their own comprehensive conceptions (2011b, 36). Thus, beyond encouraging respect for citizens' equality as citizens and promoting their good in the sort of way that all can reasonably agree upon, the state has no business in pronouncing on the validity or value of people's beliefs. Concomitantly, this political emphasis on respect is expected to lead to greater stability, as citizens will feel less imposed upon by the state and consequently will be less likely to oppose or challenge its fundamental institutions and policies.

5.2 The Political Liberal Dilemma: Substantiveness and Extensiveness

In asserting her capabilities approach as a version of political liberalism, however, Nussbaum has trouble maintaining both the substantiveness of her list and the extensiveness of its application. Her interpretation of human nature and the minimal conditions of dignity are supposed to have cross cultural appeal, yet as seen in chapter 4 many would object that demanding support for and implementing the list would undermine their integrity by requiring them to compromise their standing beliefs and values. Moreover, Nussbaum's attempt to assuage this concern in terms of the capability-functioning distinction – by defending support for the capabilities as support for opportunity-freedoms only with no expectation they be realized as particular functionings – was seen to fail in a number of ways.

Although the distinction allows one to support the capabilities without being expected to realize particular functionings, critics can object they are required nevertheless to foster or cultivate the capacity of others to realize functionings they disapprove of. Though such people may not want to prohibit such functionings (they may believe there to be something good in being able to make free choices regarding them), they may also believe this demands only their non-interference with others, not their provision of substantial support for others' choices one way or the other. Critics may also reject the distinction because of what they might see as the tendentious effects of ensuring the capabilities are held in a sufficiently robust manner. Though Nussbaum claims that ensuring that individuals have the capabilities does not push them into particular functionings – "once the stage is fully set, the choice is up to them" (2002a, 88) – many may object that staging this choice has the insidious effect of encouraging certain forms of functionings by disposing people to certain ways of living. Moreover, despite her reassurance capabilities do not entail functionings, certain functionings of some capabilities may be vital to realizing other capabilities and as such those functionings are non-optional. In this case, the capability-functioning distinction will apply to only a limited catalogue of Nussbaum's capabilities. Given interconnections and interdependences between the capabilities, the capability-functioning distinction may become less and less compelling as more and more particular functionings are required to secure other capabilities.[1] Lastly, and as demonstrated through Nussbaum's exchange with

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[1] Though Nussbaum recognizes the distinction does not apply to all of her capabilities, she does not seem to admit the full extent of possible exemptions.

Susan Okin, critics may have good reason to be wary that the capability-functioning distinction will not allow them to live private lives that teach a rejection of certain functionings if it is suspected those private teachings may threaten their own or others' capabilities. In essence, given Nussbaum's concession that "it is very difficult to know what forms of metaphysical differentiation are truly compatible with full equal respect" (2011c, 9), the worry arises this may extend to any private view whose content falls short of the full political conception. The capability-functioning distinction would end up standing or falling with the public-private distinction, a foundation which many may find quite unsecure and undependable, as does Nussbaum herself when she speaks about reasons a concern for capabilities justice must extend beyond the basic structure.

Since individuals can have such good reasons then to reject the capabilities as "built on a view that in all conscience [they] cannot endorse" (2011b, 35), it seems Nussbaum is faced with a choice. If she is to continue to conceive her theory in terms of a political liberal notion of respect that does not expressively subordinate those who disagree with it, she can (i) maintain the substantiveness of her list but limit those cultures to which it applies or (ii) maintain the extensiveness of the list's application but scale back the substantiveness of its content.[2]

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[2] As Wall points out, the values of stability and reciprocity give reason to favour a conception of justice with greater justificatory reach over one with less. The question then is whether concern for stability and reciprocity should "lead us to modify the content of what we take to be a sound conception of justice?" With regard to Rawls, Wall goes on to say that not only did he believe that justice as fairness identifies the correct content of justice, but that it could be presented in a way that has wide justificatory appeal. Thus, "we can keep sound content while increasing justificatory reach." But as he also points out, "if Rawls is wrong, then we will need to decide how much

In light of the fact that many cannot accept the ethical importance of the capabilities on Nussbaum's list without compromising their standing beliefs and values, her first option would be to maintain the content of the list but constrain its application to those who are able to accept it in good conscience. As we have seen, however, her political conception faces opposition even within western societies where liberal traditions are dominant and one might expect acceptance of the capabilities to be most promising. Consequently, it seems difficult to see what it would mean for Nussbaum to restrict application of the full thickness of her theory yet retain its function as a political conception. Even just focusing on domestic cases it would end up only applying to some within society, meaning others presumably would be governed by different political principles which is surely an untenable situation.[3] Indeed, more homogeneous liberal societies might be able to meet the political liberal standard; but in actual liberal societies disagreement is such that the list of capabilities could only be accepted on private ethical grounds and not on public political ones. The conclusion then as things currently stand is that the first option does not prove viable.

Nussbaum's second option in response to the fact that many cannot accept the capabilities on her list without abandoning their cultural identities would be to water down the list to make it more palatable to a wider range of people. She

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weight the values of stability and reciprocity have with respect to other values served by justice" (2009, 108).

[3] One might consider the recent furor in Great Britain raised by Archbishop Rowan William's 2008 suggestion that Sharia law might be accommodated within English civil law. Accommodations in the English legal system already allow for other forms of arbitration in civil law, such as Jewish religious law and canon law, though English civil law retains priority in any case of conflict. What is interesting about the incident though is the strong opposition to the misunderstanding – by lay people, lawyers and politicians – that a split legal system would split the country.

would continue to proclaim global application of her theory, but would scale back its claims so that all reasonable people could find a way to accept it without compromising their standing beliefs and values. As we have seen, there are a number of ways in which it would be difficult for people to accept the list as it is, making it difficult to determine what truncation of the list might ultimately be necessary. Indeed, this would likely differ whether considering things globally as Nussbaum intends or domestically, and then again in the latter situation which domestic cases in particular. One commentator conjectures this would mean limiting the list so as to rule out those things that seem "straightforwardly incompatible with living any sort of dignified life, however history and tradition shape local perception" (Roberts 2013, 12). Such a list would thus pertain to such things as slavery, sexual coercion and being without legal immunity from arbitrary physical attack: capabilities regarding these it is claimed would surely be seen as fundamental. However, even in this case it seems disagreement could persist, for instance over whether foetuses should be immune from arbitrary physical attack and whether categorizing homosexuals as sick counts as sexual coercion.

Regardless of how such a list would end up being specified, however, the result would be that Nussbaum would lose the traction she needs to support the sort of social and political change she deems necessary in the world given her understanding of her list as specifying the basis of any good life.[4] Nussbaum holds that her current list provides a minimal set of conditions necessary for any

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[4] The worry for Nussbaum is that this would result in an impoverished conception of political morality.

dignified conception of the good life: the specified capabilities constitute "an intrinsically valuable *part* of all reasonable conceptions of the good" (2013, 11-12). A reduced list could continue to provide necessary conditions of any dignified life, but hardly as completely as Nussbaum intends. Promoting a reduced list would thus not achieve all she wants from the capabilities as the basis for constitutions in all countries around the world. This might be seen as unfortunate by Nussbaum, but it seems required if the list is to be adjudicated by the logic of a political liberal standpoint, given empirical facts about people's comprehensive doctrines and their self-understandings through their cultural identities.

5.3 A Smarter Comprehensive Liberalism

Nussbaum can avoid this dilemma however, and maintain both the substantiveness and extensiveness of her list, by conceiving her theory as a form of comprehensive liberalism that seeks popular input in its formulation, but is not bound by the stricture that all reasonable citizens be able to reason their way to accept it on the basis of their standing beliefs and values. A smart comprehensive liberalism would eschew the stringency of political liberal respect for a more unabashed assertion of the moral importance of the capabilities, yet by being culturally sensitive and pragmatically calculative could avoid the dangers of cultural imperialism associated with comprehensive liberalism. Indeed, this could be achieved by employing the sorts of methods Nussbaum advocates already in presenting her political liberal theory as culturally respectful. The capabilities could be presented as compatible or continuous with elements of people's

standing beliefs and values (and so not as impositions), and policies could not be forced when this would be too destabilizing or cause too much social unrest (Wall 2009, 112). Such a formulation of the capabilities approach would avoid the dilemma Nussbaum currently faces as a political liberal of either disrespecting some citizens given her list's wide scope of intended application or having to vitiate her list to respect all those she wants to include within its ambit. It would also help her attend to the importance of civility or civic friendship that defines in part the political liberal concern for respect, as well as its concern with stability.

