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## A capabilities approach to best interests assessments

### INTRODUCTION

It is an accepted principle of domestic and international law and policy that the welfare or best interests of the child must be the primary or paramount consideration in any decision made with regard to that child's upbringing.<sup>1</sup> While this 'best interests standard' has become a core principle of welfare law, what might constitute a child or young person's best interests is given very little formal shape or content.<sup>2</sup> This has provoked sustained criticism from practitioners, academics and - at times - the judiciary. Much of this criticism has coalesced around the question of values, where it is claimed that the standard either lacks an underpinning framework of values to guide assessments, or that it enables prejudicial values to shape assessments with this then shielded by claims that the standard is neutral.<sup>3</sup> Notwithstanding this longstanding criticism, there has been limited success in offering credible alternatives to this flawed orthodoxy.<sup>4</sup>

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\*I would like to thank Ray Carr and Joshua Warburton for research assistance and Beth Goldblatt, Rosie Harding, Helen Stalford and the journal's anonymous reviewers for their comments on earlier drafts of this paper.

<sup>1</sup> For an account of the historical emergence and development of the best interests standard, see A Daly *Children, Autonomy, and the Courts* (Leiden: Brill, 2018) pp 73-82.

<sup>2</sup> In the UK and a number of other jurisdictions, the best interests standard is also mobilised in decision-making involving people who are deemed to lack capacity. This is enshrined in the Mental Capacity Act 2005. A growing literature has questioned the legitimacy of this standard in light of the requirements of the UN Convention on the Rights of People with Disabilities. See, for example, R Harding 'The rise of statutory wills and the limits of best interests decision-making in inheritance' (2015) 78(6) *Mod L Rev* 945; L Series 'The place of wishes and feelings in best interests decisions: *Wye Valley NHS Trust v Mr B*' (2016) 79(6) *Mod L Rev* 1101; C Johnston 'Patient narrative: an "on-switch" for evaluating best interests' (2016) 38(3) *JSWL* 249; M Donnelly, 'Best Interests in the Mental Capacity Act: Time to say Goodbye?' (2016) 24(3) *Med L Rev* 318. While the argument presented here draws on shared criticisms of the standard in both contexts, the proposed reforms address only those assessments concerning children.

<sup>3</sup> See below section 'Criticism of the standard and the question of values'.

<sup>4</sup> For an example of a positive intervention, see Daly, above n 1. Daly's 'Children's Autonomy Principle' is considered in the penultimate section, 'Implementing the capabilities approach in law'. It is also worth acknowledging the work that has taken place in bioethics to argue that best interests needs to be supplemented by a consideration of 'harm'. See, most influentially, D Diekema 'Parental refusals of medical treatment: the harm principle as threshold for state intervention' (2004) 25 *Theoretical Medicine and*

In response, this article argues that the capabilities approach developed by Amartya Sen, Martha Nussbaum, and others can give best interests assessments much needed normative content, thereby addressing many of the criticisms directed at the standard. The approach provides a theoretically nuanced framework for ‘theorizing about basic social justice’<sup>5</sup> and for evaluation, deliberation, and policy development across social welfare sectors.<sup>6</sup> Grounded in significant and on-going theoretical and empirical work, the framework provides that well-being and justice are best conceptualised in terms of people’s capabilities; that is the ‘options or choices open to the person’.<sup>7</sup> The theory focuses on what is required from states (and others) in order to foster individual opportunity or freedom, and - through this - human well-being and flourishing. As Sridhar Venkatapuram summarises, advocates of the approach: ‘champion the central idea that the well-being of individuals is *best* reflected in and promoted through their capabilities to be and do.’<sup>8</sup> In arguing for the adoption of a capabilities approach to best interests assessments, this article sets out an agenda for change. It addresses the conceptual and methodological justifications for this change, and explores the empirical work that would need to take place. Further, it identifies the steps and underlying principles necessary for a best interests process aligned

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Bioethics 243. However, this has faced some of the same criticism; specifically, that it fails to address the key issue of indeterminacy. As Giles Birchley argues, ‘All we have done is rename the best interests test while dealing with none of its failings’, G Birchley ‘Harm is all you need? Best interests and disputes about parental decision-making’ (2016) 42 *Journal of Medical Ethics* 111, p 114. The idea that ‘harm’ has a pivotal role in the test was recently rejected by the court in *Re Charles Gard* [2017] EWCA Civ 410, 20 105. See E Cave and E Nottingham ‘Who knows best (interests)? The case of Charlie Gard’ (2017) 26(3) *Med L Rev* 500

<sup>5</sup> M Nussbaum *Creating Capabilities: The Human Development Approach* (Cambridge, Mass.: Harvard University Press, 2011) p 18.

<sup>6</sup> See, for example, *ibid*; A Sen ‘Equality of what?’ in SM McMurrin (ed), *The Tanner Lectures on Human Value* (Salt Lake City: University of Utah Press, 1980) pp 195-220; A Sen *Inequality Re-examined* (Oxford: Clarendon Press 1992); M Nussbaum and A Sen (eds) *The Quality of Life* (Oxford: Oxford University Press, 1993); A Sen *Development as Freedom* (Oxford: Oxford University Press, 1999); and A Sen *The Idea of Justice* (London: Penguin, 2010); M Nussbaum *Women and Human Development: The Capabilities approach* (New York: Cambridge University Press, 2000).

<sup>7</sup> DA Crocker ‘Functioning and capability: the foundation of Sen’s and Nussbaum’s development ethic, part II’ in M Nussbaum and J Glover (eds) *Women, Culture and Development: A Study of Human Capabilities* (Oxford: Oxford University Press, 1995) p 162.

<sup>8</sup> S Venkatapuram *Health Justice* (Oxford: Polity, 2011).

with the capabilities approach. As such, the necessary foundations for a radical reconceptualization of best interests assessments are provided.

The article starts by outlining the best interests standard, including an account of the criticism the standard has attracted, before the capabilities approach is then introduced. This is followed by a theoretical justification for its mobilisation in best interests assessments based on the rights of children and the broader societal interest in human development. The practical dimensions and application of the approach are also explored, foregrounding its flexibility and adaptability. In arguing that the capabilities approach can provide the underpinning values and deliberative framework for best interests assessments, the development of capabilities lists relevant to the lives of children are considered. This exploration highlights the empirical work mandated by the approach which embeds the commitment to agency into its operationalization. The Children's Measurement Framework (CMF) developed by the UK Equality and Human Rights Commission (EHRC) for measuring inequalities experienced by children provides an illustrative focus.<sup>9</sup>

In delivering this response to long identified deficits in the current legal standard, it is not argued that we should jettison the best interests standard.<sup>10</sup> Rather, given its 'powerful symbolic meaning'<sup>11</sup> and entrenched position in law and policy, it is argued that the capabilities approach can provide an appropriate framework for the pragmatic adjudication

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<sup>9</sup> Equality and Human Rights Commission *Measurement Framework for Equality and Human Rights* (2017), available at <https://www.equalityhumanrights.com/sites/default/files/measurement-framework-interactive.pdf>

<sup>10</sup> Aoife Daly also argues for retaining the standard on the basis that it necessitates that we focus on the child's interests (above n 1, p 82), but argues that it is flawed in the way children's wishes are treated. Helen Stalford and Kathryn Hollingsworth similarly defend the best interest principle arguing that current weaknesses in its application derive - in part - from the general failure to recognise best interest as a distinct right. H Stalford and K Hollingsworth 'Judging children's rights: tendencies, tensions, constraints, and opportunities' in H Stalford, K Hollingsworth, and S Gilmore (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Oxford: Hart, 2017) p 35.

<sup>11</sup> E Godbout, C Parent, and MC Saint-Jacques 'Positions taken by judges and custody experts on issues relating to the best interests of children in custody disputes in Québec' (2015) 29(3) *IJLPF* 272, p 273.

involved in best interests determinations.<sup>12</sup> John Coggon has identified the standard as a ‘construct’ rather than as a single concept,<sup>13</sup> with law aiming to provide ‘questions and processes... that work to make it legitimate.’<sup>14</sup> This article addresses weaknesses in existing efforts to structure deliberation and secure legitimacy.

The capabilities approach has long been influential in low and middle income countries and in development studies and policy.<sup>15</sup> For instance, since 1990 the United Nations Development Programme’s *Human Development Reports* have used capabilities as a measure of inter-country quality of life comparisons and to articulate goals for public policy.<sup>16</sup> In the last two decades scholars have begun to apply the approach to high-income countries, with areas such as education, health, and welfare policy identified as sites where the capability approach has much to contribute.<sup>17</sup> The aim here is to further advance the development of the approach in two regards. First, where the approach has been operationalised it has primarily been for measurement and monitoring. The argument presented here explores its function as a deliberative framework for assessing and promoting individual best interests. Second, while prominent in development studies, economics, philosophy, and health sciences amongst other disciplines, legal scholars have been somewhat tentative in comparison in exploring the utility of this framework.<sup>18</sup> In

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<sup>12</sup> S McGuinness ‘Best interests and pragmatism’ (2008) 16(3) *Health Care Anal* 208.

