STRENGTHENING THE CAPABILITY APPROACH: THE FOUNDATIONS OF THE CAPABILITY APPROACH, WITH INSIGHTS FROM TWO CHALLENGES

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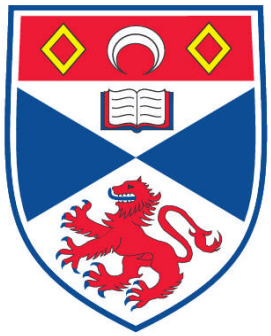
A Thesis Submitted for the Degree of PhD
at the
University of St. Andrews



2011

Strengthening the Capability Approach

The Foundations of the Capability Approach, with Insights from Two Challenges

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Submitted in fulfilment of the degree of Doctor of Philosophy

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24 September 2010

Abstract

The Capability Approach was initially developed by Nobel laureate Amartya Sen, with the first basic articulation presented in his 1979 'Equality of What?' Tanner Lecture. Since then, the approach has gained a huge amount of attention as a conceptual framework which offers a clear and insightful way to measure well-being and development. Most recently, the approach has been refined and extended by Martha Nussbaum to issues of disability, nationality, and species membership in political philosophy.

This project is about the foundations of the capability approach. More specifically, this project asks whether we can, and whether there are good reasons to, strengthen those foundations. The conclusions drawn here are that we ought to think seriously about the way that the capability approach develops as a theory that responds to real world challenges and change. More importantly, this project contends – in light of the challenges of future people and indigenous peoples – that there is good reason to think of new ways to ground the approach. This project takes up this challenge and grounds the approach in a modified version of Tim Mulgan's approach to well-being. This project demonstrates that this alternative enriches the capability approach by providing us with a way of making sense of important problems, and with options for moving forward.

Overall, this project asks important questions about how the capability approach could evolve based on challenges that remain relatively under-explored in the current literature. This project contributes to this literature by demonstrating that we can and ought to strengthen the capability approach and its ability to understand, take on board, and resolve these challenges.

For my Father and Grandfathers

I, **Krushil Watene,** hereby certify that this thesis, which is approximately **75,000** words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

I was admitted as a research student in **September 2007** and as a candidate for the degree of **Doctor of Philosophy** in **September 2007;** the higher study for which this is a record was carried out in the University of St Andrews between **2007** and **2010.**

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Acknowledgements

This project would not have been possible were it not for a good number of people. I wish to thank my supervisors Tim Mulgan and Berys Gaut. I owe a great deal especially to my primary supervisor Tim Mulgan. This project takes inspiration from Tim's work, and frames an alternative capability theory around his approach to well-being. Both *The Demands of Consequentialism* and *Future People* play a major role in this project, and have been an invaluable resource to me over the last three years. I am grateful for all of Tim's support and for all of his comments and direction on numerous drafts of all of my chapters. I am especially grateful for his patience. Thank you for your continued support in spite of my shortcomings. I could not have hoped for a better supervisor.

A special thank you must also go to my annual reviewers: Liz Ashford, Craig Smith, and John Skorupski. I am especially grateful for all of your helpful comments and suggestions, many of which helped me to shape and to complete this project. I am especially grateful to Liz and Craig who were, on numerous occasions, so very encouraging. I would also like to thank Alice Walla and Antti Kaupinnen for their encouragement, advice, and fine examples. For some very helpful comments on papers, I should also like to thank, Carolyn Benson, Rebecca Curzon, Ezra MacDonald, and Jesse Tomalty. For proof reading a number of chapters, I thank Nicola Clarke. For invaluable assistance with proof reading and editing a number of drafts of all of my chapters, I wish to thank Susan Watene.

This project has benefitted from comments at a multi-disciplinary conference held at Mansfield College, Oxford. I am especially grateful for comments from Nahshon Perez, Farah Ahmed, Muriel Kahane, and Alan Wong on a paper exploring Amartya Sen's approach to culture. This project has also benefitted from many of the papers given at a conference held at the University of Nottingham on the political philosophy of Martha Nussbaum. I am grateful to the Open University for kindly supporting my attendance. I am especially grateful for comments from Ruth Abbey, Tom Angier, Ignasi Llobera, and David Treanor on a paper examining Martha Nussbaum's approach and the problem of future people.

None of this would have been possible were it not for the belief and support of a number of people. In particular, I wish to acknowledge The University of Auckland, Faculty of Arts for a fees bursary for my first year at St Andrews – I am especially thankful to Pauline Sheddan, Tracey McIntosh, and John Morrow for all of their kindness and support. I wish to thank the New Zealand Federation of Graduate Women for a Doctoral fellowship during my first year. I am especially grateful to Nga Pae o te Maramatanga a doctoral scholarship covering my fees during my second year. I am grateful to the Maori Education Trust, and Te Runanga a Iwi o Ngapuhi for their support. I wish to also thank and acknowledge (in particular) Ngati Whatua for their continued and unwavering commitment to education. Finally, I wish to thank the Margaret Roddan Trust and the Philosophy Department at the University of St Andrews for invaluable support during my final year. It is certainly no over-exaggeration to say that without all of your support, this project would not have been possible.

I have very much benefitted (and greatly enjoyed) working on the Open University MA programme in Philosophy during my second and now my final PhD year. Not only has this made remaining in the UK financially viable, but it has also been extremely helpful for my own work. I wish to thank all of the MA students that I have had the privilege of working with. I would also like to thank David Roden and Paul Harkin for all of your support and advice during my first year.

I started out at University unsure of what I was going to do. I realise now that I have been extremely fortunate to have learnt a great deal from a number of people during (especially) my graduate years, many of whom encouraged me to undertake this project. I am grateful to the Faculty of Arts Equity Programmes under the leadership of Carmel Sepuloni and Leighton Robb. My time spent in numerous roles, and as a Tuakana mentor in particular, continues to shape my approach to teaching and learning. I am also thankful for the time I spent with the Maori and Pasifika branches of the Student Learning Centre with Matt Tarawa and Mona O'Shea. I learnt a great deal in my role there – much of which still helps me now. I would also like to acknowledge Prof. Okusitino Mahina for his leadership. Finally, I am grateful to the Philosophy Department at the University of Auckland. I am especially grateful to Phillipa Malpas and Zain Ali for encouraging me to, one day, do this. I am also grateful for all that I have learnt from Gillian Brock, Rosalind Hursthouse, Vanya Kovach, and Jonathan McKeown-Green.

Of course, my final thank you must go to my family. In particular, I wish to thank my grandmother, my mother, and especially my Aunty Sue. Thank you for all of your support during periods of very serious self-doubt. To all of my whanau, thank you for all of your advice, encouragement, patience, and love.

Contents

1. The Capability Approach

The capability approach was initially developed by Nobel laureate Amartya Sen with the first basic articulation presented in his 1979 'Equality of What?' Tanner Lecture.[1] Since then, the approach has gained a huge amount of attention as a conceptual framework which offers a clear and insightful way to measure well-being and development. Most notably, the approach has been influential in the Human Development Reports and the Human Development Index, both of which utilise the expansion of capabilities as a comparative tool.[2] The approach is inherently inter-disciplinary and influenced by a range of thinkers including, and most notably: Aristotle, Adam Smith, John Stuart Mill, Karl Marx, Isaiah Berlin, and John Rawls.[3] Given this diversity, the approach has and continues to be extended, refined, reconsidered, and applied in a number of ways and by a number of thinkers and practitioners.[4] Most recently, the approach has been refined and applied by Amartya Sen and Martha Nussbaum in different ways to questions of justice in contemporary political philosophy.[5] These developments, and this particular divergence, have led to interesting debates between and within the approach. Most notably, this divergence has given rise to two different schools of thought – both of which are well-established and influential in their own right.

Even with this momentum and divergence, the approach remains relatively under-explored in light of a number of challenges. Thus, the approach remains under-developed in terms of what insights these challenges are able to provide the approach with. There is, then, good reason to consider some of these challenges, and to consider what insights they bring to the way that the

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[1] Sen (1980)

[2] The HDI (Human Development Index) was described by Mahbub ul Haq (1995) as aiming 'to shift the focus of development economics from national income accounting to people centered policies'. What's more, the aim of human development (as stated in the first Human Development Report) is 'both the process of widening people's choices and the level of their achievement and well-being', UNDP (1990) p.9. The most recent UNDP report (the 20th Anniversary Edition of the Human Development Report) features the 'Multidimensional Poverty Index' (MPI) developed by the Oxford Poverty and Human Development Initiative (OPHI). On the influence of the capability approach for human development and the UNDP Reports see: Fukuda-Parr (2003), Sen (2000), UNDP (1990-2010).

[3] On Aristotle see Sen (1999) p.14 and 24, (1993) pp.46-8, see in particular Nussbaum (1988). On the influence of Adam Smith, see Sen (1999) p.289, (1992) p.8, (1993, 2009, 2010a). On the influence of John Stuart Mill see Qizilbash (2006b), (2008) pp.54-60. On the influence of Karl Marx see Sen (1999), Nussbaum (2006a). For a tribute to Isaiah Berlin see Sen (1999) p.349 n.1. On the influence of John Rawls see Sen (1999) (2009), and Nussbaum (2000a) (2006a).

[4] Alkire (2002), Alexander (2008), Crocker (2008), Dreze (1989), Fukuda-Parr (2003), Holland (2008), Kuklys (2005), Macleod, (2010), Terzi (2010) For an overview of the literature see: Deneulin *et al.* (2009). There have also been a number of edited volumes dedicated to the capability approach including: Nussbaum *et al.* (1993), Nussbaum *et al.* (1995), Agarwal *et al.* (2005), Vaugh *et al.* (2007), Comin *et al.* (2008), Deneulin *et al.* (2009), Brighouse *et al.* (2010)

[5] Nussbaum (1999) (1993) (2000a) (2006a), and Sen (1999) (1992) (1985) (1987) (2009)

approach can and possibly even should develop. In particular, there is space to consider other ways to shape the foundations of the approach, and good reason to ask whether the approach can and should be strengthened. At least, the main aim of this project is to demonstrate that this is the case.

1.1 Overview

We begin, in section 1.2 by introducing the approach and its key concepts. This is followed by an examination of the key differences between the formulations and articulations provided by Amartya Sen and Martha Nussbaum. This helps us to get a sense of what the approach aims to do, and how different orientations have developed. It also gives us some idea of the main challenges and questions that the approach confronts and faces. More than anything else, this section provides us with the backdrop central for our examination of the approach. In so doing, it assists us with generating and justifying the alternative that we present and assess in later chapters.

Our concern in chapter two is to examine what has become the trademark difference between Nussbaum and Sen's articulations of the capability approach. That is, the question of whether we ought to advocate a list of capabilities. We do this for two reasons. First, it helps us to understand how and why Sen and Nussbaum's theories are relevant, albeit in different ways, in later chapters. More importantly, it helps us to get a sense of why we examine Nussbaum at length in chapter three, and why we revisit Sen in chapter four. Secondly, we want to point out that Sen and Nussbaum are engaged in two very different capability-centred projects. This helps us to bring out the point that their underlying motivations are more significant to the way that the approach develops, than the question of whether or not they offer a list.

Chapter three turns to critically engage with the way that Nussbaum extends her version of the approach. We focus on Nussbaum for two reasons. Firstly, focusing on Nussbaum helps us to build on the conclusions drawn in the second chapter. In particular, it helps us to demonstrate how the scope of the theory largely depends on the foundations we use to underpin it. So, we demonstrate how Nussbaum's conception of dignity is able to deal with issues on which an account of agency remains silent. Secondly, examining Nussbaum's approach helps us to demonstrate why there is still more work to be done. In particular, it helps us to draw out two problems (problems stemming from listing capabilities, and the inevitability of conflicts) that Nussbaum's approach runs into, and which we ought to be able to take on board if we want to

move the approach forward. Nussbaum's inability to deal with these problems provides us with the conclusion that there is good reason to consider formulating an alternative.

Our aim in chapter four is to take up this challenge and to consider one alternative to grounding and extending the capability approach. Our aim is to capture the issues that Nussbaum's approach manages to include (disability, nationality, nonhuman animals), but also to deal with the two problems mentioned at the end of chapter three. In so doing, we build on and redevelop the capability approach in ways that see us revisit insights from Sen's approach. More specifically, we draw on Tim Mulgan's approach to well-being and we highlight what this brings to the capability approach. We demonstrate the ways in which Mulgan's approach to well-being, if taken on board, help to strengthen the foundations of the capability approach.

Building on chapter four, chapters five to eight demonstrate that there are challenges beyond those that Nussbaum (directly) considers that justify a development of the kind that this project puts forward. Chapter five introduces the challenge of future people, a challenge which Nussbaum acknowledges but which she overlooks in favour of John Rawls' solution. The main aim of the chapter is to make sense of Rawls' solution to this problem, and to consider the problems that Rawls' solution faces. This chapter demonstrates that Rawls fails to offer a wholly adequate theory that deals with future people. For this reason, this chapter stresses that there is good reason to be concerned that Nussbaum affirms Rawls' theory and neglects to take this challenge on board.

Chapter six follows this up and examines the kind of answer that the capability approach (and particularly Nussbaum) is going to give to the challenge of future people. This helps us to demonstrate how the inclusion of future people turns out to be problematic for Nussbaum's approach, and to exacerbate the problems mentioned at the end of chapter three. For this reason, the chapter demonstrates how and why the alternative capability theory (one grounded in Tim Mulgan's approach to well-being) is superior to Nussbaum's approach. We demonstrate that the alternative provides guidance on questions which current articulations of the approach remain silent.

Our final two chapters focus on challenges stemming from the recently adopted *Declaration on the Rights of Indigenous Peoples*. Our discussion brings together two equally important conclusions. The first is the general claim that we ought to consider redeveloping the capability approach in the

ways suggested. In other words, it helps us to further the general claim of this project, albeit in light of recent challenges. The second claim is that the capability approach is *worth* developing. We illustrate this point by demonstrating that the capability approach is able to speak to developments that shape, and continue to shape, the lives of real people.

Two problems provide the focus for chapter seven. The first is the *incompleteness* of the declaration. In particular, we focus on the way in which there is a real lack of specificity regarding: 1) what realising the contents of the declaration might require, and 2) who the declaration speaks to. Our aim is to demonstrate that this incompleteness is both justified and required. It is claimed, therefore, that the challenge is to accommodate rather than to remove this. The second and related challenge is whether we are able to capture indigeneity and indigenous self-determination within liberal theory. We examine two recent attempts to make sense of and to include indigeneity, and we show why (in the end) they fail to do so. Our discussion leads us to revisit familiar problems, and to highlight that more needs to be done to address them.

Our final chapter is primarily concerned with how and whether the capability approach is able to include indigenous peoples within the approach. Our conclusion is that indigenous peoples turn out to be problematic for the approach. Not only does it look like the approach has difficulty including indigenous peoples, but indigeneity provides us with a new source of conflict. There is, then, even more reason to be concerned that Nussbaum provides us with no clear way of moving forward on the conflicts that arise. This allows us to (again) demonstrate how useful the needs, goals, and other goods distinction is for the capability approach. We show that the added structure and flexibility that it brings to the capability approach is beneficial. We conclude by pointing out, therefore, that the needs, goals and other goods distinction gives us a way of enriching the capability approach in light of indigenous peoples.

This project is about the foundations of the capability approach. More specifically, it asks whether we can, and whether there are good reasons to, strengthen those foundations. The conclusions drawn here are that we ought to think seriously about the way that the capability approach develops as a theory that responds to real world challenges and change. More importantly, this project contends – in light of the challenges of future people and indigenous peoples – that there is good reason to think of new ways to ground the approach. This project sees itself, therefore, as asking important questions about how the capability approach could

evolve based on issues that remain relatively under-explored in the current literature. If this project is successful, it will contribute to this literature by demonstrating that we are able to strengthen the approach and its ability to understand, take on board, and resolve significant problems.

1.2 The Capability Approach

The fundamental assertion made by the capability approach is incredibly simple. When we think about well-being and development – we should think about these things in terms of what individuals are capable of doing and being. That is, we should pay attention to the kinds of lives individuals live, and to the choices they have to live the kinds of lives they value.[6] The importance of such a simple move is made clear once we consider the challenge that it poses for alternative ways of understanding well-being and development. Unlike traditional development methods, which tend to focus on GNP per capita, income, or basic needs (traditionally understood), the capability approach allows us to see that these measurements alone are insufficient. GNP per capita and income tell us nothing about the worst-off or the actual distribution of goods within society. Basic needs, though important, tell us nothing about the kinds of lives individuals are able to live.[7]

This concern with the kinds of lives individuals are able to live prompts Sen to conclude, in light of Utilitarian and Rawlsian understandings of equality, that:

> What is missing in all of this is some notion of "basic capabilities": a person being able to do certain basic things [...] the ability to meet one's nutritional requirements, the wherewithal to be clothed and sheltered, the power to participate in the social life of the community. The notion of urgency related to this is not fully captured by either utility or primary goods or any combination of the two."[8]

In contrast to resource-based approaches, the capability approach recognises that our abilities to convert goods or resources into valuable activities are influenced by differences in our own abilities as well as social and environmental factors. In other words, individuals may require significantly different kinds and amounts of resources to achieve the same level of functioning.

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[6] Sen (1999) p.18

[7] See Sen (1999) pp.1-6, Nussbaum (2000a) pp.4-6, (2006a) pp.72-73, 282-283, Robeyns (2009), Deneulin (2009a), Crocker (2008) pp.113-116, 129-140.

[8] Sen (1982) p.367

> What people get out of goods depends on a variety of factors, and judging personal advantage just by the size of personal ownership of goods and services can be very misleading [...] It seems reasonable to move away from a focus on goods as such, to what goods do to human beings.[9]

To use Sen's most famous example, a person in a wheelchair will require more resources than an able-bodied person to reach the same level of 'ability to get around'.[10] Likewise, if a particular group of individuals are discriminated against (say) in terms of their ability to be employed or educated, then this group will require more resources to ensure that they are able to obtain access to employment and education opportunities. In other words, we ought to be interested in what role particular resources play in our lives and whether they make a difference to the lives we live.

In contrast to happiness or preference-based approaches, the capability approach contends that a focus on happiness or preference-satisfaction alone may not be able to detect the way that our preferences or desires are sometimes a response to entrenched deprivation. As Sen writes:

> A person who has had a life of misfortune, with very little opportunities, and rather little hope, may be more easily reconciled to deprivations than others reared in more fortunate and affluent circumstances. The metric of happiness may, therefore, distort the extent of deprivation, in a specific and biased way. The hopeless beggar, the precarious landless labourer, the dominated housewife, the hardened unemployed or the over-exhausted coolie may all take pleasures in small mercies, and manage to suppress intense suffering for the necessity of continuing survival, but it would be ethically deeply mistaken to attach a correspondingly small value to the loss of their well-being because of this survival strategy.[11]

In other words, any theory which takes happiness or the satisfaction of preferences to have some importance needs to have some way of also capturing the importance of the conditions within which these preferences arise. If preferences can be shaped by extremely unjust background

[9] Sen (1982) pp.29-30
[10] Sen (1982) p.367
[11] Sen (1988) p.45

conditions, then focusing on preference-satisfaction looks to be extremely worrisome.[12] On the back of this worry, Nussbaum claims that she rejects:

> Utilitarian preference-based approaches as a basis for fundamental political principles precisely because they [are] unable to conduct a critical scrutiny of preference and desire that would reveal the many ways in which habit, fear, low expectations, and unjust background conditions deform people's choices and even their wishes for their own lives.[13]

This problem (adaptive preferences) tells us that something is terribly wrong with a purely subjective account of well-being. More importantly, it tells us that we ought not to take what one prefers or desires to be the *sole* unit of value. Given that our desires and our goals can be manipulated by a lack of real choice, unequal power relations, and situations of vulnerability – it looks as if we want to know what shapes our preferences, not simply what they are.

It is important to point out that while the capability approach is a response to the shortcomings of standard utilitarian and resource-based theories, it is not constructed simply as an outright rejection, and consequently as a substitution to all of the alternatives. Possessing goods, having one's basic needs met, being satisfied or happy, these are all important within the informational base of the capabilities. After all, an important part of being able to live a life that one values clearly involves possessing (or at least being able to possess) at least some goods, being satisfied and happy, and it most certainly involves having one's basic needs met. The claim which the approach wants to make is (in many ways) one of unity rather than dismissal. The approach asserts, then, not only that the standard units of value are insufficient on their own, but that each of them can be accommodated and extended within the space (and pluralism) of capabilities.[14]

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[12] Nussbaum (2000a) chapter 2, Sen (1995) pp.54-55. There is, of course, a huge amount of literature devoted to the problem of adaptive preferences. This literature considers how we might address this problem, and indeed asks whether it is a problem at all. This literature is beyond the scope of this project. For an overview of some of the issues see Qizilbash (2006a).

[13] See Nussbaum (2000a) p.118. One way to describe Nussbaum's *Women and Human Development* is to refer to it as a work which (among other goals) successfully uncovers the serious flaws in Utilitarian preference thinking. Indeed, this is precisely the way that Nussbaum described the book (within the context of the development of her own approach) at the Human Development and Capability Approach conference in New Delhi, India (2008).

[14] This point is most obvious when we examine Nussbaum's list of valuable capabilities – examined in chapter two – which brings together each of these elements of well-being. In addition, although Sen spends a lot of time contrasting the space of capability with resources, rights, and happiness, see Sen (1984), (1985), (1999), (2005). Sen's understanding of 'functioning' (which we will go on to discuss) includes these spaces. As we will also go on to discuss, this is indicative of the way in which Sen (at least initially) introduced the approach (the capability space or

Overall, the capability approach simply claims that if we want to accept that the kinds of lives individuals are capable of living is key to understanding development and well-being, then many of the standard ways of interpreting well-being and development fall short of pointing us in the right direction or providing us with the right kind of information. For this reason, the approach is motivated by a desire to conceptualise well-being and human development, and to influence and improve on the values and methods we employ. In order to understand well-being and development, the approach wants to say that we need to understand what a person is capable of doing and being, and we need to place functionings and activities at the centre of our methods. Similarly, the approach is motivated by an attempt to locate the right kind of currency for buying into discussions about how we might achieve the kind of society that matters; and wants to better understand, identify, and treat obstacles to this end. The approach is motivated by a desire for real world change.[15]

1.2.1 Functionings

Amartya Sen and Martha Nussbaum are the leading proponents of the approach. Despite sharing many similarities, there are important differences between their respective articulations of the capability approach.[16] Differences aside (for the time being), there are at least two concepts, namely *functionings* and *capabilities*, which any formulation of the approach must comprise. Both of these concepts are what separates the approach from other ways of understanding well-being and development, and they are both essential in any capability-centred exercise or discussion.

In agreement with Aristotle, the capability approach views valuable functionings as an important part of living well. A valuable and developed society is, thus, one where people are able to achieve these valuable functionings.[17] Functionings are 'the various things a person may value doing or being', which are '*constitutive* of a person's being'.[18] Functionings are, then, activities or states of being which have been or are being achieved. For example: being nourished, being educated, being healthy, working, associating with others, participating in political life – all of these things are (in the form articulated) functionings.

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metric) as adding to and being compatible with other frameworks, especially the Rawlsian framework. See Sen (1997) p.320.

[15] Much of Sen's work is dedicated to the study of famines, and his recent book (and 'comparative approach' to justice) is a clear example of his commitment to motivating real world change – see Sen (2009). The same can be said of Nussbaum's work, the focus for which has always been partly practical and policy oriented, see Nussbaum (2006) (1997) (2002).

[16] For an overview of these differences see: Crocker (2006) part two.

[17] See Sen (1992) p.39 (1999) p.73. See also Nussbaum (1988, 2001a, 2006)

[18] Sen (1999) p.75

Sen explains functionings by referring to the activity of riding a bike.[19] In such a situation, we are able to differentiate between the bike itself (as a good), riding the bike (as an activity), and the experience of doing so (as a mental state). At this point we need to ask ourselves what the functioning in this picture is, with the most obvious answer being that only *riding the bike* is an achievement or functioning. This, however, would be a mistake. Not only does an activity of some sort underlie each of the situations listed, but Sen extends the idea of a functioning to include any 'state of existence of a person'.[20] In this way, *possessing* a good (in this situation a bike), one's *choosing* to ride the bike, *experiencing* pleasure or pain and any other flow on benefits that one may get out of it (like being healthy), are functionings just as much as the activity of riding the bike itself.

There are a few things to say about this understanding of functioning. First of all, on this view one is always engaged in some activity or functioning – such as when one is eating and drinking, laughing, sleeping, thinking, and participating in public life. Secondly, functionings are not independent activities, either achieved or achievable on their own, but interdependent clusters or groups of functionings (which Sen calls functioning vectors[21]) which each rely on a range of diverse actualities and possibilities. When one wants to achieve the functioning of 'riding a bike' (for example) one must be able to possess one (at least temporarily), one must have a certain amount of space and physical ability, and one must also have a certain amount of freedom to do so.

The ground covered by the concept of functionings is, then, vast and diverse. This means that a number of differentiations and ways to organise them is possible. For instance, we are able to differentiate between: physical, emotional, as well as intellectual functionings.[22] In addition, we can differentiate between functionings that are required for or that generate others, as well as those that prevent others from being available or developed.[23] A related question (and for some the most important question) is whether we can (and even should) differentiate between

[19] See Sen (1984) p.334, (1985) p.10. See also Crocker (2008) p.164
[20] Sen (1985) p.10, quoted in Crocker (2008) p.164.
[21] Sen (1992) p.40
[22] There are a number of ways in which to differentiate between functionings – this is merely one used as an illustration.
[23] For instance, Jonathan Wolff and Avner De-Shalit claim that we can differentiate between 'corrosive disadvantages' and 'fertile functionings'. In other words, some functionings give rise to others or make the development of others possible or more likely (such as education). On the other hand, some disadvantages give rise to other disadvantages or make the development of others more likely (such as a lack of education or employment opportunities). See Wolff *et al.* (2007) pp.21-2

functionings that are valuable, and those that are not. This prompts at least two important questions for the approach and its concept of functionings: 1) what role does the concept of functioning play in understanding and measuring well-being and development? 2) Which functionings are we to endorse, and how do we value them? These questions lead us to the importance of the concept of capability, and to an important question concerning the nature and the shape of the approach overall. Indeed, as we will see, one of the most important debates within the approach has been how (and whether) we ought to determine the value of particular functionings.

1.2.2 Capability

The importance of the concept of capability becomes clear when we recognise that the question of valuable functionings must be responsive to a diverse and complex world, and capture at least part of what the good life is for (at least) human beings. The preceding section tells us that some functionings are going to be more valuable than others, but the concept of capability helps us to see that the functionings which one *intends* to achieve and which are freely chosen are meaningful in ways not found in those which occur arbitrarily. For this reason, a focus on achieved functionings alone would be incomplete, because a focus of this kind would not be in a position to accommodate the importance of choice and agency. This is why, although the concept of functioning is central, the key to understanding and promoting development and well-being is to view it as the 'expansion of capabilities people have to lead the kinds of lives they value – and have reason to value'.[24]

Even so, it would be a mistake to take the concept of capability in isolation. After all, a focus on capability (alone) is incomplete. A focus on capability could, after all, underwrite a needs-based or preference-based approach (being able to have one's needs met, or to have one's preferences satisfied). Thus, it would be a mistake to locate and hold the concept of capability in opposition with other evaluative spaces such as: needs, resources, preferences, and the like. Notice, for instance, that each of these spaces and metrics correspond with (even though they may neglect) particular functionings (activities) and the diversities that underlie them. Thus, the capability

[24] See Sen (1999) p.74. It is important to point out that this is a site of much disagreement. There is, that is, a serious question about whether the focus ought to be capability, functionings, or some combination of the two. Of course, this debate is not specific to the capability approach, and is part of a much broader debate about opportunities and outcomes. This project does raise this question in later chapters. See Phillips (2004), Fleurbaey (2006), Robeyns (2006) pp.353-5, see also Nussbaum (2006a) pp.171-3

approach and its focus on functioning tries to capture why needs, particular resources, or desires are significant – and why being able to function ought to take priority.

So, while the focus is on capability, it is a mistake to take this as a claim against functioning. An example often used by Sen and Nussbaum in capturing the focus of capability is exemplified if we take on board important differences between people who are starving and people who are fasting.[25] To be clear, people who are starving and people who are fasting are at the same level of functioning in relation to their being nourished (basically, neither of them are nourished). However, people who are starving lack an important capability, namely the capability to be nourished. People who are fasting, then, have the option or capability to be nourished, while people who are starving do not. It is this difference that the approach, and its focus on capability to function, sets out to capture. The focus should be on creating conditions whereby a person is capable of choosing to fast, and where starving (understood here as capability deprivation) implies (among other things) a lack of freedom.

The introduction of the concept of capability is a representation of things that one must be able to do and be (rather than doings and beings). It is important to stress, therefore, that capability to function prompts us to differentiate between general opportunities and a person's list of *real* choices. There is, for instance, an important difference between opportunities that exist and those that are truly available to someone in a particular situation and at some particular time. For this reason, the approach assesses opportunities in relation to the lives that they affect, rather than in general. It would be easy to overlook the subtleties that underlie whether opportunities are actually available. After all, we could view the availability of food, education, or medical treatment as capabilities. However, if this food or these schools are in an area beyond reach or if they do not make a difference to one's life, then the opportunities are unavailable. Similarly, if a wheelchair access door is never unlocked, then access freedoms for wheelchair users are unavailable. Attention is, thus, paid to differences in real opportunities (in real terms) for individuals and their lives.

1.3 Sen and Nussbaum: Key Differences

Given that the approach is both inter-disciplinary and broad, there ought to be no surprises that Sen and Nussbaum differ in the strategies that they employ and in their interpretations of the key

[25] Sen (1999) p.75, Nussbaum (2000a) p.87

concepts. After all, a focus on capability and functioning only gives us the basic building blocks to work with. Our basic overview of the concepts of functioning and capability help us to get a sense of the general flavour and nature of the approach. In what follows, we consider three differences, each of which will help us to set up for proceeding chapters and to better understand how Sen and Nussbaum's respective articulations of the approach develop and (we ought to add) are able to develop.

1.3.1 Functionings and Capabilities

Both Sen and Nussbaum set out from within human experience, and so utilise very similar foundations for grounding the approach.[26] Yet they slightly differ in the ways that they theorise about, and arrive at, the concepts and foundations. They both engage with and utilise classical literature – Sen refers to (among other texts) the *Bhagavad Gita* and Nussbaum draws on Greek tragedy and literature in grounding and carving out the approach. What's more, they both draw on a range of thinkers. However, Nussbaum utilises Greek literature and Aristotle far more overall, while Sen's approach has maintained a strong link to, and use of, the ideas of Adam Smith. There are a number of reasons for this, but what is important to take on board is that this is a clear indication of how their respective articulations of the approach are being used and arrived at in different ways.[27] Sen's background in welfare economics and Nussbaum as an Aristotelian scholar affects how they approach development ethics and political philosophy. This difference is significant – since, as we will see, it helps us to understand the nature of the differences between Sen and Nussbaum in light of their understandings of capability and functioning.

The concept of functioning (as mentioned above) is relatively straightforward. Yet, much like anything else, the way in which this concept is defined, and more importantly what is included within its scope, has important consequences for how the approach is shaped and applied. Here then it is important to locate and separate the differences between their uses of the concept of 'functioning'. Most proponents of the approach, Nussbaum included, are going to be happy to accept that functionings are going to cover a wide range of doings and beings, and that they exist in groups (vectors). However, there is space and reason to have differing opinions on what should be considered a separate functioning in the way that Sen assumes. So there are two points at which Nussbaum's use of the term functioning differs from Sen's. Recall that Sen's use of the

[26] We will go on to discuss this further in chapters 2 and 3, see Crocker (2008) p.110

[27] This is a point that Robeyns makes in light of the list question (discussed in the next chapter). See Robeyns (2005a)

term covers both: 1) the act of choosing itself, and 2) the mental states of pleasure and happiness. As the bike riding example demonstrated, each component part which makes up and is caused by the bike riding activity is understood as a separate functioning. A functioning on this view is simply whatever we are doing and whatever state of being we are in.

Nussbaum is uncomfortable with viewing both choosing and pleasure as separate functionings. On the issue of choosing itself, Nussbaum is concerned about this move because choosing without functionings would be something transcendental – and this she takes to be problematic for a human-centred approach.[28] The move that Nussbaum is far more content to make, then, is one where the act of choosing is assumed to be understood simply as a *component* of functioning. That is, and something which Crocker highlights, it is something which is made possible by someone's *ability to choose* by virtue of having the functioning of something much like practical wisdom.[29] In addition, Nussbaum disagrees with Sen insofar as he takes pleasure and happiness to be separate functionings. Instead, Nussbaum (following Aristotle) views pleasure and satisfaction as 'supervenient' rather than separate.[30]

> According to EN X [Aristotle, *Nicomachean Ethics*, Bk X] pleasure supervenes upon the activity to which it attaches, like the bloom on the cheek of a healthy young person, completing or perfecting it. Here pleasure is not identical with the activity; but it cannot be identified without reference to the activity to which it attaches. It cannot be pursued on its own without conceptual incoherence, any more than blooming cheeks can be cultivated in isolation from the health and bodily fitness with which they belong. Still less could there be a single item, pleasure that is separable from *all* the activities and yielded up by all of them in differing quantities.[31]

Notice here that Nussbaum is far more interested in maintaining a close connection between capabilities and functionings. For Nussbaum, capabilities derive their value from the value of functionings, and functionings derive value from the way in which they enable us to realise capabilities. For Nussbaum then, there are strong and necessary links between the two concepts.

1.3.2 Pluralism

[28] Crocker (2008) pp.164-168
[29] Crocker (2008) p.167
[30] See Nussbaum (1990) p.57, (1986) pp.294–5, for a full overview of this difference see: Crocker (1995) p.155.
[31] Nussbaum (1990) p.57, (1986) pp.294–5, quoted in Crocker (1995) p.155

The capability approach is inherently plural. The approach is open to a variety of functionings and capabilities and views human life as involving and needing a range of activities, from the very basic to the most complex. As mentioned earlier, the approach is able to incorporate significant elements of other metrics and spaces into its informational base – giving it a broad and inclusive construction and outlook. In many ways then, this pluralism is something which the approach assumes and endorses. A single unit of measurement or a complete and contained value would neglect the range of activities and reasons which make up and underpin our lives as human beings. Both Sen and Nussbaum endorse and allow for a plurality of goods, values, and experiences as a result.

Sen, however, goes beyond this basic level of pluralism and differentiates between four spaces within which advantage can be measured. Sen differentiates between: 1) Well-being and Agency, as well as 2) Freedom and Achievement. This allows Sen to measure and compare advantage in at least four spaces, including:

i. Well-Being Freedom
ii. Well-Being Achievement
iii. Agency Freedom
iv. Agency Achievement.[32]

It is important to point out that the concepts of capability and functioning are not lost in this extension, but simply reframed and realigned.[33] *Achievement* is concerned with what one manages to accomplish, and *freedom* is concerned with the real opportunity that one has to accomplish what they value (the capability and functionings distinction is clear here). It is, thus, the distinction between *agency* and *well*-being that is significant. *Agency freedom* is the freedom to bring about the achievements one values and which one attempts to produce, while *well-being freedom* is the freedom to achieve those things that are constitutive of ones well-being. Thus, Sen is differentiating between different kinds of functionings and asserts that these differences demonstrate how advantage can be measured in each of the above mentioned ways.

[32] Sen (1984) (1992) pp.39-42, pp.56-72 (1999) pp.189-91
[33] Importantly, Sen views capability as opportunity and aligns it with well-being. See Sen (1984) (1983) (1999). This project takes this to be a mistake and contends that this limits the concept of capability unnecessarily. What's more, Sen has recently extended his use of the concept of capability to include also having a *power* – thus, and in line with this move, this project takes capability to be richer than merely opportunity. See Sen (2009) p.205-6

Sen further explains and cements this pluralism when he introduces the concepts of opportunity freedom and agency freedom in his *Development as Freedom*.[34] A person's opportunity freedom (or well-being freedom) is a freedom to achieve something – it refers to what possibilities a person has for achieving certain functionings. Agency freedom or process freedom is a freedom to decide something – the ability to be part of the processes by which those opportunities and functionings are decided and valued.[35]

If we take it to be the case that well-being and development is about 'expanding valuable capabilities' then this distinction within the concept of capability is necessary and extremely crucial. If, for instance, we simply understand capability as increasing an individual's range of options then this says nothing about what individuals are able to choose between, what role they have had in determining them, and whether the choices themselves have any value. The recognition of agency and agency freedom allows us to say something about the kinds of choices and opportunities which individual's make and have. In other words, it highlights that one ought to be interested not just in the number of opportunities and options one has, but also in the quality of those choices for the agents themselves. This helps us to recognise that there are different ways in which to affect one's well-being, and that simply *more* options is no guarantee that our lives will be made any better.[36]

The extension of the concepts of capability and functioning in these directions are significant, and central to the way that Sen's approach develops. One key concern, and what Sen hopes to capture, is how our actions and reasons for acting are affected by a number of different things, some of which do not add to our own (personal) well-being. Indeed, sometimes we act on those things which are not directly related to our personal well-being at all, but which are expressions of our agency. For instance, individuals often participate in hunger strikes for political purposes. We cannot say that one's well-being is achieved in such a case, but rather that agency has been achieved at the *expense* of well-being. An important motivation for this move then, is a concern for redefining well-being and development, and central to this aim is capturing what we have reason to do and be. Unlike traditional economic theories which claim the individual to be

[34] Sen (1999) chapter 1

[35] Sen starts (especially in *Development As Freedom*) using the term 'freedom' more centrally within his work and begins to highlight that the concept of capability is only one aspect of it (the opportunity aspect of freedom). Again, this project takes this to be a mistake.

[36] As Sen points out, 'sometimes more freedom of choice can bemuse and befuddle and make one's life more wretched'. Sen (1992) p.59, quoted in Alkire (2002) p.7

motivated primarily (if not entirely) by self-interests – this move tries to demonstrate that these motivations cannot (and should not) be generalized.[37]

This move also demonstrates Sen's general willingness to account for human diversity and pluralism. For instance, Sabina Alkire notes that there is an important connection to be made between these spaces of advantage and the inner workings of Sen's concept of freedom. Alkire suggests that Sen wants to take account of the way in which freedom is an irreducibly plural concept, where different freedoms increase and decrease simultaneously.[38] As we pointed out, the person who chooses to go on a hunger strike for political purposes increases their agency at the expense of well-being. Here we see that if we limit the space of freedom, we overlook other equally as important spaces. Moreover, we overlook that these spaces of freedom are often in conflict. Thus, this pluralism is motivated by a desire to move away from advocating a singular and complete unit of value. Furthermore, it is based on a concern for ensuring that anything overlooked can be incorporated within the approach, something which (as we will discuss below) relates to the importance that Sen places on the incompleteness of his approach.

While Nussbaum agrees with the distinctions between well-being and agency, and freedom and achievement – she is not interested in breaking the capability approach down any further than she thinks is completely necessary. Nussbaum agrees with the demarcation of the four spaces listed, but she does not see any added benefits in introducing the terms. Quite simply, Nussbaum thinks that the concepts of capability and functioning are able to do all of this work.[39] This is telling, Nussbaum is far more interested in offering a coherent and well-packaged approach to problems of social and global justice then she is with explicitly committing herself to the range of interpretations and spaces. Again, Sen is confronting challenges central in welfare economics, while Nussbaum – already situated within the political thought of Aristotle and (more recently[40]) John Rawls need not deal with these issues directly. In line with these reasons, Nussbaum is careful not to introduce or re-use terms which carry philosophical baggage. Nussbaum prefers to distance herself from reintroducing terms like freedom and well-being – opting instead to stick to capability and functioning.

[37] Crocker (2008) chapter 5
[38] Alkire (2005) p.9
[39] Nussbaum (2000a) p.14
[40] We go on to examine this development in chapter 3.

What does this tell us about the approach in general, and what does this tell us about the question of value in particular? The first point to make is that these differences are significant for the way that Sen and Nussbaum use and are able to use their approaches (discussed next). Secondly, there is going to be a limit to how far the capability approach can go in organising society – and for this reason, both Sen and Nussbaum accept that the capability approach is only a partial theory (of justice).[41] Both Sen and Nussbaum acknowledge that while capabilities and the capability space are central to understanding justice, the capability space is not entirely adequate for it. Not only will a commitment to pluralism and the possibility of other values commit one to this very conclusion, but it tells us that the real challenge for any extension of the approach is whether new insights can be taken on board.[42]

1.3.3 Flexibility and Incompleteness

If the aim should be to expand capabilities, then the question of value must be raised. In particular, or so one would assume, we need to ask ourselves which capabilities to function are those which we should endorse.[43] This gives rise to some of the most important questions for the approach. How do we value capabilities? What kind of framework best understands the aims of the approach? By what process should value-judgements be made? At least, it seems that if our concern is to 'expand capabilities' then the next obvious question is: which capabilities?

Sen is far more implicit in his views on valuing functionings. Sen certainly allows for a normative underpinning of functionings, but does not engage with questions about value prescriptively.[44] Indeed, Sen is careful not to make value judgments and he is far more comfortable situating himself within a broadly consequentialist and pragmatic tradition where assertions about the good are minimal.[45] Nussbaum, on the other hand (as we will see), is not only far more explicit in her views on which capabilities have value, but she is willing to state her case formally.[46] Thus, on the issue of incompleteness and the listing of capabilities – the differences between Sen and Nussbaum would appear to be most prominent.

[41] Nussbaum (2000a) p.6, Sen (1992) p.87, (1999) pp.76-7
[42] This is something that this project will test in our final chapters.
[43] We go on to examine this question in the next chapter.
[44] Crocker (2008) pp.165-6
[45] This is most obviously so with Sen's most recent articulation of the approach and his focus on 'comparative justice'. We go on to consider this recent work and its relevance for this project below.
[46] A full overview of the list (including the list itself) is given in the next chapter.

Sen and Nussbaum advocate a version of incompleteness for similar and different reasons, and yet position themselves in opposition over some of the central arguments for incompleteness. When the capability approach was introduced by Sen, it was presented as a framework for evaluating social arrangements. As mentioned above, its contribution was simply to broaden the informational space of other approaches, by challenging the types of information used to measure and compare quality of life and social and economic policy. The approach was advocated as supplementary and not as a substantive theory simply because Sen traced what he considered to be the major problems with utilitarian and resource-based (typically Rawlsian) thinking to the informational base (what information these theories took to be important). A focus on widening the informational base to include a focus on capability could (or so it was argued) correct these flaws.[47] In other words, Sen sought to demonstrate how the approach could be used for solving pressing challenges within other theories rather than show how the capability approach could be a genuine alternative.

