Great Expectations

Autonomy, Responsibility, and Social Welfare Entitlement

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Thesis submitted for the degree of Doctor of Philosophy

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Date of submission: April 2014
Summary of Thesis

This thesis is motivated by the phenomenon of *sub-optimal decision-making*, where a person is unable to make effective choices that promote her best interests and as a result her life goes badly, and asks how a just social welfare policy should respond to it. Accordingly, it is concerned with two conflicting sets of expectations, both of which are at the heart of current debates concerning welfare reform in Britain. Firstly, that people should be responsible for meeting their own welfare needs through the prudent exercise of their right to personal autonomy. Secondly, that the state should provide a safety net of publicly-provided welfare goods for those who are unable to satisfy their own needs. Policymakers have sought to regulate the tension between these with the principle of welfare conditionality, which holds that those deemed culpable for their own welfare needs, or their inability to satisfy them, are disqualified from public assistance. However, I will argue that these expectations, and the public policy principle they have given rise to, are precariously founded on a mistaken assumption; namely, that individuals who have mental capacity as defined in current law are necessarily *autonomy-competent*, and, as such, equipped with the skills and dispositions required for effective decision-making that promotes their best interests. I locate impaired autonomy-competence on a continuum of personal autonomy in the neglected terrain between moral failure and mental incapacity and claim that, insofar as welfare conditionality fails to acknowledge this gap, it is prone to holding sub-optimal decision-makers unjustly responsible and perpetuating the prudential failures it claims to discourage. Accordingly, I argue that the state has a role in promoting the conditions for prudent self-government, and that autonomy-enhancing intervention, not traditional forms of welfare conditionality, is the best means through which the great expectations of personal autonomy and responsibility can be realised.
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This project was made possible by the AHRC-funded *Essex Autonomy Project* (AH/H001301/1: *Deciding for Oneself: Autonomous Judgement in History, Theory and Practice*), through which I enjoyed a studentship and superlative support and development opportunities. Inadequate expressions of gratitude go first and foremost to Fabian Freyen­hagen, whose brilliance, enthusiasm, generosity and kindness gave me the confidence to go beyond the limits of what I thought I was capable of, my bearings when I (frequently) lost my way and the renewed drive to complete this thesis when my life was turned upside down by cancer. Profound thanks also go to other members of the research team: Wayne Martin, particularly for his instruction on ‘feeling the pain’ and ‘working obscenely hard’ (I think); Tom O’Shea, whose staggering intellect, when gently deployed to help me out of a range of metaphysical pickles, made up for his troubling aversion to the countryside; Antal Szerletics, for deepening my understanding of paternalism, best interests and dwarf-tossing; Alexis Wolton for his geekery and chocolate brownies; and, Becky Parsons and Helen Cook, for their cool demeanour and calming influence, and for sharing the tears and laughter. From the Department, I would particularly like to thank Will Cartwright, Timo Jütten, Jörg Schaub, Wendy Williams and Jan Butler.

The list of other people to whom I am indebted is long. They know who they are and I hope they will forgive me if I don’t mention them by name. However, I must pay tribute to the oncologists, surgeons, specialist nurses and physiotherapists attached to Colchester General Hospital’s cancer service, and thank them for getting me through. And I must also lovingly doff my hat to Graham Sharp, Bridget Tighe, Sarah McLoughlin, Liz Craigie, Matt Sterling, Lee Phillips, Teresa Archer, Keith Cooper and, last, but not least, my mother, Janet Ashley.

Finally, I dedicate this thesis to two exceptional women, whose muse-like presence in my life has been a constant source of inspiration and wisdom. Firstly, Ruth King, who over the years has helped me to discover my autonomous self, and whose expertise has helped me to better understand the lives of the dispossessed subjects of this thesis. Thank you, Ruth, for your special brand of friendship (and for the ongoing birding rivalry). Second, Rachel Fletcher, my long-suffering partner who nine years ago made it possible for me to quit work and study, and whose belief in me has never wavered. For cooking healthy meals and encouraging me to go for walks when I became glued to the PC; for humouring me and pouring me glasses of wine when I wanted to chuck it ‘across the drove’; for not complaining that my three year sabbatical turned into a nine plus year lifestyle change; for caring for me when I was sick; for bringing such enormous joy into my life. For all this and more, a million thanks and my deepest love.
Introduction

Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination – indeed, everything and anything except me.¹

[Person]onal identity, understood as a complicated interaction of one’s own sense of self and others’ understanding of who one is, functions as a lever that expands or contracts one’s ability to exercise moral agency. [...] Identities mark certain people out for certain treatments [and] set up expectations about how group members are to behave, what they can know, to whom they are answerable, and what others may demand of them.²

I came to philosophical inquiry relatively late in life. Having worked on the frontline of social welfare for nearly twenty years – predominately providing welfare rights advice and representation - I urgently needed answers to some troubling questions. First, why do some people routinely make decisions that make their lives go badly? Second, how can we make sense of such self-defeating agency, and, third, how should society respond to it? Many of the people I worked with during my professional career lived chaotic and troubled lives and were socially excluded and disenfranchised. They tended to be mentally ill, emotionally damaged and/or in poor physical health, and, all too commonly, their lives had been marred by neglect and abuse in childhood, or derailed by misfortune and tragedy – or, if they were particularly unlucky, both. Through my work with them I came to understand that, by and large, their recklessness and irresponsibility were not behaviours borne out of a sense of entitlement or a thoughtless reliance on the safety-net of the welfare state.