<sup>13</sup> J Coggon ‘Best interests, public interest, and the power of the medical profession’ (2008) 16 *Health Care Anal* 219, p 220.

<sup>14</sup> *Ibid.*

<sup>15</sup> S Alkire *Valuing Freedoms* (Oxford: Oxford University Press, 2002).

<sup>16</sup> A Sen ‘A decade of human development’ (2000) 1 *Journal of Human Development* 17.

<sup>17</sup> S Anand, F Peter and A Sen (eds) *Public Health, Ethics and Equity* (Oxford: Oxford University Press, 2004); P Anand and P Dolan (eds) ‘Equity, capabilities and health’ (2005) 60(2) *Social Science and Medicine* 219; and P Dolan and JA Olsen *Distributing Health Care: Economic and Ethical Issues* (Oxford: Oxford University Press, 2002).

<sup>18</sup> While the approach has made less impact on legal studies than some other disciplines, see the following examples from legal scholars: S Deakin *The ‘Capability’ Concept and the Evolution of European Social Policy* (ESRC Centre for Business Research, University of Cambridge Working Paper no 303, 1, 2005); BA Goldblatt ‘Gender and social assistance in the first decade of democracy: A case study of South Africa’s Child Support

providing a detailed justification for its adoption in child law, the aim is not only to address the failing best interest standard, but also encourage a greater engagement with the capabilities approach in legal studies and practice.

## THE BEST INTERESTS STANDARD

Section 1(1) of the Children Act 1989 provides that:

When a court determines any question with respect to -

- (a) the upbringing of a child; or
- (b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

Article 3.1 of the United Nations Convention on the Rights of the Child (UNCRC) similarly states:

In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

*Welfare* and *best interests* have become synonymous and in some contexts are used interchangeably. This, of course, raises concerns regarding clarity and consistency. Further,

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Grant' (2005) 32(2) *Politikon* 239; S Deakin and A Koukiadaki *The Capability Approach and Corporate Restructuring: UK Sectoral and Enterprise-based Case Studies* (Resources Rights and Capabilities in Europe, Cambridge Centre for Business Research 50, 2009); S Deakin and R Rogowski 'Reflexive labour law, capabilities and the future of social Europe' in R Rogowski, R Salais, and N Whiteside *Transforming European Employment Policy: Labour Market Transitions and the Promotion of Capability* (Cheltenham: Edward Elgar, 2011); R Dixon and M Nussbaum 'Children's rights and a capabilities approach: the question of special priority' (2012) 97 *Cornell Law Review* 549, p 564; M Fox and M Thomson 'Realising social justice in public health law' (2013) 21(2) *Med L Rev* 278; R Del Punta 'Labour law and the capability approach' (2016) 32(4) *International Journal of Comparative Labour Law and Industrial Relations* 383; R Claassen and A Gerbrandy 'Rethinking European competition law: from a consumer welfare to a capability approach' (2016) 12(1) *Utrecht Law Review* 1.

Helen Stalford and Kathryn Hollingsworth note that in the UK the judiciary favour welfare, 'perhaps because it chimes with a traditional, paternalistic approach to protecting children.'<sup>19</sup> This focus on welfare, perpetuating ideas of 'benevolence and charity', undermines the concept of best interests as a distinct children's right:

[T]he implication is that by engaging in a rigorous welfare assessment, particularly if it is treated as of paramount importance compared to other considerations, the courts are automatically fulfilling their obligations pertaining to children's rights. But the conflation of these two concepts has obscured and even undermined the currency of best interests as a distinct 'right' and perpetuated... narrower paternalistic interpretations.<sup>20</sup>

It is important to acknowledge that notwithstanding these problems and the criticisms detailed below, some judges deliver rigorous best interest assessments. As Stalford and Hollingsworth note, 'Many judges navigate this role with notable skill and humanity to produce inspired decisions, sometimes in the context of highly complex, legally technical cases.'<sup>21</sup> Here they draw attention to two judgements by Lady Hale.<sup>22</sup> It is also worth noting Lord Justice Munby who has done much to positively develop best interests jurisprudence, asserting the need for the 'judicial reasonable parent' to reflect changing community

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<sup>19</sup> Stalford and Hollingsworth, above n 10, p 34.

<sup>20</sup> Ibid, p 35. Further difficulties arise with differing detail in the formulations, whether this is reliance on 'paramount' or 'primary' at international and domestic levels, or the shift between '*a* primary' and '*the* primary' within different UK provisions. For a consideration of the different phrasing, see D Archard *Children Rights & Childhood* (London: Routledge, 2nd edn, 2004) p 67.

<sup>21</sup> Stalford and Hollingsworth above n 10, p 30.

<sup>22</sup> *ZH v (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 or *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 WLR 1449.

standards.<sup>23</sup> In particular, Munby LJ has emphasised the importance of engaging community expectations around tolerance and the overarching obligation on parents to promote the opportunities of children and young people, a core objective of the capabilities approach and a point returned to below.<sup>24</sup> Notwithstanding such examples, it can be concluded that ‘children are routinely prey to poor judicial processes and decision-making tendencies, often with damaging consequences for the individual child... and for children’s rights more generally.’<sup>25</sup> In terms of poor decision-making tendencies, Stalford and Hollingsworth highlight the reliance on fixed conceptualisations of children and childhood, continuing failure to see children as rights-holders, the undermining of children’s autonomy, and the ‘tendency to obscure best interests assessments’.<sup>26</sup> This final observation joins the wide-ranging and sustained criticism of the standard that is addressed in the next section.

### **Criticism of the standard and the question of values**

It has long been argued that the best interests standard lacks content,<sup>27</sup> leaving it unacceptably vague,<sup>28</sup> opaque,<sup>29</sup> and vacuous.<sup>30</sup> This underpins claims that it is indeterminate,<sup>31</sup> uncertain,<sup>32</sup> and unpredictable;<sup>33</sup> resembling ‘a sociological model rather

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<sup>23</sup> See, for example, *Re G (Children)* [2012] EWCA 1233 and *Re M (Children)* [2017] EWCA Civ 2164. For a discussion of these cases, see D Monk, ‘Muscular Liberalism and the best interests of the child’ (2018) 77 (2) *Cambridge Law Journal* 261.

<sup>24</sup> See below, at n 106.

<sup>25</sup> Stalford and Hollingsworth above n 10, p 30.

<sup>26</sup> *Ibid.*

<sup>27</sup> I Kennedy *Treat Me Right* (Oxford: Clarendon Press, 1992)

<sup>28</sup> Daly above n 1, p 72. R Mnookin ‘Child-custody adjudication: judicial functions in the face of indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226

<sup>29</sup> Birchley above n 4.

<sup>30</sup> J Eekelaar ‘The role of the best interests principle in decisions affecting children and decisions about children’ (2015) 23(1) *International Journal of Children’s Rights* 3.

<sup>31</sup> Birchley above n 4, p 111.

<sup>32</sup> McGuinness above n 12, p 210.

<sup>33</sup> S Choudhry ‘Best interests in the MCA 2005 – What can healthcare law learn from family law’ (2008) 16(3) *Health Care Anal* 240; HJ Taylor ‘What are “best interests”? A critical evaluation of “best interests” decision-making in clinical practice’ (2016) 24(2) *Med L Rev* 176.



than a solid juridical standard.<sup>34</sup> More specifically, it is charged that it operates to advance parental and professional interests and values,<sup>35</sup> where it may be conflated with ‘best medical interests’,<sup>36</sup> or may obscure the prejudices and common-sense notions of decision-makers,<sup>37</sup> judiciary,<sup>38</sup> and wider society.<sup>39</sup> As Aoife Daly has recently argued, the principle is ‘drastically failing children’.<sup>40</sup>

Whilst space precludes an engagement with all aspects of this criticism, it is possible to understand and order this criticism by reference to the question of *values*. The concerns are that assessments are made with either no regard to values, or with values that we would now see as unacceptable. These two positions are elaborated below. In the last part of this section a further concern regarding values is raised. The best interests standard is a feature of welfare law across different contexts and jurisdictions. While the current focus is decision-making with and for children and young people, the following section also draws on criticisms that have been generated in response to the Mental Capacity Act 2005 (MCA). While each is served by a distinct developmental history and jurisprudence which makes aspects of their application distinct, they share a number of fundamental weaknesses. While these criticisms can be brought together, reform considerations differ, particularly the pressing question of whether best interests provisions of the MCA are compliant with the United Nations Convention on the Rights of People with Disabilities.<sup>41</sup>

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<sup>34</sup> Daly above n 1, p 94.