The sort of comprehensive liberalism that would achieve these objectives can be outlined in three steps.

1) By elaborating two philosophical standards of political legitimacy, distinguished by their basicness and relation to individuals' standing beliefs and values: (i) the in-principle legitimacy of basic rights and entitlements that regulate individuals' conduct towards one another, and which are justified philosophically independently of individuals' standing beliefs and values; (ii) the legitimacy of democratic outcomes which are grounded in individuals' standing beliefs and values, but which may not in principle curtail or compromise basic rights and entitlements.

2) By acknowledging that substantive goods philosophically determined and protected as basic rights and entitlements, and other goods determined or arrived at through democratic processes, may sometimes best be advanced by restraint and calculation, despite what would be the political legitimacy

of mandating them on the basis of their moral and philosophical

justification.

3) By substantively identifying the capabilities with those rights and

entitlements which must be ensured to each individual as a matter of basic

justice.

We turn now to elaborate these steps to show how a comprehensively liberal

capabilities approach can both be respectful and achieve the sort of political and

social change Nussbaum believes is so important.

5.3.1 Two Standards of Political Legitimacy

To establish a comprehensive liberal grounding for the capabilities

approach it is helpful first to elaborate two different notions of political

legitimacy: the in-principle legitimacy of basic rights and entitlements, and the

democratic legitimacy that emerges from democratic processes.

Basic rights and entitlements are a function of basic moral principle and

regulate how individuals may be treated either by other individuals or by

institutions including the state. Because they are justified on philosophical moral

grounds and as such are morally binding independently of individuals' standing

beliefs and values, support and respect for them can be demanded by the state

regardless of individual dissent. Indeed, coercion in terms of demanding support

for basic rights and entitlements, or punishing their violation (either through

commission or omission), is not morally problematic given the standard of

legitimacy at play. As Arneson puts this, though coercion is often a horrible evil,

"coercing someone to do what is morally right even against that person's sincere

conviction is not inherently disrespectful" (2010, 116). With basic rights and

entitlements then which express a basic moral obligation not to interfere with

others' lives (and on some conceptions to provide them with the necessities for a

dignified life), there is no disrespect in compelling critics to act to support and

uphold them.[5] Indeed, valid reasons of this sort "need not be reasons that one's

political opponents accept or even are in a position to appreciate fully" (Wall

2009, 112).

The second form of political legitimacy is democratic legitimacy and

emerges from democratic processes. Democratic legitimacy is a function of

respect for individuals' right to an equal say in the principles and policies that

govern them, and itself may be regarded as a basic right and entitlement.[6] In this

case what is legitimate is the outcome of choices determined through collective

decision-making, as grounded in individuals' standing beliefs and values and the

moral importance of being able to determine one's own life. Included in this

notion is the fact that democratic outcomes demand support from critics in the

form of obedience to law and supporting policies through payment of taxes. In

this sense, the state may demand support for what is democratically legitimate in

the same way it can demand support for what is in-principle legitimate, though

with the difference that the content of what is democratically legitimate can

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[5] This distinction between inviolability and provision of necessities is made to encompass both
those (such as libertarians) who believe basic rights and entitlements should be negatively
conceived and those (such as social democrats) who believe they should be positively conceived.
[6] Democratic instrumentalists may deny this. It should also be noted that presuming a basic right
to a democratic say need not be taken to be an endorsement of the intrinsic value of political
engagement, that is, of Aristotelian-type civic republicanism or Constant's liberty of the ancients,
particularly if providing people with that right does not mandate their actual exercise of it.
(Consider here the difference between guaranteeing the right to vote in Canada versus requiring
the exercise of the right to vote in Australia.) (See Kymlicka 2002, 294-295.)

change as individuals' standing beliefs and values change (or at least as decisions collectively based upon them change). It should be noted however that regardless of how important democratic outcomes may be, their legitimacy is constrained by the in-principle legitimacy of basic rights and entitlements which take priority. Democratic decisions then that compromise basic rights and entitlements – such as those that demand certain functionings of citizens or curtail the extension of all capabilities to all citizens[7] – consequently lack legitimacy despite how they nevertheless may sometimes be implemented.

Both these notions of political legitimacy are most easily conceived and justified in terms of a Kantian conception of individuals' inviolability. Thus, individuals have intrinsic worth as ends in themselves, which is recognized through securing their basic rights and entitlements and by recognizing the importance of their freedom to participate in democratic self-determination. Rights however can also be conceived in consequentialist fashion, and as of derivative value only insofar as they conduce to greatest good (however this might be conceived). Democratic instrumentalists for instance deny a fundamental right to a democratic say and instead maintain that democratic institutions are only valuable insofar as they achieve best consequences.[8] Utilitarian defences of rights of course are often criticized for not adequately

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[7] Barring possible justifiable limitations such as those imposed on violators of the law.
[8] Democratic instrumentalists deny unconditional affirmations of a fundamental right to a democratic say and instead maintain two claims: (i) that governments ought to be organized so as to achieve best consequences, and (ii) that under modern conditions democratic political institutions are those that achieve best consequences (Arneson 2009, 197). In this sense they take a position on the right to a democratic say that is similar to the position that utilitarians take on rights generally: any value accorded to 'rights' derives from the good they serve. However, even those who maintain a fundamental right to a democratic say may still believe that, in severe situations, the right to a democratic say may justifiably be compromised for the sake of other basic rights and entitlements.

securing the basic protections that rights are meant to achieve: as derivative they may be accused of lacking sufficient moral standing since they may be compromised as the greater good demands it. But though this criticism may seem damning, it should be noted nevertheless that even Kantian conceptions which directly recognize individuals' inviolability (as opposed to establishing it derivatively on some notion of the good) need not – and perhaps should not – present rights as absolute either. It is quite possible after all that same or different rights of same or different people may conflict and need to be balanced against one another, so that lesser rights might be sacrificed for the sake of greater rights. As Arneson says, in situations in which violations cannot be avoided, "one needs an elaboration…that tells us which is the less stringent right…that ought to be violated" (2013, 182).[9] Thomson's distinction between rights-infringements and rights-violations is helpful here. Rights-infringements occur when rights are overridden by more important rights, whereas rights-violations occur when rights are overridden by less important considerations, whether by other rights or by non-rights. For Thomson, rights-infringements are justifiable in a way that rights-violations are not: "only an absolute right is such that every possible infringement of it is a violation of it" (Thomson 1977, 50).[10]

Of course, regardless of whether rights are understood directly or derivatively, specifications of basic rights and entitlements will differ by how individuals' inviolability or the greatest good is conceived. For libertarians, for

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[9] It should be noted that Arneson (unlike Thomson) understands rights on instrumentalist grounds.
[10] One might also consider threshold deontologists who believe that though deontological norms are important, if the consequences of holding to them become too dire (past a threshold) then their violation on consequentialist grounds is permissible.

example, rights and entitlements correspond to minimal protections against such things as violence, theft, fraud and violations of contract. No positive provisions of support are due by the state or other individuals to support persons' inviolability, since any such provision would constitute a violation of others' inviolability (unless all unanimously consent to it). For social democrats, however, basic rights and entitlements may be more richly conceived. More precisely, they specify a much wider range of conditions that must be secured in order to protect what is fundamentally important about individuals, comprising both prescriptive support as well as proscriptive forbearance. We shall see further how this may be the case with Nussbaum below, but first it is helpful to elaborate a further way in which what is politically legitimate may rightly be constrained beyond these sorts of conflicts.

5.3.2 Further Exceptions to Political Legitimacy

In addition to how basic rights and entitlements and democratic decisions might be qualified as they come into conflict with one another, each may also be qualified on the basis of pragmatic calculation. This further form of constraint relates more specifically to Kantian conceptions in which both forms of political legitimacy stand independently of consequentialist considerations. That is, it relates to those conceptions on which the legitimacy of basic rights and entitlements and democratic processes is not a function of how they are popularly received or of the consequences that might follow from securing or upholding

them.[11] For indeed, expanding on both Thomson's and Arneson's observations

that sometimes rights may need to be sacrificed as they conflict with one another,

it may also be the case that in sufficiently adverse circumstances basic rights and

entitlements and democratic decisions may be compromised if the purpose of or

benefit to upholding them would be outweighed by their concomitant costs. In

such situations rights and entitlements and democratic processes are still

politically legitimate – there is no reversion to a utilitarian conception in which

legitimacy is a function of what conduces to greatest good – but this legitimacy

would be overlooked or strategically compromised for the sake of their long-term

securement or realization. Indeed, moral concern for political legitimacy would

maintain the importance of ensuring rights and entitlements and implementing

democratic decisions, but pragmatic concern would demand prudential deferral in

the case of exceptionally strained circumstances.