Generally my clients were not people who believed they had a right to get ‘something for nothing’, as politicians claim, nor, as philosophers imagine, were they surfers who thoughtlessly enslaved others whilst they spent an enjoyable day catching waves. Rather, they were people who seemed ill-equipped for life in some vital sense; they were ignorant or careless of their own interests, or misguided in terms of what they needed to do to promote them, or too apathetic or distracted to act as they ought. Their perplexing, and often frustrating, failure to do what was expected of them therefore needed another explanation. But, living on the edge of a society that generally views such people as the sum of their challenging behaviours and written-off by the state as feckless scroungers undeserving of aid, they had no voice – not one that many people cared to listen, at any rate.

In answering the first question that motivates this inquiry, it is my hope that the voice of this increasingly demonised underclass will be heard. Using case studies extracted from legal transcripts and serious case review reports, and published interview materials, I aim to explain their sub-optimal decision-making in terms of under-developed or impaired competencies, and provide a much needed context in which to understand a little better how their lives came to be as they are, what kind of lives they would prefer to have, and the barriers that block their path to it. Making sense of this empirical data and formulating a response to the second question concerning the appropriate response to this flawed agency demands the myriad resources of political philosophy.

As Jonathan Wolff explains in his Ethics and Public Policy, political philosophy is not an ideal framework within which to analyse public policy. Unlike

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social science disciplines that can report on concrete data and, on the back of this, make practical recommendations that can translate into policy, philosophy – insofar as it thrives on disagreement – cannot. Public policy debate, he observes, allows for two things that philosophers typically struggle with: ‘agreeing to disagree’ and the relegation of reason in favour of popular consensus. Despite this obvious mismatch, I agree with Wolff that the resources of political philosophy can help us make progress on difficult public policy questions, but only if they connect with these questions in the right sort of way. Thus, this thesis exemplifies a ‘bottom up’, or problem-driven, approach to applied ethics, in which the first task is to understand the problem and the moral difficulties that arise from it, and the second task is to connect those moral difficulties to ‘patterns of philosophical reasoning and reflection’. 4

My inquiry is motivated by the problem of sub-optimal decision making and asks how just social welfare policies should respond it. Essentially, then, it is concerned with two conflicting sets of expectations. Firstly, that people should be responsible for meeting their own welfare needs through the prudent exercise of their right to personal autonomy. Secondly, that the state should provide a safety net of publicly-provided welfare goods for those who are unable to satisfy their own needs. Policymakers have sought to regulate the tension between these with the principle of welfare conditionality, according to which those deemed culpable for their own welfare needs, or their inability to satisfy them, are disqualified from entitlement to certain publicly-provided goods, such as housing for the homeless, and other goods which might otherwise be their due. However, I will claim that these expectations, and the public policy principle they have given rise to, are precariously founded on a mistaken assumption; namely, that individuals who have mental capacity as defined

4 Ibid., p. 9.
in current law are necessarily autonomy-competent, and as such equipped with the skills and dispositions required for effective decision-making that advance one’s best interests. Accordingly, it tends to hold sub-optimal decision-makers – like my former clients - unjustly responsible for being in welfare need and perpetuate their autonomy-incompetence by withholding from them the social goods and services upon which autonomy-competence is contingent. I will claim, therefore, that the state has a role in promoting the conditions for prudent self-government, and that autonomy-enhancing intervention, not traditional forms of welfare conditionality, is the best means through which the great expectations of personal autonomy and responsibility can be realised.

During the course of my research, welfare reform in Britain has occupied a prominent place on the news agenda. These wide-ranging reforms profess to make the welfare system fairer and more affordable, and better able to reduce poverty, worklessness and welfare dependency, in large part by imposing harsher sanctions on those who fail to conform to certain expectations upon which entitlement is contingent. During a time of austerity, such measures have attracted a high level of popular support, particularly amongst sections of society amenable to the demonization of welfare applicants as ‘shirkers’, ‘scroungers’, and ‘parasites’. However, those monitoring the effects of these policies question whether specific reforms actually achieve their stated ends, and whether they can do so without further harming the interests of the poor or abandoning vulnerable and disadvantaged members of society. This inquiry and the recommendations that emerge from it make a timely contribution to a current, vexed debate.