<sup>35</sup> M Fox and M Thomson ‘Reconsidering “best interests”: male circumcision and the rights of the child’ in G Denniston, F Hodges, and M Milos (eds) *Circumcision and Human Rights* (Dordrecht: Springer, 2009) 15.

<sup>36</sup> Taylor above n 33.

<sup>37</sup> P Fennell ‘Best interests and treatment for mental disorder’ (2008) 16(3) *Health Care Anal* 255

<sup>38</sup> J Eekelaar ‘“Trust the judges”: how far should family law go?’ 7(5) *Mod Law Rev* 593; M King ‘Playing the symbols – custody and the Law Commission’ (1987) 17(4) *FL* 186; J Harrington ‘Deciding best interests: medical progress, clinical judgement, and the “good family”’ [2003] *Web JCLI* 81.

<sup>39</sup> A Diduck and F Kaganas *Family Law, Gender and the State* (Oxford: Hart, 2006), p 301.

<sup>40</sup> Daly above n 1, p 9.

<sup>41</sup> See above n 2.

## NO VALUES

Writing extra-judicially, Munby LJ has argued that what is meant by best interests is ‘neither self-evident nor altogether clear.’ He notes that courts have given ‘surprisingly little consideration’ to the question, and notwithstanding continued criticism, they have ‘failed, and even on occasions refused to articulate any principles or values to be applied in operating the best interests test.’<sup>42</sup> Also commenting on this failure to articulate values, Brennan J observes that the standard abrogates the decision-making to experts. Thus, a ‘complex moral and social question’ is transformed ‘into a question of fact... in the hands of “experts” who assemble a dossier of fact and opinion on matters which they deem relevant’.<sup>43</sup> Related to this, we have at times seen aspects of welfare unitised with benefits and disbenefits tallied with little or no normative reasoning or justification. We see this very clearly in Lord Justice Thorpe’s direction in *Re A (medical treatment: male sterilisation)* [2000] that a judge making a best interests evaluation should ‘draw up a balance sheet’, weighing ‘factors of actual benefit’ against ‘any counter balancing dis-benefits’.<sup>44</sup> This has proved to be a popular direction to lower courts, and perhaps it is superficially attractive, but it does beg serious questions as to how fundamental rights are treated within such calculations.<sup>45</sup>

## THE WRONG VALUES

The best interests standard works on individualised assessments and prediction. Here the courts have been at pains to stress that they judge each case on its unique merits and that

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<sup>42</sup> LJ Munby ‘Consent to treatment’ in A Grubb, J Laing, and J McHale (eds) *Principles of Medical Law* (Oxford, Oxford University Press, 1992), p 548.

<sup>43</sup> *Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 270 per Brennan J

<sup>44</sup> *Re A (medical treatment: male sterilisation)* [2000] 1 FLR 549.

<sup>45</sup> M Fox and M Thomson ‘Bodily integrity, embodiment, and the regulation of parental choice’ (2017) 44(4) *J Law & Soc* 501.

the calculation is an individual exercise removed from generalisations.<sup>46</sup> Yet, it has been contended that assessments and decisions are informed by more than the facts of each individual case. Indeed, the claim to the uniqueness of each case has itself been seen as a means of obscuring the values engaged by judges in their reasoning.<sup>47</sup> In this, the test has been criticised as being too subjective and allowing room for personal prejudice in decision-making.<sup>48</sup> Others, however, argue that rather than individual prejudice, the current standard obscures the influence of systemic or societal values or prejudices, acting as an ‘alibi for dominant ideology’.<sup>49</sup> Helen Reece, for instance, argues that the indeterminacy of child welfare knowledge has allowed other values to ‘exert an influence from behind the smoke screen of the paramountcy principle.’<sup>50</sup> This can include, for example, prejudices shaped by heteronormative or ‘pro-Christian/”Western”’<sup>51</sup> sentiment or bias. Alison Diduck and Felicity Kaganas argue that the way best interests are interpreted and determined owes less to scientific evidence than to ‘understandings of the welfare of children that accord with prevailing beliefs about how families should be structured and what the roles of family members should be.’<sup>52</sup>

#### VALUES AND EVIDENCE

It is also important to approach the question of values from the perspective of evidence. Jonathan Herring and Charles Foster observe that behind judicial determinations of best

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<sup>46</sup> See, Diduck and Kaganas above n 39.

<sup>47</sup> See, D Bradley ‘Homosexuality and Child Custody in English Law’ (1987) 1(2) *IJLPF* 155.

<sup>48</sup> See, Eekelaar above n 38; King, above n 38.

<sup>49</sup> I Thery ‘”The interests of the child” and the regulation of post-divorce family’ in C Smart and S Sevenhuijsen (eds) *Child Custody and the Politics of Gender* (London: Routledge, 1989), p 81.

<sup>50</sup> H Reece ‘The paramountcy principle: consensus or construct’ (1996) 49(1) *Current Legal Problems* 267, pp 295-6. Diduck and Kaganas above n 39, p 301. See also, Harrington, above n 38.

<sup>51</sup> Daly above n 1.

<sup>52</sup> Diduck and Kaganas above n 39, p 301.

interests ‘there lies an essentially Aristotelian notion of “the good life”’.<sup>53</sup> More generally, they contend that it ‘is a routine part of judicial business to take a view about what human beings quintessentially are and how they can best live.’<sup>54</sup> However, even while Herring and Foster go so far as to assert that a ‘judge’s job in determining best interests can more accurately be described as maximising the flourishing of the human in question’ and ‘facilitat[ing] human thriving’,<sup>55</sup> they nevertheless argue against a philosophically explicit framework:

In the vast majority of cases there is little dispute over what is in a person’s best interests. In the truly difficult cases it is unlikely that a more detailed list of factors would create any more predictability than the straightforward best interests test.... Further,... a philosophically explicit protocol would quickly become tyrannous.<sup>56</sup>

This proposition is logically sustainable. Judges engage with an idea of the ‘good life’ and we probably want them to do this, but to articulate this with any detail in a protocol or best interests framework could be undesirable depending on how this is operationalised. Nevertheless, acknowledging that the judiciary (and others) engage particular values – importing ‘a normative view of the good life into their best interests determinations... saying that it is better for human beings to live in the prescribed way’<sup>57</sup> – should lead us to question what these values might be, especially in light of the criticism we have seen of the standard.<sup>58</sup> This is particularly important in the context of prejudice and discriminatory

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<sup>53</sup> J Herring and C Foster ‘Welfare means relationality, virtue and altruism’ (2012) 32 LS 480, p 492.

<sup>54</sup> Ibid, p 492, 494.

<sup>55</sup> Ibid, p 496-7.

<sup>56</sup> Ibid, p 483.

<sup>57</sup> Ibid, p 493-4.

<sup>58</sup> As Daly writes, the standard ‘permits the imposition not only of society’s dominant values, but those values of *the types of individuals that become judges* – generally white, middle class males (and always adults, of

values. Against this background, it is argued that it is better to be explicit about the values informing calculations, and to work with an evidence-base, even at the risk of this becoming tyrannous.

The next section introduces the capabilities approach before providing theoretical and practical justifications for its mobilisation in the current context. The approach can respond to the need for a robust theoretical framework underpinned by an evidence-base to inform our understanding of the 'good life' and human flourishing. As Giles Birchley argues, the best response to the key weakness of indeterminacy is 'specifying the values that should guide best interests decisions.'<sup>59</sup>

## THE CAPABILITIES APPROACH

Beginning with Sen's *Tanner Lecture 'Equality of What?'*,<sup>60</sup> Sen, Nussbaum, and others have developed the capabilities approach in four decades of work.<sup>61</sup> The approach provides the theoretical foundations for an alternative understanding of human flourishing and development. According to Nussbaum, it holds that: 'the key question to ask, when comparing societies and assessing them for their basic decency or justice, is, "What is each person able to do and to be?"'<sup>62</sup> Thus, it is argued that well-being and justice are best conceptualised in terms of people's capabilities to function; that is, their 'effective opportunities to undertake the actions and activities that they want to engage in, and be

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course.) There is evidence that judges' subjective preferences, rather than rational argumentation, may determine the outcome of cases.' Above n 1, p 94.

<sup>59</sup> Birchley above n 4, p 111.

<sup>60</sup> Sen (1980) above n 6, pp 195-220.

<sup>61</sup> See, for example, A Sen *Poverty and Famines* (Oxford: Clarendon Press, 1981); Sen (1992), above n 6; Nussbaum and Sen (eds), above n 6; Sen (1999), above n 6; Sen (2010), above n 6.