This follows from the position that "any plausible formulation of the

primacy of justice must allow that there are occasions on which injustice should

be permitted because eradicating it would make matters worse" (Mason 1998,

106).[12] And notwithstanding that such occasions might be difficult to identify,

reliable judgements may nonetheless be possible. As an example we might

consider the case of a basic right to marriage that would extend to all consenting

adults regardless of sexual orientation. The corollary would be that on substantive

grounds there should be a politically recognized right to gay marriage

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[11] Particular democratic decisions of course are a function of popular determination, but not the legitimacy it would be claimed of democratic processes themselves.
[12] As Rawls says, "an injustice is tolerable only when it is necessary to avoid an even greater injustice" (1972, 4).

everywhere. But it could also be the case that the legitimacy of this right might be compromised on pragmatic grounds if in certain jurisdictions its mandate would result in particularly harmful or counterproductive consequences. If it might kindle the tensions of a homophobic public culture, for instance, then the social condition of the LGBTQ community might better be advanced by more indirect social-political action (such as pursuing civil unions) than by insisting on the mandate's institution. Again, this is not to say there is no justification or political legitimacy to the mandate when there is difficulty securing its public endorsement in a prejudicial public culture. Rather, it is to recognize that deferring to an antagonistic public culture may sometimes be necessary to the end of securing the minimal conditions of objectively valuable lives – i.e., to the end of securing basic rights and entitlements.[13]

5.3.3 Capabilities and Comprehensive Political Legitimacy

With these notions of political legitimacy and the various ways they might be qualified in place, we should consider next how a comprehensive liberal presentation of the capabilities approach might be elaborated on their terms. More specifically, we look to see how both the substantiveness and extensiveness of Nussbaum's list might be maintained without disrespecting those who find reason to disagree with it.

The concern of course raised by Nussbaum and other political liberals is that establishing principles or policies on grounds that can be reasonably rejected is inherently disrespectful: "forcing people to serve ends with which they may

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[13] See for example Wall 2009, 109. Also: "If political power is used to promote ideals that are sound, but widely disputed, such action might do more harm than good" (Wall 1998, 77).

reasonably disagree, would give no due respect to people as ends" (Chan 2000, 21). But there can be higher and lower standards of what can be reasonably rejected, and how compelling a position may be depends upon where one sets the standard and with regard to what principles and policies. A higher standard might rule that principles or policies founded on best or morally strongest reasons cannot be reasonably rejected, because accepting those reasons just is what it means to be reasonable. As Arneson observes, "it is not fully reasonable to be moved by some reasons while ignoring or misunderstanding stronger ones. A fully reasonable agent identifies all relevant reasons for action and assigns each its correct weight and acts on the basis of the resultant – what it is most reasonable to do all things considered" (2003, 212).[14] On such a high standard, to reject such principles or policies reveals sufficient failure of rationality to be deemed unreasonable.

On lower standards however such objections may be countenanced on the grounds that reasonable rejection does not require infallible reasoning or true appreciation of value. Thus, lower standards would allow that well-formed principles or policies could be reasonably rejected by those engaging in less than optimal reasoning: soundness of beliefs in this case is not a condition for respect. What this allows for is a spectrum of possible standards of reasonable rejectability depending upon what reasons are at stake and how controversial those reasons actually are – not empirically in terms of popular dissent, but in terms of what evidence and arguments can be adduced for the various claims under

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[14] Note that this may mean that the reasonable thing to do has reasons that tell against it, just not reasons of sufficient weight to override reasons in favour of it. (See Wall 2009, 112.)

consideration. The question then is how reasonable do we need or expect people

to be when considering issues of basic justice, in this case conceived in terms of

the capabilities?

We have seen that for Nussbaum it is paramount to avoid defining

'reasonable' in a way that denigrates the grounds of people's comprehensive

doctrines by challenging the grounds or contents of people's beliefs. Recalling

3.4 and 4.2, she employs only an 'ethical' understanding of what it means to be

'reasonable', claiming that what deserves respect is not the content of people's

beliefs but rather the person and their faculties, in particular their conscience.

Nussbaum holds that we best show respect by not judging people's

comprehensive conceptions since to inquire into the grounds of their beliefs is

"impertinent and nosy" (2011b, 33). She thus endorses a lower standard of

reasonable rejectability in keeping with the neutrality of political liberalism which

insists that people be able to endorse political principles on the basis of their

standing beliefs and values. But as we have also seen this causes her problems

when her list is rejected by people on grounds of conscience. Because her

standard of reasonableness makes no reference to the content of beliefs that

comprise individual conscience, she can implore and try to persuade people to

accept the soundness of her ideas, but is unable to do more with those who

continue to disagree with her. In such cases she can only resort to reassuring them

that the principles she wants to implement are not alien to their worldviews. As

seen, when this reassurance is rejected yet she persists with her political project

she threatens the cultural imperialism she seeks to avoid. Indeed, since her

political liberal standard of reasonable rejectability does not allow her to insist on the rectitude of her capabilities in the face of objections from those who do not seek to impose their beliefs upon others, her only recourse is to presume the authority to pronounce on the ultimate compatibility of the capabilities with critics' worldviews, thus gerrymandering the sort of endorsement she needs to meet a political liberal standard of respect.

However, by consistently conceiving capabilities as basic rights and entitlements that enjoy a higher standard of reasonable rejectability, Nussbaum can address such dissent without having to engage in this sort of dubious cultural hermeneutics. Nussbaum says that the capabilities themselves have "intrinsic value" and are "an intrinsically valuable *part* of all reasonable conceptions of the good" (2013, 11). As such, she seeks to establish them as the moral basis of constitutional guarantees around the world as something "that can convincingly be argued to be of central importance in any human life, whatever else the person pursues or chooses" (2002a, 74). Their value then is thus well conceived as a matter of basic moral principle, such that securing them is important regardless of the standing beliefs and values of those who might dissent from them. Indeed, Nussbaum says she conceives her theory as a rights approach in which capabilities supply side-constraints on action (2002a, 14). But then the capabilities should be afforded a higher standard of reasonable rejectability than they can be ascribed on a political liberal model. Nussbaum wants capabilities to function as fundamental rights, but then wants to politically justify them in terms of citizens' endorsement of them. This might be an ideal, but their moral status

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means that their political justification should not be hamstrung by matters of endorsement: the status of the capabilities as fundamental rights means they have legitimacy notwithstanding their compatibility with people's standing beliefs and values. A reasonable assessment of the value of the capabilities should thus mean accepting them as best formed, such that rejecting them reveals one's unreasonableness and failure to understand what has basic moral value. This becomes complicated of course insofar as only a particular range of each capability would bear the in-principle legitimacy of basic rights and entitlements, with any protected functionings beyond that basic range being democratically determined and thus only having contingent legitimacy. Nevertheless, if there is some basic specification of the capabilities that all individuals should be guaranteed on condition of being able to live dignified lives, then that basic range has in-principle political legitimacy that holds notwithstanding resistance or dissent, and accordingly can be instituted and upheld regardless of opposition.

With regard then to Nussbaum's position that persons and their faculties are due respect not their ideas (and that it is nosy or impertinent to inquire into the grounds of their beliefs), when we take this together with her position on the intrinsic value of the capabilities it turns out that respect for persons and their faculties must make reference to this content. More specifically, we should judge people's faculties insofar as they acknowledge the demands of basic moral principle conceived in terms of the capabilities' intrinsic value. Should individuals fail to exercise their faculties in a way that recognizes the capabilities' moral status, then their resistance does not deserve political respect nor political

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acquiescence. It is thus neither nosy nor impertinent to inquire into the grounds of people's rejection of the capabilities, though it would be to inquire into the grounds of their realizing the capabilities as particular forms of functioning. After all, though the capabilities have political legitimacy, this extends only to the opportunity-freedoms they represent, not to how or why individuals should choose to realize those freedoms as particular functionings.