This gave rise to a debate that centered on whether the metric of capability was better than the metric of primary goods. This debate, as it were, tended to centre on whether the metric of capability could replace the metric of primary goods within the Rawlsian framework.[48] Sen's most recent statement of the approach, however, shows us that he recognises that the capability approach is able to generate a framework of its own. More importantly, Sen contends that the approach can formulate its own question of justice. Rather than asking: what is the just society? – a question that Sen terms the 'transcendental approach' to justice, Sen claims that the capability approach is able to ask: what would make a particular society more (or less) just? – a question that Sen terms the 'comparative approach' to justice.[49] This is an important development in Sen's approach. However, what is most relevant for our discussion is that even this capability-centred framework is left incomplete. As the question grounding this comparative approach highlights, it is a very practical and open-ended question to consider (what justice requires that we actually do and achieve in the real world). Thus, this development, while relevant for the way the approach can be used, does not change the nature of Sen's approach and his commitment to incompleteness in particular.[50]

[47] Sen (1982) chapter 16
[48] Sen (1982) chapter 16, and Rawls (2001)168-175, see also Brighouse *et al.* (2010) for an overview of the current literature devoted to these questions.
[49] See Sen (2009) introduction. See also Sen's reply in Brighouse *et al.* (2010).
[50] Sen's comparative question relies on the space of capabilities after all, so it is no surprise that the framework is incomplete.

In any case, Sen continues to reject the claim (and criticism) that he needs to endorse a list of valuable functionings or capabilities. Sen leaves his approach incomplete for fundamental and pragmatic reasons.[51] Sen writes that (on the fundamental reason):

> The idea of well-being and inequality may have enough ambiguity and fuzziness to make it a mistake to look for a complete ordering of either [...] The pragmatic reason for incompleteness is to use whatever parts of the ranking we manage to sort out unambiguously, rather than maintaining complete silence until everything has been sorted out and the world shines in dazzling clarity [...] 'Waiting for toto' may not be a cunning strategy in a practical exercise.[52]

Both of these reasons reinforce points that we have already made. The capability approach wants to affect real world change and so views current problems as issues of practical urgency. What's more, we can see the roots of the 'comparative approach' to justice clearly here. In other words, we ought (at least on Sen's account) to be asking what would be *better*, rather than what would be *ideal*. Thus, Sen leaves the capability approach open-ended and incomplete for principled and practical reasons.[53]

As mentioned, Nussbaum endorses an incompleteness of her own. In the opening paragraphs of Nussbaum's *'Frontiers of Justice'* she claims that:

> Theories of social justice should be abstract. They should, that is, have a generality and theoretical power that enables them to reach beyond the political conflicts of their time, even if they have their origins in such conflict [...] On the other hand, theories of social justice must also be responsive to the world and its most urgent problems, and must be open to changes in their structures in response to a new problem or to an old one that has been culpably ignored.[54]

Unlike Sen, Nussbaum commits to the importance of both abstract theory and incompleteness (or more specifically to the importance of change, difference, and context). Nussbaum goes on to

[51] See Alkire (2002) p.9
[52] Sen (1992) p.47 quoted in Alkire (2002) p.10
[53] As Alkire points out, this incompleteness is deliberate. Alkire also points out that this incompleteness is honest rather than disappointing. Alkire (2002) p.9
[54] Nussbaum (2006) p.1

say that while she takes up the challenge of three unsolved problems of social justice (justice for the mentally impaired, justice for non-human animals, and justice beyond national borders), that 'there are no doubt other problems which as yet we do not see'.[55] There are, then, two main reasons for incompleteness on Nussbaum's account. Firstly, Nussbaum wants to deal with the practical problems that diversity brings to the approach. Secondly, Nussbaum wants to deal with problems which lay ahead and of which we cannot be (at least at this moment) entirely certain. Thus, Nussbaum attempts to develop a theory which is able to accommodate both of these challenges.

This partial commitment to abstract theory helps us to understand why Nussbaum commits herself to a list of capabilities for a range of beings. It is for this reason that the point at which Nussbaum's approach allows incompleteness comes much later than the point at which Sen's approach is incomplete. Nussbaum advocates a list of valuable capabilities and then leaves the questions of implementation, filling-out, and public discussion (about the list and each component) incomplete. Sen, on the other hand, advocates no such list at all – opting instead to leave the list question itself open to discussion.

These differences lead Sen and Nussbaum to endorse very different capability-centred views. It is somewhat clear, and we might put this forward as a way of making sense of the differences, that they are simply interested in very different questions.[56] However, it pays to point out that this response to the differences may not always be sufficient. Beyond the building blocks, there are deeper and much more significant differences as a result of these diversions. In other words, and as we will go on to demonstrate in the next few chapters, the foundations upon which a capability theory is built places limits on the shape of shared and overlapping applications – and applications of which Sen and Nussbaum are equally concerned. For instance, these differences affect how we interpret what development requires within the approach, and the process by which capabilities and functionings are secured. In other words, these are significant differences between Sen and Nussbaum's articulations of the approach – and they are differences which (or so this project will demonstrate) are significant for anyone seeking to engage with it.

1.4 Conclusion

[55] Nussbaum (2006) p.1
[56] Robeyns (2005a) p.193

One of the advantages that the capability approach has over other theories of well-being and development is that the informational base of the capability approach is open-ended and pluralistic. According to Sen, the key problem with a theory which reduces well-being to a single good or value is that it overlooks the complex ways in which our lives are composed of all sorts of actions and values. The capability approach differs in at least two important ways. Firstly, the approach does not rely merely on some level of satisfaction, happiness, or quantity of goods when measuring quality of life or endorsing entitlements. Secondly, the approach converts these values into valuable activities or functionings (inherently diverse activities), and assesses well-being by evaluating what these functionings are and in what ways they contribute to the kind of life someone is able to live.

Our main concern in this chapter has been to offer an overview of the main features of the capability approach. What's more, it has been to offer an overview of the major differences between Sen and Nussbaum as the most influential proponents of the capability approach. This helps to provide us with a clear backdrop for the rest of this project and gives us a clear sense of the way in which different articulations have (and even could still) develop. More importantly, it helps us to better understand how and why Sen and Nussbaum's articulations of the approach differ on important questions despite being engaged in very similar projects. In the following chapter, we consider these differences further by examining what has become the trademark difference between Sen and Nussbaum's approaches. This will help us to better understand the differences and how these differences relate to the way in which the approach can be used, applied, and developed. More importantly, this discussion will help us to get a clear sense of the way that an alternative might still be developed.

2. The List Question

Our concern in this chapter is to examine what has become the major difference between Sen and Nussbaum's articulations of the capability approach. This is the question of whether we ought to advocate a list of capabilities. We do this for two reasons. First, doing this helps us to get a clear sense of the differences between Nussbaum and Sen. This is important because the alternative capability theory that we present in chapter four (as we will see) builds on Nussbaum's approach while maintaining some strong connections with Sen. So it is important to get a sense of how and why this is so. Secondly, we want to illustrate the point that Sen and Nussbaum are engaged in two very different capability-centred projects. This helps us to bring out the point that their underlying motivations are far more significant to the way that the approach develops, than the question of whether or not they offer a list.

2.1 Engaging with Amartya Sen

As we pointed out in the previous chapter, Sen has recently claimed that the capability approach is able to challenge contemporary understandings of justice. This is no surprise. Sen has never denied that the capability approach can be extended, and he has always advocated that the capability approach can form the basis of a theory of justice.[1] Despite this new development, Sen continues to leave the approach under-developed. This means that he maintains the view that 'despite this incompleteness, the capability approach does have considerable "cutting power"'.[2] In addition, it means that Sen continues to hold the view that while the listing of important capabilities would not be inconsistent with the approach, that such a move is by no means required by it.

For Sen, the whole notion of making value judgments by listing important capabilities competes with the incompleteness and pluralism which he values and defends. In other words, Sen is concerned that endorsing a list will restrict the use of the approach, and sees that there is value in an approach that can be used across different disciplines and which is open to constant review.[3] The value of incompleteness presents us with a particularly important consideration, but it is important to point out that it leads us neither to reject a list nor commit to one. Rather, this point

[1] See Sen (1993) p.46. As we have already pointed out, Sen (initially) put forward the view that the approach is useful as an extension or replacement of the standard informational bases of other theories.
[2] Sen (1993) p.48
[3] Note that this is evident in Sen's defence of public discussion and democratic deliberation. It is also worth pointing out that many of the problems that the capability approach seeks to solve require inter-disciplinary engagement in any case. See Sen (2009) part 4, see also (2004a).

says something about the *nature* and *character* of any list endorsed. The incompleteness component need only place conditions on how any list is to be understood. In particular, it suggests that any list must be understood as only *one way* in which the approach may be used – and should not be understood as restricting the use of the approach overall.[4] Finally, that the list itself must endorse, and be open to, continued deliberation and revision.[5]

Although this seems straightforward enough, there is some cost to viewing any list of capabilities in such a way. In particular, this move still leaves the questions of which capabilities matter and why they matter open. It tells us that a proponent of the capability approach need not endorse a list, and even if they do, are not committed to defending it as anything other than useful for a particular exercise. The value of Sen's pluralism and incompleteness, then, could be seen to have come at a heavy cost, since it doesn't get us very far. There ought to be, therefore, no surprises about the criticism Nussbaum levels against it. In the end, as Nussbaum contends, if we ask what people are actually able to do and to be, we come much closer to understanding the kinds of barriers that exist in society, but not if we simply say that 'all individuals are entitled to freedom understood as capability'.[6] As the most devoted critic, Nussbaum has continued to press Sen on his hands-off approach to listing capabilities. She writes:

> It is unclear whether the idea of promoting freedom is even a coherent project. Some freedoms limit others. The freedom of rich people to make large donations to political campaigns limits the equal worth of the right to vote. The freedom of businesses to pollute the environment limits the freedom of citizens to enjoy an unpolluted environment. The freedom of landowners to keep their land limits projects of land reform that might be argued to be central to many freedoms for the poor. And so on. Obviously these freedoms are not among those that Sen considers, but he says nothing to limit the account of freedom or to rule out conflicts of this type.[7]

It is worth pointing out that in the previous chapter, one of our criticisms of happiness and preference theory was that we needed to do more than simply say that happiness or preference satisfaction matters. This was because we claimed that sometimes our preferences are a response

[4] This is a point that Sabina Alkire makes when (in light of Sen's incompleteness) she says that while she presents a framework for extending the approach, that there is good reason to keep developing alternatives and no reason to take her framework as the only way in which the approach can or even should develop. See Alkire (2002) p.11

[5] Indeed, this is an important part of Sen's approach – public deliberation is an important part of justifying any capabilities at all. See Sen (1999) (2009)

[6] Nussbaum (2003) p.48

[7] Nussbaum (2005a) p.46

to the conditions within which we find ourselves in. Here then, we see that the capability approach – when we simply say that capability matters – is open to the same problem.

Nor do we get very far if we simply claim that a particular list of capabilities is only useful for a particular exercise. Even in its weaker comparative use (when we compare standards of living or national development) – we need to know what to compare and what to make of the information we find. We still need (it would seem) a list of capabilities, and one that is going to be able to back up our findings. Contrary to what one might think then, it seems that without a list, the real 'cutting power' of the approach is lost. This is a concern echoed by a number of thinkers who claim that without some way of listing and ranking capabilities, we are unable to resolve situations wherein resolution is required.[8]

Sen's response to these criticisms is to say that freedom is a good thing, even though it can be used for bad purposes.[9] While this response may seem weak – there are two points that we should make here. Firstly, it is important to point out that for Sen (like Rawls) freedom is given priority.[10] Secondly, this response is a clear indication of Sen's unwillingness to commit to making any value judgments. David Crocker, commenting on this unwillingness, claims that there is one way in which Sen can justify this refusal. Crocker suggests that on Sen's view (where capabilities are understood as opportunities or possibilities) capabilities can not actually be malicious. Rather, on this view of capabilities, only functionings can be described as malicious, because only functionings are actual events and activities. However, while this gives Sen the option of justifying his silence, Crocker also points out that this comes at a price. On this view, Sen is unable to say that *any* capabilities are malicious at all.[11]

Although this may seem morally dubious – because we want to say that it can't possibly be the case that no capabilities are wrong – this is also a very real solution. Most of us (or so one could argue) are capable of doing all sorts of malicious things – this fact alone can't possibly make them wrong. More importantly, such an insight helps us to recognise that a distinction ought to be

[8] See Williams (1987) p.96, and Nussbaum (1988) p.176, Qizilbash (1998) p.54. According to Robeyns (2005a), there is both a strong and weak criticism of Sen's refusal to endorse a list. The weak criticism contends that Sen ought to say more about how a list ought to be derived (but not commit to a list himself), while the strong criticism claims that Sen is committed to a list of some sort. It is worth highlighting that this project while concerned with the stronger criticism, and Nussbaum as the most forceful proponent of this criticism, contends that even Sen's answer to the weaker criticism will require a list of capabilities.

[9] See Nussbaum (2005a) p.46.

[10] For instance, in his most recent work Sen says that personal liberty 'touches our lives at a very basic level' and so ought to be given priority. See Sen (2009) p.299.

[11] Crocker (1993) p.167

made between capabilities that we want to endorse and those that we want to rule out. Saying that there are no malicious capabilities is not incompatible with saying that some are certainly better or more desirable than others. We may not be able to prevent all of the malevolent capabilities by (simply) listing the ones we take to be better than the others, but we can certainly do more if we know which ones are better. This point helps us to get to the root of Nussbaum's actual question (and criticism): which capabilities should we (governments, institutions, policies) endorse, encourage, and (at least) hope that persons will choose?

Of course, Sen is not completely silent on the issue of value. After all, it is difficult to write about functionings and capabilities without recognising the value of at least some of them. Throughout his work Sen refers to many valuable activities such as: the ability to be well-nourished, to live disease-free lives, to be educated, to participate in public life, the ability to move about, and the ability to appear in public without shame.[12] So, while refusing to formally endorse a list, Sen does offer some direction in terms of what might be on a list of capabilities. There is, therefore, another reason why Sen refuses to formally endorse a list – and this is in the spirit of the *agency* aspect so central to his understanding of freedom. Because of the importance of agency, there is a limit to how far pure theory can take the approach. The list can only be drawn from democratic deliberation – drawing on the agency of each member of society.

> The problem is not with listing important capabilities, but with insisting on one pre-determined list of capabilities, chosen by theorists without any general or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why.[13]

While Sen's understanding of capability gives him the option of claiming that capabilities are value-neutral, the emphasis and importance of freedom and agency leads us to suggest that the issue is really about the value of agency itself. It is more important for Sen that we ask *how* and *who* is drawing up the list of capabilities, rather than (or at least before) *what* should go on it?

Again, we see that this move (in this case, the importance of agency) places conditions on the nature of any list endorsed. One way to accommodate this condition, then, would be to propose (as Nussbaum does) that the list is 'open-ended and subject to ongoing revision and rethinking in

[12] Sen (1993) (1999) (2009)
[13] See Sen (2005) p.335. For an overview of Sen's reasons see: Alkire (2002) pp.28-32, Robeyns (2005a) pp.195-8

a way that any society's account of its most fundamental entitlements is always subject to supplementation (or deletion)'.[14] Although this would leave a fair bit of scope for agency and democratic deliberation (at least in principle[15]), Sen would still be able to claim that a legitimate list must be drawn from public deliberation in the first instance. Sen's main justification for silence then, is the emphasis placed on agency and choice. It stems from an individual's right to choose which capabilities are valuable, and the claim that we undermine the agency of individuals if we prescribe a list in any other way. Here then, it is not just about the importance of incompleteness, but the processes used in generating a list. We can see how the importance of agency and freedom is central to Sen's approach and how it plays a central feature in his ability and willingness to endorse a list.[16]

It doesn't take too much to see how Sen's reasoning makes sense. One of the central aims of the capability approach is to recognise and adequately deal with diversity.[17] One of the ways in which the approach seems committed to doing just this is in allowing people to be part of the process wherein valuable doings and beings are chosen – allowing them to choose the kinds of lives they want to live. Since there are so many reasons why there will be differences in our answers to the question of what life we value, to offer a one-stop-shop answer in the form of a list of capabilities which theorists say are (or ought to be) valuable would be inconsistent with achieving this.[18] What's more, there are numerous examples which can be used to demonstrate how imposed value judgements have placed limits on the kinds of lives some individuals or groups of people have been able to live.[19] The relevance of uncertainty and the influence that it has on Sen's willingness to make value judgements is made clear here.

Even so, our discussion of Sen's reasoning shows us that Sen's approach is problematically incomplete, and relies on a situation wherein agency is at least *possible*. In other words, individuals

[14] Nussbaum (2006a) p.78

[15] There is a question about what viewing the list in such a way costs Nussbaum's approach. We consider this in later chapters.

[16] The importance of democratic deliberation and agency is central in much of Sen's work. Much of his time in *Development as Freedom* (1999 chapter 6) is spent arguing for democracy as a universal value. What's more in Sen and Dreze (2002) pp.26-33, a lot of time is spent on the issue of what they refer to as 'voice' and in 'giving voice to the underprivileged' (p.336). Likewise, in *Identity and Violence* (2007) pp.51-55 Sen defends the importance of freedom and agency against issues central in debates about culture and identity.

[17] As mentioned in the previous chapter, accommodating issues of disability and disadvantage are major aims of the approach.

[18] According to Sen, and on the incompleteness of the approach, he claims that the capability approach is influential in what it rejects – and notes that it rejects measuring well-being by focusing entirely on say happiness as the sole unit of concern, see Sen (1993). One list that seems consistent with this is Deepa Narayan's Dimensions of well-being which are formulated directly from conversations with the poor. For an overview of the list see Alkire (2002).

[19] The colonisation of indigenous peoples, which we consider in light of the recent adoption of the declaration in chapters 7 and 8, is a good example of this.

are imagined as being able to participate in decision-making procedures and having a say in matters that affect their lives. This assumes, then, that agency is possible and so overlooks important ways in which agency can be prevented. For instance, take a situation where the basic needs of all members of a community are met, but where they do not have any choice about the kinds of lives they are able to live. Let's say that sixty percent of the population is Muslim and force fed during the months of Ramadan, unable to pray during the week, and denied Halal meat. In an example like this, we can see how securing agency and choice requires only that we provide the members of this community with the opportunity of participating in political life. What seems to be required, at least in such a situation, are structures and processes very much like those that Sen is driving at.

Unfortunately, however, for a good number of individuals and communities it isn't a question of whether one is *permitted* to exercise agency, but whether (even when they are) they *can*. At the very least, then, we should say something about the kinds of functionings that ought to be secure, and what capabilities one ought to have access to. Without such a list, there seems to be no clear way to ensure that agency is possible even if it is made available. And without such a list, Sen is unable to achieve this aim. One is, given the state of the world, prompted to ask at this point: whose agency is Sen referring to? One could say that, in the absence of a list underpinning agency, Sen is primarily concerned with societies wherein agency is at least possible. In which case, we ought to simply ask them what capabilities are valuable. Although this would allow Sen to leave the list question open, this strategy would come at a heavy cost. Not only does it severely limit the scope and relevance of the approach, but it implies that the approach is silent on some of the most pressing real world issues. In this form, the approach would have very little to say about poverty, unmet and unsecure needs, and situations wherein agency is impossible.[20]

The view that Sen's approach is relevant only once our basic needs are met, would (not only) undermine the entire approach, but would be a gross misreading of it. Sen's capability approach grew from an extension of the basic needs approach. The capability approach is not (in other words) a rejection of the importance of basic needs, nor does it see itself as separate from it (at least in terms of the importance of meeting them). Sen developed the capability approach in order to turn our focus toward what goods actually do to our lives, rather than the mere possession of goods as such. The whole point of the capability approach is to demonstrate how

[20] On this reading of the approach, it sounds very much like a theory that is custom made for a liberal state, in the same way that Rawls contends (in light of Justice as Fairness). As we will go to discuss in chapters 3 and 5, such a move amounts to assuming that needs can be met (or, as Rawls contends, that favourable conditions pertain).

the kinds of lives we are able to live and the kinds of things we are actually able to do and be are central to understanding well-being and development. It seems clear then that Sen is committed to saying something about how one achieves and secures agency – and how agency freedom is even possible. After all, agency is a process freedom to function in important ways.[21] So it would undermine the importance of functionings to suggest that agency is secured only by recognising that people have it. For this reason, agency is something which must be made possible and the value of which relies on certain background conditions. Sen is committed to filling in this blank and saying something about (something like) the meeting of basic needs in securing one's ability to participate in democratic deliberation.

Importantly, these claims are not altogether inconsistent with what Sen has said. In particular, Sen notices the importance of education for agency when he says that 'since participation requires knowledge and basic educational skills, denying the opportunity of schooling to any groups – say female children – is immediately contrary to the basic conditions of participatory freedom'.[22] Quite simply, a concern for agency generates some view of what a person should be able to do and be. If it is the freedom to exercise agency that matters, then a person's agency must be made possible (through basic functionings or capabilities to function) before it can be protected. Thus, Sen needs to say more if he is to successfully defend the view that a list of capabilities must be drawn from democratic deliberation. In particular, he needs to endorse a list which makes the capability to exercise agency *possible*.

Here we see that Sen's concern for agency and the emphasis placed on democratic deliberation, rather than allowing him to side-step the list question, commits him to endorsing a list with this goal in mind. This leaves us with two questions: 1) what kind of list would Sen be committed to? 2) Does Nussbaum's list do the job?

2.2 Nussbaum's List of Capabilities

A full overview of Nussbaum's approach is presented in the next chapter. In what follows, we examine key aspects of Nussbaum's list to ascertain whether the list is compatible with Sen's approach.

[21] Recall that Sen differentiates between opportunity freedom and agency freedom where agency freedom is about being involved in decisions that affect one's life. Sen (1999) p.17

[22] Sen (1999) p.32, this is also quoted in Srinivasan (2007) wherein Srinivasan also criticises Sen's incompleteness in light of his concern for democracy and political freedom.

Nussbaum's list of capabilities is central to her articulation of the approach (see table. 1).[23] It is, and has been, one of the major differences between her own and Sen's approach,[24] and it is central to her desire to extend the approach beyond its comparative use.[25] The list captures, and is generated by, Nussbaum's (Aristotelian) account of human dignity. According to Nussbaum, we intuitively know what a life with (or without) dignity looks like when we see it. So to generate a list we simply need to ask ourselves: 'which things are so important that we will not count a life as a human life without them?'[26] The test then, is to ask whether a life without one of the capabilities on (or off) Nussbaum's list would still be considered a truly human life. In Nussbaum's view, each capability is required in order for one to be capable of living a 'truly human life'.[27] In other words, a life without any one of the capabilities on her list, we would not recognize as a life with dignity.

Table 1. Nussbaum's 'Central Human Functional Capabilities'

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. **Bodily health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. **Bodily Integrity.** Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason – and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination with thought and in connection with experiencing and producing works and events of ones 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 associations that can be shown to be crucial in their developments.)

[23] Nussbaum's most recent list appears in Nussbaum (2002) (2005a) (2006a)
[24] Robeyns (2005a)
[25] Nussbaum (2000) p.6
[26] See Nussbaum (2006) p.74. In Nussbaum (1993), she says that the approach 'asks us to consider what are the most important things that must turn up in any life that we will be willing to recognise as human' p.327
[27] Nussbaum (2006a) p.74

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 recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliations, 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 non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. **Other species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. **Play.** Being able to laugh, to play, to enjoy recreational activities.

10. **Control over one's environment**.
    a. Political. Being able to participate affectively 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 moveable 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 other workers.

Source: (Nussbaum (2000a) pp.78-80)

We need to make three points about the list and how it features. First, Nussbaum differentiates between basic, internal and combined capabilities. *Basic* capabilities refer to what an individual has the capacity to do – what a child (for instance) has the potential to achieve, such as the capability for life, health, speech, imagination, and so on. *Internal* capabilities recognize the development of these basic capabilities. They are states of a person sufficient for the exercise of functionings (given the correct external conditions). Finally, *combined* capabilities, then, bring together *internal* capabilities and the *external* conditions which make the exercise of those functionings and capabilities possible. This list of capabilities is a list of combined capabilities. [28]

To illustrate the importance of these differences, let's say that two children are born on the same day. One (Jane) is born to proud parents in Brighton, and the other (Mary) to proud parents in the slums just outside Cape Town city. We don't need to know where these children are born to know that it is likely that they have identical *basic* capabilities. They both have the potential for health, to play, to be educated, for practical reason and imagination. The question, rather, is

[28] Nussbaum (1999) p.44

whether they will be able to develop these capabilities. Whether they will be internalized, and whether external conditions will enable them to be exercised. It is unlikely that Mary will ever realize some of the capabilities. As a girl, she is unable to attend school and her place within her family means that her claim to being educated or well-fed is ranked lower than her brothers. At least, it is unlikely that she will ever be at the level of education and health of Jane, who is likely to be educated to University level and who will enjoy many summer holidays to Cape Town during her formative years. In other words, these differences are significant for understanding how capabilities are understood and developed. More importantly, these differences help us to understand how the list is derived and what securing them will require.[29]

Secondly, the list is incredibly diverse, bringing together a range of capabilities. This is because the list is partly inspired by Marx's understanding of human beings as having rich needs and requiring a 'plurality of life activities' to live a minimally good life.[30] The list is diverse, then, simply because there are a number of things that human beings need to be able to do if they are to live a valuable life. Notice, however, that despite this richness the list is still incomplete. The list only tells us what capabilities are important for a dignified life, but nothing much at all about how to achieve them. As we pointed out in the last chapter, this is deliberate. Nussbaum is clear that how the capabilities are achieved or understood is partly a question of how they are understood within particular societies given diverse histories and cultures.[31]

Finally, and following on from the importance of incompleteness, each capability corresponds to a variable threshold level, which is set in context and in light of particular social conditions. There are a number of reasons why this threshold level is important. First, it makes room for cultural diversity, and it means that real world issues and situations must be taken into account. It is likely, for instance, that we will be forced to set very different threshold levels of education for Mary and Jane given basic social conditions. Secondly, the threshold level allows us to see how important and interdependent all of the capabilities are. It helps us to see that we must try to set the threshold levels of each capability while also keeping all of the capabilities in mind. After all, setting the threshold of health too high is likely to leave us with other capabilities too low. Finally, and given that we ought to have all of the capabilities to live a dignified life, a

[29] Of course, sometimes the difference is one of basic capabilities – some children are simply born without the capacity to develop some of the capabilities. We take this question up in our discussion of future people in chapter 6.
[30] Nussbaum (2006a) p.74
[31] For instance Nussbaum says that it is perfectly reasonable to say that free speech laws ought to be different in Germany than the USA given very different histories, Nussbaum (2006a) p.79. The significance of history is examined further when we explore the relevance on indigenous peoples in chapters 7 and 8.

commitment to a threshold level allows some movement on how achievable the full set of capabilities actually is.[32]

Nussbaum's list of capabilities is open to criticism from a number of angles. There are two worth mentioning. The first engages with the capabilities on the list itself. Of course, it isn't difficult to claim that some individuals might have fairly good lives even if they are unable to secure a particular capability (such as practical reason). In addition, we might say that there are other capabilities that are important but which are absent from the list (such as, for instance, particular forms of expression or language).[33] The second criticism challenges the legitimacy of the list. Our discussion of Sen's reasons for leaving the list question unanswered shows us that one problem is whether the list is legitimate. In other words, it prompts the question: on what grounds are the capabilities listed actually justified? Given that the list is not drawn directly from public deliberation, there is reason to think that the list is illegitimate.[34]

Unfortunately, neither of these strategies can be successful. Nussbaum's list has evolved and continues to evolve in light of real world issues. The list was initially presented as constitutive of the good life, but it has developed into a partial and minimal account of the good. More recently, Nussbaum has relaxed the list and claims that the list is open-ended and subject to rethinking and revision. It is, then, a starting point for reflection and discussion about what a dignified existence might be. This is precisely why it is indeterminate and incomplete. Nussbaum presents the list as a tool for persuasion, so the whole idea is that we engage with the list. In other words, both criticisms are built into the list. Nussbaum welcomes and expects discussion on the capabilities. And it is this discussion that will generate (at least over time) some kind of legitimacy amongst those for whom the list applies.[35]

If we can draw one conclusion from our short discussion, it is that in much the same way that Sen has been criticised for his refusal to endorse a list of capabilities, Nussbaum has been scrutinised for doing just this. In Nussbaum's defence we ought to point out that the capabilities

[32] Nussbaum (2006a) p.71
[33] According to Wolff and De Shalit (2007) see pp.43-58, both of these claims were made during the evaluative phase of Nussbaum's list in Israel and the UK.
[34] Indeed, this is a view expressed in Robeyns (2005c)
[35] In principle, this is an important move. It is, however, very difficult to determine exactly how much this flexibility actually costs and whether in the end it works. At least, this is a question that we take up in the following chapters. It is enough to say, here, that in principle this gives Nussbaum a way around these kinds of concerns. .

themselves are not overly contentious. Indeed, most lists of well-being (whether they are lists of basic needs, capabilities, dimensions of well-being, or prudential values[36]) all share fundamental commonalities and have very little dissimilarities.[37] Criticism, therefore, ought not to centre on the list itself but on: 1) what the list is for and 2) whether we need a list of capabilities at all. At least, both of these points are relevant, as we will go on to see, when we examine whether Nussbaum's list is able to underwrite Sen's approach.

2.2.1 Securing Agency?

A list of capabilities to underwrite agency seems fairly straightforward. According to Sen, agency is 'what a person is free to do and achieve in pursuit of whatever goals or values he or she regards as important'.[38] An agent is, as Sen later writes, 'someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives, whether or not we assess them in terms of some external criteria as well'.[39] This helps us to see that the list will need to support basic activities that (at least) make participating and choosing possible.

Unlike Sen, Nussbaum's list is not primarily about securing *agency*. It is, as we have pointed out, about human dignity and being able to live a life that is 'truly human'. To be clear, the pluralism which Nussbaum endorses is not going to lead her to reject the relevance of agency – but it is going to challenge its priority overall.[40] So on Nussbaum's view, agency is going to be important for her understanding of a minimum account of the good life, but it is going to have no more importance than all of the other components on the list. Given that Nussbaum's list is generated by, and captures an account of, human dignity rather than agency – there are two ways in which to view or manipulate Nussbaum's list in light of the importance of agency. The first strategy would be to claim that Nussbaum's *entire* list can be reinterpreted and reformulated in-tact, as a list which secures agency. The second strategy would be to claim that *part* of Nussbaum's list could fulfil this role. We consider both strategies next.

If we are concerned with human agency, then the obvious place to start is to look to lists with this at its aim. One such (recent) list, offered by Gillian Brock, provides the following list as necessary conditions for human agency:

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[36] For an overview of thirty-nine lists of dimensions for human development see table 2.12 in Alkire (2002) pp.78-84
[37] See Alkire (2002) pp.78-84. Qizilbash also makes the point that most lists are reconcilable (2002).
[38] Sen (1985) p.203
[39] Sen (1999) p.19
[40] We go on to discuss this further in chapter 3 where we examine the role that dignity plays in grounding the approach and generating a particular capability approach to issues of justice.

1. A certain amount of physical and psychological health
2. Sufficient security to be able to act
3. A sufficient level of understanding of the options one is choosing between
4. A certain amount of autonomy
5. Decent social relations with at least some others.[41]

Much like a focus on capability, Brock claims that the focus ought to be on *enabling*. That is, 'a process that involves a number of different elements depending on where we are in the process.'[42] In so doing, Brock highlights that a number of things (differences in age, abilities, as well as social barriers) affect whether individuals are capable of exercising agency. In other words, and to utilise the language of capability and functioning, sometimes what is required is that we directly raise a persons level of actual functioning. So, sometimes we will and should (for instance) simply feed the starving, the very sick, old, or young. In other situations, however, we ought to focus on capability to function. In such instances, we may ensure that individuals are able to access (say) employment by either ensuring that they are informed, or by ensuring (for instance) that their children can be cared for in their absence. In each case, however, the aim ought to be that the ability to achieve each component is secure. In so doing, a number of factors will need to be taken into account in order to ascertain whether functionings or capabilities secure them in the end.[43]

The components and the focus on enabling seem to be clear enough. What is most important for our purposes, however, is that Brock claims that Nussbaum's list can be reframed and subsumed by her own (see table 2). In other words, Brock does not think her list departs from Nussbaum's list of capabilities at all, and recognises that, as her approach attempts to (partly) capture the necessary conditions for a flourishing life, the lists are mutually reinforcing.[44] If we take this approach, then one conclusion that can be drawn is that Nussbaum's list of capabilities (for dignity) fits nicely in relation to the kind of list that Sen ought to defend. Not only can we map Nussbaum's components onto an account for agency, but Nussbaum's account can be reduced

[41] Brock (2010) p.70
[42] Brock (2010) p.68
[43] Brock claims that enabling may require: 1. Direct transfers of goods, 2. Educating or teaching particular skills, 3. Assisting with or providing opportunities to exercise skills, 4. Helping individuals to reach independence (2010) pp.68-9
[44] See Brock (2010) p.71. It is important to reinforce that our concern is not with the major differences between Brock and Nussbaum, nor to claim that they stand in opposition to each other. The claim is that we ought to take the list of capabilities in light of their underlying motivations and that failure to do this leads us to overlook important elements of the theory.

and captured within Brock's list which is very much in the spirit of what the list (on Sen's account) would be for.

Table 2. Comparing Nussbaum and Brock's list

1.	Life	[physical health]
2.	Bodily health	[physical health]
3.	Bodily integrity	[security/autonomy/physical health]
4.	Sense imagination and thought	[understanding/psychological health]
5.	Emotions	[psychological health]
6.	Practical reason	[understanding]
7.	Affiliation	[decent social relations or psychological health]
8.	Other species	[if it is important, it will be because of its effect on psychological health]
9.	Play	[as with 8]
10.	Control	[autonomy]

Source: Brock (2010) pp70-1

A second strategy worth exploring, however, is one where, rather than subsuming Nussbaum's list under agency-centred headings, we simply locate those capabilities most suited to the job. An example of such a move (albeit in a different way) is proposed by Jonathan Wolff and Avner De-Shalit.[45] They provide an overview of organised discussions focusing on Nussbaum's list, and they reflect on the answers and responses that individuals give to each component.[46] Among the insights that Wolff and De-Shalit's research uncover, they recognise that particular capabilities and functionings are more important than some of the others and list the following as more important overall:

i. Life
ii. Bodily health
iii. Bodily Integrity
iv. Affiliation (in particular, belonging)
v. Control over one's environment

[45] Wolff *et al.* (2007)

[46] The conclusions (based on responses) can be framed in terms of: 1) scepticism about the inclusion of particular capabilities, 2) scepticism about the exclusion or clarity of capabilities, as well as 3) disagreements about the comparative value of particular capabilities. For instance, among those that generated the most scepticism was *practical reason* – where discussants were not convinced that second-order critical reflection was necessary for a good life. In addition, discussants generally disagreed with the capability for *other species* (plants, animals, and the natural world) – many of the discussants claimed that this was a luxury, and were embarrassed by its inclusion. On the issue of clarity and exclusions, some discussants claimed that *health* ought to also include guarding against the kind of weariness and fatigue which results from constant worries – while others pointed out that language and communication were also central to well-being. Finally, and on differences relating to specific capabilities, the capability for *life* generated strikingly different responses from those who were aged below thirty and those who were not, with the latter group viewing this capability as far more important. Wolff *et al.* (2007) pp.52-64

vi. Senses, Imagination, Thought.[47]

Importantly, whether this particular kind of empirical research itself provides a justification for this move is debatable. Fortunately, the research itself is not what this project seeks to engage with. Nor is this approach (we ought to add) at odds with Nussbaum's account in any case. As mentioned above, this kind of reframing and discussion is entirely consistent with Nussbaum's list. Thus, our concern relates to the conclusions drawn and to the practise itself of reducing Nussbaum's list on the back of the claim that some capabilities are more important than others. Such a strategy provides us with another way of assessing Nussbaum's list in light of the importance of agency. And it gives us a list that looks very much like Brock's necessary conditions for agency by another process.

We have, therefore, two ways to utilise Nussbaum's list and to generate from it a list to underwrite Sen's agency. Given that they both provide us with a way of generating a list very much like one that would underwrite Sen's theory, why would we opt for one strategy over the other? One way to proceed would be to focus entirely on the components on the list themselves. However, as we have pointed out (and as Brock's comparison highlights) most lists of well-being or particular components of them share core similarities. It is, therefore, important not to overlook that the lists are designed within a particular framework and that it is this framework that generates much of the differences between them despite the components themselves.

For this reason, reducing Nussbaum's list to a list for agency loses more that what it captures. Although Nussbaum's components can be redrawn under Brock's headings, the richness and scope of Nussbaum's list is lost when we do so. There is, quite simply, a good reason why Nussbaum's list is not drawn up or interpreted in this way. Why agency is only one (albeit important) part of the list. More specifically, there is a reason why Nussbaum's capability for 'senses, imagination, and thought' cannot be subsumed under Brock's need for 'a certain amount of understanding of the options that one is choosing between'. In addition, there is a reason why Nussbaum's capability for 'play' and 'other species' is not and cannot be interpreted as being important because it contributes to 'psychological health'.[48] Not only are all of the capabilities good for their own sake, but in the end, the concept of dignity and all that it sets out to achieve

[47] Wolff *et al.* (2007) p.57

[48] One might question whether Brock's list is different because it relates to global justice. However, this is not so, especially given that (as we will go on to discuss in the next chapter) Nussbaum's list also applies to all human beings of the world. Our concern with Brock's list is simply to demonstrate that a concern for *agency* and *dignity* are not identical – even if the components on lists are.

(discussed in chapter three) tells us that Nussbaum's list is not (solely) about a human-centred understanding of agency. Given that this is so, reducing it to agency loses the scope of the concept of dignity so central to Nussbaum's approach. A better strategy then, would be to simply say that agency is part of Nussbaum's list (similar to Wolff and De-Shalit), and that a list for agency while not entirely problematic would not be wholly adequate either. Opting to reduce Nussbaum's list would imply that nothing valuable would be lost if we reorganised and reinterpreted Nussbaum's components. This project takes this to be a mistake.

2.3 The Capability Question

The conclusion that we have reached on the issue of agency and dignity – and the capabilities that ought to underwrite them – helps us to acknowledge that the list question can lead us to overlook a more important question altogether. That is, why do the capabilities and/or functionings even matter? And what are they for?[49] Of course, if agency and dignity amounted to the same thing – then this question would be irrelevant. However, and as noted above, Nussbaum's list for dignity is only partly captured by a list for agency (and this is precisely why Brock's reduction does not wholly include 'other species' and 'play').

There are, then, important questions that we ought to raise such as: to whom does the list apply? What is the list trying to achieve or secure? Is agency or dignity all that matters in the end? It is worth pointing out that a focus on agency *alone* is unable to (directly) include the severely mentally disabled, nonhuman animals and other living beings. As we will see in the next chapter, Nussbaum wants to do more than simply secure agency. Nussbaum extends and applies her approach to issues on which a focus on agency alone remains silent. Of course, this does not (and should not) see us downplay the importance of agency. As we will go on to discuss in subsequent chapters, agency can be an important part of living well. Nor should we overlook the fact that the capability approach began life as part of the human development tradition – one obvious reason why Sen's approach, with its emphasis on freedom, might just be agent-centred. Even so, we are still left with important questions about what other beings require or need and whether agency can capture what these things might be and why they are important.

For the time being, it is important to simply say that the list question itself is of minor significance given the complexities that surround what (and who) the list is for. This helps us to see that the major question, and indeed the major difference between Sen and Nussbaum, isn't

[49] This conclusion was also reached by Adela Cortina (2002) which is highlighted in Crocker (2008).

that Nussbaum offers a list as such – but what their respective articulations of the approach are based on. In other words, we get two very distinct understandings of the capability approach which differ at the foundations, and we get a sense of the way that extending and using the approach requires much more than a list of capabilities. In the end, then, strengthening the approach will depend on what we are able to achieve at the foundations, and extending it will depend on both what the approach is for, and what its main focus should be.

2.4 Conclusion

The capability question and our discussion of the differences between agency and dignity is not all bad news. Our discussion helps us to recognise that there are different kinds of capabilities. For instance, agency while not the only capability that is important is still important overall and relies on particular functionings to underwrite it. What's more, as our discussion of Wolff and De-Shalit helped us to see, an argument can be made for the case that some capabilities are simply more important than others – if not in general, then at least in some instances. This project seeks to take on board both of these points. In particular, this project wants to ask what kind of capability approach we end up with if we utilise both points and if we capture them in the right ways. This raises, perhaps, the most important point worth making – that is, that in the end this discussion helps us to see that Sen and Nussbaum only offer us particular *versions* of the capability approach. Not only does this help us to see that there are different ways in which to ground the approach, but it tells us that if the foundations of current articulations of the approach are unable to hold up under scrutiny, then there are good reasons to seek to formulate a new version.

3. Extending the Capability Approach

The main aim of this chapter is to critically engage with the way that Nussbaum extends (and is able to extend) her approach as a theory which includes and accommodates issues of: disability, nationality, and species. We do this for two reasons. Firstly, this helps us to build on the conclusions drawn in the previous chapter. In particular, it helps us to demonstrate how the scope of the theory largely depends on the foundations we use to underpin it. So, we demonstrate how Nussbaum's conception of dignity is able to deal with issues on which an account of agency remains silent. Secondly, examining Nussbaum's approach helps us to show that there is still more work to be done. In particular, it helps us to draw out two problems that the approach runs into, both of which we ought to be able to deal with if we want to move the approach forward. Nussbaum's inability to deal with these problems provides us with the conclusion that there is good reason to consider formulating an alternative.

In the first section, we very briefly introduce John Rawls' approach before offering an overview of Nussbaum's (partial) rejection of it. Introducing Rawls is important because it helps us to track, and to get a sense of, the way that Nussbaum's theory has developed. What's more, as we revisit Rawls in light of the question of future people in chapter five, it provides us with a solid backdrop for doing so. The second section, provides an overview of the way in which Nussbaum's capability approach captures and accommodates (where Rawls' fails) issues of disability, nationality, and species. More importantly, this section allows us to see the major differences, as well as the similarities, between Nussbaum and Rawls. This provides us with some insight into the way in which problems feature and are tackled within Nussbaum's theory.

Our final section highlights two problems associated with the strategy that Nussbaum employs in furthering the approach. First we point out that the strategy of applying a list of capabilities is problematic when we introduce diverse cases. This helps us to see that grounding the approach in a list of capabilities can be problematic. Secondly, we highlight the associated problem of having to balance competing cases as they feature within the approach. In other words, the list of capabilities coupled with the issues of justice that Nussbaum seeks to include raise questions about conflicts and trade offs. This helps us to see that Nussbaum's approach is incomplete, and that there are good reasons to ask whether there is another way of extending the approach altogether.

Before moving on, we ought to reinforce why we are concerned with Nussbaum rather than Sen in this chapter. This is important given our discussion in the previous chapter. But especially so because Sen has recently given his own account of how the approach might develop as a theory of justice.[1] Our main reason for focusing on Nussbaum is because this project shares the view that we ought to develop the approach in ways that are not limited to questions of agency. So we agree with Nussbaum that the capability approach can and should shed light on more than just (human) agents as issues of justice. To be sure, our rejection of agency as the *sole* guiding feature of the approach does not amount to the claim that Sen's approach is now redundant. Indeed, our discussion of Tim Mulgan's approach in chapter four will see us revisit and affirm some of the key features of Sen's approach. However, our concern in this chapter is to engage with problems that arise when we ground the approach in a conception of dignity.