<sup>62</sup> Nussbaum above n 5, p 18.

whom they want to be'.<sup>63</sup> All capabilities together correspond to the overall freedom a person has to lead a life they have reason to value. It follows that the expansion of human capabilities should be the primary goal of public policy.

The approach can be understood as ethically individualistic. It takes each person as an end, providing a 'necessary counter-theory'<sup>64</sup> to models of welfare or development that rely on aggregated or averaged well-being, or familiar proxy measurements such as gross domestic or national product.<sup>65</sup> As such, the human development agenda is (re-)orientated towards individuals within a society rather than abstracted calculations. As Sen states, the capabilities approach 'proposes a serious departure from concentrating on the means of living to the actual opportunities of living.'<sup>66</sup> This attention to freedom or opportunity underpins a key focus on agency:

[T]he crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs. It thus commits itself to respect for people's powers of self-definition.<sup>67</sup>

In focusing on freedoms or opportunities, an important element of the approach is the attention paid to factors that influence the ability of individuals to convert resources into functionings; that is, to achieve what they want to be and do. These conversion factors

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<sup>63</sup> | Robeyns 'The capability approach: a theoretical survey' (2005) 6(1) Journal of Human Development 93, p 95.

<sup>64</sup> Nussbaum above n 5, ch 3.

<sup>65</sup> Sen (2010) above n 6, p 48. The move from resources to opportunities also challenges the economic instrumentalism of the human capital paradigm. As Dreze and Sen note, the 'bettering of a human life does not have to be justified by showing that a person with a better life is also a better producer.' J Dreze and A Sen, *India: Development and Participation* (Oxford: Oxford University Press, 2002), p 184.

<sup>66</sup> Sen (2010) above n 6, p 17.

<sup>67</sup> Nussbaum above n 5, p 18.

address the social, institutional, and structural arrangements that prevent or enable an individual's capacities to become effective opportunities and freedoms.<sup>68</sup> As Caroline Hart and Nicolas Brando explain:

They range from legal structures, environmental and social conditions to the most specific resources and skills needed to exercise freedoms. To be free to read, for example, children not only have to possess particular cognitive skills, but they strongly depend on the appropriate external conditions that allow them to effectively exercise this freedom.<sup>69</sup>

Sen and Nussbaum have worked together and separately in the development of the approach.<sup>70</sup> In both regards they share philosophical debts; notably to Aristotle, Adam Smith and Marx. They also share foundational concerns with human flourishing, freedom, and agency. Nevertheless, they have ultimately articulated quite different models. Some of this is a function of their disciplinary backgrounds: Sen is an economist and philosopher, Nussbaum a philosopher, legal theorist, and constitutional lawyer. Sen has sought a tool adaptable within policy contexts (for example, health and development), while Nussbaum has sought to articulate a universal framework of constitutional entitlements.<sup>71</sup> Much academic literature has focused on these differences,<sup>72</sup> and a particular concern has been the question of capabilities lists. While Nussbaum has generated a list of ten capabilities,<sup>73</sup>

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<sup>68</sup> CS Hart and N Brando 'A capability approach to children's well-being, agency and participatory rights in education' (2018) 53(3) *European Journal of Education* 293, p 298.

<sup>69</sup> *Ibid.*

<sup>70</sup> Eg Nussbaum and Sen above n 6.

<sup>71</sup> For a discussion of the differences in their work see Crocker, above n 7, parts 1 and 2.

<sup>72</sup> It is arguable that too much attention has been paid to the differences with commentators forgetting that their 'approaches are very closely related' and that they are 'allies in their critique of theories such as utilitarianism.' Robeyns above n 63, 103.

<sup>73</sup> Nussbaum has provided a list of central human capabilities although she stresses that any list must be subject to ongoing revision. She lists: life; bodily health; bodily integrity; senses, imagination, and thought;

Sen cautions against framing a definitive list ('a grand mausoleum'<sup>74</sup>) of capabilities. For Sen, the scope and valuation of capabilities in each context should be influenced 'by our own continued scrutiny and by the reach of public discussion'.<sup>75</sup> This reflects individual and collective agency. At the same time he has returned to certain basic capabilities such as education and health, and he has offered examples of intrinsically valuable capabilities (including being able to 'live long, escape avoidable morbidity, be well nourished, be able to read, write and communicate'.<sup>76</sup>) It is also helpful to note that Sen articulates capabilities in terms of an evaluative 'space',<sup>77</sup> with others referring to an informational or multidimensional space.<sup>78</sup>

The argument presented here draws on the work of both scholars, in part because of their shared foundational focus on human flourishing. It is important to note in this regard the degree to which they draw on Aristotle<sup>79</sup> and to recall Herring and Foster's assertion that an idea of the Aristotelian 'good life' underpins judicial best interests assessments.<sup>80</sup> The detailed work to clearly articulate what the 'good life' might require in terms of social and institutional scaffolding is important in this context. Beyond this, the argument relies on Sen's work to develop and defend the approach as a deliberative space that is responsive to context through the development of specific capabilities lists. The next section provides a

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emotions; practical reason; affiliation; other species; play; and political and material control over one's environment. M Nussbaum 'Well-being, contracts and capabilities' in L Manderson (ed) *Rethinking Well-Being* (Perth, API Network, 2005) 27-44, pp 41-2. See also, Nussbaum above n 5.

<sup>73</sup> Sen (2010) above n 6, p 242.

<sup>74</sup> A Sen 'Capabilities, lists, and public reason: continuing the conversation' in B Agarwal, J Humphries, I Robeyns, *Amartya Sen's Work and Ideas: A Gender Perspective* (London: Routledge, 2005) p 337.

<sup>75</sup> Sen (2010), above n 6, p 242.

<sup>76</sup> A Sen *Resources, Values and Development* (Oxford, Basil Blackwell, 1984), p 497.

<sup>77</sup> A Sen (1992) above n 6, p 43.

<sup>78</sup> J Ballet, M Biggeri, and F Comim 'Children's agency and the capability approach: a conceptual framework' in M Biggeri, J Ballet, and F Comim (eds) *Children and the Capability Approach* (London: Palgrave, 2011) p 34.

<sup>79</sup> See, JM Alexander *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Aldershot: Ashgate, 2008) 125.

<sup>80</sup> Herring and Foster above n 53, p 482.



theoretical justification for utilising the capabilities approach in best interests assessments before returning to the question of lists.

### **Theoretical justifications for a capabilities approach to best interests assessments**

Children do not feature prominently in what could be characterised as the founding literature of the approach. That is not to say, however, that children's importance to the human development project is not appreciated by the main architects. Indeed, Martha Nussbaum has subsequently argued, with Rosalind Dixon, that the approach is 'in its very nature intensely focused on early childhood, as a time when critical forms of support for development are either present or absent.'<sup>81</sup>

In the growing body of work that addresses children and capabilities, it is argued that attending to children's capabilities has a positive impact both at a personal and societal level. This can be translated to the two themes that Biggeri and Santi have identified as emerging in the field; that is, the 'process of evolving capabilities', and the idea of 'capable agents'.<sup>82</sup> The notion of *evolving capabilities* attempts to capture the dynamic interplay of capacity, opportunity and agency.<sup>83</sup> This recognises the complexity of promoting capabilities and foregrounds innate capacities, the fact that relevant capabilities change across the life course, and the central place of participation in decision-making. The idea of *capable*

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<sup>81</sup> Dixon and Nussbaum, above n 18, p 563-4.

<sup>82</sup> M Biggeri and M Santi 'The missing dimensions of children's well-being and well-becoming in education systems: capabilities and philosophy for children' (2012) 13(3) *Journal of Human Development and Capabilities* 373, p 377.

<sup>83</sup> *Ibid.* See, JM Bonvin and D Stoecklin, 'Children's Rights as Evolving Capabilities: Towards a Contextualized and Processual Conception of Social Justice' (2016) 23(3) *Ethical Perspectives* 19-39.

*agents*, on the other hand, reflects the idea that human development ‘relies on people’s freedom to make decisions and to advance key objectives as agents of change’.<sup>84</sup>

It is important to note that the capabilities approach, and particularly the focus on ‘evolving capabilities’, aligns with other work that has sought to articulate and promote children’s rights. Most notable in this context is Joel Feinberg’s argument that children possess a right to an open future. Feinberg divides children’s rights into two classes: dependency rights (which derive from the child’s dependence on others) and rights-in-trust (which the child is not yet capable of exercising, but which must be protected so that they can be exercised by the future adult).<sup>85</sup> Rights-in-trust vary in content, but are essentially rights ‘given to the child in the person of the adult she will become’.<sup>86</sup> Consequently the child should be ‘permitted to reach maturity with as many open options, opportunities and advantages as possible’.<sup>87</sup> It has been argued that bodily integrity and self-determination provide the foundations of a child’s right to an open future.<sup>88</sup> Self-determination is clearly an important aspect of the concern with agency at the heart of the capabilities approach. The approach enriches our understanding of what self-determination means and the structural support it requires.