We see at this point then that political respect is a matter of securing the capabilities for all persons, and not a matter of having to engineer compatibility between the capabilities and individuals' standing beliefs and values, or accommodating critics' rejections of the capabilities as unjustly or illegitimately coercive. After all, when someone dissents from the capabilities they fail to respect what is intrinsically valuable and integral to dignity and consequently has in-principle legitimacy. There is no disrespect in pursuing principles or policies that are based upon or help to secure the capabilities, since securing the capabilities for each individual and the freedoms they represent is simply what it means to respect them as persons. In this sense we have endorsement of the intellect model discussed in 4.4, on the basis of Nussbaum's claims regarding the basic moral status of the capabilities. This might mean of course having to coerce critics to support the capabilities. But though this might be regrettable insofar as it means making them support principles and policies against their convictions (something even on the intellect model we can seek to avoid as possible, and not just for pragmatic reasons), it is not disrespectful given the content of those

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convictions, and given that coercion is for the sake of what has basic moral value and is fundamental to ensuring people live dignified lives.

From this it follows that Nussbaum's ethical notion of reasonableness is inadequate. Indeed, if the capabilities are best conceived as basic rights and entitlements which cannot be reasonably rejected by critics given their intrinsic value and connection to dignified lives, as it seems they are, then Nussbaum's ethical understanding of reasonableness either needs to be expanded or supplemented by epistemic considerations. It is not enough to say in other words that reasonableness must be defined in a way that avoids denigrating the grounds of people's comprehensive doctrines, if their doctrines fail to value the basic conditions that make for dignified lives. Indeed, what it means to be reasonable must include reference to acceptance of the basic value of the capabilities, whether this acceptance is understood as an ethical appreciation of the conditions of dignity or an epistemic appreciation of the capabilities' in-principle legitimacy.

5.4 The Capability-Functioning Distinction Revisited

With these ideas in place we now revisit the objections raised in chapter 4 against Nussbaum's political liberal formulation of the capabilities approach to see how they fare on a comprehensive conception. Nussbaum intends the capability-functioning distinction to provide a way of accommodating objections to her list of capabilities since as opportunity-freedoms only they do not require realization as particular functionings. As we have seen, however, critics may object that despite the distinction implementing the capabilities would be disrespectful. Critics could object they (i) would be required to foster or cultivate

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the capacity of others to realize functionings they deem immoral or otherwise disapprove of, thus morally compromising themselves; (ii) could suffer the tendentious effects of the state ensuring the capabilities are held in a sufficiently robust manner; (iii) would be required to exercise particular functionings in order to be secured other capabilities; and (iv) might not be allowed to teach a rejection of certain functionings in private if those private teachings were suspected of threatening their own or others' securement of the capabilities.

But though the capability-functioning distinction can be objected to in these ways on a political liberal understanding of respect, it holds up much better on a comprehensive liberal conception. This is because while a comprehensive liberal understanding of the capabilities still conceives them as opportunity-freedoms to be realized as individuals choose, it makes stronger claims about what citizens owe one another regardless of whether they accept those obligations. Indeed, on the stipulation that the capabilities are sound or correct moral principles (even if open to revision), and on the condition that proponents are justified in believing them so (as Nussbaum believes she is), critics are not treated unjustly or unfairly in being made to contribute to uphold them.[15] Thus, though it remains true that individuals might find themselves induced into choosing or forced into exercising certain functionings, or might find themselves limited in their practice of private teachings in order for the state to secure the capabilities for each citizen, this is

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[15] Wall importantly points out that one need not have full certainty about the soundness or correctness of one's principles: what is important rather is basing political action on what we "take to be the best supported, if not infallible, views" (1998, 81-82, 96). See also Arneson 2013, 189.

justified on the grounds that the capabilities are of sufficient moral status that they must be secured despite such grievances.

Critics of course will continue to object that instituting the capabilities affects their capacity to live their lives as they wish: they have to compromise their integrity by enabling practices they disagree with (objection (i)), and have to strive that much harder to maintain their own beliefs and traditions as these are encroached in various ways by the demands of instituting the capabilities (objections (ii) – (iv)). But these compromises and impediments have to be balanced against the injustice of not securing the capabilities for others. Proponents after all have a choice: they can enforce the capabilities as sound political principles but in doing so have critics feel loss of equal worth, or they can fail to enforce the capabilities but in doing so countenance morally impermissible action by failing to provide others with the opportunity-freedoms they are due. Clearly there are costs in either case, as states should be concerned to protect individuals' equal worth and experience of equal worth as part of their well-being (Wall 1998, 86-89). But felt and actual loss of equal worth are not tantamount, since the former may be merely psychological whereas the latter is a function of unfair treatment. Indeed, one is not treated unfairly when bound by justified principles, nor is one harmed if one experiences those principles as harmful due to failures of reasoning or unsound beliefs.

Of course, none of this is to say that a comprehensive account would not recognize the importance of beliefs and traditions in helping people find meaning in their lives (which of course is a fundamental element of the capability of

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practical reason). Indeed, a comprehensively liberal capabilities approach would encourage individuals to understand the capabilities in terms of their traditions, and in extreme cases of resistance might allow exceptions or pragmatically prescind from pursuing their institutionalization. It would thus still attend to the importance of cultural diversity and would encourage cultural sensitivity as possible, and would also be responsive to concerns about stability. But it would neither be so sensitive as to accommodate objections based on unsound convictions, nor engage in culturally imperialistic hermeneutics to demonstrate that claims based on good philosophical reasons are in fact compatible with critics' worldviews despite their objections to the contrary.

5.5 Pragmatic Compromise

Of course, merely saying that a comprehensive account might prescind from pursuing the institutionalization of certain capabilities in extreme cases of resistance is not sufficient without some guidance as to how to exercise this restraint. Moreover, some indication of its limit is necessary since loud or disruptive protests – against having to support others' capabilities or to having to have them oneself – might demand acquiescence in a way that compromises the very purpose of the capabilities approach, and more particularly the importance of securing capabilities for others. Surely this is untenable, however, as it may simply give critics incentive to vociferously protest implementation of the capabilities.

While no universal solutions can be provided as to how to address such resistance since circumstances are always particular, providing a framework by

which to think about social reform can help point to a set of general considerations which would seem relevant to a broad range of cases. To this end one can invoke the general insight that individual acts are always contextualized by broader processes of action, and that the prospects of stable social reform are best analyzed in terms of individuals' other commitments or ongoing behaviour. This idea is defensible from a number of theoretical positions, but employing pragmatist language it can be seen that social reform tends to destabilize habits and result in problematic situations as individuals seek new reconciliations with their changed or changing circumstances.[16] One should note however that problematic situations need not be normatively suspicious: they occur as changes in personal or environmental circumstances introduce such complexity or novelty that resolutions by more or less automatic or learned responses are ineffective. Problematic situations can thus be seen as both pervasive and unavoidable. Their severity however is measured by the extent or depth of destabilization of one's habits, with survival or continuity of identity through change being a function of the stability or survival of one's overall habit sets (Gronow 2009, 199-200).

The point that emerges from this general framework is that social change often may best be achieved through reform and not by revolution. That is, it is usually best to seek change through lesser if more frequent disruptions of habits and subsequent reconciliations with circumstances, than by deeper and more systematic disruptions in response to which people might struggle to find or restore their identity. With regard to fostering endorsement of the capabilities in

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[16] See Dewey (1922) on the role of habit in human psychology and the importance of intelligently controlling habit to facilitate social reform.

particular, the framework is helpful as it emphasises the interactive nature of values and beliefs as these emerge from practice in the world. Beliefs and values inform habits, and habits shape beliefs and values.[17] Thus, by changing the circumstances in which habits have operated and creating the need to adjust them, pressure is exerted on associated beliefs and values similarly to change. Importantly, however, the more gradual these changes to habits and beliefs and values the easier it is for people to adapt to them. Not only is it easier to maintain the integrity of one's habits and beliefs and values through gradual change as there remains a continuity to them, but as people's habits remain functional and their beliefs and values remain relevant it is easier for people to identify with the world. The result is that more gradual change helps to minimize people's alienation from the world, and helps to minimize their resistance to its changes.