3.1 Nussbaum's (Partial) Rejection of Rawls

John Rawls provides us with the single most influential body of work in contemporary political philosophy. Not only did Rawls' 1971 classic *A Theory of Justice* re-ignite political theory, but it revolutionised the way that we would think about justice and just policies.[2] Rawls provides us with a theory that places the equal worth of all citizens, participatory fairness, and agreement at the forefront of justifiable political principles. What matters on the Rawlsian account is being part of the decisions upon which society should be built, and so he recognises (and attempts to capture) the importance of each cooperating member of society in decision-making. In making such claims, Rawls rejected the dominant theory of the day (Utilitarianism) in favour of what he claimed to be a superior approach to social justice.[3]

For Rawls, questions of justice are necessary and relevant between contracting parties under conditions of moderate scarcity and limited generosity (the 'circumstances of justice').[4] Those who are party to the agreement are stipulated (at least in 1971) as free, equal, and rational, and as motivated by the benefits of social cooperation and mutual advantage.[5] Later, Rawls came to imagine contracting parties as 'reasonable', according to which citizens:

[1] Sen (2009) makes two claims which we build on in chapter 4. Firstly, that the capability approach can develop outside of the Rawlsian framework (this is something that Nussbaum also accepts despite sharing many of Rawls' elements). Secondly, and as we mentioned in the previous chapters, that *capability* also includes a kind of power. We build on this in our discussion of Mulgan's approach to well-being in chapter 4.
[2] Rawls (1971) (1993) (1999) (2001)
[3] Rawls (1971) chapter 1, see also Freeman (2007) introduction.
[4] Rawls (1971) pp.126-30
[5] Rawls (1971) chapter 1

> [...] are prepared to offer one another fair terms of social cooperation [...] and they agree to act on those terms, even at the cost of their own interests in particular situations, provided that others also accept those terms. For those terms to be fair terms, citizens offering them must reasonably think that those citizens to whom they are offered might also reasonably accept them. [...] They must be able to do this as free and equal, and not as dominated or manipulated, or under the pressure of an inferior political or social position.[6]

On such a view, individuals are imagined as willing to listen to the views of others and willing to commit to (and play a fair part in implementing) the principles of justice that would be chosen. Following on from these basic stipulations, justice requires that an agreement is arrived at through a procedure modelled under fair conditions.[7] After all, or so the story goes, if agreement is important, then justice requires that no single contracting partner is in a position to tailor the principles to her own advantage. The principles of justice, therefore, can only be those which would be agreed to under fair conditions.

Of course, given the procedural nature of the theory, a lot depends on the fair conditions that the procedure is said to capture. Since if, in the end, the conditions fall short of this ideal, then the principles themselves will also fall short of what justice requires. For Rawls, these conditions are made possible by the impartiality generated in the *Original Position* (a hypothetical choice situation) by the *Veil of Ignorance*.[8] Behind the veil, individuals are imagined as being aware only of general facts about the world. They are ignorant of their places in society, their natural talents, and their conceptions of the good.[9] Such a device is supposed to ensure that no individual is able to tailor the principles to her own advantage by simulating a situation where she is unaware of what would (specifically) be in her favour. Without knowledge of one's place in society or what one hopes to achieve in the future, one is forced to consider the principles generally. More specifically, one is forced to consider the principles from the perspective of both the most and the least advantaged in society.

Rawls envisaged that, under fair conditions, we would derive two principles of justice to govern the basic structure of society (social institutions, political constitutions and the like). Firstly, he

[6] Rawls (1993) p.49
[7] Rawls (1971) p.136
[8] Rawls (1971) chapter 3
[9] Rawls (1971) pp.136-42

thinks that we would agree to secure basic liberties and freedoms for all (The Liberty Principle[10]). Secondly, that we would agree to a distribution of primary goods (including: basic rights and liberties, freedom of movement, powers, income and wealth, and the social bases of self-respect) which: 1) was to the maximum benefit of the least advantaged in society (The Difference Principle[11]), and 2) attached to positions and offices open to all (The Principle of Fair Equality of Opportunity[12]).[13] Quite simply, we would be sure to secure freedom for all, and we would agree to social inequalities only if they benefitted the worst-off, and only if social mobility is possible.

It is important, for our purposes, to make two general points about the structure of Rawls' theory. First, Rawls' theory, based on its association with contract theory[14], comes in two parts. These are: 1) the initial choice situation or the decision procedure (this part relies upon details such as *who* is party to the contract, *why* the question of distribution arises, as well as what *motivates* those to enter into such an agreement), and 2) the principles of justice which the procedure is said to generate (on Rawls' account, they are the principles that *would* be chosen by individuals if they were party to such an agreement). Importantly, while both parts are clearly mutually supportive (such that the resulting principles directly reflect the motivations and circumstances stipulated in the initial choice situation), they are also separable. In other words, one can easily accept the principles said to be generated, while rejecting the conditions of the choice situation as fair. Likewise, one can accept the conditions pertinent to the choice situation while denying the principles as those that would in fact be chosen.[15]

Secondly, Rawls' structure and principles are heavily influenced by the conceptual distinction between (and separation of) the right and the good. The role of the theory is not to offer a full account of the good, but merely to derive principles of the right.[16] Not only does this influence how the theory operates, but it also places conditions on the kinds of questions that the theory is able to ask.[17] For instance, Rawls (eventually) presents his theory as one that is constructed with the view to allowing for diverse and irreconcilable differences within (and even between) societies. In so doing, Rawls claims that his theory, without any metaphysical grounding, is a

[10] Rawls (1971) p.60 claims that 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others'.
[11] Rawls (1971) p.60
[12] Rawls (1971) p.60
[13] Rawls (1971) chapter 2
[14] Rawls (1971) p.11
[15] Rawls (1971) pp.11-17
[16] Rawls (1971) pp.446-52
[17] This is especially significant when we go on to consider the challenge of future people in chapters 5 and 6.

Political Liberalism. That is, belonging to a family of liberal theories that (among other things[18]) do not entail or endorse a *Comprehensive Philosophical Doctrine*. Instead, such a political conception allows Rawls to claim that the principles of justice are those which individuals, even with wide-ranging and diverse conceptions of the good life, could agree to (could be the subject of an *overlapping consensus*[19]). The primary goods, thus, are those that individuals value regardless of these differences.

The contractual and political underpinnings of the approach help us to understand the advantages and the disadvantages of this approach. The contractual underpinnings help us to see that there are certain conditions which must be met prior to discussions of justice being relevant to begin with. The principles must be attached to an agreement born from this understanding. Thus, the framework and the assumptions upon which the framework is built, heavily influence the nature of the principles generated, and how far those principles can extend. The political feature of the approach, on the other hand, helps us to recognise that Rawls is concerned with constructing a theory that will meet the demands of particular societies. It helps us to see that Rawls is primarily (if not entirely) concerned with modern liberal states.[20]

We have already pointed out that Rawls' theory is based on a (albeit hypothetical) contract between particular individuals. We have, then, said just enough to make it clear that addressing the three problems of justice (disability, nationality, and species-membership) which Nussbaum presses the theory to accommodate is by no means a straightforward operation. Unsurprisingly, even Rawls recognised how difficult including and accommodating these cases could be when he wrote that:

> [...] There is the problem of extending justice as fairness to cover our duties to future generations, under which falls the problem of just savings. Another problem is how to extend justice as fairness to cover the law of peoples, that is, the concepts and principles that apply to international law and the relations between political societies. Moreover, since we have assumed (as noted above) that persons are normal and fully cooperating members of society over a complete life, and so have the requisite capacities assuming that role, there is the question of what is owed to those who fail to meet this condition,

[18] According to Rawls a political liberalism: 1) applies to the basic structure only, is 2) independent of any particular comprehensive doctrine, and 3) gives expression to fundamental ideas implicit in the society's public political culture. Rawls (2003) p.11-15
[19] Rawls (1993) p.10
[20] Rawls (1971) p.24, (1993) lecture v, (1993) lecture iv

> either temporarily (from illness and accident) or permanently, all of which covers a variety of cases. Finally, there is the problem of what is owed to animals and the rest of nature. While we would like eventually to answer all these questions, I very much doubt whether that is possible within the scope of justice as fairness as a political conception.[21]

Although Nussbaum seeks to address only three of the problems Rawls mentions in the passage above (because she claims that Rawls solves the problem of future people, something that we examine in chapters 5 and 6), it is fairly clear what Nussbaum hopes to achieve here. Indeed, Nussbaum is very clear about her intentions, claiming that 'these three problems are indeed serious unsolved problems of justice', and that she will 'argue that the classical theory of the social contract cannot solve these problems, even when put in its best form'.[22] However, Nussbaum is also very sure to highlight that the conclusion 'is not that we should reject Rawls' theory or any contract theory, but that we should keep working on alternative theories, which may possibly enhance our understanding of justice and enable us to extend those very theories'.[23] Although Nussbaum's claims are modest, it seems that if there is (on Rawls' account) no way of accommodating or adequately treating these issues, then there are good reasons to depart (at least in some way) from Rawls' approach and to seek out another strategy. In other words, if Rawls does not have an adequate solution built in, then there are strong grounds for justifying departures from justice as fairness.

It ought to be, at least somewhat clear, that issues of disability, nationality, and species are excluded from the initial decision-making procedure (the original position) described above. In light of the issue of disability, Rawls states that:

> [...] At this initial stage the fundamental problem of social justice arises between those who are full and active and morally conscientious participants in society, and directly or indirectly associated together throughout a complete life. Therefore, it is sensible to lay aside certain difficult complications. If we can work out a theory that covers the fundamental case, we can try to extend it to other cases later. Plainly, a theory that fails for the fundamental case is of no use at all.[24]

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[21] Rawls (1993) p.21, quoted in Nussbaum (2006a) p.3. This projects agrees with the claim that it is difficult to deal with these challenges within a political framework. At least, this is what this project will demonstrate in later chapters.
[22] Nussbaum (2006a) p.3
[23] Nussbaum (2006a) p.25
[24] Rawls (1980) p.546, quoted in Nussbaum (2006a) p.110

There are a couple of points to make here. The first is that there is something significant about what Rawls has to say about these cases (and the case of disability in particular) as a result. Certainly, it seems that we ought not to try to do too much at the expense of overlooking the cases that we *can* sort through. For this reason, and in the end, this may just be the best place to start. Secondly, and while this may be so, we ought not to be too quick to overlook the way in which this approach to the cases stems from the starting point that contract theory takes. Once one buys into the idea that issues of justice arise between individuals who seek to reap the benefits of social cooperation, it is difficult to include cases that are inconsistent with this starting point. Thus, as helpful and practical as this approach and advice might be, in the end this approach doesn't follow on from something that contract theory *decides* to do, but the only thing left in the end.

In line with this point, Nussbaum recognises that there is a very general problem with contract theory (and the contractual element of Rawls' theory), which affects its ability to *adequately* accommodate the issues she considers. Nussbaum claims that the problem consists in the way that contract theory conflates two separate questions:

> The social contract tradition conflates two questions that are in principle distinct. "By whom are society's basic principles designed?" And "for whom are society's basic principles designed?" [...] The chosen principles regulate, in the first instance, their dealings with one another. [...] But the "by whom" and the "for whom" questions need not be linked in this way. One might have a theory that held many living beings, human and even nonhuman, are primary subjects of justice, even though they are not capable of participating in the procedure through which principles are chosen.[25]

We know that this 'by whom, for whom' conflation is integral to Rawls' theory. Thus, on Rawls' account, each of the issues will be treated in the same way. That is, if they are to be accommodated, this will need to be at a later stage and as an extension. Such an approach prompts at least two related questions:

1. Do we undermine the fundamental case by including (some or all of) these issues from the start?
2. Can we justify separating or isolating the fundamental case from these issues to begin with?

[25] Nussbaum (2006a) p.16

Nussbaum, in one way or another, provides us with answers to both of these questions. Not only does she hope to demonstrate the importance of taking the cases on board from the start, but she shows us that the answer Rawls gives to both questions – and especially the first – follows on from the structure of his theory and the contractual elements that underpin it. This helps us to recognise that Rawls is 'boxed-in' in terms of the answers he is able to give to these questions. What's more, it helps us to see that any way around the problems requires a different approach altogether. In what follows, we briefly examine Nussbaum's criticism of Rawls on each of the issues she explores.

3.1.1 Nussbaum on Disability

Treating disability as an afterthought immediately calls Rawls' conception of fairness and disadvantage into question. According to Nussbaum, there is a question of fair treatment to those who suffer from, but also who care for those who suffer from, mental or physical impairments. This is a serious problem, or so Nussbaum contends, given that we all face physical or mental impairments at some point, and given that we ought to take into account the widespread burden of care placed on others. As social institutions are to be arranged with normal cooperating members of society in mind, the structures which are put in place seem to ignore the fact of disability and vulnerability. More than this, it seems that social institutions are not conducive to (at least some) impaired individuals (and carers) who *could* participate and cooperate if conditions were favourable for them.[26]

Both of these points are serious problems. Not only do we exclude very real cases, but we overlook ways in which citizens are or will be disadvantaged. One strategy, of course, would be to alter the contracting conditions so to include these elements. This is, however, extremely difficult. In particular, Nussbaum provides us with three reasons as to why this option is not open to Rawls. The first is that the use of primary goods would be lost if we allow for the issue of disability in the original position – and this leads us to lose out on a clear and straightforward way of measuring disadvantage.[27] The primary goods are those things which 'enable citizens adequately to develop and fully exercise their two moral powers and to pursue their determinate conceptions of the good'.[28] For this reason, they are 'things needed and required by persons, as citizens who are fully cooperating members of society, and not merely as human beings [...]'.[29]

[26] Nussbaum (2006a) chapter 2
[27] Nussbaum (2006a) pp.114-6
[28] Rawls (2001) p.57
[29] Rawls (2001) p.58

This way of measuring disadvantage follows on from the starting point and the contracting conditions, and it is central to our having any way of understanding and realising the principles chosen.

The second reason why this is not open to Rawls is that even if individuals who suffer from unusual physical or mental impairments are able to contribute to society, it is unclear whether the actual costs of allowing them to do so would justify their inclusion. As Nussbaum points out:

> [...] even if we concede to the disability advocate that workers with impairments outside the normal range can be highly productive, it is unlikely that anyone could show that in general their economic productivity offsets the costs of fully including them.[30]

The third (and, what I take to be, stronger) reason why Rawls cannot modify the theory in light of these problems is because of Rawls' commitment to the social contract theory itself. According to Nussbaum, in treating disability in this way, we see 'the naked face of social contract theory'.[31] That is, that the whole point is to reap benefits, and those who are unable to improve our social conditions are simply left out. As Nussbaum says 'moralize the starting point as we may, the bottom line is that the whole point of departing from the state of nature is to reap benefits from mutual cooperation'.[32]

For Rawls, the basic question of justice revolves around the reasons citizens – as cooperating members of society – would agree to fair terms of cooperation. This seems straightforward enough, yet the preceding discussion gives us a clear sense of how deep the answers to these questions actually are. Not only are we left with no way of addressing serious issues of disability and impairment as they feature amongst us all, but these issues are problematically left out from the start. The basic structure of society is built upon foundations that not only exclude these issues from the start, but that seem to have no way of adequately including them at a later stage.

3.1.2 Nussbaum on Nationality

On the issue of justice between non-compatriots, an issue which Rawls would spend the final years of his life offering a solution to, Rawls again takes up the issue at a later stage.[33] As with the

[30] Nussbaum (2006a) p.118
[31] Nussbaum (2006a) p.118
[32] Nussbaum (2006a) p.118
[33] Rawls (1999)

issue of disability, the contracting commitments make it impossible for Rawls to accommodate non-compatriots in any other way. Rawls is able to take citizens as the units of concern in his account of domestic justice – he is, however, unable to do so beyond the nation-state. In the end, this limits the scope of justice and the nature of the questions relevant beyond the nation-state. Rawls is concerned with *international* justice rather than *global* justice per se.[34] So not only are the (domestic) principles of justice irrelevant, but our concern is with peace and order between states. Rawls leaves room for little, if any, discussion about redistribution between states. There is only a minimal set of freedoms and rights, and only a very small duty to global egalitarianism – enough to ensure that states can live by the international principles.[35]

Nussbaum is not alone in her dissatisfaction with Rawls' proposal.[36] However, and unlike some contemporary writers, Nussbaum does not see any added benefits of (directly) extending or applying Rawls' domestic account globally, by demonstrating that the (domestic) contracting conditions are applicable and that the principles (by implication) apply globally.[37] To be sure, Nussbaum agrees that such accounts are improvements on the Rawlsian approach. However, Nussbaum also claims that they fall short of what is ultimately required. Nussbaum takes it to be the case that some of the fundamental features (equality and mutual advantage) need to be modified if we are to accommodate this problem. In line with the problem of impairment, Nussbaum claims that 'we live in a world in which it is simply not true that cooperating with others on fair terms will be advantageous to all'.[38] It is, in other words, all very well that we formulate an extended version of Rawls' domestic account, but in the end we must still commit ourselves to leaving out a good number of individuals. For this reason, the problem is not to be found in the way Rawls' approach might apply globally, but in the very foundational commitments within which it operates.

We have already pointed out that equality and mutual advantage is something fundamental to contract theory and something which the circumstances of justice require. Here we see that these very conditions limit the scope of justice in the way set out above. If our aim is to change these

[34] Singer (2002)
[35] Rawls (1999) p.106
[36] A number of Cosmopolitan thinkers have rejected Rawls' strategy, and have attempted to justify extending the theory and principles (either in tact or modified) to include all human beings. See for instance: Pogge (2008), Beitz (1999), Moellendorf (2002), Brock (2009)
[37] Nussbaum here refers specifically to Pogge and Beitz, see Nussbaum (2006a) pp.264-72
[38] Nussbaum (2006a) p.273

conditions, and thereby open up our understanding of justice – we do so at the expense of the contractual underpinnings of Rawls' theory.[39]

3.1.3 Nussbaum on Nonhuman Animals

In line with the discussion of severe mental impairments, Rawls' commitment to the social contract tradition and to rationality means that he ends up drawing blanks on the issue of non-human animals within the sphere of justice. Duties of justice are exclusively within and between (most) human beings, and non-human animals generate moral duties of compassion.[40] This is not enough for Nussbaum who suggests that (much like issues of impairment and disability) there are no clear grounds to limit the scope of justice and to exclude nonhuman animals as issues of justice *themselves*.[41] The exclusion of nonhuman animals, of course, maps onto Rawls' exclusion of disability wherein equality, rationality, social cooperation, and the importance of agreement limits the inclusion of nonhuman animals from the start.

It seems fairly clear that Nussbaum successfully demonstrates that (on Rawls' account) the issues are problematically overlooked in the first instance. Moreover, it seems somewhat clear that treating these issues at a later stage overlooks the way in which the basic structure itself is (already) poorly designed. However, and despite Nussbaum's success, there ought to be a few nagging concerns at this point. The most obvious is: what is left of Rawls? Nussbaum is clear that her approach attempts to *extend* Rawls, and yet in the end she undermines core features within his approach. In particular, Nussbaum undermines the contract theory underpinning it. It's not clear, then, whether we ought to call this (at least at this point) an extension at all.[42] Another nagging question ought to be that it's not clear how Nussbaum constructs an approach of her own. It is, in other words, unclear exactly how Nussbaum is going to be able to include all of these issues within the scope of *justice*. Nussbaum's rejection of Rawls' solution to nonhuman animals gives us (at least) some insight into how difficult it will be to replace it with something richer. The final related concern that we ought to have is: what will the costs of including all of these issues be? In other words, will Nussbaum be able to back this critique up by offering, not just an alternative, but *real solutions* to the problems that including them will most likely introduce?

[39] Nussbaum (2006a) pp.331-2
[40] Nussbaum (2006a) p.337
[41] Nussbaum (2006a) pp.336-7
[42] This is an important question, but not one that this project considers. We are (in the end) more interested in how Nussbaum's approach develops over how Nussbaum extends Rawls' approach (if indeed she does).

In what follows, we examine Nussbaum's approach and examine how and why her version of the approach includes the issues that she examines. Although the discussion includes an overview of the similarities between Nussbaum and Rawls, our concern and our focus, is primarily on how Nussbaum's version of the approach itself develops.

3.2 Nussbaum's Approach

Central to Nussbaum's approach is her starting point of dignity.[43] Not only does the conception of dignity bring together key elements in Nussbaum's approach (including the architectonic functionings of *affiliation* and *practical reason*[44]) but it forms the basis of the extension of the approach to the issues of justice that she examines. There are two inter-related ways in which dignity is expressed within the approach. The first expression is (partly) Kantian and follows on from the claim that everything has an *innate* dignity. For instance, Nussbaum tells us that 'any child born into a species has the dignity relevant to that species'.[45] In one sense at least, existence is all that is required for dignity to apply in some way. The second expression, however, is in the list of capabilities itself. Nussbaum claims that what we typically mean by dignity is being able to do and be certain things.[46] More than having an innate dignity then, Nussbaum claims that any child born 'should also have all the capabilities relevant to the species either individually or through guardianship'.[47] In other words, and bringing both of these expressions together, Nussbaum thinks that our intuitive understanding (our considered judgements) about human dignity will lead us to the capabilities on her list, and to the conclusion that they 'should be pursued for each and every person, treating each as an end and none as a mere tool of the ends of others'.[48]

It is important to highlight, then, that the capabilities are not *derived* from human dignity, but flesh it out. In other words, 'dignity is not a value independent of the capabilities, [and] the articulation of political principles involving capabilities are (partial) accounts of a life of human dignity'.[49] Dignity is, thus, first expressed in an innate sense of respect, and then finds it's expression in the kinds of beings we are – that is, capable of particular activities. In such a way, Nussbaum rejects the separation of the right and the good, and tells us that the right and the good 'seem thoroughly

[43] Nussbaum (2006a) pp.159-60, see also Nussbaum (2008)
[44] Nussbaum (2006a) p.162
[45] Nussbaum (2006a) p.347
[46] Nussbaum (2006a) p.347
[47] Nussbaum (2006a) p.347
[48] Nussbaum (2006a) p.70
[49] Nussbaum (2006a) p.7

intertwined'.[50] The guiding intuition then, as far as the importance of capability is concerned, is that abilities exert a moral claim for them to be developed.[51]

From here we can see how all human beings are included from the start, since one only needs to be (at least) human for the approach to capture the dignity that one has and ought to be able to achieve. This helps us to see that it would be conceptually inconsistent to view the approach as treating issues of disability and nationality at a later stage. Even though there are differences between human beings (such as mental and physical ability, as well as geographical location and nationality), these differences do not impose any structure on how human dignity is expressed within the approach. What's more, Nussbaum's conception of dignity also includes nonhuman animals, since 'the capability approach sees the world as containing many different types of animal dignity, all of which deserve respect and even awe'.[52] Thus, even though the capabilities which capture dignity may differ across species, dignity itself is not something that relies on any *particular* capability (such as having rationality, or being a cooperative member of society). Thus, dignity is not something that we reserve for the human species only.

So exactly what warrants inclusion on Nussbaum's approach? Given the above, and what Nussbaum says on the matter, one might have thought that the value we accord to a being will depend on how many (and the kind of) capabilities that are relevant for them and their lives.[53] However, Nussbaum rejects this as the guiding formula because she wants to ensure that the importance of species-membership is not lost.[54] After all, dignity relies in part on the species to which one belongs, and so losing the importance of species would undermine the importance of the expression of dignity.[55] In other words, the capabilities that map onto the conception of dignity depend on the species to which a being belongs – so there can be no question of dignity independent of the species within which that question arises. For this reason, the list not only relies on species-dependant capabilities, but the capabilities tell us something about what it means to be recognisably part of that species. Quite simply, being a human being is partly about being

[50] Nussbaum (2006a) p.162
[51] Nussbaum (2001b)
[52] Nussbaum (2006a) p.159
[53] For instance, Nussbaum writes that 'because the Capability Approach finds ethical significance in the unfolding and flourishing of basic (innate) capabilities – those that are evaluated as both good and central – it will also find harm in the thwarting or blighting of those capabilities. More complex forms of life have more and more complex (good) capabilities to be blighted so they can suffer more and different types of harm'. (2006) p.361
[54] Nussbaum (2006a) p.179
[55] Nussbaum (2006a) p.179

able to do and be those things that human beings ought to be able to do in virtue of being part of that species.

Among other things, this helps us to see why Nussbaum relies only on a limited number of capabilities to draw the line. She writes that:

> If a creature has either the capacity for pleasure and pain, or the capacity for movement from place to place, or the capacity for emotion and affiliation, or the capacity for reasoning and so forth (we might add play, tool use, and others) then that creature has moral standing. [56]

Thus, the threshold level that grants inclusion within a particular species is also what grants moral status. A being need only have one of the relevant basic capabilities in order to gain inclusion within the moral community.

The importance of dignity and the role that the capabilities play in cashing this out provides Nussbaum with an approach that is able to include all of the cases from the start. From here we have a clear sense of how Nussbaum grounds her theory, and so we know (more importantly) how this incorporates nonhuman animals. We know, for instance, that we ought to be moved by capability loss or deprivation and that we ought to be moved by and recognise the significant suffering of all beings as instances of injustice. On Nussbaum's account, the capabilities are entitlements and extend the scope of justice to all beings able to develop them.[57] Two things follow. First, issues of disability, nationality, and nonhuman animals are included because dignity and the capabilities include them. Secondly, including them (creating a society where various species are able to co-exist and flourish) requires that we have great sympathy and benevolence.[58]

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[56] Nussbaum (2006a) p.362

[57] According to Nussbaum: 'The emotion of compassion involves the thought that another creature is suffering significantly [...] It does not involve the thought that someone is to blame for that suffering [...] Analysing the harms we do to animals in terms of duties of compassion alone entails blurring the important distinction between the compassion we might have for an animal who dies of a disease that is nobody's fault and the response that we might have to the sufferings of an animal who has been cruelly treated by humans [...] It seems however that what we typically mean when we call a bad act unjust is that the creature injured by that act has an entitlement not to be treated in that way [...] The sphere of justice is the sphere of basic entitlement. When I say the mistreatment of animals is unjust I mean to say it is wrong of us to treat them in that way but also that they have a right a moral entitlement not to be treated in that way. It is unfair to *them*'. (2006a) p.336

[58] Nussbaum (2006a) p.409

As Nussbaum tells us, the theory seems to expect a great deal from us – a great deal more, we should say, than contract theory.[59]

3.2.1 Nussbaum and Rawls: A Comparison

Unlike Rawls who sets out from the circumstances of justice, Nussbaum's capability approach is informed by Aristotelian and Marxian foundations, whereby human beings are depicted as having rich needs, and who come to form society based on the kinds of beings they are. As Nussbaum writes:

> The person leaves the state of nature (if, indeed, there remains any use for this fiction) not because it is more mutually advantageous to make a deal with others, but because she cannot imagine living well without shared ends and a shared life. Living with and towards others, with both benevolence and justice, is part of the shared public conception of the person that all affirm for political purposes.[60]

And further, that:

> The purpose of social cooperation by analogy and extension ought to be to live decently together in a world in which many species try to flourish [...] If we follow the intuitive idea of the theory [...] no sentient being should be cut off from the chance for a flourishing life with the type of dignity relevant to that species.[61]

In line with this difference, and unlike contract theory which is procedural, Nussbaum's capability approach is an 'outcome orientated theory from the start'.[62] The aim is to ensure that institutions are consistent with enabling individuals to live a dignified existence – (partly) defined by the capabilities on Nussbaum's list.

From this starting point, as Nussbaum tells us, the approach is under no obligation to 'hypothesise that the parties to the social contract are "free, equal, and independent"', nor that rationality is required to be included in decisions relating to the design of society. Not only is the approach able to capture disadvantage in a far more pluralistic way, but justice exists wherever

[59] Nussbaum (2006a) p.409 It is worth pointing out that it might be apparent that conflicts between and within the cases are inevitable. We consider this question in the final section.
[60] Nussbaum (2006a) p.158
[61] Nussbaum (2006a) p.351
[62] Nussbaum (2006a) p.82

human beings exist. Justice simply follows on from the fact that human beings are political and social animals. Justice, therefore, is not only good for all (whether one is able to cooperate or not) but it is good in itself since we are imagined as caring for others and for others' good as part of our own.[63]

The final difference, and one which Nussbaum consolidates in the very final section of her book, is that unlike the capability approach as she formulates it, contract theory has no need to focus on benevolence from the start.[64] Contract theory has, that is, a way of answering the hard question of why we should even bother with justice at all.[65] The capability approach has to rely on a controversial account of why justice matters, and why the capabilities listed should matter, by relying on an account of the kinds of beings we are, the intuitions that we (should) share, and what ought to motivate us to seek justice.[66] Rawls, by limiting the scope of justice, need not rely on such a controversial starting point – even if benevolence is part of what the veil of ignorance sets out to capture in some way.[67] In response, Nussbaum tells us that while 'it is more demanding to build strong benevolence and a commitment to justice into the foundation of a theory [...] if the weaker assumptions do not handle the problem, we need stronger assumptions'.[68] This response captures what proponents of the capability approach will often need to say when the complex nature of its foundations and its proposals are highlighted.[69] We could, as contract theory does, simplify the troubles of the world by leaving them out or coming back to them later. However, the better strategy, in the end, just might be to concede that things really aren't that simple, and that *treating* injustice requires at least an approach that allows us to confront it.

Even though these differences run deep, there are two key areas of convergence. The first source of convergence (stemming from shared Kantian elements) is the starting point of dignity and respect. Rawls sets out from the claim that 'each person has an inviolability founded on justice

[63] Nussbaum (2006a) p.87
[64] Nussbaum (2006a) p.88
[65] This is also a point that Susan Mendus makes in her review of *Frontiers of Justice*. See Mendus (2008)
[66] For instance, Nussbaum claims that 'if we are made aware of another person's suffering in the right way, we will go to his or her aid. The problem is that most of the time we are distracted, not well educated to understand the plights of other people, and not led, through an education of the imagination, to picture those sufferings vividly ourselves [...] people often have insufficient awareness of their own human vulnerability if they have been brought up to believe that they are privileged, or even self-sufficient and invulnerable' (2006a) p.412
[67] Nussbaum (2006a) pp.90-2
[68] Nussbaum (2006a) p.159
[69] For instance, even Sen (albeit in relation to the commensurability problem that the capability approach faces) points out things may be *difficult* without being *impossible*. (2009) pp.239-41

that even the welfare of society as a whole cannot override'.[70] In line with such a view, Nussbaum sets out from the claim that dignity requires that the capabilities 'should be pursued for each and every person, treating each as an end and none as a mere tool of the ends of others'.[71] Thus, for Nussbaum 'one person's well-being is not permitted to compensate another's misery'.[72] The major shift however, is that Nussbaum's conception is not limited to citizens in the sense in which Rawls contends. As Nussbaum writes, 'what is lacking in Rawls' account [...] is the sense of the animal itself as an agent and a subject, a creature to whom something is due a creature who is itself an end'.[73] Thus, Nussbaum extends and captures this concern for equality and respect in light of the capabilities, but does not limit its scope by insisting on interpreting it in light of the contracting conditions – or in fact any contract at all.

Secondly, and despite departing from Rawls, Nussbaum retains some key elements. Nussbaum presents her list of capabilities in a way very much like Rawls' list of primary goods. The list is supposed to be necessary and valuable regardless of what one's conception of the good is or might be.[74] What's more, Nussbaum affirms, and presents her approach as one type of, *political liberalism* and so as part of the family of political liberalisms that (among other things) do not endorse a comprehensive doctrine. For this reason, Nussbaum's approach offers an incomplete and minimum account of the good. In so doing, Nussbaum contends that the list could over time become the subject of an *overlapping consensus*.[75]

Both of these similarities are significant. What they help us to see is that Nussbaum's capabilities fill out the ground for Rawls' theory (by including issues of disability, nationality, and species) while trying to maintain the general shape and structure at the top. This helps us to better understand the internal workings of Nussbaum's approach. Given that one of the architectonic capabilities (at least for human beings) is *practical reason* and being able to plan one's own life – it ought to be no surprise that the approach will not want to over-prescribe on what the good life is. This gives us some sense of why Nussbaum presents the list as *capabilities*, why any component

[70] Rawls (1971) p.3
[71] Nussbaum (2006a) p.70
[72] Nussbaum (2006a) p.80
[73] Nussbaum (2006a) p.337
[74] Initially Nussbaum (2000a) presented her approach (distinguishing it from Rawls) as *thick* (because it was the content of the good life) but *vague* (because individuals and communities would specify them). Recently, Nussbaum claimed to adopt a liberal view in the spirit of Rawls in which case the list was a partial account of justice in much the same way that primary goods are. The components on the list are now neither necessary nor sufficient since we are able to (at least in principle) add or delete components. For an overview of these developments see Crocker (2008).
[75] Nussbaum claims that the capabilities 'are free of any specific metaphysical grounding [...] the capabilities can be the object of an overlapping consensus among people who otherwise have very different comprehensive conceptions of the good'. Nussbaum (2000a) p.81

(at least in principle) may be added or deleted[76], and why the approach accepts a plurality of good lives.[77] However, and most importantly, this shows us that there is a tension here between these commitments – between Nussbaum's rich account of capabilities and her commitment to political liberalism. As we have pointed out, some concessions in light of the nature and character of the list must be made to account for the flexibility that a politically liberal theory demands.[78] For this reason (and something that we will go on to examine when we consider the problem of future people) there are questions about how much bite the list of capabilities really can have, and so how central the list really can be overall given the importance of agreement and the tensions that this creates.

3.3 Does Nussbaum provide us with a viable approach?

This section poses two questions for Nussbaum's account, both of which raise doubts about whether Nussbaum's theory really does provide the capability approach with a way forward. Both problems stem from Nussbaum's strategy of extending the approach from a rigid and species-dependant starting point of dignity. The first concerns Nussbaum's reliance on a list of capabilities, and the second concerns the problem of balancing the issues of justice that come into play. This project contends that both of these points highlight serious flaws within Nussbaum's approach, and that they lead to the approach remaining silent on some of the most urgent problems we face.

3.3.1 Extending the Capability Approach

Nussbaum's list of capabilities is designed with *human* dignity in mind, and proposes a single species-relevant threshold level. Even so, Nussbaum opts to utilise the same list for all of the cases she covers (disability, non-compatriots, and nonhuman animals), and sets the threshold level to account for all human beings. One obvious question is whether this is the correct application of the capability approach at all. A proponent of the capability approach might very well claim that differences require a different way of understanding and deciding on the capabilities that will be relevant. One might further claim that, not only will this help to ensure

[76] Nussbaum (2006a) p.78
[77] Nussbaum (2006a) p.84
[78] There is a question to be asked about how Nussbaum's account is politically liberal given that it seems that Nussbaum's approach does not satisfy all of the Rawlsian conditions for a political liberalism. For instance, Freeman (2006) p.409 claims that Nussbaum's account 'does not provide principles of justice for the basic structure of society, which for Rawls is 'the primary subject of justice'. At least, there is a question about what Nussbaum means when she claims that her approach is politically liberal. This question is beyond the scope of this project.

that the capabilities are most suited to the case(s) in question, but it will help us to ensure that the process itself is legitimate.[79]

There are a couple of points to make here. As mentioned in the previous section, Nussbaum neutralises the list by offering it as a minimum account of the good, but she also differentiates between *justification* and *implementation*. This distinction helps us to bring together two features within Nussbaum's approach – the importance of abstract justification, and the importance of practical implementation (mentioned in chapter 1). So it might be that we can all agree on what the capabilities ought to be, without rejecting that realising the capabilities can be diverse. This may be so, but the question remains: why not design another list or alter the threshold level? On the issue of disability, Nussbaum claims that there is a danger in either altering the list of capabilities or opting to lower the threshold level. This claim is motivated by a desire not to weaken the entitlements of individuals with physical and mental impairments even if they are unable to (physically and/or mentally) ever reach the stipulated level.[80] As Nussbaum rightly points out, dealing with diversity requires more than an attentive space within which to think about differences. It also requires structural changes and a way of exploring the ways in which societies are (sometimes) ready-made for homogeneity. Thus, since all that is required for the list to be relevant for individuals is that they are able to experience (in some form or another) one of the (relevant) capabilities, each person is entitled to be above the threshold or at least as close as they can be to it.

What's more, there are good practical reasons why the list should remain the same. As the conception of dignity is species-dependant it would be no good to conceptually modify what a dignified existence is within the species even when we might accept that a lower level is appropriate in practise. However, there is also a deeper reason why the list remains unchanged. To understand Nussbaum's approach to disability we ought to bear in mind that on Nussbaum's account all human beings are vulnerable and dependant more or less throughout their lives, since 'we begin as dependant babies and often end in other forms of dependency'.[81] On such a view, it is our *misunderstanding* of our own humanity and animal natures that lead us to misunderstand disability and to treat it as somehow unusual. It is, thus, a misreading of Nussbaum's approach to view issues of disability and dependency as generating another list of capabilities or threshold level since we are all dependant in some measure throughout our lives. If vulnerability and

[79] Robeyns (2005c) p.71
[80] Nussbaum (2006a) p.190
[81] Nussbaum (2006a) p.182

dependence is a feature of human life – then the answer lies in integrating this fact into the list itself.[82]

Unfortunately, the introduction of non-human animals turns the discussion on its head. Even though Nussbaum acknowledges that dignity is species-relative, Nussbaum (rather than construct another list) opts for the strategy of applying the list (based on *human* dignity) to nonhuman animals.[83] Here again, we see that there are good practical reasons for taking this approach. Of course, a number of capabilities seem to fit nicely – including: *play, health, integrity, affiliation*, even (or so one could argue) a particular understanding of *control.*[84] Yet, other capabilities seem to be way off the mark – and simply irrelevant. For instance, Nussbaum suggests that protecting the capability for *senses, imagination, and thought,* requires that domestic animals are suitably toilet trained, and that protecting the capability for *practical reason,* requires 'plenty of room to move around'.[85] Even so, these problems do not lead Nussbaum to reconsider the way in which the list and the concept of dignity might apply to other species.

To be fair, one might claim that this is a minor problem. Nussbaum does, after all, acknowledge that there are issues with this strategy. After all, she is well aware that the list is not set up for nonhuman animals.[86] The important point to make, however, is that Nussbaum doesn't really leave herself any other option. The practise of applying a single list of capabilities to diverse cases stems from a deeper problem of stipulating a single list as capturing and determining moral status and dignity. In other words, and given that the guiding intuition is that abilities exert a moral claim for them to be developed, without a list of capabilities to ground the approach the conception of dignity is incomplete.

Recall that in the previous chapter, and based on the empirical work of Wolff and De-Shalit, we highlighted that there are different kinds of capabilities, some of which (we could argue) are more urgent or basic than others.[87] A species-relative differentiation then (even one based on the list for human dignity) seems the obvious answer for Nussbaum here. Such a move would allow us to ask which capabilities hold across and between species, as well as what the list is for. For instance, it would allow us to say that bodily health, integrity, play were important for both

[82] There is a question of how this impacts on the approach. This is something we consider in light of future people.
[83] Nussbaum (2006a) pp.392-401
[84] Nussbaum (2006a) pp.392-401
[85] Nussbaum (2006a) p.398
[86] Nussbaum (2006a) p.392, points out that the exercise is 'highly tentative' after all.
[87] See Chapter 2 of this thesis

humans and many nonhuman animals. But it would also allow us to say that practical reason and even affiliation is not so important for some nonhuman animals, despite its importance for others. More importantly, this would allow us to ask whether there is anything else that we ought to *include* on the list in order to adequately accommodate differences (a question we will go on to consider in chapter 4).

Unfortunately, however, Nussbaum is unable to utilise this insight. First, allowing for differences between lists of capabilities would place some pressure on achieving an overlapping consensus. At least, there is a good chance that this would complicate proceedings.[88] It seems that it might just be a better strategy to ask us all to accept a single list of capabilities for human beings, and then to ask us to include other relevant beings within the scope of concern. Secondly, however, moving away from a single list would lose the conception of dignity as it is conceived, and so central to Nussbaum's approach. Each of the capabilities is valuable in their own right and cannot (as we saw in the previous chapter) be subsumed under more stringent headings or grouped together. In other words, unless Nussbaum's approach to extending the capability approach is modified, the list of capabilities is the only way forward and the only extension mechanism available.[89]

3.3.2 Balancing the Issues of Justice

Nussbaum attempts to extend the scope of justice to include all of the issues that she examines from the start. We simply ask what we want to achieve – in this case, an approach that captures each of the issues, and then we search for a starting point that can be consistently applied across all of them. Unfortunately, one obvious problem with this strategy is that it raises issues of conflicts and trade-offs. Especially, that is, if our concern is to engage with problems in the real world, and as they feature on the ground. Nussbaum's strategy of extending the scope of justice, and addressing hard cases from the start, lands us with more issues and beings to contend with. To be clear, this is not just an issue of how we secure the capabilities and functionings for all beings, but it extends to the social structures within which all beings live, to inequalities of power, and to instances of killing and wrongdoing between and within all species.[90] The question is, then, how do we deal with the conflicting capabilities and conflicting obligations that are inevitable under such a view?

[88] We go on to examine this problem further in chapter 8 in light of indigenous peoples.
[89] We might think, at least at this point, that this is a trivial concern. We go on to point out that the introduction of indigenous peoples, however, give us even more reason to depart from a list as Nussbaum frames it.
[90] Nussbaum (2006a) p.399

On the issue of conflicts between capabilities for human beings, Nussbaum claims that sacrificing (or trading-off) any of the capabilities is prohibited. Such a situation, she tells us, indicates that the society in question is very poorly designed and very bad indeed. She writes:

> If parents face a conflict between life-sustaining food and the education of their children in the sense that only sending their children to work all day will enable the family to survive that again is a sign that society is not well-designed. Even in very poor regions intelligent planning can make it possible for people to live healthy lives and also to educate their children.[91]

One might be baffled with this response, but we ought to remember that dignity is expressed in an innate respect – that all beings must be treated as ends in themselves. What's more, (to be fair) it is a point which follows on from the claim that treating issues of diversity (such as the cases which she deals with) require that we examine the structural barriers that exist. Likewise, it goes back to the claim made in relation to issues of impairment and not lowering the threshold level or overlooking the capability simply because the levels cannot be achieved. We ought to plan better, and be more creative in our solutions rather than jump at the chance of trading off.

Yet, as individuals and communities we are often faced with choices about which and whose capabilities and functionings to secure. For instance, and dealing with the capability for bodily health, we are faced with questions about whether to invest in medical research, which medical research to invest in even if we do, whether to invest in health education, whether to make medical treatments freely available, and which treatments these are. Should our community support cancer research? Should we make cancer treatment freely available for all patients? Of course, these questions are amplified when we add that some of us carry (other) illnesses and disabilities that prevent us from reaching the threshold level of dignity for any of the capabilities – let alone the capability for health. Should we invest in research investigating severe mental impairments? Should we invest in preventing the onset of dementia? These are tough, but very real questions. Not only are we often faced with the reality that our resources are limited, but we are faced with questions like this in light of all relevant beings within and outside of our communities. *Whatever* we do, it seems that some being that could have been better off won't be.