Feinberg, and others such as John Eekelaar,<sup>89</sup> articulate models that are consistent with the capabilities approach’s focus on agency and maximising opportunity or freedom.<sup>90</sup> It should

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<sup>84</sup> Biggeri and Santi above n 82 p 378.

<sup>85</sup> J Feinberg ‘The child’s right to an open future’ in W Aiken and H La Follette (eds) *Whose Child? Children’s Rights, Parental Authority and State Power* (Totowa: NJ, Rowman and Littlefield, 1980), pp 125-126.

<sup>86</sup> D Archard *Children, Family and the State* (Aldershot: Ashgate, 2003) p 31.

<sup>87</sup> Feinberg above n 85, p 130.

<sup>88</sup> A Ouellette ‘Eyes wide open: surgery to westernize the eyes of an Asian child’ (2009) 39 *The Hastings Center Report* 15. See also, Fox and Thomson above n 45.

<sup>89</sup> See, J Eekelaar ‘The interests of the child and the child’s wishes: the role of dynamic self-determinism’ (1994) 8 *IJLPF* 42 at 48.

be noted that the approach, like Feinberg's model, has been criticised as too future-orientated; more interested in the adult the child will become than the child herself.<sup>91</sup> Indeed, it is fair to note that immediate well-being interests and gains are often downplayed in the literature which can tend to focus instead on the future adult. This can be characterised as part of the broader tendency to see children and young people as 'human becomings' with their future as adults privileged over their present.<sup>92</sup>

Whilst it can be persuasively argued that both the capabilities approach and the child's right to an open future should properly be understood as offering protections and benefits to the child in the capacity of the person they are, this is not undermined by recognising that there are obvious benefits across the life course from attending to capabilities at an early age.<sup>93</sup> Thus, we should recognise that children are 'simultaneously in processes of being and becoming.'<sup>94</sup> Further, early direct benefits are not obscured or denied by recognising that promoting the capabilities of children has societal benefits beyond the adult the child will become. This recognises that children can be 'key resources for a better future' with the child the 'centre of an intergenerational transfer of capabilities' and a 'vehicle for change'.<sup>95</sup> Another aspect of this future-orientated analysis is less about the transmission of capabilities and more aligned with deliberative democracy and collective agency. This

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<sup>90</sup> There is, however, a significant tension in this position. If an individual wishes to follow a course of action that may significantly limit future opportunities then compromising agency may be warranted. Daly attempts to address this by setting 'significant harm' as the threshold for over ruling children's decision-making. See below, text accompanying n 153.

<sup>91</sup> Archard above n 86, p 31; Fox and Thomson above n 45, p 526.

<sup>92</sup> J Qvortrup, M Bardy, G Sgritta, and H Wintersberger (eds) *Childhood Matters: Social Theory, Practice and Politics* (Aldershot: Avebury, 1994); J Qvortrup 'Are children human beings or human becomings? A critical assessment of outcome thinking' (2009) 117(3/4) *Rivista Internazionale di Scienze Sociali* 631, p 631.

<sup>93</sup> See N Peleg 'Reconceptualising the Child's Right to Development: Children and the Capabilities Approach' 21(3) (2013) *International Journal of Children's Rights* 523.

<sup>94</sup> Hart and Brando above n 68, p 294.

<sup>95</sup> M Biggeri, R Libanora, S Mariani, and L Menchini 'Children conceptualizing their capabilities: results of a survey conducted during the first Children's World Congress on Child Labour' (2006) 7 *Journal of Human Development* 59, p 65.

engages the second theme identified by Biggeri and Santi. As they explain, ‘democracy involves participation in public deliberation. Democratic societies should therefore aim to produce capable agents.’<sup>96</sup> Such capable agents can help build new social capital and positively shape social institutions.<sup>97</sup> A closer consideration of education, where there has been significant work to inform policy and practice, provides an illustration of the richness of the approach as well as the possibility of balancing child- and community-focused benefits.<sup>98</sup>

Both Sen and Nussbaum recognise the intrinsic (child-focused) and instrumental (society-focused) role of education for human development.<sup>99</sup> Sen has argued, for example, that education can foster public debate and dialogue about social and political arrangements, enabling individuals to take part in decision-making processes at multiple levels (domestic to national), and that it can empower marginalised groups to gain access to power and argue for redistribution.<sup>100</sup> While this work may reflect the future orientated bias in much of the early capabilities work to have addressed children, Nussbaum provides a more balanced articulation of both the intrinsic importance of children’s capabilities and the broader societal benefits. In this she identifies three educational capabilities: critical thinking, world citizenship, and imaginative understanding.<sup>101</sup> In Nussbaum’s model, *critical thinking* includes the capability to reason logically, to test for consistency, and assess correctness or

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<sup>96</sup> Biggeri and Santi above n 82.

<sup>97</sup> Ballet, Biggeri, and Comim above n 78, at 33.

<sup>98</sup> J Sandars and CS Hart ‘The capability approach for medical education: AMEE Guide No 97’ (2015) 37(6) *Med Teach* 510.

<sup>99</sup> Others have significantly developed work on capabilities and education, see H Brighouse, *School Choice and Social Justice* (New York: Oxford University Press, 2000); M Saito ‘Amartya Sen’s capability approach to education: a critical exploration’ (2003) 37(1) *Journal of Philosophy of Education* 17; M Walker and E Unterhalter (eds) *Amartya Sen’s Capability Approach and Social Justice in Education* (New York: Palgrave Macmillan, 2007).

<sup>100</sup> Nussbaum and Sen (1993) above n 6. See also Dreze and Sen above n 64.

<sup>101</sup> M Nussbaum ‘Education and democratic citizenship: capabilities and quality education’ (2006) 7(3) *Journal of Human Development* 385, p 385.

soundness of judgement.<sup>102</sup> Young people learn to manage difference and disagreement, and to take responsibility for their own reasoning.<sup>103</sup> *World citizenship* describes the ability to understand the differences between people and their reasoning, but also shared vulnerability that makes understanding essential.<sup>104</sup> *Imaginative understanding* accounts for the ability to imagine oneself into another's circumstances, to intelligently understand another's biography, and the emotions, wishes and desires that person might have.<sup>105</sup>

Nussbaum's account attends to the development of the capability to be knowledgeable. For children, this is part of the processes of evolving capabilities. At the same time it is essential for the development of capable citizens. To return to Munby LJ and his development of best interests jurisprudence. In *Re G (Children)* [2012] he offered a similar account of the values that education should promote. His Lordship stated that in determining what form of education was in the best interests of children, a 'judicial reasonable parent' should recognise that equality of opportunity was a fundamental value and that aspiration should be encouraged and facilitated. Importantly, he stated that children should reach adulthood best equipped to decide what life they want to lead (what they want to 'do and be') and – as far as practicable – with the skills to meet these aspirations. He concluded that, 'our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood.'<sup>106</sup>

Elaine Unterhalter and colleagues argue that the approach provides compelling arguments for the provision of certain 'forms of education through which a person can explore her own

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<sup>102</sup> See also Dreze and Sen's attention to critical agency, above n 65.

<sup>103</sup> Nussbaum above n 101, pp 388-9.

<sup>104</sup> *Ibid*, 387.

<sup>105</sup> *Ibid*. 390.

<sup>106</sup> [2012] EWCA 1233 at para 80.

conception of what she has reason to value.<sup>107</sup> The approach provides a robust alternative to the human capital approach that in many jurisdictions has been used to assess the value of education and shape educational policy.<sup>108</sup> Under this model, education is viewed as ‘an investment that yields economic returns.’<sup>109</sup> The approach challenges the focus on economic productivity, technocratic reasoning, and the managerialism that defines the human capital paradigm.<sup>110</sup>

### **Practical justifications for a capabilities approach to best interests assessments**

Severine Deneulin has argued that the capabilities approach can be interpreted as a normative language.<sup>111</sup> The flexibility of the approach allows actors to interpret the components of the theory in different settings, and construct context sensitive narratives. This is one of the approach’s strengths and is further supported by Sen’s assertion that capability lists should be context specific and developed through processes of public reasoning. In terms of the methodology employed in operationalising the approach it is important to note the acceptance of ‘checklists’ within legal deliberation. In addressing best interests assessments it should be noted that section 1(3) of the Children’s Act provides the

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<sup>107</sup> E Unterhalter, R Vaughan, and M Walker ‘The capability approach and education’ (2007) 13(3) *Prospero* 13 p 16.