Accordingly, though implementing policies based upon capabilities is important as a matter of justice with expedience consequently a priority, it is also the case that resistance needs navigating carefully when sufficiently disruptive problematic situations might result in extreme social unrest. Recognizing in such cases that implementation of the capabilities might be troublesome, yet recalling Nussbaum's claim that though independently important the capabilities are variously interconnected and interdependent, we can begin to suggest how opposition to the capabilities might pragmatically best be addressed.[18]

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[17] It should be noted that this need take no position on an internalist account of belief or action.
[18] This framework is intended to help respond to Nussbaum's objection that the state is too blunt an instrument to address delicate contextual matters. Part of Nussbaum's objection to the comprehensive liberal position that we best respect persons by insisting on the truth of doctrines we believe, as opposed to by supporting political principles that do not endorse the truth of any particular comprehensive doctrine, is that insisting on the truth of a doctrine can be a "delicate

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Interconnections and interdependences between the capabilities mean it will usually be the case that opposition to or violation of one capability entails opposition to or violation of others. Indeed, even considering capabilities discretely, opposition likely is not to a capability *simpliciter* but rather to a particular subset of related functionings that constitute only part of the range of the capability protected. Insofar as this is true, opposition to the capabilities can be conceived as opposition to what might be called capability clusters.[19]

Given this, two possibilities immediately present themselves as to how one might implement change in the face of opposition. One might be to address first the more important or pressing of the capabilities in the cluster opposed by critics, granting exemptions from or reducing efforts to implement associated but less important capabilities on the grounds these will be easier to address once change has been effected regarding those other capabilities.[20] Another possibility might be to address first those capabilities to which critics are least opposed and thus have best prospect of gaining acceptance. This would mean provisionally overlooking or granting exemptions on more important capabilities, but would be justified if reform regarding those less opposed capabilities erodes resistance to those more important in the cluster.

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contextual matter" even in the case of close friends. In the political domain, Nussbaum says, this nuanced appreciation of particular relationships is even more difficult (2011b, 20).

[19] This terminology of 'clusters' is borrowed from Wolff and de-Shalit (2007). Note however that they use the term in the context of disadvantage, whereas I am using it in the context of resistance.

[20] Some exemptions might be permanent – consider the case of the Amish whose children are allowed to leave formalized schooling earlier in order to maintain their traditional way of life. This might be criticized of course, particularly since the traditional skills learnt by boys have wider and more lucrative application to modern life than traditional skills learnt by girls, making possibilities of exit from the community unequal.

To demonstrate these methods, we can recall from 5.3.2 the case in which civil unions might be advocated instead of gay marriage if the latter would kindle the tensions of a homophobic public culture. In such a situation what immediately is sought is not agreement on the full protected scope of the capability in question, but rather agreement on a more limited set of functionings comprising it. In time, however, this compromise might be hoped to lead to a more receptive climate for gay marriage as a basically politically justified institution.[21] We now see however that in addition to this compromise one also might advocate policies regarding associated capabilities which if successful might expedite acceptance of gay marriage. Indeed, opposition to gay marriage as part of the capability of *affiliation* might be accompanied by opposition to various functionings involved in 'being able to imagine the situation of another and to have compassion for that situation' (*affiliation*), 'loving those who love and care for us and not being blighted by fear and anxiety' (*emotions*), 'opportunities for sexual satisfaction' (*bodily integrity*), and political and artistic free speech (*senses, imagination, and thought*). Functionings in these areas as they concern homosexuality could all be objected to as demanding the direct perversion of the critic in imagining or viewing representations of what they consider immoral behaviour, or as entailing their indirect corruption as supporting others' capabilities would enable this same condemned behaviour. Rejection of gay marriage is thus likely best seen as the manifestation of opposition to a cluster of

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[21] A recent Gallup poll indicates increasing acceptance of gay marriage throughout the United States. ("Same-Sex Marriage Support Solidifies Above 50% in U.S., May 13, 2013: http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx) For an argument that civil unions act as a "politically palatable compromise that would serve as a stepping stone to full marriage equality," see Johnson 2012, 198-199.

related capabilities, so that part of the effort of overcoming this resistance might involve focusing on these clustered capabilities and seeking increased compliance in their various areas. This might be achieved through promoting policies that challenge presumptions about homosexuality and break down norms about heterosexual marriage, and in general seek to develop people's sympathetic imaginative capacities. Thus, public education campaigns about the history of marriage and sex education campaigns in schools, public engagement efforts such as art exhibitions, television productions and community events, and policies regarding same-sex partner benefits might all contribute to advancements on these clustered capabilities and concomitantly erode resistance to gay marriage as an institution.[22]

Alternatively, assessment of a situation might recommend that securing public acceptance of gay marriage (perhaps through things like civil unions) should itself have priority since this would entail progress on other clustered capabilities. More likely of course is that progress on clustered capabilities would be holistic, such that broad focus on a variety of related initiatives would represent the best path to social reform. The general claim in either case however is that overcoming opposition to the capabilities is more likely to be successful when

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[22] We can imagine opposition to other clusters of capabilities regarding things like 'opportunities for sexual satisfaction and for choice in matters of reproduction' and 'being able to live with concern for and in relation to animals, plants, and the world of nature.' These might be rejected respectively as encouraging promiscuous and morally dubious behaviour, and on the grounds that animals are dirty or vicious creatures whose inferior place in the great chain of being makes them unworthy of our understanding or affiliation. Each would also have clustered capabilities – 'being able to imagine the situation of another and to have compassion for that situation' (*affiliation*), 'engaging in various forms of social interaction' (*affiliation*), 'being able to have pleasurable experiences' (*senses, imaginations, and thought*), forms of artistic and political expression (*senses, imaginations, and thought*) – that might also be rejected directly by individuals as something they reject in their own lives, but also indirectly as something they reject giving others support to pursue.

policies are implemented gradually in particular areas of concern, affording time

for reconciliation with the changes they entail, rather than when introduced

wholesale in all areas of clustered opposition. Thus, when such wholesale change

would too strongly be resisted, what is sought instead is the gradual erosion of

resistance through the cumulative effect of policies implemented in associated

areas.

Of course, a third possibility might be that if the prospect of gradual erosion of

resistance looks bleak or turns out to be ineffective, then the circumstances might

call for strong political measures and a hard-lined principled defense of

imposition despite the violent resistance such measures might give rise to. This

might also be the best course of action if the capabilities denied are important or

fundamental enough that a stand on principle is worth risking great social unrest

regardless of the prospects of gradual reform – revolution, that is, might

sometimes be the best answer. As an historical example we might consider the

civil rights movement in the United States and the social unrest and violence

threatened by segregationists. If too violently opposed the federal government

was prepared to respond with the threat of force itself, rather than seek more

gradual reform to try to mollify concerns. Reform of course remained gradual,

but not as gradual as might have occurred had minimizing the possibility of

violent reaction been a priority.[23]

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[23] As an example one might consider the Freedom Rides movement, which involved activists
challenging illegal segregation on interstate buses and which met with violent opposition in
several cities. One incident in Montgomery in 1961 saw such mob violence that the Kennedy
administration sent 500 federal marshals to enforce order. Though Attorney General Robert
Kennedy doubted it "would ever come to the point of sending in troops" since he believed the
administration would never let the "situation deteriorate to that level," he was prepared to
intervene with military force in the case of defiance of federal law (Schlesinger 2002, 294, 298).

Each of these cases represents a strategic enforcement of the capabilities as a matter of basic moral principle. A strong stand remains on the political legitimacy of the capabilities, but political realities can require pragmatic restraint and calculation to secure their implementation. Non-assertion of capabilities in combustible situations should thus not be taken as capitulation to the adaptive preferences of critics. Rather, it should be taken as recognition that careful negotiation can be required to oppose the inertia of beliefs and values opposed to or in tension with a political conception based upon the capabilities. This negotiation however must always be guided by the moral importance of securing capabilities to threshold levels. The importance of this end thus not only justifies compromising capabilities as a pragmatic necessity, but can condemn it also if concessions are too great or made unnecessarily.[24]

The importance of this preparedness to use force can be seen in the judgement of Diane Nash, a central civil rights activist who argued that "if the Freedom Rides movement had been stopped as a result of violence…the future of the movement [would have been] cut short because the impression would have been given that whenever a movement starts…all that has to be done is…[to] attack it with massive violence and the blacks would stop" (U.S. Department of State 2008, 39).

[24] It should be noted that even on matters of great principle it can be difficult to prescribe in advance when compromise is and is not appropriate. As Gutmann and Thompson point out, any attempt to draw absolute lines between 'decent' and 'rotten' compromises (those that in the words of Avishai Margalit "perpetuate cruelty and humiliation") fail for three reasons: unconditional standards may block decent compromises that improve on the status quo; rejecting compromises on the basis of absolute standards does not entail that any other compromise which does not violate that standard is acceptable; and no one can fully anticipate what the complex process of compromise can be expected to yield in most major struggles and negotiations of principle or policy (2012, 78-80). Gutmann and Thompson suggest that compromises on political principles are morally defensible when the following conditions obtain: there is practical inability to realize the full measure of what has been determined to be moral or just; opponents' positions contain something worthy; agreements would not set back progress already made and would facilitate further cooperation; compromises embody or recognize one's moral principles of which one seeks full implementation (2012, 107).