[91] Nussbaum (2006a) p.401

To be sure, Nussbaum does not limit the extent to which these difficult choices are part of our lives. Nor, does she overlook the urgency that there is for real people having to deal with them. Nussbaum stresses that sometimes situations present themselves to us in such a way that no particular action will be entirely satisfactory.[92] A parent's choice between a child's recital and much needed overtime is one such example. Indeed, Nussbaum is well aware that most of us make these kinds of choices all the time – we often must leave (some) needs unmet and we often make difficult choices for ourselves and others. Even so, her approach does not provide us with a clear way forward – not only are all the capabilities required, but no capability is more important than the others insofar as dignity is concerned. Even if we accept that these choices are tragic, it is difficult to imagine that we can (or even should) say nothing at all about how these choices are or ought to be treated. There is a serious question of what Nussbaum's approach will require of us if the aim is to secure all of the capabilities for all beings. More problematically, there is no clear way of generating an answer.

Interestingly, even though Nussbaum blocks addressing conflicts between capabilities within the human community, she does change tack when we are addressing conflicts between species. On the inevitable conflicts between humans and nonhumans in the use of animals for food and research she claims that:

> [...] nobody really knows what the impact on the world environment would be of a total switch to vegetarian sources of protein or the extent to which the diet can be made compatible with the health of all the world's children. In this case it appears that the best solution might be to focus on initially good treatment during life and painless killing, setting the threshold there at first where it is clearly compatible with securing all the human capabilities and not very clearly in violation of any major animal capability depending on how we understand the harm of a painless death for various types of animals.[93]

Similarly, on the issue of animals in research she claims that:

[92] Nussbaum (2001a), Nussbaum (2000b) also differentiates between what she terms the 'obvious question' (what is the best thing I can do now given my options?) and the 'tragic question' (are any choices free from wrong?). Nussbaum recognises that these questions are distinct and that even if we accept that there is an option that is better overall, this need not lead us to claim that this makes the option free from wrong.
[93] Nussbaum (2006a) p.402

> We should admit, then, that there will be an in-eliminability residue of tragedy in the relationships between humans and animals. [...] As a matter of ideal entitlement theory, this [scientific] research is morally bad. As a matter of current implementation, I do not favour stopping all such research immediately.[94]

It is not entirely clear why the conflicts that arise within the human species are treated so differently to those that arise between human and nonhuman species. This is especially so when Nussbaum (addressing conflicts between species) highlights that these measures are (while tragic) practical and necessary.[95] It seems, however, that the most plausible explanation is that for some beings a short but capability filled life, followed by a painless death, would not constitute any serious loss. Unfortunately, this is a dangerous move. Not only does it raise questions about whether the same can be said for some human beings, but it shows us just how important and fundamental species-membership is for Nussbaum. Here we see that, not only are we expected to meet all of the capabilities for all beings with no clear way of doing so, but we are committed to the view that entire species are more important than other beings regardless of what particular capabilities the individuals within the species actually have or could have.[96] In the end, the reason why trading-off within the human species is impermissible is simply because such a move would *always* undermine the dignity of that species. The first problem showed us just how rigid the conception of dignity is, while the second shows us how impractical and dangerous it is.

3.4 Conclusion

In the opening paragraphs of her *Frontiers of Justice* Nussbaum tells us that a theory of justice ought to have a 'generality and theoretical power that enables them to reach beyond the conflicts of their time', while being 'responsive to the world and its most urgent problems'.[97] There is a lot that one could say about Nussbaum's unwillingness to deal with conflicts within and between human communities, but it seems that the most appropriate thing to say is that Nussbaum falls short not of the aims that this project propose she meet, but of her own. Nussbaum's conception of dignity is certainly abstract, but it is (at least) unclear whether it can respond to the problems that the approach raises – let alone any others.[98] It is all very well *including* disability, nationality, and other species within the scope of justice, the difficulty is (as always) dealing with the

[94] Nussbaum (2006a) p.404
[95] Nussbaum (2006a) p.404
[96] Indeed, there is a fair amount of literature devoted to the dangers of vesting moral significance too heavily (of even at all) in species-membership. See, for instance, McMahan (2002).
[97] Nussbaum (2006a) p.1
[98] Of course, we will go on to consider two further challenges in chapters 5-8

problems that arise within and between them. It seems, thus, that Nussbaum's approach, while an improvement on Rawls' approach, shares with it an unwillingness and inability to deal with the problems that extending the scope of justice inevitably creates. There are, for these reasons, grounds to consider whether there are other ways to strengthen the approach to account for these problems. The remainder of this project attempts to take up this challenge.

4. A Capability-Centred Alternative

Our aim in this chapter is to consider one alternative to grounding and extending the capability approach. We start by offering an overview of Tim Mulgan's approach to well-being. We then consider Mulgan's approach in light of the concepts of agency and dignity, and we highlight the differences and similarities between them. This helps us to better understand what Mulgan's approach brings to the capability approach, while helping us to see how Mulgan's approach is very much in line with Sen's articulation of the approach. However, it also helps us to see that, while Mulgan's approach is a good start, we need to extend and modify it further in order to capture the cases that Nussbaum includes. Overall, our aim is to highlight the ways in which Mulgan's approach to well-being, if taken on board, help to strengthen the foundations of the capability approach

More specifically, our aim is to apply Mulgan's distinction to the problems that Nussbaum's approach confronts. The first was the problem stemming from a list of capabilities applied to diverse issues. We claimed that it was difficult for Nussbaum to convincingly apply her list (which captures *human* dignity) to nonhuman animals – and that such a strategy seemed to undermine the entire approach. The second problem was that Nussbaum's approach blocked intra-species conflicts by setting a threshold level for dignity that is species-dependant. In other words, Nussbaum provides no guidance whatsoever on how the capabilities could be considered when tough (and very real) decisions must be made – as tragic as they might be. It is this projects contention that Mulgan's approach provides us with answers to both of these problems (and at no great cost). Our aim is to demonstrate that we can strengthen the approach without radically departing from current capability thinking. In so doing, we demonstrate that this approach is a viable alternative.

4.1 Tim Mulgan's Approach[1]

[1] It is important to highlight that Nussbaum (in line with current political thought) separates ethics from politics. One might then be confused to see that this thesis draws on work in moral philosophy to ground and strengthen the approach. Although we do not go into the introduction of moral philosophy here, it is hoped that things become clearer when we examine future people (a challenge that cannot be separated in such a way, but which Nussbaum seeks to accommodate) in the next two chapters.

In his *The Demands of Consequentialism*, Tim Mulgan sets out from the claim that *Simple Consequentialism*[2], given the current state of the world, implies the following response to the question: How should I spend my next dollar?

> Consequentialism tells me to put that dollar wherever it will do the most good. In the hands of a reputable aid agency, my dollar could save a child from a crippling illness. A few more dollars might make a substantial contribution towards a clean water supply for an entire village [...] So I should give my next dollar to charity. How should I then spend my next remaining dollar? Well, in the hands of a reputable aid agency . . . It looks as if I must keep donating till I reach the point where my own basic needs or my ability to keep earning dollars are in jeopardy. Most of my current activities will have to go. Nor will my sacrifice be only financial. According to Consequentialism, I should also spend my time where it will do most good. I should devote all my energies to charity work, as well as all my money.[3]

Mulgan claims, quite rightly, that these demands strike most as absurd – and often result in many (though certainly not all[4]) rejecting Simple Consequentialism on the grounds that it is unreasonably demanding. The primary aim of *The Demands of Consequentialism,* therefore, is to formulate a Consequentialist moral theory that is not open to this criticism and rejection.[5]

For Mulgan, what is at issue here is what it is that one loses on such a demanding view. In other words, Mulgan contends that the reason why many of us reject these demands is that most of us recognise (at least implicitly) that there is a tension between the overall gains and the personal losses. To understand where Mulgan is coming from, we ought to point out that Mulgan claims that the demandingness objection draws out (or brings to our attention) two *components* of well-being which (following Joseph Raz) Mulgan refers to as *Needs* and *Goals*.[6] According to Mulgan, taking the demandingness objection seriously tells us that there is more that is required for a

[2] By 'Simple Consequentialism' Mulgan means a neutral but maximising form of consequentialism (that we ought to do whatever will lead to the most good), see Mulgan (2001) pp.3-4
[3] Mulgan (2006) p.18, (2001) p.3
[4] Of course some consequentialists simply bite the bullet and accept that consequentialism makes these demands, but deny that the demands are unreasonable. See Mulgan (2001) p.25, Kagan (1989), Singer (1972, 2002).
[5] Mulgan (2001) pp.1-3
[6] Mulgan (2001) p.173

meaningful life than simply meeting one's own needs. Our chosen projects and pursuits are a source of much (if not all) of the value that we get out of life. It is, in other words, the importance of goals (and the loss of goals) that challenges the demandingness of (at least Consequentialist) moral theories.[7]

Here we see that a distinction between needs and goals helps us to *make sense of* this challenge. The next obvious question is whether the distinction provides us with a way of working out a *solution* to it. Here Mulgan develops and reframes the distinction by giving it structural significance within the theory proposed. In so doing, Mulgan differentiates between moral *realms* (the realm of necessity and the realm of reciprocity) which correspond to moral choices that come about 'primarily on the basis of their impact on the well-being of others'.[8] This move draws on the relationships within which we stand with others, and it takes seriously how and whether we contribute to the well-being of others. The realms are constructed on the back of the claim that there are good moral and practical reasons to differentiate between meeting a person's needs, and assisting or allowing them to achieve their goals. It makes sense to say (for instance) that one is able to directly meet the *needs* of another, but it does not (always) make sense to talk about one pursuing or achieving the *goals* of another. We tend to think that there is something valuable about being able to formulate and pursue one's *own* goals – to pursue them, to achieve them, and to reflect on that pursuit and achievement – which makes goals, within a moral framework, altogether a different notion.[9]

In the end, these realms and the differences lead Mulgan to claim that there are good reasons to consider advocating different (Consequentialist) theories in each. Taking this seriously, Mulgan advocates Simple Consequentialism in the realm of necessity and Rule Consequentialism in the realm of reciprocity.[10] Such a move also allows Mulgan to locate the key area of controversy. That is, conflicts between the realms and between (for instance) personal goals and others' needs. This is where the demandingness objection, although prominent throughout the book, is most prominent. Mulgan suggests that the method that we ought to employ in choosing between

[7] See Mulgan (2001) pp.5-13 for an overview of the objection and the demands of other moral theories.
[8] Mulgan (2001) p.169
[9] Mulgan (2001) pp.174-9
[10] Mulgan (2001) pp.211-59

competing needs and goals is a 'non-proportional agent-centred prerogative'.[11] A reasoning process that tells us that we may be (morally) justified in ruling out particular actions, even those that would bring about far more good overall, based on the importance of our own goals and the losses suffered in not pursuing them.

Mulgan's approach is (unsurprisingly) controversial. In particular, there are at least three areas of controversy:

i. *The Demandingness Objection.* If one is not convinced that the Demandingness Objection calls for a review of Consequentialism (or any theory), then one may not be convinced that the framework and the resulting theory is of any interest or use.
ii. *The Importance of Goals.* If one is not convinced that goals are the (primary) source of value in life, then one might question its role within the theory – and thus the resulting theory overall.
iii. *The Separation, and Structural Significance, of Needs and Goals.* If one is not convinced that needs and goals ought to be given structural significance within the theory (or separated at all), then one may not be interested in the resulting theory.

One might claim (as above) that the demandingness objection limits how useful Mulgan's theory is in the end. This project takes this to be a mistake. To be sure, one would be justified in rejecting the *way* in which Mulgan uses the distinction. More specifically, one would be justified in rejecting the way in which conflicts between needs and goals are interpreted and dealt with (the non-proportional agent-centred prerogative, and the consequentialism underpinning it). But the framework itself stands alone, and so the distinction between needs and goals, and the structural importance that they have ought to be judged on its own merits. One can, after all, generate a distinction between needs and goals without appealing to the demandingness objection itself – even though the objection is (as Mulgan demonstrates) certainly one way of grounding that distinction. Quite simply, the aspect of Mulgan's approach which relates directly to the demandingness objection is not whether needs and goals matter, or whether needs and goals ought to be structurally included within the theory put forward. Rather, the controversy concerns

[11] Mulgan (2001) p.271

Mulgan's answer to the question of what the distinction tells us about how we ought to approach moral and political problems.

It ought to be (somewhat) clear that this project does not share Mulgan's primary aims. We do not, that is, set out to construct a Consequentialist response to the demandingness objection, or in fact settle on any particular theory at all. This is not because this project denies or overlooks these problems. Rather, it is because our main concern is to ask whether the needs and goals distinction – and the practise of giving the distinction structural significance – helps us to strengthen and develop the capability approach. Our concern, then, is with whether the capability approach benefits from adopting the distinction and the structure that it can provide. What this does mean, however, is that this project accepts that goals are a significant part of what makes life valuable, and accepts that the structural significance accorded to (and separation between) needs and goals is one way that the approach can develop. We do this by pointing out (in section 4.2) that focusing on what one is able to do and be is able to capture this distinction and these insights from the start.[12]

4.1.1 On Needs and Goals

Needs contribute in two ways to Mulgan's theory – and (arguably) to any theory of well-being. Firstly, needs are those (uncontroversial) 'biologically determined necessities of life, such as food, oxygen, or shelter'.[13] However, they also play a secondary role since they also underwrite (in this case) having and pursuing goals or 'our chosen pursuits, projects, and endeavours, which give life much of its meaning, and purpose'.[14] In other words, primary needs (what makes life possible) apply to any theory that we wish to assert, and how controversial 'other' needs are largely depends on what we take the good life consists in.[15]

[12] Despite the differences, this project is in the spirit of the kind of theory and kind of approach that Mulgan advances. In particular, we share the view that some moral and political problems call for new ways to approach these questions, and that we ought to consider the kinds of resources these new approaches might have available.
[13] Mulgan (2001) p.173
[14] Mulgan (2001) p.173
[15] For instance, Onora O'Neill makes this point when she says that: 'It isn't controversial that human beings need an adequate diet, shelter, and clothing appropriate to their climate, clean water and sanitation, and some parental and health care. Without these they become ill and often die prematurely. It is controversial whether human beings need companionship, education, politics, and culture, or food for the spirit – for at least some people have led long lives that were not evidently stunted without them'. O'Neill (1998) p.95

For Mulgan, without goals of at least some kind, it seems that there would be very little that one could get out of life. Mulgan emphasises this point by drawing on the following two cases from Joseph Raz:

1. *The Man in the pit.* A person falls down a pit and remains there for the rest of his life, unable to climb out or to summon help. There is just enough ready food to keep him alive without (after he gets used to it) any suffering. He can do nothing much, not even move much. His choices are confined to whether to eat now or a little later, whether to sleep now or a little later, whether to scratch his left ear or not.

2. *The Hounded Woman.* A person finds herself on a small desert island. She shares the island with a fierce carnivorous animal which perpetually hunts for her. Her mental stamina, her intellectual ingenuity, her will power and her physical resources are taxed to their limits by her struggle to remain alive. She never has a chance to do or even think of anything other than how to escape from the beast.[16]

Both of these cases tug on our intuitions about what makes life worthwhile and what a good life (at least) would certainly *not* be. At the very least, they help to illustrate the kinds of lives that we (at least intuitively) could not imagine as being meaningful in any way.

These examples also help us to understand that goals are valuable (at least in part) because they are chosen, and because they can be pursued and realised. This (in turn) helps us to see that the goals we pursue depend (in part) on what goals are available to us, and the contribution they make to our lives given the social and political frameworks within which we live.[17] Many of the goals that we pursue depend on what opportunities we have, many of which are made available because of others. Even so, many goals also require a certain amount of independence and personal commitment. Our goals cannot be pursued or achieved in any meaningful way unless we are the ones that actually do so. Sure, someone else can write one's doctoral thesis for them – but an important part of what makes the goal of doing so valuable is that one pursues and realises this themselves. Thus, while our goals depend on the kind of social and political conditions

[16] Raz (1986) pp.373-4, quoted in Mulgan (2001) p.186
[17] Mulgan (2001) p.182

within which we live, the goals that one can and does pursue and realise herself is a trademark characteristic of how and why they are valuable.[18]

4.1.2 Separating Needs and Goals

Our discussion shows us that the connection between needs and goals is fairly straightforward. On Mulgan's view, goals are where we get most of our value from life, and needs are those basic things that goal pursuing agents require (whatever their goals happen to be). While straightforward, this does raise an obvious question for Mulgan's view. If our main concern is really with goals – given that they are the source of meaning in life – then why would we carve out a space for needs when goals and having goals is able to capture them? In other words, by focusing on choosing, pursuing, and realising goals, we presuppose the importance of needs – so why bother separating them?

This point questions, and so helps us to understand, the importance of differentiating between *components* of well-being – and in identifying the ways in which one's life can go well. We highlight two reasons for this distinction. First of all, if we subsume needs within the space of goals, then we lose much of the moral force behind needs as *needs*. Such a move entails that the force of needs depends entirely on the pursuit of goals – not only would this limit the scope of morality (implying that morality consists entirely of goal-pursuing agents), but it would problematically weaken the claim to need. After all, we tend to respond to the needs of others in response to their needs not their associated goals. When someone says, for instance, I *need* X, we tend to differentiate between: 1) because I need something to eat, and 2) because I want to finish my thesis. To be sure, there is something forceful in type-2 claims (depending, to be sure, on what they are), but the important point is that we would lose the force and significance of type-1 answers (that we respond to the neediness of others) if we appeal directly to type-2. Not only is it the case that type-1 answers are important regardless of what one's goals are or might be, but the force of type-1 answers do not and should not depend on type-2.[19]

[18] Mulgan (2001) pp.174-82

[19] Soran Reader and Gillian Brock in making this point, contend that the moral force of needs depends on the answer that one gives to the 'what for?' question that a needs claim elicits. Reader *et al.* (2004), see also Reader (2005a), Wiggins (2005), Thomson (2005), Doyal *et al* (1991), and Braybrooke (2005).

Mulgan helps us to understand the significance of this distinction further. Mulgan recognises that there is a difference between needs and goals which justify separating them as components of well-being and as structural inclusions themselves. First of all there are differences between needs and goals in terms of how one responds to them or justifies them within a moral framework. Secondly, there is a difference in the way that they contribute to well-being and in the way that they differ in light of our relationships with others. Quite simply, it is (practically) unhelpful to interpret needs within the space of goals. Needs are distinct from goals in terms of *what* they are, *how* they can be met, and *who* can meet them.[20] Unlike goals, it matter's little actually who meets one's needs – at least insofar as meeting them goes. It matters little, for instance, who provides for them, or how far resources have travelled to get there. So there are (alongside good moral reasons) good practical reasons, in the end, to make this distinction.

4.1.3 Necessity and Reciprocity

Although the distinction between needs and goals form the basis of Mulgan's approach, the real bite of Mulgan's approach is where the distinction is positioned structurally. In other words, it is the distinction between *moral realms*, drawn from needs and goals that provide Mulgan with a unique and novel approach.[21] Not only is this the way that Mulgan reorganises how we approach and understand morality, but it also provides the justification for Mulgan's hybrid moral theory.[22]

The first thing that one ought to ask, however, is how and why the needs and goals distinction become the realms of 'necessity' and 'reciprocity'. This is an important question, the answer to which provides us with some insight into the role that the distinction plays overall. For Mulgan, the relevant questions in this case are concerned with obligations: what is it that we owe to those whose needs are unmet, and what do we owe those whose goals we (in some way or another) can contribute to? In this sense, the answer is straightforward and it relies on what we ought to base our reasons for acting (one way or another) in each realm on.[23] When we consider needs, we owe

[20] Mulgan (2001) p.175
[21] Mulgan (2001) pp.169-173, pp.211-234
[22] Mulgan advocates 'combined consequentialism'. As we have mentioned, Mulgan claims that the moral realms help us to see that particular theories (simple consequentialism and rule consequentialism) tend to be ready made for particular moral questions and problems. Given that this is the case, there are good reasons to advocate different moral theories to deal with them.
[23] Mulgan (2001) pp.169-173

others based on necessity – based, that is, on the way that they are in need. Not only is this what grounds our obligation, but it is (in the end) what best captures and guides our reasons for acting.

The answer within the space of goals isn't so straightforward. Mulgan bases the obligation on reciprocity. This is because, since we all wish to pursue goals, we ought to do so in a mutually beneficial way.[24] This seems fair enough, especially given that the realm of reciprocity concerns itself with how members of a community will interact.[25] However, it does seem fair to question whether reciprocity is the only way (let alone the correct way) to capture goals. It seems quite apparent that this is merely one way of framing how we understand the nature of our obligations to others as goal-pursuing agents. Thus, while needs can only be captured as needs, we ought to say that the structural inclusion of goals (given the controversy surrounding their inclusion) may, but need not, transpire in reciprocity. To be sure, it seems that there ought to be at least some room for reciprocity – but whether this should be the sole or guiding reason is another question altogether.

This is good news. Our discussion in chapter three focused on Nussbaum's rejection of reciprocity as the (sole) basis for motivating a concern for justice. It was demonstrated that paying too much attention to reciprocity (or mutual advantage) leads us to overlook or limit (in this case) why social life is valuable, why we value our own and others' good, and the grounds upon which we interact with others to begin with. It seems, then, proper to say that reciprocity, while certainly one aspect of goals (and obligations in particular) ought not to be the only way in which we express or capture the space of goals in the end. It pays, as this project does, then, to leave this space open and to refer to it (like needs) simply as the realm of goals.

4.2 Agency and Dignity: Needs and Goals?

At this point, we have a simple distinction between needs and goals and one obvious question: how does this distinction sit with the capability approach? Fortunately, it is not too much of a challenge to place the distinction within the capability approach. It might have occurred to us that the distinction between needs and goals is similar to the distinction that Sen makes between well-being and agency. In fact, the distinction as Mulgan presents it, is very much in the spirit of

[24] Mulgan (2001) pp.169-173
[25] Mulgan (2001) p.172

Sen's approach. Indeed, as Mulgan's account of needs underwrite *having goals*, agency is part and parcel of why needs are important. Our discussion of Sen's articulation of the approach in chapter one pointed out that for Sen, well-being concerns one's 'wellness' or 'personal welfare', and agency 'refers to the realisation of goals and values [one] has reason to pursue'.[26] Recall that both well-being and agency relate to *freedom* (being able to do and be) and *achievement* (doing and being). In other words, the distinction itself is about different kinds of capabilities and functionings – and different ways in which one's life can go well or badly.[27] Thus, there is clear overlap between the kind of approach that Sen endorses, and what Mulgan is (arguably) trying to capture.

The connection between agency and goals is even more revealing when we point out that Sen refers to *realised agency* and *instrumental agency* – the difference consisting in the role that an agent plays in realising a goal.[28] For instance, there is a difference between a goal which one has but that one is unable to bring about, and one which an agent actually brings about herself. This matches a distinction Mulgan makes between desire and striving[29] – and where (as we have pointed out) the active pursuit of goals are central to how we ought to understand why they are valuable. The same basic distinction is drawn by Sen – though with one significant difference. Whereas Mulgan recognises that (valuable) goals are those projects that one pursues and is directly involved in bringing about, Sen is happy to allow that one's goals or agency can be realised by others.

> If my agency objectives include the independence of my country, or the elimination of famines, the first view of agency achievement would be well met if the country *does* become independent, or if famines *are* in fact eliminated, irrespective of the part I personally manage to play in bringing about that achievement.[30]

[26] Quoted in Crocker (2008) p.151
[27] As we have mentioned, Sen tends to view well-being within the space of capabilities (as one type of freedom) and agency as another. For instance, Sen claims that capability is an opportunity freedom, while agency is a process freedom, see Sen (1993) p.36, (1999) p.17. This thesis takes this to be a mistake – since capability (as Sen notices in his recent work – see Sen (2009) pp.205-7) can accommodate both the opportunity and process aspects of freedom that Sen differentiates between. Thus, we situate needs and goals within the capability approach (broadly understand to capture more than opportunities).
[28] Crocker (2008) p.153
[29] Mulgan (2001) p.180
[30] Sen (1992) pp.57-8, quoted in Crocker (2008) p.153

As David Crocker points out, this understanding of agency is useful because it suggests that one's agency can be enhanced and realised through public policy and the actions of others.[31] It is also helpful, however, given the way that our goals are sometimes bound up with the goals of others – something that (for instance) parents will understand particularly well.[32]

At this point, we seem to have a number of options in terms of how we make sense of this difference between Sen and Mulgan – all of which would enrich our understanding of the space of goals, agency, and the connections between them. Yet it seems that the most obvious place to start is by noting that, in the end, the difference is insignificant. There is no reason to think that Mulgan would reject Sen's point that the realisation of (at least some) goals by others add meaning or value to one's life. The important point (for Mulgan) is that we do not overlook the value that there is in pursuing goals and in actively attempting to bring goals about *ourselves*. Not only because of the importance of actively pursuing goals, but because of the importance of allowing and encouraging one to do so. A focus on realised agency *alone*, in other words, would not capture all of what it is about agency or having and pursing goals that matters insofar as well-being and our obligations to others is concerned.

There is also a fair amount of convergence when we consider needs and well-being. Sen refers to well-being as 'wellness', 'personal advantage', and generally the capabilities that one has as part of her options.[33] Well-being could be seen to be far more richer and so far more controversial than the mere space of needs, especially since Sen claims that they consist in elementary things such as 'being in good health' to other more complex things such as 'being happy' and having 'self-respect'.[34] However, and despite the terminology, it seems that Mulgan's account of needs ought to be very much like this, especially given that needs include things that underwrite agency (such as a basic social framework that is conducive to it). There is, thus, a great deal of similarity between Sen and Mulgan. Despite being concerned with very different questions, it seems somewhat clear that their answers rely on very similar frameworks and foundations.

[31] Crocker (2008) p.153
[32] For instance, parents think of themselves as sharing the goals of their children even when they are unable to contribute to their achievement directly themselves.
[33] Crocker (2008) p.151
[34] Crocker (2008) p.151

This convergence is good and bad news. Good news because it demonstrates that Mulgan's approach to well-being is not at odds with current capability thinking, but bad news because it raises the question of whether Mulgan's distinction actually brings anything new to the capability approach. It raises the question: why do we need Mulgan's approach at all? Despite the similarities, there are two key differences. The first is that Mulgan's needs and goals distinction is both simpler and richer than Sen's distinction. It seems clear that Sen means something very much like a capability-centred understanding of (rich) need, and that he means something very much like goals. However, Sen is dealing specifically with human beings and human development, so the distinction between well-being and agency does not lend itself very usefully beyond the human community.[35] This is precisely why extending the capability approach led us to focus on Nussbaum. Importantly, even though Mulgan too limits his discussion to human well-being, the distinction between needs and goals lends itself more readily (in a variety of ways) to capture more than this.[36] Indeed, needs readily extend and capture all living beings in a way that an agency-centred understanding of well-being simply does not.[37]

The second difference, however, is that Mulgan's distinction is taken (and able to be taken) one step further. Mulgan utilises the distinction to provide his theory with structure. In other words, the distinction gives Mulgan a way of dividing morality based on: 1) how our actions (indirectly) affect the needs and goals of others, and 2) what we are (directly) able to do for others and their lives. This allows Mulgan to structurally capture the way that our concerns are very different when we are dealing with needs and goals, and that our reasons for acting tend to correspond to different reasons when we are faced with choices relating to needs and goals. This helps us to see that, while needs and goals map onto well-being and agency quite readily, the concepts of needs and goals are far richer than well-being and agency. Needs and goals are able to generate

[35] This is not to say that Sen does not think we have any obligations to nonhuman animals. In fact, Sen claims that we have an obligation to animals because we are in a position of power over them, and because we are able to do so. Rather, the point I make here is that Sen's approach seems to include them only indirectly – since it is because we are able to consider them that we ought to do so. We go on to point out that such an approach to nonhuman animals is unhelpful. (2009) p.205

[36] See Mulgan (2001) p.178

[37] Here we see that the language of needs provides us with a way of getting at what it is that we are trying to do and include. It seems, for instance, that we can talk about the needs of nonhuman animals, and even plants – but far more difficult to talk about the 'advantage' or 'wellness' of nonhuman animals or plants.

obligations and moral communities, something which Sen (despite recognising that the capability approach can endorse this view) does not develop in full.[38]

4.2.1 Dignity

Given our discussion of the differences between Sen and Nussbaum in chapter two, as well as our discussion of Nussbaum in the previous chapter, it ought to be fairly clear that the needs and goals distinction (at least as it has been described above) is not going to fit so well with Nussbaum's account. At least, that is, not without some changes.

Nussbaum acknowledges the centrality that goals have in life, when she writes that 'we see the person as having activity, goals, projects – as somehow awe-inspiringly above the mechanical workings of nature, and yet in need of support for the fulfilment of many central projects'.[39] What is missing, however, is that Nussbaum does not include a rich account of agency (as Sen does) that incorporates goals and being able to pursue projects that one finds meaningful, in the list itself. To be sure, Nussbaum's capability for *practical reason* includes the ability to plan one's life, but the capability refers only to being able to engage in critical reflection about one's life, and not actively pursuing those plans. Given that Nussbaum directly refers to goals (above), it is surprising that there is no provision for the *pursuit* and *realisation* of goals as a functioning itself. It seems, at least as far as the list goes, that a dignified existence does not require that one is able to pursue and realise meaningful goals at all.

We could (and ought to) be a little bit more charitable here. In the end, while there is no obvious provision for actively pursuing and realising goals – it seems clear that goals themselves (and living a life one values) are central to the aims of the approach.[40] For this reason, it would be inconsistent with the approach to maintain that goals (and the functionings required in light of them) are missing altogether. What's more, given Nussbaum's association with political liberalism we ought to deduce that in the end the list and the conception of dignity tends to be about being able to have, value, and pursue goals of one's own. So, as far as Nussbaum's account goes, it is not that goals seem to be absent from the list – since something very much like goals are

[38] As we have pointed out, Sen recognises that 'capability' also involves having a power and so we ought to do what we are able to do. However, Sen does not recognise that we are able to generate moral communities on the back of this insight. Sen (2009) pp.205-7

[39] Nussbaum (2001) p.73

[40] Indeed, Nussbaum does refer to human beings as 'centres of agency and freedom' see Nussbaum (1999a) p.20

important for a dignified life – but that we can enrich Nussbaum's list by making this much clearer.

We could say that (at least) one of the reasons why goals are not (more) prominent within the list is because the list is protecting more than the goals of (human) agents. Quite simply, Nussbaum wants to capture the way that a good life for some beings does not require having goals in the sense that Mulgan claims. Unlike Sen and Mulgan who recognise different components of well-being, Nussbaum skips straight to listing capabilities without saying very much at all about whether those capabilities can be (or ought to be) organised or situated in light of different aspects of well-being. To be sure, one could point to various capabilities that look very much like needs and those which underwrite having goals[41], but to do any more than describe them would undermine the entire list and its concern for dignity. So it is important for Nussbaum not to highlight goals at the expense of the good of non-goal pursuing beings, and those who are unable to choose, pursue, and realise goals. In other words, including more than agents leads Nussbaum to downplay the importance of goals (or more specifically, to downplay agency). To be sure, this is not to say that agency does not matter at all. After all, something like agency is important for the dignity of many human beings. Rather the point here is that ensuring that all beings are able to flourish means that agency is simply one of many valuable functionings.

This helps us to raise an obvious question: can the needs and goals distinction include more than goal-pursuing agents? Two things might be put forward for incorporating non-goal-pursuing beings into the framework. Given the importance of goals, the first strategy would be to hold that the space of goals – and the richness that it brings through its concern with more than choosing, but also actively pursuing and realising – is pluralistic enough to capture non-goal-pursuing beings (albeit indirectly). After all, we benefit from the goals that others pursue and realise (as Sen helps us to see) – and we often seek the good for others as part of our *own* good (as Nussbaum helps us to see). Thus, non-goal-pursuing beings (such as the severely mentally impaired, nonhuman animals, as well as other living beings) benefit from the goals that we (as agents) pursue, and benefit from the way in which we seek their good as part of our own.

[41] As we pointed out in chapter 2, Brock's list of human needs mapped well into Nussbaum's list, while *practical reason* and *control* underwrite agency.

However, an approach that focuses entirely on goal-pursuing-agents leaves other beings in an incredibly vulnerable position in terms of what their lives will be like. It seems counter-intuitive to say that their lives ought to depend entirely on the choices, actions, and values of others. It is, after all, difficult to maintain that it matters in no way at all what kind of life non-goal-pursuing beings live – and that they matter only indirectly. We don't need to know whether the severely mentally impaired or nonhuman animals are able to contemplate, choose, pursue, and realise their own goals, to know that there are things (even above basic survival) that are good for them (such as music or nonhuman animals).[42] Nor is it the case that their lives matter only when our goals happen to include them. Rather it matters because *their* lives matter. Of course this leaves us in a position where we are required to concede that more than agents matter and that including them within the goals of others is not quite enough.

The second obvious move, then, is to say that the space of needs sufficiently captures non-goal pursuing beings. Even Mulgan seems to opt for this strategy (if only in passing), when he points out that needs are general and could include any being that has them.[43] This seems straightforward enough and largely uncontroversial, given that nonhuman animals, the severely mentally impaired, and even other living beings have needs. Even so, this move raises the question of whether the space of needs is enough, given that it commits us to the claim that a meaningful life consists *solely* in the meeting of needs. There seems to be at least two reasons why this is problematic. Firstly, focusing entirely on needs commits us to the claim that whatever is *good* for the lives of non-goal pursuing beings can (and ought to) be characterised as *needs*. However, as we have already said, we know that there are things that we are able to do for the severely mentally impaired and nonhuman animals that would make their lives better (such as music). Yet, we also know that they do not *need* these things to survive. In other words, we want to say that there is more to life than just needs.

Secondly, and in line with the first point, we want to be able to say that meeting the needs of nonhuman animals and the severely mentally disabled is important because their lives are and can be *valuable*, not merely because we think that meeting needs (wherever and whenever this may be) is a good thing to do. The space of goals and the contribution that goals make to life allows us to

[42] For instance: a lot of research has been done into the benefits of music for mental illness, with some researchers claiming that music enhances the quality of life for advanced dementia patients, see chapters 8 and 9 of Koen (2008)
[43] Mulgan (2002) p.178

say something about agency, something that could not be captured entirely within the space of needs (because goals are conceptually and practically distinct). In the same way, we want to be able to capture the lives of non-goal-pursuing beings beyond needs. The space of needs (like goals), then, does not provide us with a clear way of capturing all of what it is about the lives of non-goal-pursuing beings that matter. It seems, quite simply, that the needs and goals distinction, while important, tells us only part (though to be sure, an important part) of what well-being consists in. If this is the case, then we need to be able to say a bit more.

4.2.2 A Third Space

At this point, what we need is a way of accommodating all of what contributes to the lives of non-goal-pursuing beings within the framework. One way to do this would be to change the way that we understand goals. Indeed, one way forward would be to separate the *realisation* of goals from the *pursuit* of goals. Doing this would allow us to say that pursuing goals is merely one aspect of the space of goals and one part of what makes goals meaningful for agents. We could say, therefore, that nonhuman animals and the severely disabled still have goals (have things that are good for them) even in the absence of autonomous choosing and pursuing. This is certainly one way forward, and one worth exploring. It is, however, both intrusive to the needs and goals distinction, and a solution that is (based on the problems we will go on to discuss) short lived. This option reframes the space of goals entirely, and changes the dynamic of the distinction. More problematically, this solution amounts to the claim that *only* needs and goals matter.

Another way to capture those things that contribute to the lives of non-goal pursuing beings, then, would be to include a third space. This space will allow us to include whatever else (beyond needs and goals, and beyond the way we frame needs and goals) we have reason to value – what we might refer to simply as *other goods*. Why would we opt for an additional place-holder over unpacking the space of goals? One reason is that it allows us to include (or to leave open the possibility for) other components of well-being. We want to be able to leave open the possibility that there are components of well-being that just don't fit neatly into Mulgan's two-way split. For instance, we want to leave room to be able to say that there are things that simply cannot be described as needs but also too distant from autonomous choice to count as goals. We want to ensure that we can capture the fact that there may be things that we pursue for others that stand apart from needs and goals.

We might think that leaving this space open to anything else that we think might be valuable is a cop out – especially since the content of this space is now extremely under-specified. However, it is important to point out that, given the diversity of cases we consider, it will pay not to be too specific about what this space might include in any case. Indeed, this lack of specificity turns out to be beneficial when we introduce the challenges of future people and indigenous peoples in later chapters. As we will go on to see, both of these challenges require and call for a space that is largely under-specified. More importantly, capturing indigeneity calls for a space within which to capture the importance of other *values* – so the lack of specificity allows us to ensure that the space is broad enough to include these values. At this point, then, it is important to highlight that by 'other goods' we do not limit our discussion to actual goods (or resources). Rather, we mean 'other goods' in a much broader sense. It will include whatever we have reason to do for non-goal-pursuing beings, as well as what we place value in.

Including this (rich and broad) third space allows us to enrich Mulgan's distinction without making it unnecessarily determinate or controversial. We now have, then, a modified version of Mulgan's distinction, a three-way distinction between needs, goals, and other goods. The distinction provides us with a way of capturing all of the cases that Nussbaum includes, while providing us with space to fill out this third component further in later chapters. Our concern, at this point, is with what this means for the capability approach in light of the challenges that Nussbaum considers. More specifically, we are left with the question of exactly how this distinction helps us to strengthen the foundations of the capability approach.

4.3 Enriching the Capability Approach

Grounding the (modified) distinction within the capability approach provides us with much needed clarity. Interpreting needs as those things that (for instance) human beings ought to be *able to do and be* allows us to cut across the problems that a basic needs approach has tended to face and which the capability approach has been critical of.[44] This is especially so given that a focus on capability leads us to treat the needy as active participants in their own lives, rather than

[44] The capability approach has been critical of the basic needs approach which it partly grew in response to it. For an overview of Sen's objections to basic needs, see: Crocker (2008) pp.129-40 and Alkire (2002) p.166. This has led to a fair amount of literature devoted to comparing and contrasting needs and capabilities. Recently, needs theorists such as Gillian Brock (mentioned in chapter 2) and Soran Reader have shown that a plausible theory of basic needs will include agency bringing it very much in line with the capability approach. See: Reader et al. (2004) (2005a) (2005b) (2006). See also Alkire (2002) (2005a), Brock (2009) (2005).

passive recipients. What's more, the concepts of capability and functioning help us to better understand the importance of goals – and the significance of choosing, pursuing, and realising goals. However, the real test is whether the distinction is able to provide answers to the problems confronting Nussbaum's approach in its extension. It is all very well providing more structure to the approach and to illuminating the foundations. However, the real challenge is providing the approach with a way of addressing problems, and in particular, the problems highlighted at the end of the previous chapter.

4.3.1 Replacing the list

Cracks in Nussbaum's version of the capability approach, and her strategy for grounding and extending the approach, start to shine through when the extension takes place. Recall, that on Nussbaum's account, an extension involves applying the approach to another species (because all human beings are included from the start). Nussbaum's list of capabilities which (partly) expresses her conception of dignity for the human species makes it difficult, if not impossible, for the (same) list to apply to other species. It is the importance of species-membership for the conception of dignity that raises this problem – and which makes this inevitable in the end. This helps us to see that the list seems to get in the way of capturing the dignity of nonhuman animals – and that the list is in fact unable to fully capture nonhuman animals in the end. There are at least two problems. The first is that the concept of dignity needs clarification. This is why the list (at least for Nussbaum) is so important – because the concept of dignity (like the concept of capability) is not a concept free from the capabilities, and so it requires some fleshing out.[45] The second is that the list (partly) expresses that dignity. Once the list is decided, each component (where there is the capacity for it) is an entitlement and a requirement on others. Both problems stem from the decision to offer a single list of capabilities which implicitly captures the starting point of human dignity. This raises the questions: is this the only way to extend the approach? Is there any need for a list at all?

Another strategy would be to formulate an approach that is underpinned by components of well-being – such as needs, goals, and other goods. Such an approach need not lead us to reject the importance of dignity (though such an approach need not rely on it), and provides us with more

[45] Of course, Nussbaum thinks that the capabilities are part of the conception of dignity – but we still need to say something about what these capabilities are.

structure in terms of how this concept could be fleshed out. What's more, it provides us with a way of capturing the (practical) importance of species without relying on an extension mechanism that is problematic – or in fact any extension mechanism at all. The distinction more fully utilises the importance of application and captures both the differences and the similarities between issues of disability, nationality, and species. Each of the cases that Nussbaum mentions have *needs* – but even within the species needs differ. Likewise, agents pursue and find value in pursuing meaningful *goals* – but this is not all that well-being consists in and there are also *other goods* that we value and that capture non-goal pursuing beings. The needs, goals, and other goods distinction in its pluralism and generality is, therefore, able to capture all of the cases in their diversity from the start. There is no extension of the approach required.

Do we lose anything valuable when we lose the specific list of capabilities? This is an important question – it seems that there is much to gain from replacing the list with components of well-being. However, one criticism might be that we still need a list of capabilities without which the approach is useless. The first thing that we ought to point out is that a list of basic needs for any species is fairly easy to work out. Indeed, it seems that a list that focuses on physiological survival is the obvious start – so there is no reason to think that the distinction lands us in no-man's land in terms of practical guidance. There is, after all, a fair amount of convergence between abstract lists offered by philosophers, and the kinds of lists generated through scientific and empirical studies.[46] For instance, any list will include (at least) something like basic needs (adequate food, health, shelter, and clothing), regardless of the way in which that list is derived.[47] This helps us to see that the framework need not lead us to draw blanks on what the lists might look like, or feel compelled to construct the lists ourselves. Thus, using a list to ground and extend the approach is, if we take this on board, unnecessary.

It seems that there is, thus, no great loss if we utilise the needs, goals, and other goods distinction. However, reframing the capability approach under broad categories might raise a question of its own: why not focus simply on something even more general such as happiness or well-being? In other words, why stop at needs, goals, and other goods – why not generalise even further. Our aim in the next section is to illustrate why there is still good reason to acknowledge

[46] Qizilbash (2002a)
[47] For instance all of the lists of dimensions of human development from different disciplines covered in Alkire's table 2.12 include health, food and water, maintenance, security. See Alkire (2002) pp.78-84

the general differences between needs, goals, and other goods. Focusing on something like happiness or well-being leaves us no better off than Nussbaum's list when it comes to conflicts and diverse cases. How do we make sense of the well-being of nonhuman animals, and the well-being of human beings with a range of abilities? More importantly, how do we make sense of the conflicts between the well-being of human beings, or between nonhuman animals and human beings? As our discussion in the next section will show, what we need is direction and clarity in terms of the questions we ought to ask and what we ought to be doing. What we need is a way of making sense of the conflicts which draws on how our lives play out and are affected by others. What we need then, or so this project contends, is something like a distinction between needs, goals, and other goods.