<sup>108</sup> C Buzzelli ‘The capabilities approach: rethinking agency, freedom, and capital in early education’ (2015) 16(3) *Contemporary Issues in Early Childhood* 203; E Unterhalter ‘What is equity in education? Reflections from the capability approach’ (2009) 28 *Studies in Philosophy and Education* 415; K Mok and W Jeong ‘Revising Amartya Sen’s capability approach to education for ethical development’ (2016) 17 *Asia Pacific Education Review* 501; MP Cockerill ‘Beyond education for economic productivity alone: the capabilities approach’ (2014) 66 *International Journal of Educational Research* 13.

<sup>109</sup> E Unterhalter ‘Education’ in S Deneulin and L Shahani (eds) *An Introduction to the Human Development and Capability Approach: Freedom and Agency* (London: Earthscan/IDRC, 2009), p 207.

<sup>110</sup> M Nussbaum *Not for Profit: Why Democracy Needs the Humanities* (Princeton: Princeton University Press, 2010).

<sup>111</sup> S Deneulin ‘Constructing new policy narratives: the capability approach as normative language’ in GA Cornia and F Stewart (eds) *Towards Human Development* (Oxford: Oxford University Press, 2014).

‘welfare checklist’<sup>112</sup> that applies to a number of orders available under the Act, and has been described as both ‘a most useful aide-memoire’ in other cases,<sup>113</sup> and ‘a clear statement of what society considers the most important factors in the welfare of children.’<sup>114</sup> However, for current purposes the checklist is important in terms of the broader concern with practice and method.

Law and policy has seen a proliferation in the use of checklists, now an accepted part of our deliberative and practice landscapes. This is seen in statute, case law, and in the provision of ‘soft law’ in terms of policy guidance. The use of checklists has shaped practice across professional ‘high-risk, high reliability groups’.<sup>115</sup> They are employed in sectors from aviation (since 1938)<sup>116</sup> to different areas of medical practice, such as in the operating room,<sup>117</sup> intensive care unit,<sup>118</sup> and diagnosis.<sup>119</sup> Nevertheless, there is scepticism regarding the introduction of checklists, identified by some as part of the bureaucratisation of reasoning and decision-making seen with new managerialism. There are also practical concerns. It has been argued, for instance, that adding checklists into high pressure and time limited

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<sup>112</sup> Section 1(3) provides that in making decisions for children in these situations ‘the court shall have regard in particular to’:

- (a) the ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under the Act in the proceedings in question.

<sup>113</sup> Re B (Change of Surname) [1996] 1 FLR 791 at 793, CA.

<sup>114</sup> Law Commission, *Family Law: Review of Child Law: Guardianship and Custody* (Report No. 172), para [3.19].

<sup>115</sup> JW Ely, L Graber, P Croskerry ‘Checklists to reduce diagnostic errors’ (2011) 86(3) *Academic Medicine* 307, p 307.

<sup>116</sup> A Gawnde *The Checklist Manifesto: How to get things right* (New York: Metropolitan Books, 2009).

<sup>117</sup> R Karl ‘Briefings, checklists, geese, and surgical safety’ (2010) 17 *Annals of Surgical Ontology* 8.

<sup>118</sup> P Pronvost, D Needham, S Berenholtz et al ‘An intervention to decrease catheter-related bloodstream infections in the ICU’ (2006) 355 *New England Journal of Medicine* 2725.

<sup>119</sup> Ely, Graber, and Croskerry, above n 115, p 307; M Sibbald, ABH de Bruin, and JG van Merrienbore ‘Checklists improve experts diagnostic decisions’ (2013) 43 *Medical Education* 301.

processes can lead to ‘cognitive load’, compounding the demands that already exist in high level decision-making.<sup>120</sup> Alternatively, they are seen to contribute to ‘expertise reversal’ and the undermining of established skills.<sup>121</sup> Finally, critics challenge the implicit belief that lists are in some way neutral: ‘safer’ than the vagaries of human reasoning which may be fraught with bias and unpredictability.<sup>122</sup>

Acknowledging this criticism, the capabilities approach demonstrates that it is nevertheless possible to have a normative core and operationalise this through guidelines that are philosophically and empirically informed. If best interests assessments are being made with an implicit notion of ‘the good life’, as Herring, Foster and others argue, we can and should develop a framework that makes this explicit and is informed by a theoretical and empirical evidence-base. The next section turns to work that has sought to develop capability lists for children. Whilst this has taken place in a number of contexts,<sup>123</sup> given the immediate focus is the UK, the work of the Equality and Human Rights Commission (EHRC) is examined.

The UK Equality Act 2006 aimed to consolidate existing provisions, advance protection from discrimination, and promote equality. The Act charged the EHRC with the duty to monitor inequalities and progress in achieving social change. In response, the EHRC worked with the Government Equalities Office, Scottish Government, Welsh Assembly, Office of National Statistics, and others to develop a comprehensive measurement framework for assessing

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<sup>120</sup> S Kalyuga, P Ayres, P Chandler, and P Sweller ‘The expertise reversal effect’ 38 (2003) *Educational Psychologist* 23.

<sup>121</sup> S Kalyuga ‘Expertise reversal effect and its implications for learner-tailored instruction’ 19 (2007) *Educational Psychology Review* 509.

<sup>122</sup> See, Gwande above n 116.

<sup>123</sup> See, for example, M Biggeri ‘Children’s valued capabilities’ in M Walker and E Unterhalter (eds) *Amartya Sen’s Capability Approach and Social Justice in Education* (New York: Palgrave Macmillan, 2007); M Dominguez, L del Moral-Espin, L Gálvez Muñoz, ‘A well-being of their own: Children’s perspectives of well-being from the capabilities approach’ 26(1) (2019) *Childhood* 22; Biggeri, Libanova, Mariani, Menchini, above n 95.



equality and human rights in the UK in the twenty-first century.<sup>124</sup> Academic input was provided by members of the Centre for Analysis of Social Exclusion (CASE) at the London School of Economics,<sup>125</sup> and the processes of public deliberation were managed by Ipsos-MORI.<sup>126</sup> The EHRC engaged not just with a broad range of professionals concerned with child development or working with children and young people, but also with young people themselves. This reflects the commitment within the approach to public deliberation in the process of identifying and articulating relevant capabilities and the importance of the capability to engage in decision-making processes that affect you.<sup>127</sup> In this regard, information from young people regarding the capabilities that they value should form part of any starting point. This would be consistent with the spirit of the Convention on the Rights of the Child (UNCRC), if not the processes of its inception. As Ballet, Biggeri and Comim comment, no child ‘participated in drafting the Convention and, more generally, the rights were prepared during international conventions in a top-down fashion, without roots at local level’.<sup>128</sup>

The purpose in addressing this work is threefold. First, it provides an opportunity to illustrate the key features of the capability approach in the context of its application. Second, it draws attention to the empirical work that underpins the operationalization of the approach. Again, this reflects a core commitment to agency and participation. Third, it details the construction of a children’s capability list. In this, it demonstrates a potential

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<sup>124</sup> S Alkire, F Bastagli, T Burchardt, D Clark, H Holder, S Ibrahim, M Munoz, P Terrazas, T Tsang, and P Vizard *Developing the Equality Measurement Framework: Selecting the Indicators* (Equality and Human Rights Commission, Research report 31, 2009).

<sup>125</sup> ECHR above n 9 p 3.

<sup>126</sup> Ipsos MORI *Consulting for a Capability List: Research Study Conducted by Ipsos MORI for the Equalities Review* (Ipsos MORI, 2007), available at <https://webarchive.nationalarchives.gov.uk/20100702224210/http://archive.cabinetoffice.gov.uk/equalitiesreview/upload/assets/www.theequalitiesreview.org.uk/morireport.pdf>

<sup>127</sup> Sen (2010), above n 6.

<sup>128</sup> Biggeri, Ballet, and Comim above n 78, p 39.

methodology for defining - and the likely broad parameters of - a capabilities framework for best interests decision-making. This would provide the evidence-based values and deliberative architecture to underpin assessments.

#### A CAPABILITY LIST FOR CHILDREN

In meeting its statutory duty to develop a measurement framework, the EHRC started a process which would first lead to the adult focused Equality Measurement Framework (EMF). The methodology and EMF went on to shape the Children's Measurement Framework (CMF). The initial task of generating the adult EMF was underpinned by three key inputs: the capabilities approach as developed by Sen; the international human rights framework; and extensive consultation with the general public, including individuals and groups at risk of discrimination and disadvantage.<sup>129</sup> In accepting Sen's articulation of the approach as their starting point, CASE devised a two-stage process. The first stage involved deriving a 'minimum core capability list' from international human rights documentation.<sup>130</sup> While this had a number of important advantages, including building on international processes that are – at least in part - democratic and deliberative, they nonetheless fail to live up to the 'central role for broader processes of democratic deliberation and debate' reserved by the approach.<sup>131</sup> Responding to this, the second stage involved processes of deliberation and debate 'giving the general public and those at risk of discrimination and

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<sup>129</sup> Alkire et al above n 124.