5.6 Beyond Apologetics: Methodological Adoption

How compelling one finds a comprehensive liberal presentation of the capabilities approach clearly depends upon how compelling one finds Nussbaum's characterization of the capabilities as having the fundamental moral importance she ascribes them. Now any question about the soundness of Nussbaum's moral characterization of the capabilities might be thought moot if defending the capabilities approach as a form of comprehensive liberalism is understood as an exercise in apologetics. That is, if we accept Nussbaum's conceptualization of the capabilities as having intrinsic value, as constitutive of any reasonable conception of the good, and as integral to any dignified life, then the question that follows is how best do we theorize the capabilities approach. Given the various failures of a political liberal presentation the answer is argued as a form of comprehensive liberalism. On the other hand, if we understand this comprehensive liberal interpretation as an exercise in social-political philosophy beyond mere apologetics, then reasons must be given for accepting Nussbaum's moral conception of the capabilities.

Chapter 3 discussed how doubts have been raised in the literature about Nussbaum's sociological methods in claiming that the value of the capabilities is supported by widespread cross-cultural academic and grassroots discussion. As we saw with Alison Jagger in particular, Nussbaum's "failure to pay careful attention to the issue of representation undermines the plausibility of her assertion that her list of capabilities expresses values that are widely accepted across the world" (2006, 313). Indeed, Nussbaum herself admits that the groups she

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consulted were "designed to exemplify certain values of equal dignity, non-hierarchy and non-intimidation" (2002a, 151), and so it is questionable what independent validation of the capabilities this consultation provides. But though this criticism of method directly challenges Nussbaum's claim that she can establish the capabilities approach on a political liberal founding (it undermines the attempt to "link the legitimacy of political principles of justice to their wide (actual) acceptability by – and applicability to – a plurality of citizens" (Deveaux 2002, 504)), it does not in itself undermine the attempt to establish the capabilities approach on more comprehensive grounds. What people currently accept may at times be a good indication of the validity of normative political principles,[25] but popular acceptance need not be conclusive about substantive moral matters: people may be wrong in accepting or valuing what they do as is illustrated by the concern with adaptive preferences. Indeed, this is the point of Nussbaum's repeated claim that good political principles require a normative basis that does not rely exclusively on individuals' stated preferences in deriving a sense of what is good for them (Abbey 2011, 175).

The question then is what sort of argument might justify the normative thickness of the capabilities given the dubiousness of sociological appeals to their prevailing or incipient widespread acceptance?[26] What, in other words, might

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[25] Reflective equilibrium as a constructivist method of determining moral-political principles is after all based upon the initial plausibility of such appeals.

[26] Deveaux comments on this that "If Nussbaum were to offer better justification for her substantive conception of the good life as reflected by the list of capabilities, we could at least grapple with that. Not only is such an argument not forthcoming, however, but the conception of flourishing that Nussbaum sets out depends upon a normative *ordering* of choices that she does not acknowledge." With regard to this latter point, Deveaux argues that Nussbaum presumes women will always choose and develop capabilities than enhance their ability to make choices and lead reasonably self-directed lives, including those regarding nutrition and shelter, before pursuing

justify conceiving capability provision as a matter of justice, such that capabilities are best conceived as basic rights and entitlements that cannot be reasonably rejected, and such that upholding or imposing them in the face of dissent or resistance should not be seen as politically disrespectful?

Moral justification is a function of meta-ethical commitment, and as this is the case rather than try to provide definitive moral justification of the capabilities it may be more useful to explore reasons why theorists representing a wide range of moral and political philosophical commitments might endorse Nussbaum's capabilities or a list that approximates them. Indeed, proceeding in this manner would be in keeping with Nussbaum's meta position that convergence on capabilities from a variety of theoretical perspectives should make us more confident about basing policies upon them. To this end I conclude by examining why utilitarians, rights theorists, virtue ethicists and pragmatists might all have reason to endorse capabilities on the basis of their respective understandings of liberal justice, though note also problems that would have to be resolved.

5.6.1 Utilitarians

Those who maintain the prospects of utilitarianism despite criticisms it faces as a political morality might have good reason to incorporate a concern for capabilities as part of their metric of value. Recall that utilitarianism has trouble ascribing an inviolability to persons that the welfare of society as a whole cannot override, and has trouble discriminating the content of desires to be included in

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other capabilities such as religious fulfilment. In essence, Nussbaum's presumption is that women will make "rational choices in the order suggested by the degree of critical importance of the capability in question, as elaborated by Nussbaum" (2002, 517).

the utility calculus. Capabilities might offer a solution to these problems by securing a wide range of freedoms for individuals and mandating these freedoms to basic threshold levels: this would introduce safeguards against sacrificing individuals in the name of the greater good, and place provisions on decision-making that may make us more confident about accepting decisions which appear troublesomely adaptive in perpetuating oppressive or unjust situations. Moreover, securing capabilities and the restraints they embody might be useful in maximizing utility. Requiring of individuals a robust range of freedoms supported and enabled by social institutions encourages discovery and pursuit of the good which promotes utility under a variety of conceptions. Indeed, not only could this lead to a wide range of pleasures to be experienced or preferences to be satisfied, it could also foster Millian self-development as capabilities allow for extensive experiments in living through a multitude of permutations of functionings. In all of these ways securing capabilities would promote utility whilst protecting individuals.

However, on a utilitarian standard the mandate that capabilities should be secured to threshold levels would only have derivative justification insofar as they are instrumental to the greatest overall good. Accordingly, the capabilities would lose the fundamental status that Nussbaum ascribes them, and the utilitarian problem of insufficient protection of human dignity and intrinsic value would return. Utilitarians however might ascribe threshold capabilities a high enough utility value that only in extreme situations might compromising one person's capabilities result in greater utility overall. Capabilities could be conceived in

terms of consequentialist rights and thus as fundamental moral or political goals

which can justifiably be violated only when doing so results in extensive utility

gains for others. This might seem an ad hoc solution, but might be more

compelling when recalling that even fundamental rights as side-constraints are

rarely absolute, as they can be overridden by other fundamental rights or on some

conceptions by drastic or severe enough consequences. One might also recall to

this end Sen's judgement that the consideration of consequences and happiness

are important in life just not exclusively so (2009, 8). Thus, if utilitarians can

implement capabilities in such a way that strong enough protections can be

ensured of individuals, both in terms of basic rights and liberties and

circumstances of decision, then perhaps they can heed Sen's warning but also

maintain their fundamental consequentialism.

This said, however, an endorsement of capabilities as part of a utilitarian

conception of justice might have trouble accommodating a distributive paradigm

that appeals to the notion of thresholds. As this is so, criticisms of utilitarianism

claimed avoided by thresholds might return with criticism of their very viability.

To see this, consider that Nussbaum's sufficientarianism holds that raising

people from below to above capability thresholds has lexical priority over

capability enhancements for those already above threshold levels. Nussbaum

does not give guidance how to distribute among those below or already above

threshold levels (with regard to the latter she says many paradigms might be

possible[27]). But given the unlikelihood of a situation in which all are secured

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[27] Arneson doubts Nussbaum's claim that distributions above threshold levels can be bracketed as of secondary concern to the importance of getting people above threshold levels of the capabilities.

above threshold levels, we can ask whether in distributing to those below

thresholds we should give priority to those most deficient in capability holdings,

to those with most to gain by increases, or to those most easily raised above

threshold levels. Though Nussbaum is silent with regard to principle on these

matters,[28] many of her policies regarding education of the disabled presume a

utilitarian maximizing principle that eschews the first option of always

prioritizing distribution to those most deficient in capabilities (Stein 2009, 511-

513). Thus, it seems that Nussbaum advocates absolute priority in distributions

for those below threshold levels vis-à-vis those above threshold levels, but then

some form of prioritarian principle for those below threshold levels. It follows

from this however that if all members of society but one were above threshold

levels, all resources should be expended trying to raise that one person above

them also, rather than directing resources to those already above them regardless

of how much and how many of these others might be helped. Peter Singer for one

adjudges this absurd. (Singer 2002)

The argument that utilitarians would thus make on this score is that a

sufficientarian paradigm, even one supplemented by a prioritarian principle

applied to those below the standard identified, will always be dubious in the light

of possible greater gains for those above threshold levels. If thresholds however

He argues that many decisions about above-threshold level distributions would affect distributions
to those below (Arneson 2000, 55-59).