4.3.2 Dealing with Conflicts

Imagine that a mystery illness has swept across our community. The illness leads those that have it to lose all ability to function and then shortly die. Of course, most of us are not likely to be affected by this illness, and we will continue to live a fairly long and healthy life doing whatever it is that makes life worthwhile for us. Our community faces an obvious question: do we invest in medical research to prevent or treat the onset of this mystery illness? This seems like an easy choice if we have the available resources, but let's add that as a community we haven't been awfully careful with our resources. A few years ago we decided to make this right and to invest all of our savings into two programmes: 1) preserving our natural parks and wildlife for the future, and 2) building a new children's hospital which would centralise our research and treatment of child cancer. In other words, we don't really have any spare resources, at least not at our disposal. Meanwhile, in a neighbouring community famine has broken out. They haven't had the resources to devote to regenerating their lands, and this has meant that their crops have failed. Most of them are currently dying from hunger.

Recall that on Nussbaum's account, we ought to ensure that all of the capabilities are secure for all relevant beings. Where does this leave us in terms of our choices in the example above? For a start, it tells us that what is at stake are capabilities. We know that those who suffer from the mystery illness lose all of the capabilities and their ability to plan their lives (or at least realise those plans). We also know that without some support our natural parks and wildlife (including many nonhuman animals) will lose some of their capabilities (at least they may lose their ability to

survive into the future). Finally, we know that many of our neighbours are dying of starvation even before they have had the chance to reach any of the capabilities. Our conclusion is that this is a tragedy, but do we have a way of moving forward? Given that we lack the resources to do everything, it seems our hands are tied. At least, it seems that we have two options: either we somehow rule out some of the choices, or we somehow generate more resources. For Nussbaum, neither is ideal. No relevant being ought to be left out, and it's not clear where these resources will come from (or even whether we will ever have enough – a point which we consider further in the next chapter which examines future people). It seems, then, that on Nussbaum's account we get a clear picture of what the end result ought to look like, but no clear sense of how we get there (if indeed we can).

So, how does the distinction help us out? For a start, the distinction helps us to say more than that the conflicts are between capabilities. The distinction helps us to see that there are a number of ways in which conflicts occur:

i. *Conflicts between Needs.* We are often faced with decisions between meeting our own and others' needs.
ii. *Conflicts between Goals.* We are often faced with decisions about choosing, pursuing or realising our own goals and pursuing and realising the goals of others.
iii. *Conflicts between Other Goods.* We often find a conflict between other goods.
iv. *Conflicts between Needs and Goals.* We are often faced with decisions between meeting our own and others' needs and choosing, pursuing and realising our own and others' goals.
v. *Conflicts between Needs and Other Goods.* We often make decisions between meeting our own and others' needs and others' other goods.
vi. *Conflicts between Goals and Other Goods.* We often make decisions between choosing, pursuing, and realising our own or others' goals and others' other goods.
vii. *Conflicts in Planning.* We often make decisions about whether to protect needs, goals, and other goods now or later, as well as decisions affecting who will face some or all of the conflicts listed.

Laying out the way in which conflicts feature help us to see that we can draw a couple of obvious conclusions for dealing with conflicts. One strategy is to say that some beings are simply more

important than others – in which case the question we would be asking is *who* rather than *what* matters. We could say, then, that our own community matters far more than others (ruling out our neighbours dying of starvation), and that human beings matter more than nonhuman animals (ruling out our nature and wildlife programme). This will free up some resources and leave us to pursue our goal of building a new hospital and investing in researching and treating the mystery illness. This is certainly one way of making life easier. By limiting the scope of justice, we give ourselves a way out of some of the problems that arise. However, in the end we only manage to overcome the conflicts by excluding some of the cases, some of which (our starving neighbours in particular) intuitively seem far more urgent. This hardly looks like a solution then.

Another strategy would be to focus on the components of well-being themselves. Three further strategies become available to us. The first is to say that we ought to give needs lexical priority to goals and other goods. Thus, whenever there is a conflict where needs are involved, we ought to focus on meeting them first. Secondly, and given that more than needs matter, we could also include the role that needs play in our lives. This allows us to say, for instance, that some beings suffer greater losses than others based on what makes their lives meaningful. So for instance, we could rank the needs of goal-pursuing beings above the needs of those who are unable to pursue any goals at all.[48] In so doing, we could argue that the loss suffered by a goal-pursuing agent in not being able to pursue goals, is greater than beings whose lives consist solely in the meeting of needs and other goods.[49] This would give us a (non-species based) way to describe Nussbaum's claim that the dignity of nonhuman animals is not at stake if they live capability-filled lives followed by a painless death. This would mean that we would need to reduce our nature and wildlife programme and overlook the new children's hospital (given that this isn't strictly a need). We are left in this case with two projects, the mystery illness and our neighbours who are dying from starvation.

However, the distinction also opens up a third strategy. Here we see that (at least) two questions come into play:

[48] Of course, there is a question about who is able to pursue and realise goals – human and nonhuman – and how this will come into play.
[49] Even Nussbaum notices that beings with more capabilities suffer greater losses in not being able to achieve them. Nussbaum (2006a) p.361

1. What (needs, goals, other goods) should we (be able to) *realise*?
2. How should these needs, goals, and other goods be *pursued*?[50]

This means/end distinction helps us to highlight a couple of important differences. First it helps us to see, that while we might share the same need or goal, we can also be in a situation wherein pursuing that need, or choosing to pursue that goal is very different. For instance, the mystery illness and our neighbours dying from starvation are issues of need. Yet, pursuing and realising them are very different. The mystery illness is far more complicated, we merely need to send our neighbours resources to assist them to meet their needs.

However, this means/end distinction is also operating within the space of goals. Recall that many of us will not be affected by the mystery illness and will simply go on living and pursuing our own goals. So, its not just how much resources we have as a community, but also what our choices are for our own lives that impact on what problems there are and what resources we have available. Let's say that as a community we decide to encourage the goals of contributing to both advances in medical research and global poverty. Perhaps this leads many of us to adopt the goals of doing so. Some of us work to donate as much as we can to this end – including our money and even our bodies when we die – and others put themselves through a PhD in order to put our money (and our bodies) to good use. This helps us to see that there are significant questions raised about how the *content* of needs and goals (in particular) might be used as a resource. By endorsing particular goals (what they are and how they can be pursued) we give ourselves one way to limit the scope of the problems, by providing ourselves with more resources.[51]

Of course, if none of us opt for the pursuit and realisation of this important goal (assuming that it is offered as a choice), then we have a problem. After all, the choice to promote these goals will have cost us valuable resources. What's more, if many of us opt instead to pursue the goal of creating medical insurance companies on the back of this mystery illness, then it looks as if these goals will be in direct conflict. In other words, it might not be a simple question of what our community encourages us to do, but what goals we end up choosing. How do we respond to these conflicts? One obvious answer would be to simply limit the goals that are available to us. In

[50] Mulgan makes this distinction when he refers to 'range constraints' and 'method constraints'. Mulgan (2001) p.261
[51] As Mulgan points out, we may opt for the claim that only particular goals can be realised and pursued – such as the development of particular human capacities. Mulgan (2001) p.261

other words, we simply rule some goals out. After all, we know that no *particular* goal is required for our lives to be worth living. Unfortunately, even this is not a straightforward solution. It amounts to the claim that some goals are better than others, so even this option is not problem-free.

The distinction not only helps us to see what the questions and options are, but it is clear about what opting for one course of action over the other amounts to. On Nussbaum's account, focusing on securing all of the capabilities for all relevant beings is likely to amount to constraints on what goals we can pursue and how we can pursue them. It is likely to give us the single goal of securing the capabilities for all beings around the world. This looks extremely demanding if this is the case.[52] At least, the distinction helps us to recognise that it is unlikely that hard decisions will never have to be made. We often must decide where to place resources and so (for instance) we must choose *who* will need to face these conflicts and even *which* conflicts they are (such as who should have access to particular medical treatments). The inclusion of future people is one such case and example of planning (discussed at length in chapters 5 and 6). Here we face questions about how we ensure that the needs of future people are secure, tough decisions relating to whom we bring into existence, and what kinds of lives they are able to live. If we accept that future people matter, then it seems that no amount of long-term planning can really remove the need to have to make decisions about the kinds of lives we live in the short-term.

So far, the distinction has helped us to understand what is at stake. However, we ought to point out that the distinction, while providing us with useful insights for organising and understanding these conflicts, also allows us to draw out what the capability approach might be able to say about obligations within and between particular moral communities.[53] The distinction helps us to see that we can ask more than simply: which beings, species, or needs, goals, and other goods are important? We are also able to ask: what can we do for others? How do our capabilities and functionings (our needs, goals, and other goods as individuals, and communities) affect the lives

[52] Of course, this might be jumping the gun. Nussbaum doesn't actually tell us too much about what we ought to do – so it is premature to say that the approach is demanding. What's more, the list is (after all) a tool for political persuasion. Of course, as we will go on to discuss in chapter 6, it's not clear that this is a solution at all. Indeed, in the next few chapters we highlight that Nussbaum's commitments mean that she is unable to say very much at all.

[53] Ingrid Robeyns claims that any proponent of the capability approach that is interested in questions of justice must have a way of answering this question of what the capability approach might say about obligations. See Robeyns (2009)

(needs, goals, other goods) of others? Here we see that a rich understanding of capability (beyond mere opportunity) provides us with an answer. We ought to do what we are capable of doing (what we have the opportunity and the power to do), and we ought to do whatever it is that we have reason to value. Framing the options in this way softens the conclusions that were reached above. Sure, we ought to pursue our own goals, but there is an argument to say that if we *can* then perhaps we ought to pursue particular goals (based on some conception of what we have reason to value) such as (in this case) medical research and global poverty. Here we see that this simple insight from Mulgan is not only captured within, but also implied by, the capability approach. If our concern is with what individuals (and communities) are able to do and be, then such a focus is central to our understanding of how we ought to think about the problems we face.

4.4 Conclusion

This chapter has demonstrated that the needs, goals, and other goods distinction brings clarity and organisation to the capability approach. The distinction provides us with a way of approaching some of the problems we face, and with options that are far richer than what the capability approach currently has at its disposal. At least, the distinction (by not buying into a particular conception of dignity at the foundations) helps us to see what our options are and the implications of opting for one option over the others. The distinction shows us that we may be able to develop and extend the approach without a list of capabilities, and that we give ourselves more options for dealing with the conflicts that arise as a result. For both of these reasons, the needs, goals, and other goods distinction builds on the capability approach and offers another way of constructing and expressing it. There is, then, good reason to (at least) further explore what this alternative brings to the table. At least, part of the aim of the rest of this project is to do so.

5. Future People

So far we have demonstrated that utilising insights from Tim Mulgan's approach provides us with a way of enriching and developing the capability approach in light of two problems that Nussbaum's approach is open to. At least, or so we have argued, it gives us a clear sense of what is at stake and what options we have for moving forward. The aim of the next four chapters is to further this claim by demonstrating that there are challenges beyond those that Nussbaum (directly) considers that justify a development of this kind.

This and the following chapter consider the problem of future people. This is a problem which Nussbaum acknowledges in her *Frontiers of Justice,* but which she neglects to engage with in favour of John Rawls' solution.[1] Nussbaum's affirmation of Rawls' solution provides us with two general questions: 1) what does Rawls say about the problem? 2) Does Nussbaum's approval of Rawls' solution, coupled with her capability approach, provide a viable theory? The aim of this chapter is to engage with the first of these questions, which we do over three sections. The first section offers a modest overview of the challenge posed by future people. We pay particular attention to offering an overview of the non-identity problem and the repugnant conclusion. The second section offers an overview of John Rawls' approach and examines how Rawls includes and accommodates this problem within his theory. The final section examines two problems that Rawls faces, and asks what resources Rawls has available to deal with them. This chapter demonstrates that Rawls fails to offer a wholly adequate solution, and that there is good reason to be concerned that Nussbaum (being in favour of Rawls' solution) neglects to take this challenge on board. Our conclusion provides us with strong reasons to probe Nussbaum on her silence, and grounds to seriously question whether this is a mistake.

This chapter does not pretend to offer a comprehensive discussion of the literature devoted to the challenge of future people. Instead, we set the rather modest (and relevant) aim which consists in laying the foundation for examining how we ought to take Nussbaum's affirmation of Rawls' solution. For this reason, we limit our discussion to the most important challenges, to giving an account of Rawls' solution, and to the problems with it. This is why we focus on the non-identity problem and the repugnant conclusion, and why much of the literature devoted to

[1] As mentioned in chapter three, Nussbaum examines only three of the four problems which Rawls mentions because she thinks that Rawls succeeds in solving the problem of obligations to future people, Nussbaum (2006a) p.23.

these problems (and the non-identity problem in particular) is not considered. This is not to dismiss the relevance of this literature, but to limit our discussion to trying to work out why Nussbaum does not view the problem as warranting (unlike the other three issues she examines) any discussion at all. For this reason, the structure of our discussion largely follows Nussbaum's treatment of Rawls' solution to the issues of disability, nationality, and species-membership. In line with Nussbaum's conclusion of Rawls' treatment of these issues, this chapter demonstrates that Rawls is unable to adequately include or accommodate future people within his theory.

5.1 Parfit's Non-Identity Problem and Repugnant Conclusion

The literature devoted to the challenge of future people is heavily influenced by Derek Parfit and his conceptualisation of the metaphysics which underlies the nature of the challenge itself.[2] Not only has Parfit guided our thinking about questions concerning future people – by helping us to see the complex nature of existence and identity – but he uncovers why it is so difficult to offer an adequate moral or political theory with a problem-free incorporation of future people built-in. More particularly, Parfit provides us with two incredibly powerful problems to consider against the backdrop of future people, both of which help us to understand how complex this challenge is, and both of which have generated (and continue to generate) a huge amount of literature.

5.1.1 The Non-Identity Problem

We can affect the lives of future people in at least two ways. We are able to determine: 1) the kinds of lives future people are able to live – by determining the kinds of social, political, economic and environmental circumstances that prevail – and we are able to determine 2) who they are. In other words, we are faced with, what Parfit describes as, 'same people choices' and 'different people choices'.[3] To illustrate this difference, a choice between which school(s) to send our children to, or where to settle down and raise a family do not affect (necessarily) *who* comes to exist. Instead, they affect the kind of life some particular individual(s) may end up living.[4] On the other hand, a choice between whether to start a family this year or in a few years time can (and is likely to) affect *who* will exist.[5] What's more, if one is more likely to have twins this year rather than in a few years time for some reason (perhaps it would coincide with heavily

[2] Parfit (1984) chapter 4
[3] Parfit (1984) p.356
[4] A same people choice is even more clear-cut, given current advances in freeze fertilised eggs (cryopreservation). These advances allow us to decide when (and even whether) a *particular* future person is (at least given the chance to be) born and what life they can have. See: Chiang *et al* (2010)
[5] The same choice exists when we are (for instance) faced with a choice between which (and how many) freeze fertilised eggs to use at the expense of the others.

subsidised fertility treatment), then one's choice can also affect *how many* people will exist in the future (we get a distinction between what Parfit terms 'same number' and 'different number' choices).[6]

These distinctions show us just how complicated and serious the challenge posed by future people is, and our examples show us just how relevant these questions are. How should we respond to these questions and challenges? One response would be to say that it seems incredibly pertinent where one decides to raise their child, given that a *particular* child will be affected by the outcome of that choice. On the other hand, whether or not one decides to start a family this year or in a few years time is not something which ought to be up for evaluation. After all, a choice between when to start a family merely affects who, how many, and when some person comes to exist – a choice which does not affect any *particular* person either way. In other words, one response to the distinctions is that they help us to understand which questions are up (and ought to be up) for evaluation. More specifically, they help us to see that if we evaluate moral questions in relation to a particular person being affected (harmed, wronged) by a particular choice or policy, then different people choices are beyond the scope of consideration.[7]

This seems, at first sight, to be a suitable response – especially since most of us accept that in order for something to be wrong or harmful it needs to be wrong or harmful for someone. This intuition, however, is placed under some pressure when we introduce future people. Take the following two classic cases:

1. *The Case of the Slave Child.* In a society in which slavery is legal, a couple that is planning to have no children is offered $50,000 by a slaveholder to produce a child to be a slave to him. They want the money to buy a yacht.[8]

2. *The Risky Policy.* As a community, we must choose between two energy policies. Both would be completely safe for at least three centuries, but one would have certain risks in the further future. This policy involves the burial of nuclear waste in areas where, in the next few centuries, there is no risk of an earthquake. But since this waste will remain radio-active for thousands of years, there will be risks in the distant future, if

[6] Parfit (1984) p.356
[7] Mulgan (2006) p.9, Gosseries *et al.* (2009a) p.3. In particular, this is the view put forward by David Heyd, see Heyd (1993).
[8] Kavka (1982)

> we choose this risky policy, the standard of living will be somewhat higher over the next century. We do choose this policy. As a result there is a catastrophe many centuries later. An earthquake releases radiation, which kills thousands of people. Though they are killed by this catastrophe, these people would have had lives that are worth living. (The radiation gives people an incurable disease that will kill them at about the age of 40, but has no effects before it kills).[9]

In both cases, our response is that we ought to condemn these actions and reasons. In the slave child case, our intuitions tell us that it would be wrong to bring a child into existence in order to condemn that child into a life of slavery. We want to say that such an action is both harmful for the child and at odds with how we view parental obligations. On these grounds (regardless of who the child is) we want to say that such a move is unjustified. Yet, the fact that the child would not have otherwise existed (the non-identity problem) shows us that it is unclear what makes this so. After all, the child's existence depends entirely on this arrangement. Similarly, our initial reaction to the risky policy is that we ought to prevent harmful consequences if we are able to do so with very little cost to ourselves. Yet, it is difficult to maintain that another policy would be better given that (like the slave child) those affected by the policy are likely not to have been born under the alternative. In short, there is something about the actions (condemning a child into a life of slavery, and adopting the risky policy) which we want to say is wrong – but it is unclear exactly what makes this so.

On an extreme reading of the non-identity problem, and indeed one answer to it, we owe nothing to future people. This is based on the claim that no generation can claim that *they* have been harmed when that harm (if any) is a condition of their existence.[10] However, this option is in no way clear-cut. Recent environmental concerns and policy-making is, in large part, grounded in a serious concern for the kinds of lives future people will (and ought to) be able to live. What's more, a good number of the claims underlying this recent awareness is that future people should be better off than present people, and that we ought to minimise (as best we can) the challenges that they will face. Accepting that the non-identity problem limits how we interpret and understand obligations to future people, then, amounts to saying that these recent developments and debates are misguided. More problematically, it amounts to saying that the consequences of current and future policies are not constrained by the way that they affect the lives of future

[9] Parfit (1984) p.371
[10] For current responses to the non-identity problem see: Gosseries (2003), Meyer (2010), Roberts (2009)

people. This seems awfully unattractive given our response to the cases, and the current political environment.[11]

A proper reading of the problem, then, tells us that we ought to incorporate future people into our theories, and that we ought to ensure that we are able to take them into account. With this in mind, it is worth pointing out that the cases provide us with a number of important insights. Firstly, the cases (and the risky policy in particular) help us to see that it can be difficult to differentiate between same people and different people choices. Indeed, trying to work out the long-term effects of the policies that we adopt is likely to land us in the middle of an empirical nightmare. There is real uncertainty surrounding the way in which policies are going to affect where, when and even who reproduces – and as a consequence, who ends up existing in the future. It is, thus, not only important to bear the relevance of different people choices in mind, but it is incredibly difficult (if not impossible) to ignore this question altogether.[12]

In addition, one of the conclusions that we ought to draw from our intuitive reactions to the cases is that we want to say that they are both problematic regardless of the relation within which we stand with the people (whoever they are) that will be affected by them. One might claim, for instance, that the slave child case is far worse than the risky policy. One reason for holding such a view would be because we ought to feel more responsible for the slave child case – given that (or so one could argue) our responsibilities are different in this case (as parents) or because our responsibilities diminish with time.[13] Yet, our (at least initial) response to both problems tends not to differentiate between the near and the distant future in such a way. Rather, our responses to both of the cases tell us that we see ourselves as standing in moral relations with both the near and distant future. So, while we might have *different* obligations, we ought not to (intentionally) harm *any* future people – whoever they are and whenever they will exist.

Finally, both cases help to demonstrate that, despite the abstract nature of the challenge of future people, the problems and the solutions required are (at least partly) practical. The lives and identities of future people are shaped by what we *do* now and in the future. Their lives are shaped by what problems we leave behind, and by what measures we take to resolve them. We know, for instance, that our policies affect where, when and how many people will be born, and we know

[11] Gosseries (2003) (2008b)
[12] Parfit (1984) p.371
[13] To be sure, there is a question of how we balance the well-being of all existing individuals with future people and whether we discount the future. This is beyond the scope of this project. See Broome (1994), (1999) pp.44-67.

that their identities and lives will be shaped by our decisions. So while it pays to pay attention to the abstract problems that a concern for future people brings, it is equally as important not to lose sight of the practical challenge of addressing them either.

5.1.2 The Repugnant Conclusion

Unfortunately, even if one is able to get around the non-identity problem, it is not all smooth sailing. Recall that we know that the policies we adopt, and the general choices we make, also affect the *number* of people that exist in the future. This raises serious questions about population ethics. How many people *should* exist in the future? Under what conditions (if any) should we reproduce? Are we (always, sometimes, or never) obligated to reproduce? Is there an upper limit to how many people should exist in the future?[14] Our answers to these questions largely depend on how we determine what makes life worth living, and how the number of people that exist impacts on this answer for both current and future people.[15] In other words, it depends on what we think will make the world a better place, and what role the number of people play in answering this question.

One obvious response to this question would be to say that the number of future people matters only insofar as it contributes to or subtracts from whatever it is that makes life worth living. On the back of this claim we could then say that when we are faced with a choice between possible futures, the right option is the one that contains more of whatever makes life worth living (the total view).[16] Unfortunately, this simple solution has disastrous results when we apply it to population ethics. To illustrate the problem, imagine a world (A) where everyone alive has a fairly good quality of life. Now imagine a world (B) where that number of people was doubled, but where the quality of life decreased only slightly per person, leading to an increase overall. Of course, if we keep adding people to this thought experiment and lowering the quality of life per person, but increasing it overall, then it seems that we may eventually end up in a world (Z) where billions of people have lives which are barely worth living, but which is still better than a world (A) where far fewer people have even better lives. In other words, it amounts to the claim that:

[14] Parfit (1984) pp.381-90
[15] Ryberg *et al.* (2008), (2004).
[16] Parfit (1984) p.387

> For any possible population of at least ten billion people, all with a very high quality of life, there must be some much larger imaginable population whose existence, if other things are equal, would be better even though its members have lives that are barely worth living.[17]

Our conclusion, then, is that Z must be better than A.[18] Yet, this seems counter-intuitive. How can a world where billions of people live lives that are only barely worth living be better than one where less people live far better lives? Such a conclusion is, as Parfit points out, morally repugnant.[19]

We have two responses to the repugnant conclusion: either we accept it or we reject it. Accepting the repugnant conclusion (accepting that Z is better than A) amounts to saying that we are and ought to opt for the world where billions of people have lives that are barely worth living. In other words, the conclusion is not repugnant at all.[20] A world where billions of people have lives that are barely worth living is better than one where fewer people have much better lives. If we are maximizing consequentialists, then we ought to create such a world, if we have the choice. We ought to maximise whatever makes life worth living and we ought to do whatever it takes to do so.

Alternatively, if we reject the repugnant conclusion (and reject that Z is better than A), and so agree that the conclusion is repugnant, then any theory open to it ought to be rejected outright.[21] We must find a way of overcoming the repugnant conclusion. We focus on one popular strategy for overcoming the repugnant conclusion, the lexical view.[22] This will help us to understand how Mulgan utilises the needs and goals distinction in light of the problem of future people in the

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[17] Parfit (1984) p.388

[18] Parfit (1984) p.387 Parfit describes the 'impersonal total principle' as the claim that 'if other things are equal, the best outcome is the one in which there would be the greatest quantity of whatever makes life worth living'. See also Mulgan (2004) p.59.

[19] Parfit (1984) p.388 Tim Mulgan traces the problem that the repugnant conclusion highlights to the very foundation of maximising forms of consequentialism. According to Mulgan, not only is it a problem with the *maximising* nature of consequentialism, but with its absolute commitment to *consequences*. This leads Mulgan to view the problem as an extension of the *Demandingness Objection* (mentioned in chapter four). According to the original demandingness objection, maximising forms of consequentialism ask us to donate all of our resources to charity until our own needs are in jeopardy. The repugnant conclusion shows us that we are also committed to creating as many people as possible even when it will mean that our lives and their lives will be barely worth living. See Mulgan (2004) chapter 3.

[20] One might claim, for instance, that we ought to embrace the conclusion simply because we cannot judge what the lives of future people will be like without privileging our own perspective. See, for instance, Ng (1989).

[21] Ryberg *et al.* (2008)

[22] Mulgan (2004) pp.64-80, Parfit (1984) pp.413-416, Griffin (1986) pp.85-9

next chapter, while also helping us to make sense of the resources Nussbaum has available for dealing with it also. The capability approach is likely to reject the repugnant conclusion. The approach focuses on giving each individual a flourishing life, and does not regard the creation of new people whose lives are barely worth living as compensation for the limited capabilities of others.

Our discussion of the repugnant conclusion shows us that if we can say something substantial about what makes life worth living, then we may be able to block it. In other words, if we adopt the *lexical view* we have a way of saying that more lives that are barely worth living cannot possibly outnumber far fewer lives that contain all of what makes life worth living. This would enable us to claim that there is a point beyond which many lives that are barely worth living would never *out-value* fewer lives that contain all of what makes life worth living. Even though, we ought to say, the former may *outnumber* the latter. Mulgan formulates the lexical claim as follows:

> *The Lexical Claim.* If x is lexically more valuable then y, then, once we have a sufficient amount of x, no amount of y can compensate for a *significant* reduction in x.[23]

Utilising the needs and goals distinction, we could say that no amount of basic needs could compensate for a serious reduction in goals. In other words, a life that contains no goals at all can not be compensated by a huge increase in needs. Thus, a good number of individuals whose basic needs are met would not out-value a smaller number of individuals who were able to pursue goals of their own. This captures the response of the capability theorist, who makes the simple point that *more* individuals who live lives that are barely worth living does not (itself) make life worthwhile for those that are living it. In other words, it helps us to see that a question about what makes life worth living is not about how much of some general good we ought to generate, but about what these lives are like. What we want to know is what makes life worth living for real people in the real world, and the lexical view gives us at least a framework for making sense of this.

Both the non-identity problem and repugnant conclusion uncover flaws (and strengths) in the structure of some of our most important theories. Both problems tell us something valuable

[23] See Mulgan (2004) p.67, see also Parfit (1986) pp.413-18, and Griffin (1986) pp.85-9. Note that there are also arguments against the lexical view which we do not consider. For instance, there is the claim that it is difficult to determine what the lexical level ought to be (to get this strategy off the ground), as well as the objection that it is elitist. For an overview of both problems see Mulgan (2004) pp.67-80.

about the way we approach questions of moral and political significance as they apply to future people. Most important of all, both problems help us to better understand why a general reluctance to entertain the question of what we owe future people, is matched by a reluctance to dismiss the problem altogether.[24] There is, then, much more to say about both of these problems, and even more to say about the literature devoted to both of them.[25] However, and we ought to stress that, as our concern is to offer an overview of Rawls' solution, our primary concern is to lay both these problems out so to provide some background for the way that they challenge the conceptual underpinnings of our theories, and Rawls' theory in particular.

5.2 Rawls and Just Savings

Our discussion of Rawls in chapter three, and Nussbaum's acceptance of some of Rawls' core elements in developing her capability approach, helps us to see that the Rawlsian framework has been (and remains) instrumental in raising, reformulating, and cementing a number of key discussions. For our purposes (in this chapter at least), it has provided (and continues to provide) an important and influential framework for dealing with our obligations to future people.[26] Rawls provide us with the first full articulation of a theory of intergenerational justice – and describes the problem as one that *'*subjects any ethical theory to severe if not impossible tests*'*.[27]

Rawls does not welcome the conclusion that justice as fairness is unable to say anything at all about future people. Indeed, there is a general reluctance amongst contract theorists, to accept this view.[28] Perhaps one reason for this is that accepting this conclusion confirms just how vulnerable and powerless future people are, something which cuts to the heart of what contract theories aim to mitigate.[29] Aside from these structural reasons, an important part of Rawls' project is to offer a liberal theory that can sustain itself over time.[30] Given that, as Gauthier writes, 'each person interacts with others both older and younger than himself, and enters thereby into a continuous thread of interaction extending from the most remote human past to

[24] Gosseries (2003) Of course, again, this is in large part true, but there are those who dismiss obligations to future people altogether, for instance see Heyd (1993).
[25] For an overview of this literature see Meyer (2010), Ruberg *et al* (2008), Roberts (2009)
[26] To be fair, Rawls does not devote a huge amount of space to this issue, but as Nussbaum's acceptance of his solution makes clear – it is an important contribution nonetheless. See Rawls (1971) pp.284-310, (1993) p.274, (2001) sections 49.2 and 49.3
[27] Rawls (1971) p.284
[28] Even David Gauthier is reluctant to hold the view that reason tells us that we have no obligations at all. See Gauthier (1986).
[29] Gosseries (2003) (2008b), Gardiner (2009)
[30] Rawls (1993) p.140, see also Freeman (2007) chapter 6.

the farthest future of our kind',[31] any theory that wishes to sustain itself and affect real world change will at least take future people into account.

Since Rawls' principles of justice are derived from the original position, we simply need to ask how the question of future people arises from within it. Rawls' answer is that in the original position we are to imagine ourselves 'as members of an ongoing society enduring from one generation to the next'.[32] It looks as if future people are, thus, built into Rawls' theory and the principles of justice. However, we should not to be so convinced that including future people will be a straightforward operation. Our discussion of Rawls in light of the way that he includes issues of disability, nationality and nonhuman animals in chapter three gives us reason to be sceptical. Recall that Rawls was left with dealing with these issues at a later stage, and that the resulting theory in light of these problems was less than ideal. This prompts us to ask, then, not *whether* Rawls includes future people, but *how* and (perhaps even more so) at what cost.

Rawls provides two ways of incorporating and generating obligations to future people. He explains his initial solution as follows:

> [...] The persons in the original position are to ask themselves how much they would be willing to save at each stage of advance on the assumption that all other generations are to save at the same rates. That is, their willingness to save at any given phase of civilisation with the understanding that the rates they propose are to regulate the whole span of accumulation.[33]

This solution relies on the way in which the veil of ignorance prevents contracting parties from knowing how privileged or deprived their generation is. One of the things which parties will need to contemplate and agree on, then, is how much they (and every generation to follow) ought to be expected to save for the future (so the veil of ignorance is of course fundamental to how this is possible). While this sounds fair enough, it is not so clear just how this gets off the ground. Based on the structural conditions of Rawls' theory, it is hard to see how this question will be dealt with when those in the original position are not (themselves) set to benefit from the accumulation they commit to. So there is a question of how (on this view) at least the first

[31] Gauthier (186) p.299, cited in Gardiner (2009) p.99
[32] Freeman (2007) p.137
[33] Rawls (1971) p.287

generation considers accumulation as obligatory and binding (in their interests at all).[34] For this reason, Rawls' original solution see's him introduce (and see as necessary) a motivational assumption which stipulates that the present generation are modelled as caring about their descendants. Rawls tells us that we ought to see ourselves as 'heads of families' with a 'desire to further the welfare of [our] nearest descendants'.[35]

There are at least two problems with this (original) solution. Firstly, it relies on what seems to be (at least overall) an *ad hoc* motivation.[36] At least, it is difficult to make sense of the claim that those behind the veil of ignorance are imagined as caring for their descendants into the future indefinitely, but not those with whom they will share a life.[37] At best, the original position now looks uneven, and at worst tailored. Secondly, and a criticism that has come primarily from liberal feminists, Rawls contradicts the place of the family within his theory when he claims that we ought to see ourselves as 'heads of families'. This is especially so given that Rawls (himself) highlights that we often need protection from other family members. Moreover, Rawls claims that the principle of fair equality of opportunity may only ever be imperfectly possible so long as the family exists.[38] It seems, then, Rawls again makes a major departure from his approach in order to make room for future people. In line with Nussbaum's critique of Rawls presented in chapter three, we can see that both of these problems stem from the rigidity of contract theory and the conditions set out in its basic framework.[39] As we pointed out, it is difficult, once we commit to a particular view of society and of individuals, to add anything to it without undermining (or at least distorting) these basic commitments.

Although Rawls later admits that he doesn't take the original solution to be terribly controversial[40], he still rejects this initial solution and suggests that present generations look to past generations to solve the problem.[41] Rawls' second (and favoured) solution sees him stipulate that parties behind the veil of ignorance are to decide on a rate of savings based on what they would want all past generations to have saved for their future. So while the first solution asked those in the original position to agree on a rate of savings based on a concern for our

34 Rawls (1971) p.288
35 Rawls (1971) p.128
36 Mulgan (2004) p.41
37 Mulgan (2004) p.41
38 Rawls (1971) p.74, see also English (1977) and Munoz-Darde (1998)
39 Again, we see that it is Rawls' commitment to equality, mutual advantage, and the circumstances of justice that guide and limit our approach to the problems and ultimately the solutions possible.
40 Rawls (1993) p.274 n.12
41 Rawls (1993) p.274

descendants, the second solution asks us to consider the question in light of what we would have accepted past people to have implemented for us.

> Rather than imagine a (hypothetical and nonhistorical) direct agreement between all generations, the parties can be required to agree to a savings principle subject to the further condition that they must want all *previous* generations to have followed it. Thus the correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time.[42]

This change means that the present generation is placed at the centre of the question itself. The present generation is imagined as being involved in an answer to a question which they must both condone and commit themselves to. Insofar as Rawls' general approach is concerned, this revised solution is much better. The motivational assumption driving the first solution is now no longer required. So this is far more in line with Rawls' theory overall, and incorporates something akin to an intergenerational categorical imperative ('do unto future generations what you would have wanted previous generations to do unto you').[43]

So, Rawls manages to include future people within the original position without relying on a problematic assumption. This helps us to see how important the second solution is, but it is not all the work done just yet. It raises another question altogether: how are obligations to future people understood within the original position, and what questions arise? We know that issues of disability, nationality and nonhuman animals were limited within the theory – so we ought to be interested to know what limits (if any) there will be for future people.

For Rawls, the question that those in the original position ask themselves is: what are we obligated to *save* for future people – or more correctly, the next generation? Rawls contends that we would generate some very clear obligations. He claims that each generation must: 1) 'preserve the gains of culture and civilisation', 2) 'maintain intact those just institutions that have been established', and 3) 'put aside in each period of time a suitable amount of real capital

[42] Rawls (1993) p.274
[43] Mulgan (2004) p.43

accumulation'.[44] Making sense of the first and second conditions is easy enough. We ought to leave future people at least no worse off than ourselves, and we ought to ensure that they are able to benefit from past gains. It is, therefore, the final condition that changes the game – and that is (for this reason) most problematic. It helps us to see that for Rawls, maintaining the status quo is not enough. We ought to see ourselves as part of an ongoing society that has and will grow and develop over time, not just one that has and will endure.

To be sure, making sense of this requirement is easy enough. We know that we have benefitted enormously from the gains of past generations. If they had consumed more or even all of what they had produced, our lives (assuming same people choices) would have been very different.[45] The problem, however, is that it leaves Rawls having to be able to include a provision for *saving* for the future. And it leaves Rawls having to generate a just rate of savings in order to balance this requirement against the claims of justice for present people (the just savings problem).[46] In other words, not only do we need to show that the theory 'neither permits too much savings, nor that it forbids it entirely',[47] but we need to work out how much a just rate of savings would be (at least for us).

Of course, it would be a mistake to expect Rawls to provide us with an *actual* amount. Rawls merely wants to give us a way of working a rate of savings out. We know that the challenge is to find something in between saving too much and saving too little, and given that this is a practical exercise, the amount of savings required will depend on the circumstances that we find ourselves in. As Rawls tells us, 'when people are poor and saving is difficult, a lower rate of saving should be required; whereas in a wealthier society greater saving may reasonably be expected since the real burden of saving is less'.[48] Thus, we are not (at least in principle) expected to save at the *exact* rate of previous generations – only at the rate at which we would rationally have wanted them to have saved (regardless of what they actually did). Nor are we expected to save indefinitely, saving is only required until we reach a stage where 'just institutions are firmly established', at which point the positive rate of savings turns to zero and we are required to maintain just institutions.[49]

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[44] Rawls (1971) p.285
[45] Mulgan (2004) p.40
[46] Indeed, this is the problem that characterises Rawls' solution to the problem of obligations to future generations – that is, that we need to work out how much justice requires we save for the future.
[47] Mulgan (2004) p.40
[48] Rawls (1971) p.287
[49] Rawls (1971) p.287

No doubt, all of this amounts to a very useful way of thinking about justice for future people. It is, however, not quite complete. We are still left with questions about whether we can generate an answer to this question from within the original position, and we are still left with questions about what the right balance ought to be.[50] In other words, Rawls provides us with a good start – it is just not awfully clear whether Rawls has the goods to generate a complete solution. Thus, and despite the insights, there are still reasons to question the Rawlsian framework in dealing with this challenge.

5.3 Two Problems for Rawls?

We isolate and consider two problems, both of which are recounted in Tim Mulgan's *Future People*, which this section largely follows. The first is based on the way Rawls attempts to *generate* answers to the question of future people – and arises because of the non-identity problem. The second is based on Rawls' assumption of favourable conditions, and arises because of the limits that this assumption places on the challenge itself.[51]

5.3.1 Non-Identity

Rawls' strategy for deriving conclusions from the original position is (as we have said) akin to an intergenerational categorical imperative. In other words, the procedure asks us to look to previous generations to determine the correct rate of savings. We have claimed that this strategy improves on Rawls' original solution, at least given the foundations of Rawls' theory, but now we see that it is still not all the work done by any means. Unfortunately for Rawls, there is a serious question of whether we could rationally will a previous rate of savings if we would not have existed under such a rate. In other words, the non-identity problem poses a very serious question: can we will a rate of savings if it turns out that we would not have existed? Here we see that the contractual underpinning of Rawls' theory limits the approach that we can take to the challenge and is placed under serious doubt when the non-identity problem is taken on board. It reinforces just how significant these foundations, in trying to answer this question, are.

If we accept the non-identity problem, then there are (as Mulgan points out, and bearing in mind the conditions of the original position) two solutions to this problem. One is to stipulate that we do not know whether we will actually exist. In other words, those behind the veil of ignorance

[50] Recall that, as mentioned in chapter 3, the principles of justice and the contractual underpinnings are separable – so we can accept Rawls' solution to the problem and still reject the contractual underpinnings.
[51] Mulgan (2004) pp.42-50

are to decide on and accept a rate of savings even if it means that they would not have existed. The other option is to stipulate that those party to the contract know they will exist regardless of the policies chosen.[52] Rawls opts for the latter, since the alternative would, he thinks, 'stretch fantasy too far'.[53] In the end, however, neither stipulation really helps us out. We are still faced with a choice about what we ought to will, yet knowing that we would exist (regardless of the outcome) would lead us to prefer that previous generations create a small population with high income wealth. On the other hand, not knowing whether we will exist will lead us to prefer that previous generations create a present generation that is as large as possible. In other words, we will either be drawn to ensuring our lives are as good as possible, or to ensuring at least our own existence.[54] In short, it is not very clear whether we can get round the problems either way. It seems then that if we are to get around this problem, then we will need to go beyond the details of what information we have in the original position.

A fair amount of literature has been devoted to showing that contract theory is able to respond to the non-identity problem.[55] It is important then to say that based on this literature, Rawls could have a way round this problem. It has been shown that the non-identity problem is diffused if we highlight the fact that the non-identity problem assumes that a wrongful action must also be harmful to someone (that what happens as a consequence of an action partly determines that it is wrong).[56] However, it is certainly the case that an action can be wrong even if it is harmful to no-one (if, that is, we separate the actions themselves from the outcomes). Such a move allows us to say that a course of action can be wrong even when the only alternative involves non-existence. So, for instance, there is nothing to prevent the slave child from claiming that they have been wronged even when they would not have otherwise existed, on the grounds that an act or intention is wrong, or that a right has been violated. More importantly, this strategy allows us to grant that those in the original position could evaluate actions quite apart from the effect that they would have had on them (and their own existence), because their own existence would be irrelevant to what makes an action wrong.

[52] Mulgan (2004) p.43
[53] Rawls (1971) p.139
[54] Mulgan (2004) pp.43-4
[55] Although Mulgan does not consider this literature in his *Future People*, he has recently acknowledged the significance of it. See Mulgan (2010)
[56] See Kumar (2003) (2009), see also Roberts (2009)

No doubt, this gives Rawls a way of generating conclusions from the original position, while allowing us to overlook the complex issues involved in determining the results of particular policies. Even so, there is still one nagging concern. In particular, there is a danger that we could base the just savings principle entirely on some consequences-free conception of right and wrong. Yet, this seems to overlook the fact that the challenge of future people is in large part (even if it is not entirely) a question about consequences.[57] So, while we ought to try to ensure that we are able to say that cases such as the slave child case are certainly wrong, we ought not to rely entirely and exclusively on the claim that actions can be wrong regardless of who is affected by them. What we need then, and what those party to the agreement ought to bear in mind, is that despite placing ourselves at the centre of the question of just savings (by asking what we would have accepted previous generations to have saved), our primary aim still ought to remain forward-looking. It may not matter, in other words, whether we exist as a result of the savings of previous generations, but it does still matter what the lives of those who would have existed would have been like.

5.3.2 Assumption of Favourable Conditions

In the few pages dedicated to the problem of future people, Rawls does not consider the non-identity problem. For this reason, one sure fire solution would be to ignore it. After all, Rawls could (as above) simply borrow a solution to it. Unfortunately for Rawls, a more serious problem arises when we take into account that Rawls addresses the problem of future people in the latter stages of his approach. In line with our discussion of Rawls' treatment of other issues, Rawls takes the challenge of future people up after the fundamental case is considered and once the basic structure is decided. Again, this turns out to be a fatal error. This leads Rawls to offer a theory which, suitable for a modern liberal state, assumes that favourable conditions pertain.[58] Such a move, however, leaves Rawls unable to take on board, and to respond to, the way that the challenge features within the theory.