<sup>130</sup> This required working inductively from core international human rights to determine a 'set of underlying (or implicitly defined) states of being and doing ... protected and promoted in international law.' Ibid, p 100. The main sources for this work were the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These were supplemented by other treaties.

<sup>131</sup> T Burchardt and P Vizard 'Operationalizing' the Capability Approach as a Basis for Equality and Human Rights Monitoring in Twenty-first-century Britain, *Journal of Human Development and Capabilities* 12:1 (2011) 91-119 p 102.

disadvantage a defining role in identifying and justifying the selection of central and basic capabilities.<sup>132</sup>

This work resulted in the following list of Central and Basic Capabilities: to be alive; to live in physical security; to be healthy; to be knowledgeable, to understand and reason, and to have skills to participate in society; to enjoy a comfortable standard of living, with independence and security; to engage in productive and valued activities; to enjoy individual, family and social life; to participate in decision-making, have a voice and influence; of being and expressing yourself, and having self-respect; of knowing you will be protected and treated fairly by the law.<sup>133</sup> It is clear that while important, this list provides limited guidance and behind each identified capability is a fuller articulation of what is involved in recognising and promoting that capability. These details derive from the public consultation and so give important insight into how the public conceives of these freedoms and opportunities. To give a discipline relevant example, listed below is the further detail that attaches to legal security - the capability of knowing you will be protected and treated fairly by the law:

- Know you will be treated with equality and non-discrimination before the law;
- Be secure that the law will protect you from intolerant behaviour, and from reprisals if you make a complaint;
- Be free from arbitrary arrest and detention;
- Have fair conditions of detention;
- Have the right to a fair trial;
- Have access to affordable and high-quality information and advocacy as necessary;
- Have freedom of movement;
- Have the right to name, gender and nationality;
- Own property and financial products including insurance, social security and pensions in your own right;
- Know your privacy will be respected.

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<sup>132</sup> Ibid.

<sup>133</sup> T Burchardt and P Visard *Developing an Equality Measurement Framework: A List of Substantive Freedoms for Adults and Children* (Equality and Human Rights Commission, Research Report 18, 2009).

Having generated the adult list, the EHRC moved to commission a Children's Measurement Framework (CMF). The starting place was the adult list which was then assessed in light of the UNCRC and national frameworks concerned with children's welfare and rights.<sup>134</sup> Moving to the second phase, CASE and Ipsos-MORI conducted two workshops with parents and children from the general public to refine the new provisional list. The first round of consultations engaged teenagers between the ages of 13 and 16. The second included those between the ages of 9 and 12, and parents of children under the age of 8.<sup>135</sup> A third and final consultation subjected a provisional list to scrutiny by experts from children's organisations and other stakeholders.<sup>136</sup> These three stages resulted in the final children's list.

Whilst the key identified capabilities are the same, the process generated differences in the detail supporting each capability. Although these cannot be covered in detail, the example of the capability of knowing you will be protected and treated fairly by the law can be returned to. Again, much of the detail is the same as the EMF, however there are key differences that illustrate the sensitivity to age that the process captured. Thus, this included that: prison should only be a last resort for children; there should be a minimum age of criminal responsibility; there should be access to high-quality information, and mechanisms for complaints and advocacy as necessary, which are all specifically designed

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<sup>134</sup> T Burchardt, T Tsang, and P Vizard *Specialist Consultation on the List of Central and Valuable Capabilities for Children* (Equality and Human Rights Commission, Research Report 41, 2009), p 4. Thus, the list is informed by the *Every Child Matters Framework*, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272064/5860.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272064/5860.pdf); the Welsh Assembly's *Seven Core Aims for Children and Young People*, available at (<https://gov.wales/docs/ds/jlg/publications/cyp/151106-core-aims-comprehensive-version-en.pdf>); and the Scottish Government's *Getting it Right for Every Child*, available at <https://www2.gov.scot/Topics/People/Young-People/gettingitright>.

<sup>135</sup> Burchardt, Tsang and Vizard above n 134, p 4.

<sup>136</sup> This included subject specialists from government units, non-profits, non-governmental organisations and academics from England, Scotland and Wales. Ibid.

for children; and that 16 and 17 year olds should have access to property and financial products in their own right. The final element in the supporting detail is that children should have their own interests the primary consideration in legal proceedings concerning their parents.<sup>137</sup>

Members of CASE have identified the development of the EMF and CMF as the beginning of a broader policy mobilisation of the approach.<sup>138</sup> Similarly, Ballet, Biggeri and Comim argue that the approach can become a framework for normative evaluation and together with human rights ‘can produce a cogent set of policy prescriptions.’<sup>139</sup> In contributing to this work and arguing for an extension of the applied reach of the framework, an important question remains regarding the methodology. In developing the CMF the starting point was the EMF, which built on collective expressions of valued adult freedoms and liberties. This was subsequently developed through work with children and young people and a consideration of national children focused standards. Nevertheless, there remain questions regarding the extent to which the adult focused foundations limit the Framework’s ability to capture and promote what is specifically important about childhood and early adulthood, and what must be protected and advanced.<sup>140</sup>

## IMPLEMENTING THE CAPABILITIES APPROACH IN LAW

This article aims to set out and provoke two agendas for change. First, the article mobilizes the capabilities approach to provide a response to long recognised failings in the best interests standard, outlining the further work needed to align the standard with the

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<sup>137</sup> Burchardt and Vizard above n 131.

<sup>138</sup> Burchardt, Tsang and Vizard above n 134, 109-10.

<sup>139</sup> Ballet, Biggeri, and Comim above n 78, pp 39-40. For a discussion of the sympathetic relationship between the UN Convention on the Rights of the Child and the Capabilities approach see Hart and Brando, above n 68.

<sup>140</sup> I am grateful to Helen Stalford for raising this point.

approach. Second, it seeks to encourage a fuller engagement with the capabilities approach in legal studies. In order to do both, and before detailing the necessary elements of any implementation strategy for law, it is helpful to consider some of the criticism that has been levelled at the framework and that may be hampering development of capabilities work in legal studies.

The approach has been the focus for varied criticism. Some of this has been generated by early 'sloppy use of terms' and 'conceptual confusion',<sup>141</sup> perhaps the inevitable growing pains of an emerging interdisciplinary language. Other criticism has been misplaced. Some have questioned, for instance, the priorities of the approach. As a theory of justice it has been charged that focusing predominantly at the local and national scale has meant a failure to address profound injustices created by the global economic system and its institutional structures, such as global trade agreements.<sup>142</sup> This, and similar criticism, is misdirected as the framework seeks to enable interpersonal comparison of well-being and advantage. As Ingrid Robeyns argues, given the focus on well-being, it is legitimate to argue that capability theorists should address 'the most urgent cases of injustice, investigate their underlying causal processes and mechanisms, and concentrate on the development of solutions.'<sup>143</sup>

There are two strands of criticism that may be more significant obstacles to legal engagement with the approach and which therefore need to be addressed. The first is the charge that the approach is too complex to be operationalised. Robert Sugden, for instance,

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<sup>141</sup> I Robeyns, *Wellbeing, Freedom, and Social Justice: The Capability Approach Re-examined* (Open University, 2017) p 170.

<sup>142</sup> See, for example, T Pogge 'Can the Capability Approach Be Justified?' *Philosophical Topics* 30 (2) (2002) 167; A Jaggard 'Challenging Women's Global Inequalities: Some Priorities for Western Philosophers'. *Philosophical Topics* 30 (2) (2002) 229.

<sup>143</sup> Robeyns above n 141 p 194.

points to the 'rich array of functionings' identified by Sen, and the scope for disagreement amongst reasonable people as to what constitutes the good life. Given such complexity he asks whether it provides a 'realistic alternative' to existing frameworks or methods.<sup>144</sup> Rawls similarly claimed that Sen's approach is 'unworkable', in that it calls 'for more information than political science can conceivably acquire and sensibly apply'.<sup>145</sup> Adoption of the capabilities approach in diverse national and supra-national contexts, and work to implement it through context specific capabilities lists, has done much to deflate such criticism.