[28] She says this is a practical matter, not a matter of justice: "In desperate circumstances it may
not be possible for a nation to secure [all the capabilities] up to the threshold level, but then it
becomes a purely practical problem what to do next, not a question of justice. The question of
justice is already answered: justice has not been fully done here" (Nussbaum 2006a, 175). As
Stein points out this judgement of practicality not justice is dubious: deciding who should receive
scarce medical resources, or which research programmes should be funded when many are
underfunded, are surely not just practical matters but matters of justice too (Stein 2009, 508).

become seen as dubious by utilitarians such that a purer distributive principle

would be vouched appropriate,[29] then it may be they can no longer appeal to

threshold guarantees as a way of circumventing the possible sacrifice of

individuals in the name of the greater good, and the inclusion in utility

calculations of troublesome adaptive preferences. Though utilitarians thus have

good reason to endorse capabilities and to incorporate a concern for them into

their theory, these problems would remain to be resolved.

5.6.2 Rights Theorists

Rights theorists might have good reason to support capabilities as a way of

providing for the exercise of autonomy and the cultivation of rationality in the

various spheres of action and behaviour the capabilities specify.[30] Indeed,

although Nussbaum specifies practical reason as an architectonic of the other

capabilities, if one's normative theory revolved around autonomy it could equally

serve this role by requiring higher standards of critical reflection in deliberation

and on action. But capabilities could also appeal to rights theorists who resist the

Kantian position that intrinsic worth is tied to rationality and concomitantly the

capacity for autonomy. For Nussbaum, securing the capabilities is important to

protect human dignity, which for her is a broader normative notion than

rationality. Thus, securing capabilities can be seen as a way of respecting the

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[29] See for instance Arneson (2006).
[30] Capabilities for instance might support Colburn's 'autonomy-minded liberalism' (2008), whilst Raz (1986) might support capabilities insofar as they secure the resources and conditions necessary for the valuable exercise of autonomy.

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intrinsic value of human beings through a manifold of human experience, and not just as this experience can be reduced to a rational basis (2013, 672).[31]

Otherwise, the conception of rights as side-constraints on action might be well supplemented by making capabilities the bases of rights. Indeed, Nussbaum herself takes this line when she explains the close connection between human rights and capabilities, with the verdict that capabilities can be seen as a species of human rights (though should not supplant human rights in political rhetoric given the various advantages of human rights talk) (2002a, 96-101).

As with utilitarianism, however, the question comes up as to how to reconcile Nussbaum's distributive paradigm with what might be claimed the counter-intuitiveness of its results. Sufficientarianism may well be attractive to rights theorists because thresholds help to specify the requirements of securing the equal dignity of persons and ensuring that no life is privileged over any other. On the other hand, and as we have seen, it might be questionable how convincing such a standard may be if this would require the direction of extensive resources to raise someone from just under to just above threshold levels, instead of spending them in a way that would greatly improve the welfare or expand the rational and autonomous capacities of very many already above threshold levels.

One way of responding to this problem might be by means of threshold deontology which allows for violation of rights when the consequences are sufficiently important to warrant or excuse that violation.[32] This would entail a

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[31] For another defense of rights not grounded in autonomy see Cantor (2004). Cantor argues that rights can be grounded in the capacity for self-determination, but also in an interest in well-being and the maintenance of bodily integrity.
[32] See for example Moore (1989) and Nagel (1979, 126).

compromise with consequentialism though with a strong emphasis remaining on deontic principle. Thus, though fostering each person's capabilities would remain important as a function of respecting their intrinsic worth, this dictum could be compromised in extreme situations where massive expenditures result in little good, and could be directed more efficiently to greater good elsewhere, either in terms of greater welfare or greater cultivation of rational and autonomous capacities. A response along these lines however would challenge Nussbaum's claim that securing greater capabilities above threshold levels is unimportant (or not sufficiently important) from the perspective of justice: it would challenge her position that greater capabilities need not enhance well-being and as such are irrelevant as compared with a focus on capability-deficiency (2006a, 292-295). It is possible to argue she is wrong in this however, as with the case of theorists who claim that though distributions below thresholds may generally be more important, distributions above thresholds may also be important and may sometimes be more important in particular circumstances.[33]

One way of considering this issue more specifically is in terms of individuals with severe mental or physical impairments who would need extensive support to reach or approach threshold levels of certain capabilities. The question might be asked whether such persons should have their own threshold levels or lists of capabilities instead of being held to the standards set

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[33] Consider Arneson: "If I am worse off than Smith, but the flower seeds in my possession will do me barely any good at all but would provide Smith a wonderful and profound aesthetic experience, then Smith, not I, should have these flower seeds, and if our only options are (take seeds from me, give to Smith) and (leave seeds in my possession) then I should favor the former. The same point would hold if the calculation favors the better off because the numbers of the better off who can be aided greatly exceeds the numbers of the worse off who could benefit from a choice to assist them. It is reasonable to tilt in favor of the worse off but unreasonable to tilt in favor of the worse off to the extent of strict lexical priority" (2000, 58-59).

for the rest of society. Nussbaum for one rejects special lists for special cases because of the widespread pernicious tendency to "denigrate the competence of people with impairments and their potential contribution to society" (2006a, 188). Indeed, claims about expense she says are often an excuse not to think creatively about solutions to problems and are a way of avoiding expanding sympathy and understanding. As she says, many improvements in people's lives have been achieved through research and social restructuring that would not have happened without demands that the disabled enjoy similar standards to those enjoyed by the rest of society. Accordingly, Nussbaum thinks that a single list for all persons is important for strategic reasons, but also for normative reasons to remind us of the continuity between impairment and non-impairment, and that people with mental and physical impairments are owed respect as equal citizens who can lead good human lives (2006a, 190-191).

A single species norm list makes sense for all these reasons, and it should also be emphasized that the situation of justice in the world is such that examples of directing massive resources to elevate individuals to above threshold levels instead of spending them on those already above threshold levels may be something of a red herring, given the great numbers of people currently below threshold levels who can reasonably easily be raised above them, and who would have to be so elevated before this choice would arise. As this is the case, the question might be deferred. Still, if the issue is forced, then it seems that a threshold deontological response might be best. Regarding those whose conditions are truly extreme, the obligation to make effort to raise them to

threshold levels might be excused for the sake of the interests of others already are above them. Voicing such a position might not be strategic however for the reasons Nussbaum mentions.

Lastly, deontologists who take up the metric of capabilities would have particular reason to investigate further the notion of personal responsibility, an issue quite under-theorized in the literature. Briefly, the question regards the direction of resources to individuals who make poor decisions and subsequently find themselves below threshold levels. Should resources be directed towards such people to raise them to thresholds anew, or can holding people responsible for their poor choices sometimes mitigate this obligation? Nussbaum would likely express caution about such a position because of its implicit presumption that provision of capabilities should be a function of desert or merit, and because it would thus lose traction on the importance of securing dignity as basic to human beings. However, deontologists who respect people's rationality might think differently particularly in a context of limited resources. After all, part of respecting people's autonomy is to respect their right to make self-destructive choices, and presuming those choices were made from an enabled position this might include dealing with the consequences that follow from them.[34] Surely it is important to help people rectify poor choices, particularly as these threaten the conditions of dignified life and given that the gravity of actions is not always appreciated beforehand: tomorrow's hunger cannot be felt today (Kunbur 1987, 66). But there may also be room here for extra argument for state measures to restrict or discourage the initial making of poor choices, and also for state

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[34] Kant for instance makes an argument along these lines with regard to capital punishment.

measures to reform those who repeatedly or intransigently make poor choices, the remediation of which places great burdens on the rest of society. There is a tension here clearly between the importance of allowing people to make free decisions but also wanting them to make socially propitious decisions, and work would be needed by deontologists who take up capabilities to investigate to what extent these two issues can be brought together.

5.6.3 Virtue Ethicists

Virtue ethicists might see reason to support capabilities insofar as the central notion of dignity they emerge from is amenable to a number of conceptions of human flourishing. Indeed, a dignified life on Nussbaum's approach requires a fundamental set of capabilities, but how individuals pursue the good through the capabilities is a matter of individual choice. As capabilities thus allow for diverse realization of lives, they allow for an expanded understanding of possible ways in which human beings can flourish. Moreover, these different forms of flourishing would allow for a fuller understanding of the particular virtues that make for a flourishing life. That is, they would allow for a deeper understanding of what it means to be courageous, honest, generous and so forth, as these are realized through different combinations of functionings.