More specifically, introducing future people exposes weaknesses in Rawls' assumption of favourable conditions. Mulgan illustrates this weakness by focusing on two boundaries: childhood and disability. In relation to childhood, Mulgan's argument relies on the way in which, on Rawls' view, justice is owed to persons who have the two moral powers (a conception of the

[57] Indeed, this is precisely why Rawls' original solution is consequences oriented.
[58] Mulgan (2004) p.44

good, and a sense of justice[59]). Given that this is so, Mulgan points out that the parties in the original position will know that:

i. All human life begins with a childhood,
ii. No child born simply realises these powers or spontaneously develops them,
iii. Many social conditions are inadequate for their development, (in some societies it is unlikely that they will ever develop).[60]

Given this information, parties to the contract will know that the persons that they represent might be disadvantaged. This gives them good reason to select principles of justice ensuring their society has very few of these children, and that all children have an equal claim to the early care required in order to ensure the development of these powers (which Mulgan dubs the development principle[61]). As Mulgan points out, this is not a simple inclusion – a principle that aims to ensure that all children develop these powers will take priority.[62] In other words, it leads to very different results and a very different society to the one which Rawls assumes will prevail.

Such an illustration highlights just how sensitive Rawls' assumption of favourable conditions (and the priority of liberty) really is. What's more, it also shows us why it is so important to exclude some cases (such as the severely disabled) from the start. Unfortunately for Rawls, however, the introduction of future people means that this strategy (and so his treatment of disability) also breaks down.[63] On Rawls' account, a disability is something that prevents an individual from contributing to society. In line with Mulgan's discussion of childhood and development, it is a very pertinent question exactly who is able to contribute to society. We know that medical advancements have contributed to alleviating some of the barriers that would have been faced by existing individuals if they were born only a few generations earlier. Any of us could have suffered disadvantages or even died from (now) preventable diseases if social conditions and medical advancements were different.[64]

[59] Recall that for Rawls, individuals are treated as free and equal. Their freedom consists in the possession of these two moral powers, and their equality in their being cooperating members of society. See Rawls (1993) p.19
[60] Mulgan (2004) p.45
[61] Mulgan (2004) p.45
[62] As Mulgan points out, the liberty principle is pointless if individuals are unable to at least minimally develop these powers. Mulgan (2004) p.45
[63] Mulgan (2004) pp.46-8
[64] Mulgan (2004) pp.46-8

Because we know that we happen to live in favourable conditions, we will also know that things could have been very different. Without the savings of previous generations, we may have been severely disabled and so excluded from Rawls interpretation of the fundamental case. Given these details, it looks as though medical progress must continue at least at its current rate – we must save at least as much as our ancestors regardless of what they saved. What's more, it may even lead us to favour a higher rate of savings, given that the worst-off in society (who are not 'severely disabled') may have been even better off if medical advances were even higher. Here we see that Rawls' assumption of favourable condition presupposes that previous generations get it right. In other words, it depends in large part on previous generations bringing these conditions about. This suggests that Rawls theory commits us to bring about particular conditions. In other words, Rawls' procedure for generating a just rate of savings looks to be far more complicated and far more demanding than Rawls allows.[65]

Mulgan's criticisms help us to see that Rawls not only simplifies the challenge by overlooking just how we are able to affect future people (by overlooking different people choices), but that Rawls only includes future people superficially.[66] Once we introduce future people as they feature within Rawls' theory – there are questions about the social conditions within which children exist and develop, as well as serious questions about medical advancements and the kinds of barriers that prevent individuals from being full members of Rawls' society. By limiting the scope of the problem, Rawls is able to limit the impact of future people and he is able to assume that favourable conditions pertain. Once we demonstrate that this is not so, we see that the problem of future people is far more demanding, and that what is required is some way of working these competing demands out. The problem of future people is (unfortunately) not just a question of how much current generations should save for future ones, but a question of what kind of lives we and they ought to be able to live. More precisely, the question that future people raise is what the real *cost* of our theories and these savings (or lack of savings) will be. Unfortunately, Rawls does not include future generations as they feature. This means that this conclusion is not reached and no provisions for dealing with these questions are considered. We are left with no guidance at all.

[65] Mulgan (2004) pp.46-8

[66] Rawls treats future people as an extension of his theory – in much the same way as he treats the other three problems that Nussbaum examines.

Our discussion of Rawls' approach to the problem of future people is two-sided. In one sense, Rawls provides us with some extremely useful insights – and insights (we ought to add) that a good number of theorists working on this problem share. There is a move to find the right balance between saving too much for the future and saving too little, and there is a desire to make sense of how future people feature and ought to feature within our theories. Despite the value in this aim, Rawls is unable to offer a theory that manages to do this because of the way that the problem features within his theory. Not only does he assume the problems away, but he problematically limits the real force of the problem of future people in the end. Thus, while Rawls manages to isolate the challenge well, he is unable to fill this out because (like the issues that we considered in chapter three) Rawls' framework does not take the problem on board form the start. In line with Nussbaum's rejection of the contractual underpinnings of Rawls' approach in relation to issues of disability, nationality, and nonhuman animals – Rawls is unable to do justice to the problem of future people.

5.4 Conclusion

Given that Nussbaum affirms Rawls' solution to the problem of future people and given that Rawls does not offer a viable solution to it – we ought to be worried about Nussbaum's silent agreement with Rawls. Indeed, as mentioned above, it seems clear that Rawls' approach to the problem of future people ought to have been treated the same way that Nussbaum treated the other issues she discussed. There is no obvious reason why Nussbaum understood Rawls' solution to this problem to be an exception, except to simply say that Nussbaum thinks that Rawls' solution is adequate.[67] Without a full discussion of this problem, it is difficult to ascertain exactly why, how, and which one of Rawls' solutions fits in with Nussbaum's capability approach. We take these questions up in the next chapter.

[67] Not only does Nussbaum not explain in any way how her approach affirms (or is even able to affirm, given the departures) Rawls' solution, but when questioned, Nussbaum simply claims that Rawls does a 'pretty good job' (during a live link, Nottingham conference on Nussbaum's political philosophy 2010). Without any more than this, one can only speculate that Nussbaum thinks that Rawls simply gets it right.

6. The Capability Approach and Future People

This chapter sets itself three aims. The first aim is to review Nussbaum's endorsement of Rawls' solution to the problem of future people. The second aim is to examine the way that Nussbaum's capability approach fits in with this answer and asks, based on problems highlighted in the previous chapter, whether Nussbaum's capability approach does any better. It is argued that Nussbaum, while providing us with an approach that improves on Rawls' solution, is in the end (and because of these improvements) even more problematic.[1] It is shown that the inclusion of future people turns out to be problematic for Nussbaum's approach and that she makes a great mistake when she overlooks it. The final aim, then, is to further demonstrate that the capability approach needs to be developed if it is to have a way of dealing with this challenge, and that it is strengthened by adopting the needs, goals, and other goods distinction presented in chapter four.

6.1 Nussbaum and Future People

As we demonstrated in the previous chapter, Rawls runs into problems when he is generating conclusions for future people because of the contractual underpinnings of his approach. Fortunately then, and as we covered in chapter three, Nussbaum provides us with a different approach to questions of justice. Informed by Aristotelian and Marxian foundations, human beings are depicted as having rich needs and as coming to form society based on the kinds of beings they are.[2] As an 'outcome orientated theory from the start', the aim is to ensure that individuals are able to live a dignified life, (partly) captured by the capabilities.[3] From such a starting point, it is fairly easy to see how Nussbaum's approach includes future people. We know that all relevant beings are included because dignity (in some measure) applies to them. By extension, future people are included because (at the very least) we ought to care about the kinds of lives that they will be able to live. We ought to seek their good for them – as part of our own good. Moreover, we ought to consider their lives when we make choices about our own lives, and when we make choices about the design of society.[4]

[1] As we have said, as Nussbaum does not provide us with a full articulation of her understanding of how Rawls' solution fits in with the capability approach, this is partly speculative. There is good reason to think, however (given this silence) that Nussbaum simply agrees with Rawls.
[2] Nussbaum (2006a) p.132
[3] Nussbaum (2006a) p.81
[4] Nussbaum (2006a) p.91

Given these departures, it seems quite obvious what Nussbaum means when she says that Rawls provides us with a plausible answer to the problem of future people. At least on a charitable reading, what Nussbaum means is that Rawls provides us with a useful way of thinking about these obligations. That is, that the just savings problem is (at least) a good start and that we ought to adopt a capability-centred understanding of what justice requires that we invest in for future people. We ought to invest in their ability to live dignified lives, and in their capacity to continue to do so.

This is not a controversial agreement.[5] Framing the problem as one which consists in working out how much we ought to save without overlooking the importance of present people simply provides us with a general framework for considering the problem. So, it can be affirmed by people with very different views on the content of our obligations. Even so, problems arise when we start to ask how this question can be answered, and when we look at the way the problem is incorporated into the theory itself. We know that Rawls faces problems here, none of which he considers. As Nussbaum fails to engage with the problem at all, it looks as if Nussbaum (in so doing) provides us with no solution either. That said, and given the differences, we ought to leave some room to ask whether Nussbaum's approach will provide us with the answers and the guidance on which Rawls remains silent. In what follows, we consider whether Nussbaum's capability approach is able to do any better.

6.1.1 Non-Identity

Nussbaum's outcome oriented approach, and her concern with capabilities, means that the non-identity problem is irrelevant. In the end, Nussbaum incorporates future people into her approach in a way very much in line with Rawls' original solution. On Nussbaum's view, we are imagined as caring for our descendants and being concerned about the kinds of lives that they are able to live (whoever they are). As mentioned in chapter three, the sentiments (in particular, benevolence and compassion) are fundamental to understanding and motivating (on Nussbaum's view) a concern for justice. Thus, Nussbaum generates obligations to future people from within her basic framework, and does not rely on a procedure open to the non-identity problem. What's more, this motivational assumption is not at odds with Nussbaum's approach, and entirely consistent with it.

[5] As mentioned, there is only a small minority that would disagree with this. In particular, David Heyd (1993).

Take the slave child case mentioned in the last chapter. Nussbaum's list of capabilities and her emphasis on dignity will come into play in at least two ways. Firstly, the list of capabilities (emotions, and the social bases of self-respect in particular) should influence what we choose (or even consider choosing) for our own and other children. For instance, no individual (let alone parent) with compassion for the life and dignity of present or future beings should enter into such an arrangement. Secondly, and even if one did enter into such an arrangement, doing so would undermine core capabilities such as bodily integrity, and being able to choose to live a life one values. Thus, the slave child case would amount to a situation that was grossly at odds with the aims of Nussbaum's capability approach. Not only does the approach look to place restrictions on what current individuals ought to do, but it also restricts the kinds of lives that future individuals (whoever they are) should have.[6]

Even so, and to be fair, we ought to say that Nussbaum's strategy (relying on compassion and benevolence) raises questions of its own.[7] Introducing future people indefinitely seems to stretch the sentiments a great deal. Typically, the sentiments are strong over a few generations, but then diminish very sharply.[8] If this is the case, then it looks as if we can only be motivated to care for the next generation (or two), in which case we would only be *obligated* to the next generation (or two). Yet, as we highlighted in the previous chapter in light of the risky policy, what we need is an approach that somehow manages to capture future people indefinitely (at least in some way), not one that can only manage to generate inter-generational concern.[9] At least we want to be able to say that we ought not to intentionally harm any future people regardless of when they will exist.

Nussbaum looks as if she may be aware of this problem. In her *Frontiers of Justice* she tells us that the capabilities approach expects a great deal from us and that creating a society where various species are able to co-exist and flourish requires that we have great sympathy and benevolence,

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[6] Of course, this response presupposes that conditions are ideal (that capabilities are secure). There is, then, a question of what we ought to do when conditions are less than ideal. As we will go on to point out, it's not entirely clear what advice Nussbaum would give us if this were the case.

[7] Nussbaum develops an account of the emotions and their expression in *Upheavals of Thought*. For Nussbaum, the emotions involve: 1) intentional thought, they are 2) directed at a particular object, and are 3) evaluative. Although we do not cover this side of Nussbaum's work here, it is important to highlight that the question raised here is not *whether* the emotions are relevant, but rather *how*. The point being made is simply that it is unclear what we ought to have reason to direct our emotions at, and how we ought to evaluate situations like this. See Nussbaum (2003a) chapters 1-4

[8] Mulgan (2004) p.33

[9] There is a lot of literature devoted to intergenerational reciprocity – and how we could make sense of obligations between generations. See especially: Gosseries (2009b)

and that we 'sustain these sentiments over time'.[10] Indeed, Nussbaum is clear that achieving the kind of society she endorses will require not only that we educate towards the sentiments, but that we pay attention to the way that 'the surrounding culture can make a great deal of difference to the emotions people experience, and to their efficacy'.[11] Nussbaum does not examine this any further. However, and something that we will consider further in the following two chapters, the revival of indigenous languages, education, and world views provides us with an example with which to demonstrate that educating to live with concern for future people (and indeed all beings) indefinitely just may be possible.[12] An important part of many indigenous peoples' development programmes worldwide is to rediscover and redevelop indigenous ways of doing and being.[13] Many of these programmes include a concern for all beings both now and into the future. More importantly, there is a concern for, and motivation to, preserve or bring about circumstances that the current generation may never even live to see themselves.[14] There is, then, a cultural revival which includes educating people to live with and for the future. Based on this revival, it seems fairly clear that (over time) this might even be possible.[15]

6.1.2 Favourable conditions

Unlike Rawls, Nussbaum does not put hard cases to one side. Nussbaum includes children and the severely disabled, and Nussbaum is clear that the capabilities must be nurtured and developed. What's more, Nussbaum recognises that exactly *who* is able to participate in society and to live a dignified life is partly a question of how society is designed. For this reason, Nussbaum's approach is not vulnerable to the inclusion of future people in the same way that Rawls is. The conditions that Nussbaum assumes *persist* over time rather than fall apart. It is, then, entirely consistent with Nussbaum's view to say that we ought to consider the lives of all human beings into the future. Moreover, it is consistent to say (since issues of disability and childhood are taken on board from the start), that Nussbaum's approach does not need to treat

[10] Nussbaum (2006a) p.409
[11] Nussbaum (2006a) p.412
[12] Indigenous peoples are used as merely one example of this. On indigenous ways of doing and being see Marsden *et al* (1992), on indigenous education see: Smith (2006) (2005), Cajete (1994). Of course, the same can be said about many non-indigenous cultures and even some religions (insofar as their development could exemplify the kind of project Nussbaum has in mind). For more on the relevance of religion for development (and the capability approach) see: Deneulin *et al* (2009d) (2008)
[13] See Wessendorf (2009)
[14] This is similar to something that Avner De-Shalit highlights when he says that 'human experience lives within the present and within a future that extends beyond our own lives', see De-Shalit (1995) pp.14-22
[15] At the end of *Frontiers of Justice*, Nussbaum herself points out that on the question of whether the capabilities approach is 'hopelessly unrealistic? Only time and effort will answer this question.' Nussbaum (2006a) p.410

future people or other beings as an extension.[16] For this reason, Nussbaum's approach is superior to Rawls and (arguably) something akin to the kind of picture that Rawls' theory ends up being once basic needs come into play. That is, once something very much like Mulgan's development principle (discussed in the last chapter) comes into play.

We know that Rawls does not provide us with any answers from here – by assuming favourable conditions and by limiting the scope of the challenge of future people, Rawls optimistically assumes these problems away. So, given that Nussbaum is aware of the demands and the problems that such a starting point raises – what is her response? Unfortunately, and as we covered in chapter three, Nussbaum provides us with her own version of optimism. Nussbaum claims that conflicts between the capabilities can be *planned* away, and so any conflicts between the capabilities simply tell us that 'society has gone wrong somewhere'.[17] While it looks as though Nussbaum's approach is very much like Rawls' here, it pays to point out that Nussbaum's strategy is superior to it, but even more problematic. It is superior because Nussbaum (at least) acknowledges that conflicts between the capabilities and beings exist and need to be dealt with somehow (so the demands on Nussbaum's view are at least clear-cut). Yet, acknowledging these problems means that Nussbaum's optimism is even more problematic. It was bad enough on Rawls' limited view, so the conflicts are even more urgent and the optimism even more unlikely on Nussbaum's all-inclusive view.

6.2 Two problems for Nussbaum

We have already questioned Nussbaum's optimism. Indeed, in chapter three we claimed that, even when we limited our discussion to the cases that Nussbaum examines, it is difficult to make this approach stick. There are no surprises, then, that it is placed under even more pressure when we introduce future people (and we should add other future beings). More particularly, the introduction of future people brings to the surface (at least) two problems, both of these problems are considered next.

6.2.1 The Capability for Bodily Integrity

[16] As we highlighted in chapter three – an extension (by definition) can only be to other species given that the approach captures all human beings from the start. Thus, once we have included all human and other relevant beings the inclusion of future people does not depend on an extension of the theory – although it may require a particular application list.

[17] Nussbaum (2006a) p.401

Future people raise questions which immediately conflict with the capabilities of existing individuals. Most obviously, future people seriously call into question the capability for bodily integrity, and 'choice in matters of reproduction'.[18] Now, and to be fair, given that Nussbaum does not concern herself with future people, one conclusion to draw is that this capability is not meant to apply in anyway at all to questions about existence. Indeed, Nussbaum says as much when she writes that:

> My general rubric of 'choice in matters of reproduction' was intended, above all, as a way of thinking about marital choice, the defence of women's bodily integrity within marriage (against both domestic violence and marital rape), and the importance of securing to women freedom of exit from an abusive marriage.[19]

However, we cannot overlook the fact that this (particular) capability still has relevance for a number of questions. Moreover, we cannot ignore that it reveals a tension between existence and non-existence. Indeed, even Nussbaum concedes that an implication of this kind is relevant, albeit in light of the question of abortion – a topic which she has yet to consider in full.[20] It is, therefore, worth examining how this capability bears on future people, and how the inclusion of future people might (itself) shape it.

We know that the current generation is (largely) responsible for who exists and what conditions are left behind. Given that this is so, there are questions about how we deal with conflicts between reproductive freedom and the lives of future people. It is not awfully clear whether Nussbaum is able to provide us with much guidance here – especially since it is not clear how the sentiments will bear on these questions. Would the sentiments move us to limit the number of human beings that exist in the future? Should our concern for all human beings (including some 10 million children that die preventable deaths each year) lead us to refrain from reproducing at all? What about when circumstances are such that reproducing may be the only way to improve our own lives or when it is the only capability we have? No doubt, a society wherein women have very few opportunities, and where reproducing is a way to improve their lives, is certainly poorly

[18] Recall that the capability for bodily integrity involved: 'Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction'.
[19] Nussbaum (2008b) p.342
[20] Nussbaum (2008b) p.342

designed. But this does not tell us how to balance the lives and capabilities of existing individuals with future ones.

Like any liberal theory, the capability approach wants to make room for choice in matters of reproduction. But under certain conditions (such as when there is widespread poverty and death from totally preventable diseases), choosing to reproduce can be dangerous. As Nussbaum often remarks in light of Sen's unwillingness to list capabilities, some freedoms are harmful as they undermine the freedom of others. In this case, the freedom to reproduce can be harmful for both already existing human and nonhuman beings and it can seriously undermine the lives of future people.[21] As we saw in light of Rawls' theory (albeit in a different way), it matters a great deal (to the design of society) *who* is and will be able to enjoy the capabilities up to the relevant threshold level. If we are to ensure that all beings are able to get as close as they can to the threshold levels of dignity, then it is not just a question of how society is designed, but what we invest in medical advances now and in the future.[22]

What's more, what we want is an approach that is able to say something about both the social conditions within which future people will live, as well as who they should be (in this case, what capabilities they ought to be able to develop). To be sure, Nussbaum's approach seems to be ready-made for both of these requirements. As mentioned in chapter two, Nussbaum differentiates between basic, internal, and combined capabilities. Basic capabilities (the innate capacities that one has and that can be developed) seem to be most relevant here – we simply ask what basic capabilities all beings ought to have and be able to develop.

Unfortunately, such a move seems to uncover a tension within Nussbaum's theory. Recall that an important part of Nussbaum's approach is the claim that we are all vulnerable and dependant (in at least some measure) throughout our lives.[23] We are, after all, human animals that are not born self-sufficient and independent, but rather with needs and stages of dependence that persist and fluctuate. For this reason, we ought to create a society wherein beings with a range of abilities are able to flourish, and we ought to celebrate these differences wherever they exist. In other words,

[21] Of course, there is evidence to suggest that expanding capabilities (human development) often results in people choosing against reproducing – see Anand *et al* (1994). Even so, reproducing and securing the capabilities for existing individuals remains in conflict.

[22] In fact, Nussbaum makes a similar point when she says that if treatments become available that would allow individuals to function in ways that they otherwise would not be able to, society is obligated to make them available because these functionings are important. Nussbaum (2006a) p.193

[23] The same point is made by John Haldane in light of abortion, see Haldane (2008).

we ought to create a society that does not discriminate on the grounds that some are less able, more vulnerable, or needier than others.[24] Yet, if the list of capabilities and the threshold level of dignity is important, then it should follow that (if we can) we ought to *ensure* that future people are able to reach this level. Quite simply, we ought to ensure that they are able to live dignified lives.[25] After all, what role do the threshold levels and the conception of dignity play overall if they do not tell us something about what makes life worthwhile?

This point is furthered when we highlight that the threshold level is fundamental to Nussbaum having a way round the repugnant conclusion (outlined in the last chapter). The threshold level provides Nussbaum with a way of side-stepping this problem because she is able to adopt the lexical view.[26] This allows Nussbaum to claim that there is a point below which life is (regardless of however many people there are) simply not worth living. It tells us that a world where a large number of beings were unable to reach the threshold level would never out-value an alternative where far fewer beings could reach it. The threshold level of dignity, then, helps us to see that we ought to (at least) maintain the current threshold level for future people indefinitely. Again, however, this move relies on the claim that there is something valuable about living a dignified life (as the threshold level clearly implies). Of course, this seems altogether inconsistent with Nussbaum's approach to the issue of disability and the importance of focusing almost entirely on generating social conditions that are inclusive of all. Given this tension, the threshold level of dignity leaves us with no clear way to make sense of how we ought to approach these questions. More importantly, we have no clear way of thinking about existence and how significant the list of capabilities really is or should be.[27]

We ought to pause here. The capability for bodily integrity, and the threshold level of dignity looks now to be extremely complex having introduced future people. More importantly, we ought to pause because we are now firmly within terrain that Nussbaum is not concerned with,

[24] In other words, it seems that Nussbaum endorses a multi-*abled* society. That is, one wherein no individual or group of individuals are singled out on the grounds of ability. See Nussbaum (2006a) p.435

[25] This point is also made by Thom Brooks (2010), where he considers how prescriptive the capabilities actually are with reference to a community that decides against exercising them. Brooks highlights that this draws out a tension between treating the capabilities as having fundamental concern, and focusing on having the opportunity to reach the threshold levels. In other words, can the capabilities and the threshold level of dignity have any real bite if we also accept individuals choosing to live below them?

[26] See Mulgan (2004) pp.64-7

[27] This could be extremely problematic for the approach. It questions whether we can even think about the content of obligations to future people within the space of capabilities. At least, it would question what the capability approach contributed to this problem.

given the political nature of her theory.[28] Recall that Rawls is concerned primarily with the question of how much (capital) we ought to save for the future – and the question of who should exist is not considered. Following Rawls, Nussbaum also contends that the conception of dignity that she supports (and so the list of capabilities) is not grounded in any metaphysical doctrine.[29] Thus, the only moral content that Nussbaum affirms is that which can be acceptable to those who have diverse and irreconcilable conceptions of the good (an overlapping consensus). We are, therefore, dancing on dangerous ground here. Questions about reproduction and existence are not easily reconciled across religious and cultural differences – and the technology and advancements that may provide us with the tools to answer these difficult questions are (and are likely to remain) extremely controversial.

It seems then that solutions to these questions are not to be found within Nussbaum's theory. Not only, then, are parts of Nussbaum's theory in tension, but the political nature of the theory comes at the expense of challenges and questions that are significant for how the list of capabilities and the conception of dignity feature within it. We are not only left with questions about the importance and relevance of dignity now and into the future, but we are left without any way of making sense of exactly what we ought to be saving for the future. In other words, it's not clear whether we ought to be thinking in terms of capabilities for future people at all.[30]

6.2.2 More than Capabilities

This tension between who is brought into existence and the capability for bodily integrity helps us to draw out another problem which Nussbaum's approach seems to raise. On Nussbaum's account, we ought to have all of the capabilities – and reproducing ought to be (at least partly, if not entirely) a choice relating to what we want to do with our lives (not a way of securing or jeopardising access to capabilities). In other words, real choice in matters of reproduction partly assumes that all of the capabilities are at least secure. This helps us to bear in mind that *more* than the list of capabilities matters in the end. In other words, we know that it is problematic if anyone is not able to live a dignified life – but this is not enough (even on Nussbaum's own view) to live a full and meaningful life. The capabilities are supposed to enable us to pursue our own conceptions of the good. This, in the end, is at least partly what the capabilities are for.

[28] Recall that Nussbaum offers her approach as one type of political liberalism.
[29] Nussbaum (2006a) p.79, (2000a) p.83, (2008a)
[30] Anand *et al* (1994). According to Sen and Anand, we ought to conserve opportunities for worthwhile lives. This is certainly something that the capability approach ought to say, but it is still unclear what this means and how we cash it out.

This raises a problem. Even if we accept that we ought to ensure that all of the capabilities are secure for all beings, what room will be left for any more than this? This helps us to see that there are questions which Nussbaum does not answer, but which future people impel us to take on board. What is the point of securing the capabilities in the end? What should we do when there is a conflict between the capabilities or between one's own conception of the good and the capabilities of others? Nussbaum tells us that we ought to have all of the capabilities up to the relevant threshold level, and that more of one capability does not make up for losses in others. If being able to pursue our own conception of the good is, however, also important – then it also follows that no amount of capabilities will make up for the fact that we are unable to live and experience our own lives in our own way.[31] As our example in chapter four highlighted, if contributing to medical research and alleviating global poverty now and into the future is important, it's unclear how much room there will be for pursuing our own conceptions of the good. This, and examples like it, is what is at stake on Nussbaum's account. There are serious conflicts between others' capabilities now and in the future, and living a life that we value. If we are somehow able to secure (in some measure) the capabilities for all beings (now and into the future), it is likely that this will be at the cost of being able to pursue our own conception of the good.

6.2.3 Can we Move Forward?

In line with a conclusion reached in chapter three, what we desperately need is some way to compare the competing elements that are at stake. What we need is something like a capability-centred distinction between different components of well-being. Not only will this help us to make sense of what is at stake, but it will allow us to say something about each of them (whatever they are). At the very least we will be able to say something about the kinds of goals we pursue (how we pursue them, what our aims are, what the cost will be), and about how we weigh up our own goals (as individuals and communities) with our own and others' needs. We might want to say that sometimes needs ought to trump goals, or that we need some room for the pursuit of goals of at least some kind even (perhaps controversially) at the expense of some needs. The question for the capability approach, however, is how we manage to say anything at all.

At least, it seems that we have three options. One strategy is to argue that having the capabilities on Nussbaum's list is enough (on its own) to live a meaningful life. This is certainly possible

[31] Recall that this is implied by the needs and goals distinction which Mulgan utilises, and which we mentioned in chapter 4.

given that Nussbaum's list is so rich, and especially given that Nussbaum's list was originally framed in this way.[32] Unfortunately, however, this move is at odds with Nussbaum's (most recent articulation of the) approach and with the way that the list is meant to feature within the theory. Nussbaum claims that the list of capabilities is not *constitutive* of the good life, but constitutes *preconditions* for it. Anyone who wishes to pursue their own conception of the good will at least require some (if not all[33]) of the capabilities up to the relevant threshold level. Thus, this strategy is blocked on Nussbaum's account.

A second strategy then, is to say something about the kinds of goals that we pursue. This option could, following our distinction in chapter four, see us differentiate between realising goals, and the pursuing goals. This is certainly possible. As we have claimed, no particular goal is required for one's life to go well. Many of us (as individuals and as members of communities) can fulfil a number of goals, none of which would have so much authority so as to reduce our lives drastically if we were unable to pursue or achieve them. It matters immensely, then, if our needs are neither secure nor properly met, whereas as long as we are able to pursue (at least) some valuable goals, our lives may not be jeopardised by limitations on their content. However, Nussbaum will not want to over-prescribe on the content of goals, because she wants to remain as neutral as possible on questions of the good. All that Nussbaum could say on the matter is something like: no goal can be pursued that prevents the capabilities from being met or secured for all relevant beings.[34] Unfortunately, however, such a strategy is likely to leave us with little or no room to move once we take future people into account. Such a move, that is, is likely to leave us without any room to pursue any goals of our own at all.

The final option then is to accept that some conflicts (in particular, those which arise because of the importance of goals – such as the basic freedom to reproduce) may not be so easily planned away. This leaves Nussbaum having to say something about how we prioritise and balance needs and goals when (as unfortunate as it might be) they conflict. Again, however, it is not clear whether Nussbaum will welcome this strategy given her unwillingness to entertain conflicts within the list itself and (by implication) between the capabilities and our conceptions of the good.

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[32] Nussbaum (1988), for an overview of the development of Nussbaum's list see Crocker (2008) pp.186-92

[33] Recall that Nussbaum allows, at least in theory, for any of the capabilities to be revised, substituted and even deleted.

[34] Indeed, Nussbaum claims that the state ought to intervene in order to protect the capabilities when they are threatened by the actions of others and the state. See Nussbaum (2000a) pp.221-2

Our conclusion is unfortunate. Nussbaum does not provide us with any clear way forward on the problem of future people, especially when we consider how future people feature within the theory. More problematically, however, Nussbaum's approach seems to leave our hands tied, and provides us with very little guidance whatsoever. It would seem that the only solution is to limit the scope that future people have overall. As we saw on Rawls' account, such a strategy simply (and, we ought to say, superficially) assumes the problem away, so even if Nussbaum could somehow manage this, it is hardly a solution. By neglecting future people (and the complexities that they create), we see that we lose sight of the real impact that this challenge has on the kinds of lives that we (and they) will be able to live. We overlook just how significant questions about the future really are. If we are to move forward on this problem, then it looks as if the capability approach will need to be able to say more than it currently it does.

6.3 Moving Forward: Needs, Goals, and Other Goods.

We have already said something (albeit in chapter four) about the needs, goals, and other goods distinction. Here we see that the problem of future people helps us to bring this distinction to life. At this point, then, we ought to say something about how the distinction between needs, goals, and other goods provides us with some guidance on how we might move forward. To be clear, our aim is not to offer final answers to questions about what obligations we have to future people (or other beings for that matter).[35] Rather, the aim is to lay out what the distinction says about how we might understand and make sense of these obligations. Our aim is to say something about the kind of space the distinction gives us for (at least) considering these complex questions. We illustrate this point by focusing on how we might make sense of reproductive choices, and how we might make sense of our obligations now that future people have come into play.

6.3.1 Mulgan's Reproduction Principle

Issues of reproduction cut to the heart of freedom, existence, and vulnerability. Questions about who we ought to bring into existence, based on the kinds of lives they will (and ought to) be able to live, are relevant for questions about justice and future people. With the needs and goals distinction in hand, Mulgan develops the following principle to guide reproductive choices:

[35] Recall that Nussbaum does not provide us with final solutions either. More importantly, Nussbaum leaves us unable to say anything at all about which option we ought to take. Thus, offering a theory which at least leaves open a number of possibilities is already better placed.

> Reproduce if and only if you want to, so long as the child you create will live above the lexical level. Unless you are unable to have a child who will live above the lexical level, in which case you may create if and only if (a) the value of your child's life is greater than x (where x is between zero and the lexical level); and (b) you could not have given any child of yours a better life.[36]

Mulgan's reproduction principle is a good example of how we might balance the importance of needs and goals (and we could add other goods) for both current and future people. The importance of liberty as well as pursuing and realising goals of one's own (which may include reproducing) leads Mulgan to claim that any individual, able to do so, ought to be permitted to reproduce. In other words, no-one should be forced to reproduce or forced to refrain from doing so.[37] However, the importance of having one's needs met and being able to pursue goals, also leads Mulgan to (commit to the) claim that we must also bear in mind *who* we bring into existence and the kind of life they will be able to live. After all, if needs and goals are important, then they are important for anyone that does and might very well exist. Ideally, then, we must only bring a child into existence if we are sure (or as sure as we can be) that that child will have their needs met and be able to pursue goals of their own. Failing this, we ought to ensure that the child is at least able to live the best life that we could have provided.[38]

There are a number of questions about what this principle might yield. At least, it's not entirely clear who is permitted to reproduce. This is largely because we need to fill this principle out. Interestingly, and based on the structure of Nussbaum's approach, it looks like something very much like Mulgan's reproduction principle would be implied by it. Recall that Nussbaum provides us with two threshold levels. The first is the species-based threshold level of (human) dignity, and the second is the (human) species threshold level. On Nussbaum's account, although we are all entitled to get as close as we can to the threshold level of dignity, moral status is granted provided that one of the relevant capabilities applies. Here then, we are able to fill out

[36] Mulgan (2004) p.170

[37] We ought to point out that Mulgan is (of course) referring to human agents here – so it is important to highlight that Nussbaum will want to include at least all sentient beings (more precisely, all beings who have at least one of the relevant capabilities). We ought to also add that this is not to say that Nussbaum will want to treat the cases equally. In line with points made in chapter three, Nussbaum is happy to endorse sterilisation programmes for nonhuman animals because this is entirely consistent with living a dignified life (at least for them). See Nussbaum (2006a) p.371

[38] It is worth pointing out that this gives us a way round problem cases such as the slave child case – by providing us with a way of assessing our reasons for reproducing. It does not, however, cover cases where children are (often we ought to add) simply born with impairments. So we ought to stress that once a child is born, the capabilities and being able to live a dignified life (whatever that means) kicks in. In other words, all children born ought to be able to develop and have the capabilities (or at least reach their own potential).

Mulgan's reproduction principle. We are able to say, that is, that one ought to reproduce provided that one's child will be able to reach the stipulated threshold level for all the capabilities, and failing that this is at all possible, that one's child will at least have one of the relevant capabilities (and we could add, the best one(s) that we could have provided[39]).

To be sure, we would need to be able to do more with Nussbaum's approach to take these insights on board. At least, we will need to be able to include issues of reproduction within the scope of the approach. As we have pointed out, it's not clear that this is possible. What's more, we would need to include more than the reproductive choices of human beings if we were to remain consistent with Nussbaum's approach. At least, we will need to weigh our goals against the needs of all relevant beings now and into the future. Even so, it does show us that Nussbaum need not remain silent on these issues. In other words, and despite leaving us without a clear way forward, Nussbaum (and the capability approach in general) does have the resources available to answer these difficult questions. Mulgan's reproduction principle shows us how the capability approach might balance the goals of current people with the needs and goals of all relevant beings now and into the future.

6.3.2 Making Sense of Obligations

Our next discussion raises a more general concern. Whether or not we include reproductive choices within the scope of the problem of future people, we still have a question of how we incorporate future people into the approach. That is, we are still left with a question about how we make sense of the obligations we have to all relevant human and nonhuman beings now and into the future. One obvious way to make sense of this question is to rely on the list of capabilities and each of the components. Collectively the capabilities tell us that we are obligated to ensure that *whoever* exists in the future is capable of living a dignified life (and we ought to add, whatever that means for them). We can, however, be more specific than this. The capabilities also tell us a story about the kinds of institutions (social, economic, and political) we ought to protect and secure, and so the kinds of conditions future people ought to be able to live within.[40] Likewise, some of the capabilities (such as *other species*) tell us that we ought to ensure that future

[39] We might think this is not in line with Nussbaum's view – but recall that even Nussbaum claims that affiliation and practical reason are the truly human and architectonic functionings. What's more, only some of the capabilities carry weight insofar as moral standing is concerned. There is, then, a case to be made for the claim that some capabilities are more valuable than others.

[40] For instance, play tells us something about education and employment policies, while political and material control tells us something about ownership.

people are able to (at least in some measure) co-exist with other species and to be able to enjoy the environment. The capabilities, then, provide us with some idea about content – and some idea about how we might understand how the list includes and ought to include future people.

Notice, however, that what we haven't done is try to work out how each of the components on the list apply and are shaped by future people. No doubt, this would be one way forward, and one consistent with the way that Nussbaum applies the list to nonhuman animals. However, the (now) huge scope of the problem seems to impel us to approach the question by generalising about, rather than specifying in too much detail, the components on the list. Focusing on how each of the capabilities bear on questions about current and future beings indefinitely would not only be time-consuming and complex, but it would complicate the way conflicts arise. For instance, if we were to focus on the capability for bodily integrity, we would be required to ask how bodily integrity is to be understood across different species, abilities, localities, and now time. Thus, something like a distinction between needs, goals, and other goods, will allow us to organise and make sense of the conflicts. It allows us to say that we ought to consider obligations in light of future needs, goals, and other goods, and it helps us to get a clear sense of the relationships within which we stand with future people.

By taking into account the relations within which we stand with current and future beings, we have some kind of framework for working out how to make sense of the competing and overlapping obligations that come into play. In line with the points made in chapter four, there are significant differences in the way that we are *able* to contribute to the needs, goals, and other goods of others. At least, we can see that the following three questions come into play:

i. Which needs, goals, and other goods are we able to pursue, or realise for future beings?
ii. Whose needs, goals, and other goods can we pursue or realise? (which future people are they)
iii. What needs, goals, and other goods will or could there end up being in the future?

We are able to do more to directly protect and meet the needs of individuals with whom we share an existence, and even more so those with whom we stand in familiar relationships with. Meeting the needs of our own children is very different (in terms of what we can actually do) to meeting the needs of others. When we are dealing with future people (many of whose needs we cannot

directly meet), the best we can do is ensure that they will be able to meet their own needs. Likewise, we cannot have an active role in the way future people *pursue*, or are able to pursue their goals in the same way that we can actively engage with present generations and their chosen pursuits. Nor, we ought to add, can we help future people to *realise* goals of their own, at least not in the same way that we can assist current generations to do so. At least, framing the questions this way helps us to see that there are questions that we simply cannot raise, let alone answer, when we are dealing with future people. What's more, that the relations within which we stand with future beings enrich our understanding of the obligations we (ought to) have.[41]

The structural importance of needs, goals, and other goods, help us to see that we are in a position of power over future people in a very clear sense. We are able to impact on the lives of future people in ways that they are simply unable to impact on ours. Being able to determine who they are and the conditions within which they will exist gives us a power that (consistent with Nussbaum's own approach[42]) places them in perhaps the most vulnerable position of all. The risky policy and slave child case showed us that future people are often on the receiving end of the choices that we happen to make. What we end up doing, then, largely determines the kind of lives they will live and whether they will exist at all. No doubt, then, it seems that their lack of real choice in the matter ought to seriously figure in our decisions and planning.

Of course, it is not all bad news for future people. We are also – in at least some sense – in a position of powerlessness as well. A concern with and for goals shows us that many (though, to be sure, not all) of our own personal and shared goals extend beyond our own lifetimes.[43] As we pointed out earlier, many of us often have shared goals that extend to and include a future that we will not even live to see. Thus, future people are not just the beneficiaries, but also (in some sense) the custodians of what we value and hope for the future. In other words, we have no clear way of ensuring that our goals (whatever they are) are even pursued let alone realised. To utilise the example introduced in chapter four, even if we work to devote all of our money and bodies to medical research when we die, there is no guarantee that our bodies will be used, or even that our efforts will have made any difference at all. There is, then, a huge amount of uncertainty

[41] Mulgan claims that we ought to focus on meeting the needs of all current and future people, but that a concern for goals ought to lead us to focus on the goals of our particular community. Mulgan (2002) (2004)

[42] It is worth pointing out that Nussbaum also says (albeit in light of human and nonhuman animals) that large asymmetries of power make an issue of justice more urgent – if we take this claim in relation to future people its unclear why they are not examined. Nussbaum (2006) p.83

[43] This is something that Janna Thompson claims and which she terms 'life-time transcending interests'. See Thompson (2009a) (2009b).

surrounding what the lives of future people will be like and what contribution (if any) we make. There is uncertainty surrounding what their lives will be like and what well-being will consist in. This helps us to see one reason why it makes sense to advocate other goods as a placeholder. We simply do not know what other goods or components of well-being will be relevant in the future.

We stand, thus, in rich and complex relations with future people, a point which the needs, goals, and other goods distinction help us to draw out. Not only are we able to consider what we are able to do for future people, but we are able to consider (in relation to goals) what restrictions there are for the goals that we hope might one day be realised – if not by us, then by others. We are, that is, able to appreciate how important future people are for projects that extend beyond our own lifetimes, and how important planning for the future will be. Drawing this out, we can see that the needs, goals, and other goods distinction provides us with an approach that is able to give us insights for moving the capability approach forward.[44] In particular, the distinction helps us to see that we can make sense of the conflicts if we have a way of understanding how the capabilities contribute to our own and others' lives (whether they help us to meet our needs, goals, or other goods). Doing this helps us to see that we need to do more than consider *who* our actions and decisions affect, but also *how* they affect others and even more so how our actions *ought* to affect others. In this way, the distinction provides us with a framework that allows us to ask deeper questions and generate deeper answers to the difficult questions we face.

6.4 Conclusion

Our aim was to examine whether Nussbaum's affirmation of Rawls' solution to the problem of future people is justified. On the back of the previous chapter, we had reason to be concerned that Nussbaum overlooked this problem and the way that it affects the shape of her approach. Unfortunately, as this chapter has shown, it turns out that future people pose even more of a problem for Nussbaum than Rawls. If we consider Nussbaum's capability approach against the problems that we uncovered in the previous chapter, Nussbaum leaves us in no better position than Rawls. This is the case, even though Nussbaum does manage to build on and improve on Rawls' account with the capability approach. The introduction of future people places pressure on Nussbaum's starting point of dignity and her unwillingness to deal with conflicts in particular.

[44] Of course, this is not to say that this is all the work done. We know that we still need to decide on a way forward given the available alternatives. Given that Nussbaum leaves us with our hands firmly tied, at least the distinction manages to strengthen the capability approach in light of the challenge of future people by providing us with real options for moving forward.

We find ourselves, faced with a tension between Nussbaum's approach to issues of disability and the threshold level of dignity, and with no way of making sense of significant questions about reproduction. More importantly, we have revealed that Nussbaum is, in the end, *unable* to provide us with a way forward. When we take all of Nussbaum's commitments into account, it becomes apparent that she is left with no options at all when serious conflicts are in play. The approach is, therefore, strengthened by adopting and grounding the capability approach in the distinction that this project proposes.

7. Indigenous Peoples

So far, this project has demonstrated that there are good reasons to consider grounding the capability approach within the needs, goals, and other goods framework. It has been shown, more specifically, that there are strong arguments for thinking more about the shape and structure of the capability approach, against challenges central to how (and whether) we can move forward. The final two chapters remain consistent with this aim by furthering the claim that we ought to redevelop the capability approach in the ways suggested. Our final chapters, however, also seek to do more than this. Recall that one of the advantages of the capability approach is that it is able to take on board and to grow as new challenges shape it.[1] Our final chapters, then, also seek to substantiate this claim with reference to the recently adopted *Declaration on the Rights of Indigenous Peoples*. In so doing, our final chapters demonstrate that the alternative capability theory that this project puts forward is *worth* developing, as it is well-placed to make sense of significant features of the declaration.