The second criticism comes from a misreading of the theory. It is commonly charged that the approach is too individualistic. This is meant in two senses: that it works with an atomistic view of individuals, and, related to this, that it fails to adequately address structural inequalities and experiences of disadvantage shared by groups.<sup>146</sup> As already noted, the individual is the object of ethical concern within the approach and it may be that this is misunderstood to mean that it is concerned with the fictional decontextualised individual of classic liberal thought. However, the approach is primarily concerned with the social and institutional structures within which individuals are embedded and the extent to which these promote or limit opportunities and flourishing.<sup>147</sup> While the approach relies on an ethical or normative individualism (the individual and not an aggregate or proxy measure is the focus for ethical attention), this does not imply ontologically individualism, that is, a fictional atomised individual floating free of the many social networks that shape, support,

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<sup>144</sup> R. Sugden 'Welfare, Resources, and Capabilities: A Review [Inequality Reexamined]' *Journal of Economic Literature* 31 (4) (1993) 1947, 1953.

<sup>145</sup> J Rawls *Law of Peoples* (Cambridge MA: Harvard University Press, 1999) p 13.

<sup>146</sup> See, for example, F Stewart, 'Groups and Capabilities'. *Journal of Human Development* 6 (2) (2005) 185.

<sup>147</sup> See, Dreze and Sen above n 65 p 6.

and constrain life.<sup>148</sup> The consistent attention that Sen, Nussbaum, and many others have paid to the structural barriers and enablers that impact individuals and groups makes the persistence of this criticism surprising.<sup>149</sup> This criticism, whilst groundless, may have negatively impacted on engagement with the capabilities approach in socio-legal studies where rich understandings of human sociality are valued and flourish.

Returning to best interests assessments, this final section provides further necessary guidance for meaningfully implementing a capabilities approach. This seeks to ensure that the use of the approach is cognisant of the broader children's rights framework, that it does not wither to a normatively empty checklist, and that it addresses these criticisms of the approach.

To achieve this, there are four elements that must be included in any implementation framework. First, those making assessments, or otherwise deliberating in the space of capabilities, must engage with the foundational proposition that welfare and flourishing are best advanced by promoting an individual's freedoms to 'be and do what they have reason to value'.<sup>150</sup> So the starting point is the premise that flourishing is best supported by maximising the opportunities that individuals have to choose from as they determine and pursue their life goals. This provides the essential normative foundation for subsequent deliberation and decision-making.

Second, this foundational proposition centres not only the core commitment to opportunity, but also highlights the place of agency and the need to include children and young people in decision-making. This aligns with the right of children to be heard in

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<sup>148</sup> Robeyns above n 141, 184-5.

<sup>149</sup> Ibid. See also Robeyns above n 63.

<sup>150</sup> Sen (2010) above n 6.



proceedings affecting them contained in Article 12(2) of the UNCRC. While it is possible to identify limited instances of good practice, and acknowledge important calls for improvement,<sup>151</sup> it is clear from national and international surveys that children are not being adequately afforded this right.<sup>152</sup> Aoife Daly has made an important intervention in an attempt to strengthen the participation and agency of children. Daly advocates replacing the right to be heard with the Children's Autonomy Principle. This states that in best interests assessments children should get to choose how they are involved and the outcome, unless this is likely to cause 'significant harm' to that child.<sup>153</sup> The argument here is compatible with Daly's principle. Indeed, the focus on capabilities may provide the needed guidance for what constitutes 'significant harm'.<sup>154</sup> That is to say, the principle could be reformulated to identify 'significant loss of opportunity or capability' as the limit to the principle.

Third, this foundational belief in maximising opportunities or freedoms has been operationalised through capability lists. These are context specific lists that are generated through processes of public reasoning. The article highlights the CMF developed by the EHRC as an example of the process whereby a framework for assessments may be developed. In the case of the CMF, this identifies capabilities that are essential for flourishing and the detail behind each capability gives a further resource to assist both monitoring and deliberation. Such context and purpose specific capability lists are important in moving the

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<sup>151</sup> For example, J Munby 'Unheard voices: The involvement of children and vulnerable people in the family justice system' (2015) *Family Law* 895.

<sup>152</sup> Daly above n 1, Chapter 4.

<sup>153</sup> Daly above n 1.

<sup>154</sup> See the review by E Cave 'Review of children, autonomy and the courts: beyond the right to be heard, by Aoife Daly' (2018) 40(4) *Human Rights Quarterly* 1041.

approach beyond a general framework<sup>155</sup> and challenge the criticism that the approach is 'unworkable'.<sup>156</sup>

Fourth, in assessing capabilities in the context of individual well-being it is not enough to simply identify the appropriate list of opportunities, rather we must address a person's ability to exercise their agency in the context of these opportunities. Thus, we must attend to the barriers and enablers that effect the realisation of these opportunities and their conversion into functionings. This illustrates the understanding of individualism embedded in the approach. So while the well-being of the individual is the focus of ethical concern, the individual is simultaneously recognised as located in relationships, networks, and structures that can either support or constrain opportunity and flourishing. Returning to the EHRC, Burchardt and Visard identify treatment and autonomy as key considerations in this regard. Therefore, the fourth requirement is the need to consider an individual's 'empowerment, choice and control in relation to critical decisions'.<sup>157</sup> Thus, as well as identifying the substantive freedoms and opportunities available to people, we also need to assess the quality of the options, constraints and barriers they experience, and their treatment by others.<sup>158</sup> Daly's attention to the need for 'autonomy support' for children and young people in best interests processes aligns with this. As she states, autonomy support should mean 'non-controlling, impartial information and support to form and/or express views and decisions about a best interests matter'.<sup>159</sup> At the same time, decision-making should aim to

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<sup>155</sup> Biggeri, Libanora, Mariani, and Menchini above n 95, p 65.

<sup>156</sup> Rawls above n 145.

<sup>157</sup> Burchardt and Visard above n 131, pp 96-7.

<sup>158</sup> Ibid, p 97.

<sup>159</sup> A Daly 'No weight for "due weight"? A children's autonomy principle in best interests proceedings' (2018) 26 International journal of Children's Rights 61, p 85 (emphasis removed).

maximise the child's 'empowerment, choice and control'<sup>160</sup> beyond the court or other best interests process.

Any implementation framework must aim to foster a developed understanding of the capabilities approach and the architecture needed to promote capabilities, including the capability to be involved in decision-making that affects you. This should benefit the overall assessment process as well as helping to avoid adoption of the approach being reduced to the bare application of a checklist. Given the complexity of much legal deliberation and reasoning this is not an overly onerous proposal. Rather, it should be understood as offering a means of structuring judgements of the 'good life' that are already believed to take place in best interests assessments. In this, it provides a robust and empirically supported understanding of what is required to promote well-being and flourishing.

## CONCLUSIONS

The best interests standard is a long established principle of domestic and international welfare law, policy, and practice. It is generally accepted that the best interests of children and young people should be the primary or paramount concern when making decisions with regard to care or upbringing. The standard has become ubiquitous, yet as Stalford and Hollingsworth observe, this 'belies the complex, speculative and often highly subjective nature of a process that seeks to determine definitively what is best for children.'<sup>161</sup>

Addressing the wide body of criticism directed at the standard, this article has highlighted how these criticisms may be understood in terms of values, acknowledging that the standard may lack underpinning values or may act as a smokescreen for discriminatory

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<sup>160</sup> Burchardt and Visard above n 131, p 96.

<sup>161</sup> Stalford and Hollingsworth, above n 10, p 33.

values. Further, we may see reliance on incompletely articulated or empirically unsubstantiated values as judicial approaches to a child's best interests draw on intuition or 'common sense'.

In response, it is argued that the capabilities approach can provide a flexible normative framework that has been developed through four decades of interdisciplinary work. It builds on a familiar philosophical tradition that has long interrogated what it means to be human and has attempted to articulate how we might understand and promote flourishing and well-being. The foundational proposition that we should focus on maximising the opportunities and freedoms that people have to do and be what they have reason to value is easily understood. This proposition is then operationalised in different contexts through capability lists. Such lists, however, are interpreted as part of the fundamental commitment to agency and therefore are not hollowed out to a purely bureaucratic application. In this context, the article has argued for a preliminary engagement with the methodology and children's capability list generated by the EHRC. In developing their methodology, CASE challenge the sceptical position of those like Rawls and Sugden who claim that it is too complex to be workable.<sup>162</sup>

Even as we acknowledge the diverse areas of legal studies and practice where the approach has begun to be explored,<sup>163</sup> the capabilities approach has not made the inroads into law that has been seen in a significant number of other disciplines and fields. This article has provided a clear example of where the approach might make a real impact and has addressed a number of criticisms that may have hindered engagement with the theory. It has provided the conceptual and methodological justification for its use in child law, and

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<sup>162</sup> Rawls above n 145 p 13.

<sup>163</sup> See, above n 18.

detailed the steps needed to develop a more effective best interests process. This work, providing the foundations for a necessary reconceptualization of best interests assessments, has relevance beyond the current context into other, far ranging, areas of legal studies and practice.