Importantly, then, capabilities could provide a grounding for virtue ethics which may be needed with the demise of its traditional grounding in natural teleology. They would be able to do this however in a flexible way since different lists could be formulated in accordance with different valuative conceptions of the human being. Nussbaum's theory as we have seen is formulated on the basis of a

particular notion of human dignity; but other conceptions of human dignity and the conditions of flourishing life might be possible, and so virtue theorists with different eudaimonic visions could formulate lists correspondingly. Aristotelian, Confucian, Buddhist and Christian capabilities lists could thus all be possible.

Different lists that reflect different valuative conceptions of human beings, and thus different virtues as instantiations of those conceptions, would still lend themselves however to a manifold understanding of each mode of flourishing and its respective virtues, so long as the focus continues to be on capabilities and allows for a wide range of combinations of functionings. That is, regardless of the particular formulation of the list, so long as an emphasis on capabilities remains central, the particular form of flourishing and the virtues it displays will be amenable to a range of possible realizations, which allows for a richer understanding of that form of flourishing and its associated virtues. Moreover, this versatility of capabilities lists and their amenability to different conceptions of virtue would be accommodating of elitist conceptions by means of varying the distributive paradigm. For instance, a Nietzschean capabilities list might be formulated to reflect a self-affirming valuative conception of the human being that emphasizes life-affirming creativity and the importance of individual style. By establishing a base line that determines possibility, distributions could then be prioritized for those most capable of realizing perfectionist values.

Generally, however, virtue ethical approaches that endorse capabilities could evaluate virtuous character in terms of an effort to promote whatever list of capabilities has been determined, and could do so both in terms of personal virtue

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as one directly acts to promote others' capabilities, and in terms of civic virtue as one supports a communal ethos that fosters capabilities. Both forms are important since the capabilities approach as an outcome-oriented not procedural conception of justice sees concerns with justice as transcending institutions and requiring an ethos of justice of individuals. Indeed, though Nussbaum advocates restructuring institutions and organizations to provide the social dimension of mixed capabilities, she nonetheless believes that justice requires the cultivation of citizens' sentiments in order to effect her vision of social change: as she says, securing dignity requires a public culture that puts altruism and the relief of misery at its core, and central to this are various educative campaigns to be conducted through both public and private endeavours (2011a, 96-97). To this end, a public culture must be fostered that promotes concern for dignity, and a personal virtue of justice that focuses on capabilities so that citizens will be motivated to address and redress unjust inequalities wherever they find them. Virtue ethicists thus concerned about civic virtue would find the capabilities approach particularly appealing, regardless how they would favour formulating the list.

5.6.4 Pragmatists

Lastly, pragmatists might find reason to support capabilities as the freedoms and ranges of capacities they secure provide space for a wide array of experiments in living. In particular, those who argue in the Deweyan tradition might have reason to embrace a political conception that focuses on capabilities. Central to Dewey's ethical theory is the notion of 'growth' which he conceives as

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the process by which organisms enhance their ability to participate in their natural and social environment, by exploring, qualifying, restructuring and utilizing the various possibilities and limitations they face. This is particularly important insofar as the world is conceived to be in fundamental process, so that organisms are constantly challenged to adapt to changing intersections between themselves and the world. Indeed, as human organisms do this well, they discover and elaborate new meanings in the world and consequently enrich their experience (Gouinlock, 240).

Given this basic conception, Deweyan pragmatists would see reason to support political principles and policies that foster human capacities to cope with and adapt to change. This is particularly the case insofar as many situations we face are both unprecedented and unpredictable, both as changes occur in ourselves as we develop new values and desires and expectations, and as the world undergoes novel social and material and ecological transformations. Capabilities thus seem well suited to securing these capacities insofar as they ensure wide substantial freedoms in the central areas of human concern, and emphasize the capacity for new valuations and new forms of living. Moreover, specifications of capabilities, as well as capabilities themselves, can be varied as populations deem them in need of alteration to suit their circumstances. Thus, transformations of the wider world, and populations' revaluations of how to make their way in it, are both accommodated by a capabilities perspective.

5.6.5 A Different Consensus

The convergence on capabilities from a variety of theoretical approaches should make us more confident in basing policies upon them. Indeed, this convergence can be seen as an overlapping consensus of plausible philosophical theories that endorse substantive liberalism and an alterable list of capabilities as the best means of implementing those liberal commitments. Importantly, however, such an overlapping consensus would differ from Nussbaum's political liberal overlapping consensus by not being bound by the beliefs and values of people's actual commitments. Instead, its grounding in substantive claims to truth or basic value means that whichever of these theories turns out to be correct, we have good reason to think it can endorse substantive liberalism and a commitment to basic capabilities.

6: Political Liberal Justification through Comprehensive Liberal Means

Nussbaum develops her capabilities approach as a partial theory of justice that is better able to diagnose and address injustice than resourcist and welfarist alternatives. Though she sees her theory as complementary to the best of these competing theories, she believes nevertheless that it has several advantages: its focus on outcomes accommodates variations between persons and circumstances elided by a procedural focus on distributions of resources, and its objective valuation of important capabilities affords critiques of decisions which perpetuate injustice through troublesome adaptive preferences, and of principles which countenance sacrifice of individuals for the sake of the greater social good.

As Nussbaum justifies her account however she pursues an ideal she is unable to realize. She morally justifies her list of capabilities in a way that is not beholden to individuals' valuations of them, but she politically justifies them on the basis of individuals being able to wilfully endorse them. When individuals both value and endorse the capabilities these forms of justification converge, but they can also be in tension, particularly given Nussbaum's expansive notion of reasonableness which allows people to reasonably reject capabilities so long as they are prepared not to force their views upon others.

Nussbaum attempts to dissolve this tension by addressing each type of justification. First, she claims that the moral content of her theory is subject to ongoing revision, such that failure to be able to endorse the capabilities can be reason to reevaluate the list's constitution. Second, she claims to facilitate critics' endorsement of the capabilities by means of the capability-functioning distinction

and her hermeneutical endeavour: capabilities can be endorsed without commitment to the value of any particular functioning, and can be endorsed in good conscience given compatibilities between the list and critics' worldviews and traditions.

In each case however Nussbaum's attempt to address the tension between the two forms of justification fails, because her hermeneutical endeavour allows political principles to be justified on the basis of distant entailment from critics' standing beliefs and values. Though the moral content of her theory in principle is open to revision in the case that endorsement is not possible, it is never quite clear when this failure obtains given her *in posse* notion of endorsement. Because critics' opposition may be due to adaptive preferences, it is proponents who determine whether critics are able to reason to accept the capabilities on the basis of their standing beliefs and values. Yet if political implementation of the capabilities can be justified on the basis of proponents' expectations that critics will endorse them, and if this expectation is based upon imperialistic interpretations of critics' self-understandings, then Nussbaum begs the question of the "plausible path" to endorsement that ultimately politically justifies her project (2011a, 90-91), particularly given the effect of interim implementation on the public culture and critics' standing beliefs and values.

But though Nussbaum's theory fails her ideal she may still be able to achieve it. Her political justification falls short of political liberal standards in the various ways we have seen, and faced with a choice between her two standards of justification she should relinquish her political standard given the basic moral

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importance she ascribes the capabilities. By advocating instead a comprehensive liberal standard she can implement the capabilities regardless of their actual or anticipated endorsement, and can avoid having to contrive their political justification by conceiving endorsement in deferred or *in posse* terms. This comprehensive standard however can help Nussbaum secure endorsement of the capabilities in the future. Though manipulating people into endorsing political principles is illegitimate on a political liberal standard when these are contrary to their standing beliefs and values, on a comprehensive liberal standard this is not only acceptable but astute given the moral and practical importance of citizens' non-alienation from governing principles.

Accordingly, though Nussbaum may well maintain that political liberalism is the only form of universalism that has a chance to be persuasive in the modern world, in the case of her capabilities this may only be possible through comprehensive liberal means. Given the extent of pluralism in modern societies and Nussbaum's understanding of what it means to be reasonable, her list may well achieve the widespread endorsement it requires for political liberal legitimacy, but only insofar as that endorsement is cultivated by methods political liberals would reject as illiberal.

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