For reasons of space, this chapter examines only two challenges, both of which stem from the declaration. The first is the *incompleteness* of the declaration itself. In particular, we focus on the way in which there is a real lack of specificity regarding: 1) what realising the contents of the declaration requires, and 2) who the declaration speaks to. Our aim is to demonstrate that the incompleteness is both justified and required. It is claimed that the challenge is to accommodate rather than to remove this feature. The second and related challenge is whether we are able to capture indigeneity and indigenous self-determination within liberal theory. In other words, can we (as the declaration impels us to do) take on board the full extent of indigeneity and indigenous self-determination? We examine two recent attempts to make sense of and to accommodate indigeneity and indigenous self-determination, and we show why (in the end) they fail to do so. Our discussion highlights two familiar problems. We contend (on the back of these problems) that more needs to be done to move forward.

We ought to make two points before proceeding, both of which will help to clarify what this chapter sets out to do. Firstly, it is important to point out that our concern is not to argue for indigenous rights. Rather, our concern is to raise the more modest question of whether the capability approach can accommodate indigenous peoples and some of the problems they give rise to. Secondly, and in relation to the first, by focusing on indigenous peoples we do not

[1] At least, this was the point we made in chapter one where we claimed that part of the value of Sen and Nussbaum's incompleteness will be in its ability to deal with new problems.

contend that indigenous peoples are a unique case insofar as accommodating cultural minorities or cultural groups is concerned. It is likely that a number of the concerns that are raised here hold for a good number of cultural minorities. We focus on indigenous peoples and the declaration in particular because it provides us with a case within which to consider the kinds of current and practical challenges that are raised by culture. Thus, while our attention and our focus is on indigenous issues, we do not thereby contend that these issues are specific to indigenous peoples.

7.1 The Incompleteness of the Declaration

The rights specified in the declaration are described as minimum standards 'for the survival, dignity and well-being of the indigenous peoples of the world'.[2] Among other things (including some forty-five articles), the declaration provides some guidance on what achieving the contents of the declaration might require.[3] This sounds promising. However, the declaration has not been without its fair share of controversy.[4] Not only have concerns been expressed by a number of states, many of whom eventually voted in favour, but four states (including: Australia, New Zealand, Canada, and the United States) initially voted against.[5] This controversy is no big surprise when we reveal that the declaration represents new developments in international law.[6] In addition, it is no surprise when we add that the content and structure of the declaration raise questions about the nature of rights and obligations, the role and shape of the state, as well as the importance of history and culture in our lives.[7]

Among those concerns specifically expressed by states, one general concern was that the declaration lacked (much needed) clarity. This resulted in at least two worries.[8] First of all, it was

[2] For the declaration see the UNPFII (2007). For an overview of the development of the declaration see Errico (2007a) (2007b). The earliest indigenous international appeal was made in 1923 when Chief Deskaheh (Iriquois) travelled to Geneva in the hope of addressing the League of Nations on issues pertaining to the rights of Native Americans to live on lands according to their own values. Around the same time, Maori religious leader Tahupotiki Wiremu Ratana attempted to address the League of Nations on the issue of Maori claims based on violations of the Treaty of Waitangi.

[3] See section VIII of the declaration.

[4] The declaration was adopted in September 2007 with 144 votes in favour, 11 abstentions, and 4 against.

[5] In April 2009 the Australian government moved to accept the declaration. In April 2010, New Zealand after originally claiming that a number of articles were against its constitution, accepted it also. Canada has now said (March 2010) that it intends to adopt the declaration, and the USA is currently reviewing its position.

[6] Of course, the declaration is not legally binding, but it does demonstrate a commitment to indigenous peoples' claim to self-determination in international law (if, that is, we understand international law to include a normative element), see Anaya (2004) p.120, n51.

[7] For instance there are serious questions about who self-determination now applies to. Likewise, there are questions about how we accommodate indigenous self-determination. Finally, there are questions about the importance of *peoples* and what role peoples ought to have within the state.

[8] One other worry, and one clear way to examine indigenous peoples (and indeed all peoples) in political philosophy would be to do so as an issue of rights – and as an issue (more specifically) of individual versus group *rights*. This is, however, not the route taken here. This is in large part based on (and in agreement with) the claim that we 'need to detach ourselves from the paralyzing discourse of 'individual versus group rights' that dominates so much of the

claimed that the lack of clarity meant that significant articles (and the overarching right to self-determination in particular) were open to dangerous and conflicting interpretations.[9] In light of this concern, a number of states were sure to clarify their acceptance of the declaration by claiming that particular rights (more specifically, rights to traditional lands and natural resources, as well as self-government) would not be interpreted as undermining national sovereignty or territorial integrity.[10] Secondly, a number of states highlighted that (even if we could clarify the claim for self-determination) there needed to be clearer indications of *who* could claim these rights, given the existence of ethnic minorities.[11] To contend with this problem, a number of states were sure to make it clear that no 'indigenous peoples' (no peoples covered by the declaration as they understood it) were within their territories.

Both of these concerns are considered in turn. We begin by clarifying how the claim for self-determination provides us with some clear boundaries. Indeed, given the problems that the claim for self-determination continues to raise, it is important to say something about what this tends to be understood to consist in. We then consider why the UN rejects a formal definition of indigeneity. This provides us with some clarity about why the contents and the scope of the declaration must be (and must remain) incomplete. In both discussions, our conclusion is roughly the same. It is claimed that, for practical and principled reasons, we cannot make any specific claims about what the content of what self-determination and indigeneity is or ought to be. We conclude by pointing out, therefore, that the challenge is to accommodate and to make sense of this incompleteness.

7.1.1 Understanding Indigenous Self-Determination

Within the declaration, there are three areas on which it has proved difficult to yield agreement. The first is the claim to self-government (article four) which stipulates that indigenous peoples have the right to manage their own (internal) affairs, and to control the ways and means for financing their autonomy. The second is the claim that indigenous peoples ought to be able to participate in, and consent to, any decisions that affect them (articles nineteen and thirty-two).

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consideration of indigenous claims in western political theory'. My aim, in other words, is to examine the declaration by asking what other resources we have available to answer questions about peoples and self-determination. Of course, while I do not engage with rights theory directly, there are conclusions drawn which may be relevant for such a discussion. Such a discussion is, however, beyond the scope of this project. For example see Ivison *et al.* (2000) p.17. For an overview of these issues see Nickel (2007) pp.163-7.

[9] This was highlighted by the Philippines, Morocco, Canada, and New Zealand.

[10] This was highlighted by Japan, the Philippines, Indonesia, Brazil, Canada, and New Zealand.

[11] The United States of America and China were particularly concerned that there was no definition of indigenous peoples. Mauritius was concerned that some (other) groups would push for these rights, while Germany pointed out that no ethnic groups or minorities within its borders were deemed indigenous.

The third is the claim that indigenous peoples ought to control (and have returned) traditionally owned lands and natural resources (article twenty-six). These articles form the basis of self-determination, enabling indigenous peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'.[12] So it is not terribly difficult to see why generating agreement has been so challenging.

What do these articles and self-determination amount to, insofar as the sovereignty and integrity of states is concerned? For a start, it is a mistake, for both practical and cultural reasons, to assume that the claim to self-determination for indigenous peoples is necessarily about complete independence.[13] Indeed, many indigenous peoples seek a form of independence *within* the nation state, so there tends to be a desire to seek a way of living together on fair and shared terms.[14] After all, many indigenous peoples are not (entirely) territorially distinct, and so territorial independence would require either territorial confinement, or the outright removal of the current state. Of course, the impracticalities of either solution means that generating any sort of agreement (and so moving forward) on this issue would be seriously jeopardised if we were to take such a view. More importantly, however, complete independence would be culturally problematic because it would assume an understanding of sovereignty and authority that was singular. This overlooks and undermines the way in which indigenous peoples view sovereignty and authority as overlapping and interdependent.[15] Taking this view, then, misunderstands what is valuable about (and valuable for) indigenous peoples.

From here we ought to see that a number of ways of grounding self-determination can be rejected or (at least) restricted upfront. The first is the claim that self-determination restores an *inherent sovereignty*.[16] If the interpretation of inherent sovereignty amounts (by definition) to an

[12] Anaya (2004) p.320

[13] Self-determination for peoples is not a recent addition to the UN charter, rather it can be found (and has its roots in) some of the earliest UN documents. However, and while it was appropriate to understand self-determination as *independence* against the backdrop of the German, Austro-Hungarian, and Ottoman empires – it is important to bear in mind that there are key differences in the way that self-determination is used by indigenous peoples today. It can not be stressed enough that this has been a significant site for disagreement. The American declaration on the rights of indigenous peoples excluded this term from it, putting forward instead 'internal self-determination' in order to clarify what was meant. Despite these initial problems, many states are coming to see that a broad understanding of self-determination (one that it not restricted to independence) would be far better in the end. See Anaya (2004) chapter 3, and Errico (2007a) (2007b)

[14] See Anaya (2004) chapter 3, see also Wilkinson (2006) for an overview of the way in which self-determination has been pursued and realised for Native Americans.

[15] See Anaya (2004) pp.100-3, see also Alfred (2006) for a discussion of why sovereignty is an inappropriate concept from the indigenous point of view.

[16] For instance, some theorists claim that liberal theory is unable to take on board or capture the indigenous claim to *inherent sovereignty* and that for this reason liberal political theory cannot capture indigeneity. What's more, they claim

interpretation of self-determination as complete independence, then this is problematic for the reasons outlined. The second is the claim that self-determination protects a *traditional way of life*.[17] As we have said, the declaration seeks to enable indigenous peoples to determine their own cultural development. So this position problematically amounts to the condition that self-determination for indigenous peoples depends on a particular definition of what it means to be and to live in a way that is *indigenous*. In other words, indigeneity (on this view) is problematically based on a particular cultural existence, upon which claims to self-determination (and indigeneity) are (and can be) made. Rather than ground self-determination for indigenous peoples, this view problematically stands in opposition to it.

Understanding self-determination as independence *within* the state, however, does raise a number of questions – and one in particular. How do we implement this claim and what does it require of states? The obvious conclusion is that there is very little that one can say about what realising self-determination consists in. So, even if we are able to justify indigenous self-determination and many of the articles listed in the declaration, we cannot say very much at all about what this means in real terms. This looks to be a cop out. After all, it doesn't help us to move forward on the issues. Framing the challenge as an issue of self-determination within the state will require that we ensure that indigenous peoples are able to preserve their cultural heritage, without losing the ability to live, and to be able to choose to live, in the modern world.[18] This seems awfully complex.

There are, however, at least two reasons why this open-endedness and lack of specificity is required. The first and rather obvious reason is because the question of what self-determination for indigenous peoples requires is a practical one. We cannot (as a matter of fact) answer this question without engaging with what is required of us on the ground. It would be far more problematic if we were to formulate some general approach to what realising the contents of the declaration requires by relying on pure theory alone. At least, there is no guarantee that this strategy would provide us with any real answers either. As valuable as pure theory is, there is still a limit to how far we should expect it to get us. It is important to separate, then, justifying indigenous self-determination and pursuing or achieving indigenous self-determination. We may only need pure theory to justify self-determination, but we need to engage with indigenous

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that thinking about indigeneity as an issue of justice (alone) ultimately fails. See, Ivison *et al* (2000) p.10. For a rejection of inherent sovereignty see Anaya (2004) pp.98-100, and Kymlicka (2002) p.125.

[17] Kymlicka (2002), Anaya (2004)

[18] See Fleras (2000) p.220, see also Anaya (2004) p.99, and Kymlicka (2002) p.123

peoples (and indeed all peoples) on the ground in order to ascertain what achieving it might require.

The second and related reason why it is difficult to make any real sense of what self-determination specifically requires of states is because doing so relies on specifics about indigenous peoples themselves. We have already said that pursuing and realising the contents of the declaration and determining how they feature is (in large part) a practical exercise. It relies, therefore, on what a particular indigenous people value, on their diverse histories, and on what barriers (if any) there are to achieving self-determination. This brings us to an important question: exactly what makes an indigenous people *indigenous*? We need to know who self-determination (at least in this case) applies to, before we can say too much about what self-determination consists in. At least, if we have a sense of what indigeneity consists in (how we define it) then we have some understanding of how self-determination is or can be achieved for indigenous peoples. We take up this question next.

7.1.2 Defining Indigeneity

The UN estimates that there are around 370 million indigenous people, belonging to some 5,000 indigenous groups worldwide.[19] An indigenous people (the Maya in Guatemala; the Aymaras in Bolivia; the Amerindians in Guyana; the Maasai in Kenya; the 'Hill Tribes' in Thailand; the Inuit; Sammi; Aborigines; Torres Strait Islanders; Maori) can be found in practically every region of the world. Even with this representation, it has proved difficult to work out how best to define indigeneity. Even the UN Working Group for Indigenous Peoples and Permanent Forum claim that the focus is on *identifying*, rather than *defining* indigenous peoples. In other words, there is fairly widespread refusal to say much at all about exactly what makes an indigenous group 'indigenous'.

It is not so hard to see that it is extremely difficult (if not impossible) to offer a definition of indigeneity that will capture this depth and breadth of difference. Each indigenous people have their own cultural, regional and historical differences. So, the first reason for this shortfall is that it is difficult to locate what allows indigeneity to be consistently applied. At least, that is, if we want to do more than attribute some superficial characteristic for the sake of clarity. There is, however, another reason. Offering a definition of indigeneity endorses the practise itself of

[19] Eversoul *et al.* (2005)

defining indigeneity. As we have pointed out, the heart of the declaration is self-determination – so the point, as the UN claims, is to let indigenous peoples define themselves.

In light of both of these points, the UN, rather than offer a formal definition of indigeneity, opts instead to consider indigeneity against four features, each of which aims to provide guidance on understanding and identifying indigenous peoples. The first is that indigenous peoples typically have *historical continuity within pre-colonial and/or pre-settler societies.* In other words, contemporary indigenous peoples are descended from ancestors who have occupied a given territory from time immemorial, or (at least) prior to colonization or foreign arrival and settlement. Secondly, indigenous peoples are understood to have *distinct institutions, and cultural links* to particular lands and natural resources. They have their own political systems, languages, cultures and beliefs – and they wish to maintain and develop as peoples and communities. Thirdly, indigenous peoples tend to form *non-dominant groups* in society. In other words, indigenous peoples tend to be characterized as minorities, disadvantaged, and altogether in opposition to or outside the majority culture within which they live. Finally, and in line with our discussion of self-determination (and so the guiding feature), understanding who is indigenous and what makes this so requires that we recognise the importance of *self-identification*. In other words, an indigenous individual identifies themselves as indigenous, and is accepted by the community as indigenous based on terms acceptable to them.[20]

Each of these characterisations draws on important elements in the histories (and contemporary situations) of many indigenous peoples. Indigenous peoples certainly have a history of (or are experiencing forms of) colonisation and discrimination. In addition, many indigenous peoples have their own social, political, and spiritual systems (world views) which they wish to live by. More importantly, they wish (and indeed consider themselves obligated) to strengthen and maintain these institutions and values for the well-being of future people.[21] What's more, most indigenous peoples and individuals are among those most disadvantaged in the world, and under constant threat because of forced assimilation and environmental degradation. They are, then, almost always comparatively worse-off in terms of their standard of living, life expectancy, risk of

[20]See in particular the working definition given by Daes (1996) and the ground-breaking Report by Cobo (1983) which led to the drafting of the declaration – see especially chapter 5. There have been a number of conditions placed on how an individual is classified as indigenous including (for instance) blood quantum, see Anaya (2004) for an overview. However, a good example of why this particular measurement is problematic is the Maori concept of *whangai* (adoption). If an individual has been raised within a Maori whanau (family) and if the whanau (of which they are part) collectively accept them as part of the whanau, then that individual is able to hold claims to ancestral lands.
[21] See the statements by Indigenous leaders in Ewen (1994)

disease, and level of education.[22] Finally, a good number of indigenous peoples seek a form of self-determination and control over how they grow and develop as a people. In other words, these four features provide us with a very real characterization of many contemporary indigenous peoples and the realities they face.

Even so, it doesn't take much to see that focusing exclusively on all or even some of these features to define indigeneity would not be the best way forward. Defining indigeneity in terms of colonization and/or minority status is tricky. While we want to certainly capture the history and situations of indigenous peoples, we also want to ensure that we do not exclude indigenous peoples who do not share that history. Some indigenous peoples, for instance, are and remain majority groups (such as most South Pacific Island nations), while others remain un-contacted.[23] Likewise, while it is certainly true that indigenous peoples tend to have their own social and political institutions, and to be culturally distinct in some way, such an understanding of indigenous culture (as we have pointed out) could limit and place conditions on how they are able to develop. It may assume a particular cultural environment, and it may impose the view that indigeneity consists in living a particular way and by a particular lifestyle.[24] So not only would this misunderstand the way culture actually is[25], but it would be at odds with a commitment to self-determination and self-identification.

So while it is certainly helpful to list (at least) these features, it is problematic to place too much emphasis on them. Even though (we should add) we might typically use them to identify and characterise indigeneity. In light of the diversity of indigenous groups, we simply can't commit to a rigid definition – and, in light of the importance of self-determination, we can't over-prescribe either. A concise (but flexible) characterisation of indigeneity can only be considered and filled out in context. The best we can get out of an overarching definition is an open-ended and general account of what indigeneity might be to guide this filling out. In other words, exactly who is indigenous and what this means, is (partly) a practical question that can only be faced and answered by peoples and states themselves.[26] It seems, then, that we find ourselves in a familiar

[22] Eversoul (2005)
[23] There is thought to be a number of uncontacted (or isolated) peoples around the world, with more than fifty in the Amazon Rain Forest. See Wessendorf (2009).
[24] Some indigenous peoples are termed 'hill peoples' hunter-gatherers, or are imagined as living in local 'hapu' (sub-tribes) and 'iwi' (tribes or peoples). Yet this is not the reality for many indigenous people who may live in (for instance) urban areas. See Barcham (2000) on the challenges and implications of urbanisation for Maori.
[25] See for instance Nussbaum (1997) pp.127-30
[26] Indigenous claims range from the return of lands and cultural artefacts, to greater representation in politics, to recognition for indigenous institutions and systems of thought, as well as to control over traditional lands and management of natural resources. For an overview of indigenous issues see Maaka *et al* (2006). See also UNFPII

situation. Framing the solution as one which consists in laying out exactly what achieving self-determination requires, this time on the back of how we define indigeneity, seems to misunderstand what moving forward consists in.

7.1.3 Moving Forward

So far we have said that we ought not to expect the declaration to be too specific. Of course, this is not to say that we ought to have no concerns at all about this incompleteness. Indeed, leaving the question of indigeneity open complicates (and indeed has complicated) proceedings. It might not be such a big problem in countries such as New Zealand and Australia where it is fairly clear (and where there is clear-cut agreement about) who the indigenous peoples are. But it is not so clear (and so far more demanding) in Europe and Africa where there is a rich history of migration and contestation over lands. Indeed, one of the reasons why the declaration was stalled during its drafting was because the African nations were weary of the rights the declaration gave to indigenous peoples. This was precisely because there are so many peoples within African states. The implications here are, then, huge and most unlike those in countries like New Zealand and Australia where there is merely one (albeit plural) indigenous people to contend with.

However, in the end it matters little to the practical implementation of the declaration whether or not we have a definition of indigeneity. We don't need a clear-cut definition of indigenous peoples simply because the requirement to respect such peoples is part of a more general requirement to be honest about the past. If this general requirement is respected within a society, then indigenous (and other minority) groups will have the space and the resources to identify themselves. What is required, then, is not a definition of indigeneity, but that states openly and honestly engage with their own and others' histories.

An important part of the existence and survival of all peoples (whoever they are) is their ability to recount and draw on their histories as they shape and continue to shape their places in the

(2008) for an overview of how states might pursue and achieve the contents of the declaration. It is also important to point out that how these claims are understood, and what they refer to, depends on the cultural landscapes and values of particular indigenous peoples, their current (and historical) situations, and the nation(s) within which they live. Some claims are based on documents (such as treaties), and the details of those documents bear on the kinds of claims that can be made. What's more, in terms of the return of land, a lot depends on whether previously (illegitimately) confiscated lands can be returned. This is both a practical and normative issue – its unclear whether (given the basic rights of all citizens) all land can be returned (bearing in mind that indigenous peoples claim *all* lands and natural resources as traditionally owned). This problem is heightened by the way that property rights may (at least according to some) transfer over time. See for instance Waldron (1992) pp.15-20. This particular problem is beyond the scope of our discussion.

world.[27] So, actively recognising and remembering this history recognises that indigenous peoples (and indeed, all peoples) have voices and stories of their own. More specifically, there are at least three reasons why acknowledging this process of remembering is important. First, it can assist indigenous peoples to face (and to overcome) histories of grave injustice and great loss of hope.[28] This, according to Linda Smith, is fundamental to the process of both healing and transformation. It helps indigenous peoples to come to terms with losses, and to respond to those losses with what it means to survive. Secondly, this process enables indigenous peoples to celebrate their own (continued) survival, even in the face of this history.[29] It allows indigenous peoples to recognise, that despite policies often tailored to assimilate and eradicate them, they have managed to survive and to bring about change.[30] Finally, this process promotes dialogue amongst and between indigenous peoples and the state. More importantly, it creates a space for peoples to share and to engage with systems of knowledge that exist and continue to exist. Remembering this history is, in other words, fundamental to enabling self-determination.

It might seem that we have not made very much progress. We started out with the claim that the declaration is incomplete, and we have come to the conclusion that this is because it cannot be any other way. At least, it doesn't look as if we have made any real headway at all. What is most apparent is that there is an important distinction to be made (to borrow from Nussbaum) between *justification* and *implementation*. Our discussion has shown us that pure theory alone cannot give us the answers to how self-determination is realised. Indeed, we ought to expect that pursuing and realising self-determination is likely to differ precisely because indigenous peoples are themselves so diverse. This conclusion is, then, simply what engaging with real human beings and real communities requires.

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[27] Indigenous people, for instance, name their children not just after people, but places and events in their histories. What's more, they place themselves not just in relation to people, but primarily in relation to land, mountains, rivers, and even meeting houses (all of which are part of that history). See Smith (2005) p.146.

[28] Linda Smith writes that 'this form of remembering is painful because it involves remembering not just what colonisation was about but what being dehumanised meant for our own cultural practices. Both healing and transformation become crucial strategies in any approach which asks a community to remember what they may have decided unconsciously or consciously to forget'. See Smith (2005) p.146. A good example of such a history is the removal of Aboriginal children for settlement in White Australian families – what has become known as the 'stolen generations'. This was a practise that continued into the 1970s. See Human Rights and Equality Commission Report (1997)

[29] It is important to say that Smith views 'celebrating survival' as a separate project among twenty-five projects for indigenous peoples (of which 'remembering' is also one), see Smith (2005) p.145.

[30] Charles Wilkinson (2006) recounts a tale wherein a grandmother explains to her grandson that she wishes him to bury her in the old way because she believes that she will be the last person to do so. The grandson recounts that if his grandmother had survived just five years she would have seen that not all was lost.

Our conclusion is, then, straightforward. What we desperately need is not a theory able to complete the declaration and its requirements. What we need is a theory that is able to make sense of both the restrictions and significance of this incompleteness. In other words, what we need is a framework that understands the limits of theory and the importance of practical solutions for moving forward. This helps us to see that there is now good reason to turn our attention away from what realising self-determination requires, to the question of how indigenous self-determination itself is justified. More specifically, there is reason to ask whether liberal theory is able to capture the importance of indigeneity and indigenous self-determination, and whether liberal theory is able to help us to solve the problems that including indigeneity will give rise to.

7.2 Indigeneity and Liberal Theory

In what follows, we examine two ways in which to make sense of indigeneity and the claim to self-determination for indigenous peoples within liberal theory. The first comes from the liberal multicultural tradition and focuses on the work of Will Kymlicka. The second comes from the international law tradition and focuses on the underpinnings found within the work of James Anaya. As we will see, there is generally a fair amount of overlap between both theorists' work. In particular, they both accept that the claims that indigenous peoples are able to make can also be made by other minority peoples (albeit of a similar kind). However, what we will also see is that (despite their efforts) neither of them captures the importance of indigeneity itself. For this reason, neither of them provides us with a clear way forward on the issues that arise and so prompt more thought on how we might move forward.

7.2.1 Kymlicka's Approach

A key figure within the liberal multicultural tradition – a body of thought that concerns itself with how liberal theory is able to accommodate cultural groups – is Canadian philosopher Will Kymlicka.[31] Central to Kymlicka's position on this issue, is the connection that he makes between freedom and culture.[32] Unlike other liberals who claim that individuals simply need to be left alone to make up their own minds[33], Kymlicka claims that this is not possible in any meaningful sense unless individuals have access to what he terms 'societal cultures'.[34] These cultures are

[31] See for instance: Kymlicka (1995) (2000) (2002a) (2002b) (2007), Young (1989) (2000), Parekh (2000), Barry (2002), Kukathas (1998)
[32] Kymlicka (1995) chapter 5
[33] A good example of this is Kukathas (1995) who takes issue with the claim that liberal theory cannot deal with culture – and argues that we need not modify liberal theory at all. See also Barry (2002).
[34] See Kymlicka (1995) p.82. According to Kymlicka, a societal culture includes practises and institutions that cover the full range of human activities (public and private), associated with national groups, and intimately tied to freedom.

understood to be the contexts of choice that individuals find meaningful, and which (or so Kymlicka contends) individuals have a deep bond to.[35] Thus, if liberal theory is concerned with freedom, and if what we mean is that individuals ought to be able to make meaningful choices, then liberalism is committed to protecting these contexts of choice.

> For meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and freedom of expression and association. They also need access to a societal culture. Group differentiated measures that secure and promote this access may, therefore, have a legitimate role to play in a liberal theory of justice.[36]

Aside from a claim about special measures for minorities, what we get here is a deeper and fuller understanding of freedom and of what it means to be autonomous. Liberal theory is (ultimately) concerned with allowing and ensuring that individuals live the kinds of lives they choose. However, Kymlicka gives us a deeper understanding of why choice is even preferred, and why it even matters. In other words, liberals ought to care about valuable and meaningful options, and if the existence of cultural groups is required in order for us to secure this meaning, then liberals are committed to securing the context of choice inherent within societal cultures. It is not, in other words, simply about having a choice, but having choices that matter and that mean something to us.

In terms of understanding where and how indigenous peoples fit into this view, we ought to say that for Kymlicka, cultural diversity can be 'multinational' or 'polyethnic'. The former involves the 'incorporation of previously self-governing, territorially concentrated cultures into a larger state', while the latter transpires through 'individual and familial immigration'.[37] Thus, the way that Kymlicka differentiates between diversity is by an appeal to immigration, or more specifically by an appeal to post-colonial voluntary migration.[38] What this helps Kymlicka to do is pave the way for the kinds of claims he thinks each of these groups are able to make. 'Self-government rights' typically apply to national minorities who seek to maintain themselves alongside a majority culture, and who characteristically require autonomous rights to achieve this. On the other hand,

[35] He says, for instance that 'most people, most of the time, have a deep bond to their own culture'. Kymlicka (1995) p.90
[36] Kymlicka (1995) p.83.
[37] Kymlicka (1995) pp.11-26
[38] Of course, non-voluntary migrants make this difficult – for instance African Americans and Refugees complicate this distinction. See Kymlicka (1995) pp.21-5

'polyethnic rights' are described as those which function to both promote and support integration into the larger society, and so apply to ethnic groups who typically seek full membership in the majority culture. Finally, 'special representative rights' are designed to guarantee political representation for all groups within the governing body of the state.[39]

In short, then, Kymlicka does not (at least, not specifically) differentiate between indigenous and non-indigenous peoples, or more correctly between indigenous minorities and other minorities. For Kymlicka, the relevant status afforded to indigenous peoples within the framework is a national minority. This applies to any group that is: 1) an historical community, 2) more or less institutionally complete, 3) that occupies a given territory or homeland, and which 4) shares a distinct language or culture.[40] Indigenous peoples fit into this category and therefore have the correspondingly stronger cultural rights. There is, therefore, no differentiation between indigeneity and non-indigenous minorities because the main distinction is between national minorities and voluntary migrants. To be sure, if it was the case that only indigenous peoples fit into this category, then of course only indigenous peoples would be national minorities and only indigenous peoples would have the stronger self-governing rights. Given that this is not so, a number of other groups also fit into this category.

This helps us to make two points. First, it shows us that Kymlicka is well aware of the fact that some groups who may not typically be characterised as indigenous (such as the Catalans or Scots[41]) still have strong claims to self-governing rights. This helps us to bring out, secondly, two further points. Firstly, that many non-indigenous minorities could (over time) develop those features that characterise national minorities and societal cultures.[42] Secondly, that it is not clear why the declaration pertains specifically and solely to indigenous peoples. Both of these points, helps us to reiterate why the indeterminacy of the scope of the declaration remains so worrisome for states. States were concerned with what the declaration would commit them to, and what this would mean for their own development. It is a very important question whether self-determination extends to include more than indigenous peoples. Despite the importance of this question, it is not one that we consider here. Rather, our concern is to ascertain whether, regardless of whether non-indigenous peoples have a claim to self-determination (and more

[39] Kymlicka (1995) p.26
[40] Kymlicka (1995) pp.21-2
[41] Without a definition of indigeneity, this is up for grabs. At least, the Scots and Catalans tend not to be identified as indigenous peoples.
[42] Fiji-Indians are a good example of this. They are an ethnic minority but also a minority that exists no-where else in the world. Their culture and way of life is a fusion of Indian and Melanesian cultures. African Americans also exemplify this to some extent. On the Fiji-Indian culture see Ali (1981)

importantly if they do) Kymlicka's account adequately accommodates indigenous peoples. Our answer will be no.

7.2.2 Anaya's Approach

Unlike Kymlicka, James Anaya's aim is to make sense of the way in which indigenous peoples feature in international law. In so doing, Anaya aims to make sense of why indigenous peoples have been singled out in international law and why it makes sense to differentiate between indigenous and non-indigenous groups. On Anaya's account, the *substantive* aspect (the substance) of self-determination applies to all *peoples*, and has 'constitutive' and 'ongoing' aspects. The 'constitutive' element requires that the 'governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed.'[43] The 'ongoing' element stipulates that within the structure of the state itself (and regardless of how it was created), peoples ought to be able to 'live and develop freely on a continuous basis'.[44] Quite simply, the substance of self-determination applies to how society is designed and what peoples are able to do. All peoples should play a part in shaping the structure of society, and they all ought to be able to develop and redevelop as peoples within it.

On such a view, the substance of self-determination applies to all peoples, with indigeneity having no impact at all on why self-determination applies to them. Indeed, Anaya is clear that peoples refers to 'all those spheres of community marked by elements of identity and collective consciousness within which peoples' lives unfold'.[45] In taking this view, Anaya rejects restricting peoples to territorial divisions on the grounds that it 'ignores the multiple and overlapping spheres of community, authority, and interdependence that actually exist in the human experience'.[46] Instead, Anaya affirms something very much like that which Will Kymlicka terms a societal culture, but without any rigid territorial condition.

From this general approach to self-determination, one obvious answer to the question of why indigenous peoples have been singled out is to say that indigeneity bears on how self-determination is achieved. This is especially so given that a lot will depend on the circumstances within which indigenous peoples have and continue to exist. Indeed, Anaya suggests that implementing self-determination for indigenous peoples requires, at the very least, some thinking along dimensions of: non-discrimination, cultural integrity, control over land and resources, social

[43] Anaya (2004) p.105
[44] Anaya (2004) p.105
[45] Anaya (2004) p.103
[46] Anaya (2004) p.101

welfare and development, as well as self-government (dimensions which are, as it happens, represented in the declaration).[47]

Unfortunately, for Anaya this is not enough. Although it just might be the case that self-determination is something that applies to all peoples, in the end only indigenous peoples have been (as a matter of fact) granted this right.[48] To make sense of this basic fact, Anaya claims that indigenous peoples' self-determination is further grounded in what he calls the 'remedial aspect' of self-determination.[49] In so doing, Anaya claims that while self-determination is 'concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies', it also 'gives rise to remedies that tear at the legacies of empire, discrimination, oppression of democratic participation, and cultural suffocation'.[50] Importantly, this remedial aspect is not based solely on correcting historical wrongs, but on remedying 'a particular set of vulnerabilities' that are understood in terms of 'disparities of economic and political power rooted in history'.[51] By this, Anaya does not mean to say that no other minorities have suffered historical wrongs, but simply that indigenous peoples have tended to suffer more systematically than others.[52] And, more importantly, that this is what characterises (as a matter of fact) the indigenous rights regime in international law.

Both elements of self-determination (the substantive and remedial aspects) assume a democratic (and liberal) structure.[53] Institutions are imagined as enabling all peoples to be involved in decision-making, and peoples are imagined as being able to live the kinds of lives they value as a matter of choice. Thus, self-determination presupposes a democratic system of government, even though (we ought to add) Anaya does not specifically make this point. There is, then, a fair amount of (implicit) overlap with Kymlicka's liberal multiculturalism. In particular, what is consistent across both accounts is that special rights and financial support ought to be part and parcel of how a liberal society accommodates indigenous peoples (and other relevant minorities). In other words, if we are to ensure that minority cultures (and the individuals within them) are

[47] Anaya (2004) chapters 4 and 5
[48] Kymlicka (2002) pp.120-5
[49] Anaya (2004) pp.106-10
[50] Anaya (2004) p.98
[51] Anaya (2004) p.125
[52] Of course, this strategy is up for grabs. It's not clear whether this is true or whether we ought to base our thinking on the extent to which peoples have suffered. What's more, even if we do, it's not clear that this excludes non-indigenous minorities. See Anaya (2004) pp.106-10.
[53] Kymlicka takes issues with this point and claims that this move seems to undermine the cultural integrity of indigenous peoples (to live in ways that may not be in line with this). We do not consider this problem here, but we do go on to make some claims about the value of indigeneity that bears some resemblance to this argument. See Kymlicka (2002) pp.131-2

not disempowered and altogether disadvantaged by the majority, then positive measures are required. Thus, and despite the differences, they both endorse the need for us to rethink social and political structures, and the general shape of the state.

7.3 Two Related Concerns

Adding to these similarities, however, both Kymlicka and Anaya overlook what accommodating indigenous peoples and self-determination requires and amounts to. For this reason, both views fall short of providing us with clear answers to at least two problems – both of which we ought to concern ourselves with, and both of which we consider next.

7.3.1 Capturing the Importance of Indigeneity

Firstly, neither Kymlicka nor Anaya manage to capture the importance of indigeneity itself. Kymlicka places value in the general importance of culture for freedom – so on his account indigeneity is valuable because of the contribution it makes to freedom. Anaya's remedial aspect of self-determination, on the other hand, provides us with a way of making sense of the international indigenous rights regime. But a concern with correcting unequal power relations remains silent on the *contribution* that indigenous peoples themselves could make to the way we understand living together. A concern with power, while certainly important, does not tell us what is and would be valuable about indigeneity even when they are secure in their cultural survival. For this reason, such a focus seems disappointing and altogether incomplete.

This raises an obvious question: exactly what is valuable about indigeneity – what is it that we ought to capture? A lot of attention is paid to the *uniqueness* of indigenous peoples. There is, of course, a lot that backs up this view. As we have said, indigenous peoples can be found in practically every region of the world, and they are responsible for much of the cultural diversity that exists.[54] This is also how the UN frames its concern for indigenous peoples and their cultural heritage. It would be easy to understand this uniqueness to consist in some romantic notion or way of life.[55] For a number of reasons, however, this would be a mistake. For a start, such a view would amount to the claim that indigeneity consists in some *particular* way of life. As we pointed out earlier, this misunderstands the way in which communities and cultures develop and grow.

[54] See Trask (2008)

[55] For instance, it might be held that what is unique about indigenous peoples is a mysterious and romantic 'otherness'. For more on this view see Kymlicka (2002) p.129. This is not the view proposed here.

Instead, or as this project contends, the value of indigeneity (and indeed the value of all peoples) consists in the scope and content of its world views. That is, in the rich perspective that it brings to living together. In other words, it is the collective world views of indigenous peoples which represents and provides us with a body of knowledge or distinctive lens through which to assess what is important. It provides us with ways to consider how all beings (both human and nonhuman) might live together. Once we recognise this, we can see that there is a difference between recognising that indigenous peoples ought to be self-determining, and recognising that there is a body of knowledge and approach to problems which may benefit us all. The former consists in merely asking whether we can accommodate indigenous peoples (or cultural groups more generally) within our theories, while the latter asks us what indigenous peoples themselves contribute (or could contribute) to these very theories.

Interestingly, this is something that Anaya highlights, but which he does not develop in full. Anaya remarks that the political philosophy of the Iriquois (Haudenosaunee) confederacy and the Great Law of Peace in particular:

> [...] Promotes unity among individuals, families, clans, and nations while upholding the integrity of diverse identities and spheres of autonomy [...] Such conceptions outside the mould of classical western liberalism would appear to provide a more appropriate foundation for understanding humanity, its aspirations, and its political development than the model of a world divided into exclusive, monolithic communities, and hence a more appropriate backdrop for understanding the subject matter of self-determination.[56]

This view, and others, of interdependence and living together is echoed throughout indigenous communities.[57] For instance, indigenous peoples tend to see themselves as 'caretakers of the world' with an obligation not just to contemporaries, but to plan for and to have vision for the future. Indigenous peoples contend, for instance, that they ought to 'make every decision on behalf of the seventh generation to come, to have compassion and love for those generations yet unborn'.[58]

[56] Anaya (2004) p.102, see also Young (2000)
[57] Ewen (1994)
[58] One might claim (on the back of chapters 5 and 6) that this is problematic as it amounts to the claim that we are justified in overlooking the 8th generation and others to follow. However, this project takes this principle to be a general claim (and illustration) about having obligations to future people indefinitely. See Lyons (1994) p.33

It is, then, important not to overlook that the claim to self-determination for indigenous peoples (and indeed all peoples) is a claim to be able to contribute to the way that we move forward. In other words, indigenous peoples and indigeneity is valuable (as all peoples are valuable) *because* they provide us with a new lens through which to consider problems within and between states. Self-determination, then, is not simply a platform for indigenous peoples to claim resources, recognition, and remedial measures within the state. Rather, indigeneity (and the declaration) helps to raise questions about whether the structures within which we exist are at odds with the freedom of all peoples to survive into the future. For this reason, we ought to move beyond examining what achieving self-determination for indigenous peoples requires of us. We ought to also consider what indigenous peoples might, themselves, have to contribute to the existing governing institutions, and to the values that continue to shape them.[59]

We might think, at this point, that it is unclear why liberal theory should have any problem taking these diverse peoples and voices on board. However, there are two reasons why we have reason to be sceptical. The following two examples illustrate the first reason.

1. *The Sinking Island.* Imagine a small but populated island in the south pacific. Let's say that the indigenous islanders have to contend with slowly rising sea levels, in large part due to the way in which neighbouring islands have chosen to live. The islanders themselves live a fairly moderate lifestyle insofar as the consumption of natural resources is concerned, but the rising sea levels mean that pretty soon their entire island will be underwater. They will be unable to preserve their lands for future people and will be forced to migrate to neighbouring islands.[60]

2. *The Semi-Nomadic Peoples.* Alternatively, say that on another island two very different peoples co-exist. Let's say that the indigenous peoples believe that a semi-nomadic lifestyle is the best way to live. For the most part, this is because they believe that this lifestyle ensures that we limit our consumption of natural resources, and we ensure regeneration and preservation for the future. The other group, on the other hand,

[59] Indeed, Iris Marion Young notes that there is an argument to be made for the influence of the Iriquois confederacy on the founding institutions of the United States. See Young (2000).
[60] Tuvalu (an island in the south pacific that is (arguably) slowly disappearing due to rising sea levels) seems to fit this description. Of course, again, this case does not rely specifically on indigeneity or an indigenous people. The same conclusion would be drawn for any peoples indigenous or otherwise. See for instance Barnett *et al.* (2010)

> believes that the best life consists in building permanent communities, and to use resources when and as they are required.[61]

Both of these examples show us (albeit in different ways) the depth of difference even when we accept that all peoples ought to be able to live a life they value. More importantly, they both show us how vital working together really is. In both examples, and the sinking island in particular, we can see just how difficult it is for some of us to live together. At least, given the diversity that there is, it's not clear that this is always possible.

The second reason why we ought to be sceptical is that the world views of many indigenous peoples place value in more than liberty. Take the semi-nomadic people in the example above. Let's add that they believe that all creatures and natural objects (including animals, plants, and even rocks) have value or a life essence.[62] They believe that all beings have value for their own sake and ought to be treated with respect. In other words, even in the absence of human beings or freedom, all beings would still have value. Compare this to the other group who believe that there would be no reason to preserve nonhuman animals and the environment if no human beings thought this was a good idea, or if all human beings ceased to exist. Here again, we see that there are major differences between what peoples value, and it's not clear how we make sense of this within liberal theory.

7.3.2 Conflicts

Our examples raise a rather obvious, but familiar, problem. Neither Anaya nor Kymlicka gives us a clear way to confront and resolve these differences. Again, it is all very well including indigeneity (and all peoples), but it is quite another to say something about how we resolve the problems and the conflicts that are likely to result. To be sure, this is not to say that Anaya and Kymlicka give us no direction at all. After all, they both enrich our understanding of freedom and self-determination as it applies to peoples. It is to say, however, that they do not go quite far enough in terms of addressing some of the problems that may exist (on the ground).

[61] Again, this is not to say that only or even all indigenous peoples hold this view. However, this case does resemble, in some respects, the Indigenous people of Australia, see Flood (2006)

[62] For instance, Maori refer to 'mauri' or 'life force' which extends to all living beings, and even rocks and meeting houses. See Smith (2005) and Mead (2003). Again, the claim is not that this kind of view is limited to indigenous peoples.

Our examples demonstrate that a commitment to including indigeneity (and all peoples) is likely to result in severe conflicts between what we have reason to value.[63] It doesn't look to be the case that we can (as a matter of fact) all live the lives we value. Our example of the sinking island shows us that even when we are isolated island cases, there are serious consequences and conflicts resulting from the choices we make and are able to make. At least, it shows us that we ought to be sceptical of the simple claim that we all ought to be left to live whatever life we choose. It is also difficult to see how we could reconcile the values of semi-nomadic people with the values of other group. The semi-nomadic people (having and living with a concern for all living beings and even inanimate objects) include within their sphere of concern far more than the other group (who limit the scope of concern to human beings). The relation that the other group view themselves as standing with natural resources is in opposition to the semi-nomadic people. If they continue to live as they have done, it is likely to be the case that there will be little room for the semi-nomadic people to be semi-nomadic. We cannot play these conflicts down. Nor, as the declaration helps us to see, can we exclude them from our concern. Instead, we are compelled to say more about what it might take to resolve these challenges and difficulties.

Accepting the declaration requires that we take on board that there will be serious conflicts between peoples and what they value. There is, then, a real danger in leaving open the question of what the good life consists in, and vesting our answers generally in a concern for freedom alone. Our examples show us that this strategy is likely to favour particular values over others. More importantly, it is likely to lead us to overlook and lose sight of the contribution that other values could make to the problems that we face.

7.4 Conclusion

Our aim has been to raise some of the significant questions that indigenous peoples and the declaration on the rights of indigenous peoples in particular, have thrown at us. In the first half of the chapter we examined the declaration and its incompleteness as it relates to the content of self-determination and defining indigeneity. We came to the conclusion that the incompleteness of the declaration is necessary and that what we need is a theory and framework able to capture this. We then examined whether liberal theory is able to accommodate indigeneity and paid particular attention to Will Kymlicka and James Anaya. Our conclusion is that neither of them manages to capture the contribution that indigeneity (and indigenous world views) might make to what we value and how we live together. Given that this is so, we pointed out that they were

[63] On indigenous values see for instance: Alfred (2006), Ivison (2000), Maaka *et al.* (2000), Mead (2003), Smith (2005) (2006), Wilkinson (2006), on indigenous issues see Bartholomew *et al.* (2003)

unable to appreciate the challenges that including indigenous peoples (and indeed all peoples) bring about. We are left with the claim, therefore, that there is scope to do more and good reason to consider whether the capability approach can assist us to move forward.

8. The Capability Approach and Indigenous Peoples

In the previous chapter we considered two problems, both of which we drew out of the *Declaration on the Rights of Indigenous Peoples*. First, we highlighted that there has been confusion and dissatisfaction from states surrounding the incompleteness of the declaration. Secondly, we pointed out that there are questions around whether current liberal attempts sufficiently capture indigeneity and indigenous self-determination. This project did not take the incompleteness (despite the practical issues mentioned in the last chapter) to be a problem in itself. Rather, our contention was that we needed a theory that is able to embrace and to make sense of this incompleteness. However, on the problem of indigeneity and indigenous self-determination, we claimed that we need to make room for the contribution that indigeneity itself may be in a position to make to the challenges that we face. Even though, we should say, such a move may leave us with serious conflicts, and no clear way of making sense of them.

This project has shown that the capability approach deals well with incompleteness. The complications that the incompleteness of the declaration highlights are not new to the capability approach.[1] The capability approach shares the reasons for incompleteness and the complex issues that arise. Like the declaration, the capability approach does not rely on some particular characteristic in grounding it, and contends that such a move would be at odds with what we tend to find within the human experience. What's more, the capability approach does not set out to provide us with all of the answers and instructions for moving forward, but with guidance on working this out.[2] In so doing, the approach takes on board that at some point we must be left to move forward on our own and in light of circumstances that relate to us on the ground. There is, then, an alliance between the framework within which the declaration sits and the capability approach that is worth highlighting and preserving.[3]

[1] Indeed, a fair amount of work has focused on how we operationalize the capability approach and measure capabilities. In other words, the capability approach has faced very serious practical questions of its own. For an overview of some of the recent work on this issue see Comim *et al.* (2008) part 2, Deneulin *et al.* (2009a) part 2.

[2] Given that Nussbaum, as we saw in chapter six, leaves us very little guidance on moving forward, there is a question about whether her approach is in the spirit of the capability approach at all. At least, it's not clear whether this is the case if we are given no guidance at all.

[3] Of course, there is a point about how the capabilities map onto rights here – especially given that Nussbaum views her approach as one type of human rights approach. For reasons mentioned in the previous chapter, we do not go into this here. We do, however, acknowledge the relevance of this question, especially as it relates to the declaration. See Nussbaum (2006a) pp.284-91

Our concern in this chapter, then, is primarily with how and whether the capability approach is able to include indigenous peoples. More specifically, we consider whether indigenous self-determination and indigeneity can be taken on board. Our conclusion is that indigenous peoples turn out to be problematic for the approach. More specifically, we point out that it is not clear whether the list is able to accommodate indigenous self-determination without some major departures. More than this, we demonstrate that (even if the approach could include indigenous peoples) indigeneity provides us with a new source of conflict. There is, then, even more reason to be concerned that Nussbaum provides us with no clear way of moving forward on the conflicts that arise.

This allows us to (once again) demonstrate how useful the needs, goals, and other goods distinction is for the capability approach. We show that the added structure and flexibility that it brings to the capability approach is beneficial. More specifically, we show that the spaces of needs, goals and other goods capture the way in which self-determination and indigeneity feature within the approach, while also managing to include the value of indigeneity itself. We conclude by pointing out, therefore, that the needs, goals and other goods distinction gives us a way of enriching the capability approach in light of indigenous peoples.

8.1 Including Indigenous Peoples

In the introduction to *Women, Culture and Development,* Nussbaum contends that 'cultural traditions pose obstacles to women's health and flourishing' and that 'customs, in short, are important causes of women's misery and death'.[4] Yet, in *Cultivating Humanity*, Nussbaum is clear that there is much to gain from the study of non-Western cultures.[5] Moreover, Sen differentiates between 'cultural exclusions'[6] (by which he means cultural limitations on freedom), and 'cultural liberty' or the freedom 'to live and be what we choose'.[7] In so doing, Nussbaum and Sen recognise that culture is able to both subtract from and add to well-being.[8] What's more, they

[4] Nussbaum (1995) p.3
[5] Nussbaum (1997) chapter 4
[6] Sen makes a distinction between 'living mode exclusion' and 'participatory exclusion – the former affecting one's 'opportunity freedom' to live and value a particular cultural lifestyle, and the latter affecting one's 'process freedom' by limiting one's ability to participate in the political community. See Sen (2007), UNDP (2004) chapter 1, Sen (2004c). An obvious point to make here is that there are clear connections between the capability approach and the liberal multiculturalism mentioned in the last chapter. At least, it seems clear that the capability approach can take Kymlicka and Anaya's insights on board.
[7] UNDP (2004), Sen (2007) chapter 2
[8] Traditionally, culture was viewed as something which inhibited development and so a contributing factor in under-development and developmental difficulties. More recently, however, culture has tended to be seen in a better light – not only as a resource for, rather than an obstacle to, development, but as generally misunderstood. It doesn't

both recognise that culture is a pervasive and influential aspect in our lives. Any concern for (at least) human beings must have a way of capturing this.

So, cultural groups are a source and context of freedom, and part and parcel of human life. What does this say about including peoples (and indigenous peoples in particular) within the approach? The obvious answer is to say that if indigenous peoples matter, the list will apply to them (as indeed the list applies to all peoples). In other words, our concern with indigenous self-determination is really one that stands apart from the list itself. Suppose that we accept this strategy (that the list applies to indigenous peoples), where does this leave us on the question of how we capture the value of indigeneity? If we accept that the list applies to indigenous peoples, then indigeneity is relevant when we are realising the capabilities. This answer to how indigenous peoples feature is captured within the flexibility of Nussbaum's approach. It follows on from the claim that the list is open-ended to allow for filling out in practise. What's more, this strategy maps onto the way that the list was applied to issues of disability, nationality, and nonhuman animals. We simply ask how and in what way the capabilities ought to be pursued and achieved by or for them. In the same way, we are prompted to ask how the capabilities can be pursued and achieved for indigenous peoples. It is, then, entirely consistent with the way the list operates to adopt this strategy.

While this strategy seems straightforward enough, there are two (related) problems with it. First, it amounts to the claim that these cases (and indigenous peoples in particular) do not affect how Nussbaum's capability framework ought to be constructed. In other words, this strategy presupposes that the list of capabilities itself ought to stand. We have already expressed concern over whether this ought to be the case dealing with nonhuman animals, so there is reason to ask whether this is enough for indigenous peoples. Secondly, this strategy amounts to the claim that the list itself has nothing at all to contribute to the way that we might solve the problems that indigenous peoples raise. Based on the foundational and overarching importance that *affiliation* has in generating and grounding the list, its not clear (at least at this point) whether we ought to play down the relevance of the list for moving forward on the significance of peoples (and indigenous peoples particular).[9] In what follows, we consider whether indigenous peoples ought

take that much to see, however, that culture *can* and *has* been both an obstacle and a resource for development. See Sen (1999) chapter 6, (2007), Nussbaum (1997) chapter 4

[9] This view is also put forward by Frances Stewart, albeit in light of how we understand the role of groups, and conflicts. See Stewart (2005), see also Deneulin (2009e), Evans (2002)

to have a more prominent role within the list, and (if so) whether the approach is able to accommodate such a role.

8.1.1 Indigenous Self-Determination within the list

All of the capabilities on Nussbaum's list are relevant for indigenous individuals, as they are for all individuals. However, there is a question about whether the list can assist us to determine whether indigenous self-determination is justified. Taking this question on board, the following two capabilities seem to be relevant if we are to generate within the list a concern for indigenous self-determination:

7. **Affiliation.**
   A. Being able to live with and toward others, to recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to understand the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
   B. Having the social bases of self respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provision of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

10. **Control over one's environment.**
   A. Political. Being able to participate effectively in the political choices that govern ones 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 bases as others, having the right to seek employment on an equal basis with others; having the freedom from unwarranted seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognitions with other workers.[10]

The capability pertaining to 'political and material control' provides us with language which closely resembles self-determination. Likewise, the capability for 'affiliation' (to engage in forms of social interaction) seems to provide us with a way of getting fairly close to including indigenous peoples (and indeed all peoples) within the list. In particular, having the 'social bases of self respect' seems to uncover the significance of recognising peoples within the list. At least, it seems to draw our attention to the relevance and prominence of both individuals and groups in achieving dignity. It prompts us to ask, then, what the social bases of self-respect consists in. More importantly, it raises a question (in this case) of whether the social bases of self-respect for indigenous individuals will presuppose indigenous self-determination.

[10] Nussbaum (2006a) pp.76-7

Our discussion will focus on the social bases of self-respect. In so doing, we do not overlook the capability for control, or indeed any of the capabilities (given as they are all relevant for dignity). Rather, we simply take the social bases of self respect to be most fundamental for our purposes and most relevant overall. Our main concern is to ascertain whether the social bases of self-respect requires that we acknowledge and realise self-determination for indigenous peoples. This will help us to see whether (and if so, in what ways) the capability approach is able to contribute to our discussion.

8.1.2 The Social Bases of Self-Respect[11]

Indigenous self-determination is fundamental to understanding how to secure and to realise the social bases of self respect for indigenous peoples. The social bases of self-respect is (in large part) bound up with the cultural identities and worldviews that one has. Many of our identities suffer from historical or social misrecognition. They are, and continue to be, situated against and within unequal social arrangements, even when (we ought to add) political and economic measures have been put in place to rectify them.[12] Given that this is so, there is an argument to be made for the claim that emphasis needs to be placed on *peoples*, and the socio-historical inequalities and injustices that they have faced and continue to face. At least, it looks as if we are going to want to say more about what affects this capability for individuals on the ground, and whether the recognition of peoples is required in achieving it.[13]

If we accept the claim that indigenous self-determination is required for the social bases of self-respect, for (at least) indigenous individuals, then at least two things follow. First, it looks like the social basis of self-respect requires the inclusion of something like *remembering*. This is something

[11] Rawls explains the social bases of self-respect as being able to have confidence about one's place and position in society, and knowing that one's conception of the good is worth pursuing, see Freeman (2007) p.153. This seems very much like the way that Nussbaum uses it, except to also add that all of the capabilities are central to understanding and realising it.

[12]There are still large disparities in New Zealand between the Indigenous and non-indigenous peoples even though there is a long history of settlement and regeneration. This is also not something that is specific to indigenous peoples – even in the UK where it has been illegal to pay woman less than men for some thirty years, there is still an obvious pay gap. In relation to indigenous peoples see Trask (2008)

[13] Severine Deneulin makes this point when she says that we are going to have to say more than simply 'individuals matter' and 'individuals ought to be able to appear in public without shame'. As she points out, we are going to want to ask *who* these individuals are and *what* affects this capability in *their* lives. See Deneulin (2008). What's more, Frances Stewart claims that group associations can lead to a sense of self-respect, and that individual well-being often depends on the well-being of the group(s) to which one belongs. See Stewart (2005). We should also point out that often capability theorists (Deneulin included) refer to the 'ability to appear in public without shame'. This is largely based on Sen's use of this phrase from Adam Smith. We take this to be very much like the social bases of self respect. See for instance Deneulin (2008) (2009e), De Herdt (2008), Evans (2002), and Stewart (2005), Nussbaum (2006a) p.293

that we highlighted in the previous chapter, and something that we said was important for the existence of indigenous peoples (and indeed all peoples). Of course, the capability for emotions (including 'grief', 'justified anger', and even 'love'), might be part of this process. But it's not clear that these emotions are enough to capture *remembering* on their own. As we mentioned in the last chapter, *remembering* also involves the transference of knowledge (such as memories), and the redevelopment of an indigenous identity. *Remembering* is, then, more than an emotional process or response, but also a way in which to transfer and develop as a people. It is, in other words, an activity and process that is bound up with the importance of acknowledging a shared history and a shared future.

Secondly, and more importantly, it looks as if realising the social bases of self-respect requires a transformation of how a number of other capabilities are to be understood. If we are able to maintain that the social bases for self-respect calls for more attention to (in this case) indigeneity, then it looks as if other capabilities will also need to be reviewed insofar as they are affected by a concern for self-determination. Such a move, however, makes the capabilities and the list itself far more complex. This is not simply because it changes the nature of the list, but because it means that the list will need to be more flexible (at least in some way) in terms of to whom the capabilities are imagined as applying. It will, for instance, be no good to maintain that the list and the capabilities only apply to individuals – but rather that some capabilities will need to be understood as applying (or at least possibly so) to peoples.

Take, for instance, the capability for material control, which refers to the right to hold property. We could read indigenous land claims into this, yet as the capability applies to individuals, this move would (as it stands) be incompatible. This is clearly problematic for indigenous peoples. The capability is unable to capture indigenous understandings of ownership and control which tend to be group-based. Secondly, it neglects historical land claims, and situations wherein the return of land is significant even when indigenous peoples (or individuals) are not discriminated against in holding or purchasing property.[14] The same can be said about the capability for bodily health. As we have pointed out, one way to proceed would be to ask: what does 'being in good health' mean for a particular indigenous people? What does it mean to have adequate shelter, to be adequately nourished? Unfortunately, however, what the social bases of self-respect would

[14] Again, then, it seems that history and remembering is fundamental to grounding the capabilities for indigenous peoples.

require is that we ask: how should we understand what health is? For instance, the Maori health model includes not merely bodily, mental, and emotional health – but also spiritual health, the health of whanau (an extended family unit itself), and even the health of inanimate objects.[15] Thus, the differences are not just about how the capabilities *apply* to indigenous peoples, but what the capabilities *themselves* ought to be.

We ought to pause here. There are at least two cards that Nussbaum could play at this point. The first is that it is (as we have stressed in earlier chapters) an open question as to what might be included in the list. There is, then, a good chance that whatever is not accommodated within the list, can be added to it. As Nussbaum contends, the capabilities are ongoing and open to revision, such that any of them can be supplemented or deleted.[16] There is, then, certainly scope for anything that holds its weight to be included within the list. In other words, if self-determination for indigenous peoples is important for dignity, and if this calls for other capabilities or functionings, then the list will be committed to accommodating them.

Secondly, one might suitably claim, that we are barking up the wrong tree here. Nussbaum's list is not meant to say anything about indigeneity and indigenous claims. While indigenous peoples may be woven into the list or added to it, this is not what the aim of the list is.

> The capabilities approach is not intended to provide a complete account of social justice. It says nothing, for example, about how justice would treat inequalities above the threshold [...] It is an account of minimum core entitlements, and it is compatible with different views about how to handle issues of justice and distribution that would arise once all citizens are above the threshold level. Nor does it insist that this list of entitlements is an exhaustive account of political justice; there may be other important political values, closely connected with justice, that it does not include.[17]

In other words, the list tells us to focus on securing the capabilities for all relevant beings. This is not to say that indigenous issues are irrelevant, but rather that they arise, and give rise to issues

[15] The Maori health model 'Te Whare Tapa Wha', for instance, includes: *Taha Wairua* (spirituality), *Taha Hinengaro* (thought and feeling), *Taha Tinana* (physicality), *Taha Whanau* (extended family or tribe).
[16] Nussbaum (2006a) p.78
[17] Nussbaum (2006a) p.75

that arise, once we are all above the threshold levels. Quite simply, we ought not to expect the capability approach and the list to provide us with these answers.

Unfortunately, neither of these options (either including indigenous peoples by adding to the list or excluding them by limiting the scope of the list) provides Nussbaum with a way out. There are two concerns that both of these strategies give rise to. Firstly, if indigenous self-determination is important for the social bases of self-respect, then this capability will need to be either excluded from, or redefined within, the list. It is difficult to exclude the social bases of self-respect. We cannot get passed the importance and relevance that this capability has for achieving dignity. Even Nussbaum goes so far as to say that 'only in the area of self-respect and dignity itself do I think that actual functioning is the appropriate aim'.[18] In other words, the option of excluding this capability is not open to us. Perhaps, then, we ought to redefine the capability. In so doing, perhaps we claim that the social bases of self-respect will require only a minimum level of recognition – that is, recognition as human beings. Unfortunately, however, even this will require that we overlook the fact that (as we have said) for a number of individuals, the discrimination that they are subjected to has very little to do with who they are (as individuals), and much more to do with their social or cultural associations. Discrimination is, at least in a lot of cases, culturally and historically entrenched. In other words, it seems that neither of these options looks to offer us a way out.

Our second and related concern is that Nussbaum claims that the capabilities can form the basis for an overlapping consensus. On the back of this claim, if we contend that indigenous self-determination applies only once the list is settled, then it sounds as if we thereby exclude indigenous peoples from the process itself. Such a move seriously questions Nussbaum's claim that the list of capabilities *can* form the basis for an overlapping consensus. At least, it seriously questions whether it is an overlapping consensus at all. On the other hand, if we include indigenous peoples and the possibility that other capabilities and functionings can be included within the list, then this complicates and (again) undermines whether an overlapping consensus is possible. At least, it puts forward the view that we would not need to agree (if indeed we did) with the same lists of capabilities. Now it looks as if the overlapping consensus (and so the list itself) is going to lack any real bite. Again, this hardly looks like a solution at all.

[18] Nussbaum (2006a) p.172

8.1.3 Some Familiar Problems

So far, our conclusion is that the capability approach does not have it easy. Rejecting indigenous self-determination looks to require that we exclude or at least downplay the importance of the social bases of self-respect. Accepting that indigenous self-determination ought to feature within the list will mean that we need to reframe the list, and places pressure on the claim to an overlapping consensus. Adding to an already difficult situation, we ought to point out that three familiar problems also come into play, each of which the inclusion of indigenous peoples looks to exacerbate. We consider each of them next.

In chapters three and four we claimed that there is good reason to ask whether we ought to base the capability approach on a list of capabilities. We questioned this strategy on the back of the claim that the diversity of cases (and in particular, including nonhuman animals) gives us good reason to reconsider whether this is the best way forward. It might have been trivial to raise this question in relation to nonhuman animals (given that Nussbaum is well aware of the problems). However, here we see that it is not just a question of whether the capabilities suitably apply to indigenous peoples (as it was with nonhuman animals). Our concern is with whether the capabilities *require* the recognition of (at least) indigenous self-determination. As we have illustrated above, this is not such a trivial case. The social bases of self-respect is an important capability, and one that is required for a dignified life. Yet, without indigenous self-determination it is not clear that achieving this capability is possible. At least, then, indigenous peoples seem to give us even stronger grounds to question whether the best way forward is a list of capabilities at all. At least, if we can include indigenous self-determination without a list of capabilities, then this would be worth exploring.

This brings us to our second concern. Indigenous self-determination introduces another source of conflict and so more reason to question Nussbaum's unwillingness and inability to respond to them. Recall that it is not enough on Nussbaum's account to have all of the capabilities. We ought to be able to pursue (and to be able to realise) our own conceptions of the good. Yet, our example of the sinking island nation in the last chapter showed us how different our conceptions of the good are likely to be, and how impossible (at least for some) pursuing and realising our conceptions of the good really is.[19] At least, without restricting what can be pursued, it's not clear

[19] It is surprising that Nussbaum does not consider indigenous peoples and ethnic minorities directly herself. Given, that is, that (as we mentioned in chapter six) many of them would agree with the sentiments of her capability approach (that we have obligations to all nonhuman animals and to future people). Instead Nussbaum limits her

that the sinking islanders will continue to exist into the future. Similarly, our semi-nomadic people case showed us that we find ourselves faced with conflicts between what we value. How do we move forward if the semi-nomadic peoples rank the environment and future people above current peoples when they share an island with a group that place no value in the environment at all? At least, it's not clear that we can unless we say more about what ought to be important.

This raises our final (albeit related) concern. Recall that indigenous peoples and their values have survived despite policies often designed to eradicate them. This helps us to see that a focus on capability alone may lead us to overlook how important actual functionings are and can be. It is all very well focusing on capability, but we ought to recognise that we presuppose particular functionings in doing so. We know, for instance, that protecting the *capability* to speak a particular indigenous language will not (on its own) secure this capability for future people. Rather, *speaking* that language and *pursuing* that language and its knowledge will be the only way to ensure that it continues to exist. Indeed, our discussion of the social bases of self-respect provides us with a good illustration of why and how actual functionings matter (in this case, *being* self-determining). There is, then, a real need to lay out exactly what the capability approach in its concern for the capabilities of all peoples and all relevant nonhuman animals both now and into the future is going to require of us.

It looks as if Nussbaum's capability approach is both committed to including indigenous self-determination, and unable to do so without some major departures. More importantly, we find that even more pressure is placed on Nussbaum's list of capabilities and her unwillingness to say something substantial about conflicts. Again, it seems, we are left with questions about how to further the approach in ways that will allow us to say more about what the capability approach might be able to contribute to these challenges. We find good reason to seek an alternative. At least, we are left with two questions: 1) Can the capability approach say more about indigeneity and indigenous self-determination? 2) Can we strengthen the capability approach so that it is (at least) *able* to lay out what options we have for moving forward?

8.2 Indigeneity and Self-Determination: Needs, Goals, and Other Goods

examples to the Amish and Jewish communities in the US. This gives Nussbaum the option of drawing on the fact that these people have *chosen* to live in a liberal society, and this gives Nussbaum a platform for claiming that liberal values on this basis ought to stand. Of course, indigenous peoples and ethnic minorities are a more difficult case in question. At least, disputes between indigenous peoples and the state cannot be so easily settled. If the capability approach is to stand, then it ought to deal with these most difficult cases. See Nussbaum (2006a) pp.182-85

The problem highlighted in the preceding section was not so much that the capability approach is *unable* to accommodate indigeneity and indigenous self-determination. Rather, the problem is that (in its present forms) including or excluding indigenous self-determination comes at a heavy cost. More importantly, the claim is that the capability approach is able to say very little (and sometimes nothing at all) in terms of how key issues are resolved on the back of the inclusion of indigeneity and indigenous self-determination.

This project, so far, has claimed that the needs, goals, and other goods distinction is able to provide us with a clear way in which to strengthen the capability approach. In what follows we demonstrate that this is also true in relation to indigenous peoples. In so doing, it is claimed that the distinction provides us with a way forward on at least the following three questions, each of which we consider in turn:

i. *How do we Capture Indigenous Self-Determination?* (recall that we need a way of making sense of self-determination)
ii. *How do we capture the Importance of Indigeneity?* (recall that we need to be able to include the indigenous point of view)
iii. *How do we accommodate and Coordinate the importance of both Individuals and Groups?* (recall that the capability approach recognises both, but does not provide us with any way of coordinating conflicts)

8.2.1 Self-Determination: Revisiting Needs and Goals

Whether our needs are met, sometimes relies almost exclusively on those around us. This especially applies when we are very young, old, or ill – but it also applies when our needs depend on our own or others' existence or abilities. What's more, the cultural structures within which we exists, can affect how important our needs are, and how much weight there is behind our claim to having them met at all.[20] Ensuring that one's needs are met (or even secure[21]) sometimes depends on those around us, and how they value our claim to having them met. Needs are,

[20] For instance, one might have a less urgent or weaker claim to food simply because one is the youngest and/or a female child.

[21] This is an important point. There is a great difference between having one's needs *met* and *securing* them. For instance, unsecure needs will often give rise to what Wolff and De-Shalit's participants refer to as 'constant worries'. This is precisely why Wolff and De-Shalit argue for 'secure functionings'. They point out that two people with the same employment have very different lives (and worries) if one is permanent and the other is casual. The casual employee, thus, is disadvantaged in not having *secure* employment despite still *having* employment. See Wolff *et al.* (2007) part one. See also Shue (1996) p.13, and Ashford (2007)

therefore, partly shaped and determined by the cultural structures within which we live. Any interest in meeting or securing needs, then, requires that we engage with these structures.

Likewise, it is difficult to imagine goals that do not rely on or include others. This is not just a story about the kind of social framework within which goals make sense (which is also important), but about the nature of our goals themselves. For instance, it is hard to imagine achieving or pursuing goals on our own. Sure, we might pursue them in our own way, but we certainly do not pursue them without the assistance of at least some others. Moreover, how we pursue our goals depends on the cultural contexts within which we find ourselves in, and so what pursuits we take to be possible are heavily dependant on the cultural groups, and structures within which we exist.[22] In other words, the availability, nature, and pursuit of goals tend to be culturally dependant. It is, thus, difficult if not impossible, to imagine needs and goals entirely and exclusively as things which relate *solely* to individuals.

To be sure, none of what we have so far said is at odds with Nussbaum's capability approach. Nussbaum makes the same claims in relation to the list of capabilities and in her concern with vulnerability. Even so, and as far as indigeneity and indigenous self-determination is concerned, this understanding of needs and goals is not quite enough. Our concern here is whether it makes sense to refer to the needs and goals of indigenous *peoples*. In other words, are there needs and/or goals that indigenous peoples require so to ensure that they are able to exist and continue to exist? Of course, we have already pointed out that indigenous peoples exist even in the absence of (recognised or secure) self-determination.[23] On the back of this claim, one response would certainly be no. Yet, this would overlook that indigenous peoples (while they certainly exist) are less than *secure* in there existence.[24] The sinking island example provides us with a good metaphor to illustrate this. Without some changes, it is inevitable that one day they will cease to be able to exist in ways and on lands that are meaningful to them. There is, then, still good reason to ask whether needs and goals ought to apply to indigenous peoples.

Recall that it was difficult for the capability approach to un-problematically take on board indigenous self-determination because dignity is captured (in large part, even if it is not entirely)

[22] Of course, this is not to say that we have no choice at all. As Sen contends, one can be situated within a cultural context and still make critically meaningful choices, see Sen (2007) pp.32-6
[23] For instance, and despite China (recently) claiming that there are no indigenous peoples in China, there is still a strong sense of (indigenous) identity amongst Taiwanese and Tibetan peoples. See Mendes *et al.* (2009)
[24] Trask (2008)

by a list of capabilities. So, even if we could maintain that dignity (in some measure) could apply to indigenous peoples (or indeed any group), we needed to back this up by demonstrating that indigenous self-determination was included (or could be included) within the list. However, this strategy turned to place a number of key features and the list itself under pressure. It gave us reason to question whether indigenous self-determination is best captured by a list for human dignity at all – and so gave us reason to seriously question whether the capability approach could accommodate indigenous peoples.

It looks, then, comparatively simple to include indigenous peoples within the distinction between needs and goals. To be fair, in large part this is simply because there is no specific list. In other words, it is because we have not (and need not) flesh out the space of needs in a way that is likely to limit how applicable the space of needs and goals are. We need, then only to ask whether it makes sense to say that indigenous peoples have needs and goals. Of course, if self-determination is concerned with ensuring that the existence of indigenous peoples is both possible and (more importantly) secure, then self-determination can certainly be described as a need. What's more, it seems consistent to say that indigenous self-determination partly consists in indigenous peoples being able to pursue their own goals in their own way.[25] It seems then, that both needs and goals provide us with a way of making sense of self-determination.

Of course, this is not to say that this is all the work done. Adding indigenous peoples to the space of needs (as adding nonhuman animals and the environment) complicates the conflicts that arise and the decisions that we can make (considered in section 8.2.3). There is also the concern that even needs and goals rely on particular functionings. In other words, ensuring that peoples are able to be self-determining (as the sinking island case and semi-nomadic people case shows us) relies on what we *do*, not so much on what we are capable of doing (considered further in section 8.2.2). For the time being, at least, the needs and goals distinction has managed to *include* indigenous self-determination without too much problem at all. While this is not quite the end of the story just yet, it is so far an improvement for the capability approach.

8.2.2 Capturing the Importance of Indigeneity: Including Other Goods

[25] Mulgan (2002) p.193

So far, we have claimed that needs and goals in their generality and flexibility are able to include indigenous self-determination. But what about capturing the importance of indigeneity itself? Moreover, what about the inclusion of other goods?

One conclusion in the last chapter was that including indigenous self-determination was not enough. We claimed that we had to be able to capture the contribution that indigenous world views themselves could make to the way we develop and choose to live. More importantly, we highlighted – with reference to two examples (the semi-nomadic peoples and the sinking island population) – that it is difficult to exclude the indigenous voice if our concern is to ensure that all peoples are self-determining. What's more, our examples helped us to see that there is diversity between peoples that a concern for freedom (and capability) is unlikely to capture.

Can a differentiation between needs and goals capture these different world views? In one sense our answer ought to be yes. We could say that valuing inanimate objects and the environment, as part of an indigenous world view, is a need. It is, one might argue, fundamental to the existence and continued existence of indigenous peoples to capture or draw on these values. However, there is reason to look for another space within which to capture these differences. This is because while we might claim that they are needs, we still need to highlight the way that these needs cannot be subsumed (entirely) within the capability space. Recall, that we pointed out that sometimes actual functionings are far more valuable for indigenous peoples. Thus, we need a way of capturing the way in which indigenous worldviews cannot be subsumed entirely under a differentiation between needs and goals alone.

Surprisingly, then, the space of *other goods* turns out to provide us with a way forward. The inclusion of other goods has so far been (in large part) on the back of the claim that there are things which might be good for nonhuman animals and/or the mentally impaired to have or to do which cannot be captured by needs or goals. However, here we see that there are things that a concern for including indigenous peoples brings about that do not sit well within a capability-centred framework. What we need is a space to include not just more than needs and goals, then, but more than a concern with and for capability.[26] What we need, in other words, and what the space of other goods gives us, is a way of taking this into account. The inclusion of other goods

[26] We might think that this marks a deviation away from the capability approach. As we pointed out in chapter one, even the capability approach accepts that more than the capability space matters, so this move is entirely consistent with the approach.

turns out to be central to capturing the importance of indigeneity, and to recognise how these other goods (including the value placed in land, rocks, and the environment for their own sake) impact on the needs and goals of indigenous individuals and peoples. Most importantly, it provides us with a space within which to view and to consider what we ought to place value in, and what the indigenous voice contributes to answering this question.

We might think that the space of other goods now looks to be complicated. Including values now means that the space of other goods is both within and outside of the capability approach (since we want to leave room for more than capabilities). Indeed, the space of other goods is (as we said in chapter four) broad and inclusive. But this is, in one respect, precisely because it is an open question as to what we include within it (a point we made in relation to the uncertainty surrounding future people). It is, in other words, a site of conflict itself. Thus, including values within the space of other goods helps us to clarify rather than complicate other goods. Not only does it reinforce that there is a need for a third space, but it shows us that Mulgan's framework is able to accommodate new challenges as they arise. It shows us how inclusive and adaptable the capability approach (with these insights) can be.

8.2.3 The Problem of Conflicts

Being able to capture the importance of indigeneity is good news, but it also brings our attention to what has become (at least within this project) a familiar problem. That is, we find ourselves with questions about how we resolve the conflicts that are likely to result. We have considered the question of conflicts in light of the needs, goals, and other goods distinction in enough detail. However, it is worth pointing out that the inclusion of indigenous peoples adds to and clarifies the way in which conflicts often occur. For a start, it is important to highlight that now we see that conflicts between and within needs, goals, and other goods occur between both individuals and peoples. The inclusion of indigenous peoples brings this to life for us, and helps us to understand how and why this is so.

Take the example of the sinking island. Let's say that we live on a neighbouring island and that we have a national wildlife park pretty much the size of the sinking island. The national park is resource rich and something that we wish to preserve for future people. We know that the needs of our current and future people (and wildlife) are now in conflict with the needs of current and future islanders. Do we allow them to migrate to our island on the grounds that they integrate

with the majority culture? Do we give them our national park to preserve what they can of their way of life? More importantly, will doing either of these things really make up for the losses that they will have suffered in having to migrate away from ancestral lands? This helps us to understand just how important, but also controversial, our choices are, and how difficult ignoring these conflicts really is. It also helps us to see that the conflicts are, in large measure, about what we value and ought to value.

Does the introduction of indigenous peoples change the shape of the way in which components feature structurally? Recall that one benefit of the distinction is that it gives us a way of making sense of responsibilities. This is because it focuses on what we are able to do and be, and highlights that we stand in different need, goal, and other goods based relationships with each other. The introduction of indigenous peoples reinforces this structure by providing us with the following insights. First it reinforces that we stand in relations with others in terms of what we *value* – and what we place value in (other goods). Secondly, and in relation to the first, we can see that one way of contributing to the lives of others is by affirming or adopting what it is that they value (for instance, as individuals or communities we might agree with the sentiments of the semi-nomadic peoples and adopt their way of life, or think of ways of limiting our affect on the environment). Finally, the inclusion of indigenous peoples helps us to recognise that we ought to see ourselves not merely as individuals that stand in moral relations with others. Rather, we ought to see ourselves as part of a number of overlapping communities and peoples that stand in relations with other communities and peoples.

8.2.4 Individuals or Groups?

Of course, our discussion does not amount to the claim that there are no severe conflicts between individuals and peoples within the needs, goals, and other goods framework. Indeed, the introduction of indigenous peoples shows us that we make choices that have consequences, not just for individuals, but for entire peoples. The claim then, is simply that the needs, goals, and other goods framework will help us to locate the conflicts and to see that some are likely to be more severe than others. Our chapter devoted to future people demonstrated that the lexical view could provide us with a way forward. Recall that this is because the lexical level allows us to say that no amount of needs (and we could add other goods) could make up for a significant reduction in goals (and we could add, what we value). This raises an obvious question: can the lexical view play a role here?

If we apply the lexical level to indigenous peoples then we could say that existence (mere needs) is pointless without at least self-determination and (at least a sufficient amount of) indigenous goals. Indeed, if we apply this to the sinking island case, we can see why (if they are unable to remain on their own island) occupying our national wildlife park is the only option worth taking. At least, it's not clear whether (in the absence of being able to pursue goals as a people) the option of migrating to and integrating into our culture is even an option at all (at least for the existence of the islanders as peoples). What's more, the lexical level also gives us a way of explaining why the sinking island case may be far worse than the semi-nomadic people case. Without some intervention or support the sinking island people will never be able to pursue and realise any goals at all. The semi-nomadic people, on the other hand, are still able to pursue (at least) some goals despite serious limitations on what they can be.

Perhaps we could also say that goals held by individuals could be limited when they are in conflict with the needs and goals of peoples. For instance, perhaps the goals that I pursue and choose to pursue are largely responsible for the sinking island. It seems that on such a view, and given that there are a number of goals that I could pursue, many of which would not lead to rising sea levels, I simply ought to pursue alternative goals. To be clear, this is not based on the fact that there are a number of sinking islanders, and only (as it happens) one of me. On the contrary, it is enough to say that the sinking islanders' needs and their ability to pursue any goals at all is what is decisive. My well-being would not be severely jeopardised by limitations on the content or realisation of my goals, whereas the sinking islanders would. There is, in other words, a serious question about what those of us above the lexical level ought to sacrifice to ensure that others are able to reach it (or in this case, so to ensure that others do not fall below it). It looks as if, then, the lexical level could play a role here, and provide us with (at least) one way forward.

We might say, at this point, that while we have one way of determining which conflicts are more urgent, we are still left with the question of whose responsibility this is. After all, it is one thing to say something about what should and could be done, but quite another (and perhaps even more controversial) to say who ought to do it. This is especially so in the case of the sinking island. Recall that many states adopted the declaration on the back of the claim that no indigenous peoples were within their territories. In other words, the claim was that *they* were under no obligation to implement the declaration despite being in support of it. However, and as we have pointed out, the distinction (and indeed, a focus on what one is able to do and be)

impels us to say something about obligations. It prompts us to ask what we as individuals and communities are able to do for others based on the relations within which we stand with them. This helps us to see that we all stand in relationships with indigenous peoples (as we do with all peoples). So the fact that only some states include indigenous peoples within them, does not (itself) lead us to the conclusion that some of us have no obligations at all. The needs, goals, and other goods distinction (and indeed the capability approach with its focus on what we are able to do and be) endorses the view that we each stand in (at least) some relation (needs, goals, or other goods) with indigenous peoples. For this reason, we all have obligations of at least some kind to indigenous peoples as indeed we have to all peoples and to each other.

It seems, then, that the needs, goals, and other goods distinction is able to deal quite well with questions about indigeneity (and culture more generally). Not only does the distinction manage to make sense of indigenous self-determination and to include indigeneity itself, but it manages to give us a way of making sense of the inevitable conflicts that arise. Again, it seems that we have good reason to explore this alternative further.

8.3 Conclusion

Our aim in this chapter has been to achieve two things. First, we wanted to demonstrate that the capability approach can include indigenous peoples (and so all peoples) within its framework. To do this we had to redevelop the capability approach by focusing on a distinction between needs, goals, and other goods. This was because Nussbaum's list of capabilities was not able to include indigenous self-determination without some major departures. At least, it wasn't clear whether Nussbaum could make sense of the way that indigenous self-determination fit into the list. The second point we wanted to make was that we could say something about how we could deal with including indigenous peoples. As we have claimed throughout this project, it is not quite enough to include cases as they arise. What we need is to be able to take on board the insights that they generate, while responding to the challenges that they bring.

It is, then, on this second issue that we have made the most progress. We have shown that the lexical level provides us with (at least) one way of making sense of the conflicts that arise between peoples' needs, goals, and other goods. More than this, however, we have demonstrated that we need a way of grounding the capability approach that is open to these new developments and that leaves open the possibility of moving beyond a focus on capability alone. In other

words, we need to take on board the challenges that arise even if doing so relies on a richer framework itself. We were able to do so by focusing on the importance and significance of other goods, and by showing that this pluralistic three way distinction is still both simpler and richer than a list of capabilities. What we have shown, then, is that Mulgan's needs and goals framework is able to adapt as these new problems shape it. In doing so, we have shown that this flexibility is able to enrich and strengthen the capability approach when indigenous peoples (or more generally, issues of culture) come into play.

8.4 Main Conclusion

We started our final chapter with the claim that the capability approach is a good place to start if our concern is to make sense of key features of the Declaration on the Rights of Indigenous Peoples. Of course, this entire project is built on the view that the capability approach is a good place to start. On all of the issues that we have examined, we have tried to highlight that the capability approach is well-suited to deal with each of them. What's more, we have tried to demonstrate that the approach has the resources available to move forward. Indeed, even after highlighting a number of concerns with the approach along the way, this project still sees itself working with and within the capability approach (albeit at the foundations).

The alternative presented here is not, then (we ought to say), miles away from Nussbaum or Sen. While we focus, in large part, on Nussbaum's approach to draw out problems, we also focus on Nussbaum because this project agrees that Nussbaum's version is the most developed available. We are, then, primarily in agreement with Nussbaum's aims, despite justifying the alternative based on problems within it. Likewise, we emphasise that the needs, goals, and other goods distinction is very much in the spirit of the kind of approach that Sen advances. Albeit one that is also able to accommodate the challenges that Nussbaum examines. The alternative presented here is, then, shaped in light of both Sen and Nussbaum, and in light of the problems that their articulations of the approach face.

This project has, therefore, been directed toward the question of how we might develop the capability approach. It has been concerned with locating what the challenges are, and finding out whether the capability approach (in some form) is able to deal with them. Our conclusion is largely positive. The alternative that we present here is meant to provide the capability approach with a way forward on a number of important real world challenges. The aim has been to put the

capability approach in a position where it is able to make sense of what is at stake, and to have a clear sense of the options we have for moving forward. Our main aim, then, has been to demonstrate that the needs, goals, and other goods distinction is able to strengthen the capability approach.

On the back of this aim, we have managed to demonstrate the following:

1. The distinction gives the capability approach a way of making sense of all of what is at stake. For instance, it brings to life the conflicts that we face and it shows us what the costs of opting for one course of action or policy over another will inevitably be.
2. The distinction provides the capability approach with a way to approach the questions that we have considered. At least, it shows us that we needn't limit ourselves to viewing problems as rooted primarily in questions about who ought to be included, or what the unit or scope of concern ought to be. Instead, the distinction shows us that we can approach problems in a way that impacts on these questions without being limited by them.
3. The distinction, then, also gives the capability approach some clear options for moving forward on the conflicts that we faced, and shows us that we can get further without a rigid list of capabilities in the first instance.
4. The distinction helps us to draw out and generate obligations. The distinction helps us to see what results we get when we take the claim that we ought to focus on what we are capable of doing and being seriously. It shows us that a focus on capability itself prompts a real concern for others not just a concern for the options we have for our own lives.
5. Finally, the distinction helps us to capture just how important and relevant future people and indigenous peoples (and all peoples) are. The distinction helps us to see that there are serious questions raised by both of them and so good reason to think of ways to deal with them. More importantly, it shows us that there are serious questions surrounding whether we are able to consider these important questions within current articulations of the capability approach. The distinction helps us to see, that we can formulate an alternative capability theory that is better placed to deal with these (and possibly even other) problems.

Of course, as much as we have done, there are a good number of questions and challenges that this project has not examined. Not only are there questions about the capability approach itself, but also questions about what the needs, goals, and other goods distinction might say about a host of questions. In particular, one question that we have not considered here but which is certainly relevant is how the capability approach, and the needs, goals, and other goods distinction in particular, sits with or transforms our understanding of rights. In addition, there is likely to be a question about what demands the resulting theory makes and what our response to these demands are. In other words, there is a question of whether there are limits to the demands that we can make of individuals and communities insofar as needs, goals, and other goods are concerned. If there are, then there are questions about where this leaves the importance of needs, goals, and other goods.

This brings us to our final point. This project has not offered an answer to the conflicts, but only a number of ways of working such an answer out. We have not said whether we ought to limit the scope of the theory, restrict the content of needs and goals, leave some needs unmet, or adopt the lexical view (despite demonstrating how useful these options, and the lexical level in particular, may be). As we have said, these are all tough questions, but also questions that need to be answered (in at least some way) if we are to move forward. This might look, then, to be a cop out in one respect. It is important to stress, therefore, that it is not due to a lack of courage to make these tough decisions that this project stops short of doing so. Rather, it is in recognition of the importance of first being able to say anything at all. In so doing, we have provided the capability approach with a way of making sense of the problems that arise and a framework for moving forward. More significantly, we have demonstrated the kind of foundational changes the capability approach will require if it is to be 'responsive to the world and its most urgent problems'.[27]

[27] Nussbaum (2006a) p.1

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