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Before I provide a roadmap of my argumentation strategy, let me first make three clarificatory points. First, this thesis is written, unashamedly, on the basis of what I understand as a result of my practical experience, and, hence, its argumentation is founded on an analysis of social welfare and mental capacity provisions that currently operate in Britain. However, insofar as these provisions are broadly similar to those operating in other jurisdictions, the relevance of what follows is not geographically limited and is more widely relevant. For instance, conditional welfare systems, particularly those relating to unemployment benefits, are in evidence throughout Europe, North America and Australasia. Similarly, the test for mental capacity that is deployed in England and Wales, as set out in the Mental Capacity Act 2005, shares commonalities with those of a range of European countries and is similar to the test that has evolved in the US.

Second, insofar as I utilise a set of case studies as a springboard into my inquiry, I should say a few words regarding how they were selected. In compiling them, my aim was to provide a range of genuine, real-life cases that could illuminate the range of deficiencies I frequently observed in my frontline practice. My selection


was limited by the availability of source materials that provided sufficient narrative
detail so as to be useful. To the best of my ability I have selected a range of cases
that are representative, in terms of the range of individuals concerned, their
background circumstances and (in relation to those cases concerning the adjudication
of rights under homelessness law) the way in which these circumstances are
accounted for in the assessment of entitlement.

Third, as will soon become apparent, the problem of *sub-optimal decision-
making* engages a range of philosophical concepts, including personal autonomy,
liberal neutrality and coercion. The burgeoning literature that attends each one is
testimony to their contested nature as much as to their importance in human affairs.
In order for me to deploy these resources effectively, and avoid the need to resolve a
range of disputations that have for many years occupied better minds than my own, I
have helped myself to certain ‘containment strategies’. These, I believe, avoid the
risk of ‘over-reach’ but at the same time provide a fair basis upon which to test
various claims and reply to ensuing objections.

**Roadmap of Argumentation**

In Chapter 1, I will illuminate the phenomenon of *sub-optimal decision-
making* with the introduction of ten case studies, all of which exemplify decision-
making that is not favourable to the best interests of the decision-maker. These case
studies suggest deficiencies in a range of evaluative skills and executive dispositions,
which go some way to help explain why the individuals in question chose or acted as
they did. Also apparent are the background circumstances which commonly coincide
with these impaired competencies: childhood trauma, personal crises, domestic
violence, ill-health and disability.
Such decision-making, I will argue, cannot be adequately understood simply in terms of moral failure – where, taking into account all relevant circumstances, it is appropriate to blame and hold a person accountable for a wrongful and/or harmful act or omission – or legally-defined standards of mental incapacity. I will articulate mental incapacity in terms of the legal standard which applies in England and Wales in accordance with the *Mental Capacity Act 2005* (which, herein, I will refer to as ‘MCA capacity’). I will argue that this notion of mental capacity is a threshold concept that seeks to draw a value-neutral line between capacitous and non-capacitous decision-making, and as such it is essentially different from personal autonomy, which is a broader conception of what it is to be a self-determining agent. This requires more than the largely cognitive range of decision-making skills required for MCA capacity. Accordingly, I will locate sub-optimal decision-making on a continuum of personal autonomy between moral failure and mental incapacity and conceptualise this intermediate terrain in terms of impaired autonomy-competence, where an agent is legally competent to make a particular decision but is nevertheless ill-equipped to make and enact choices that promote her best interests.

In Chapter 2, I will claim that so-called ‘welfare conditionality’ – certainly as it is practiced – fails to acknowledge the gap between moral failure and mental incapacity and accordingly is unjustly punitive. The principle of welfare conditionality is most apparent in the administration of social welfare safety-nets like housing for the homelessness and unemployment benefits and holds that the right to benefit from such publicly-provided welfare goods should be linked to personal responsibility. Accordingly, an applicant is denied (full) assistance if she is deemed culpable for the acts or omissions from which her need for support arises. I will explain that this kind of *hands-off* intervention - that seeks to encourage personal
responsibility by stipulating conditions for entitlement – is distinct from *hands-on* interventions that encourage personal responsibility by helping individuals to acquire and develop the skills upon which it is contingent. I will return to the latter in Chapter 5, but in this chapter I illuminate the policy and practice of *hands-off* welfare conditionality with an analysis of the ‘intentional homelessness’ test, which in the UK distinguishes between priority homeless households who are deserving of (and, thus, entitled to) public assistance, and those who are not. With reference to the case study materials introduced in Chapter 1, I will show that – at least in practice - the conception of personal autonomy which is implicitly used in this context is that of MCA capacity; provided that an individual satisfies the legal standard for capacity at the relevant time, she should be held accountable for the consequences of her acts and omissions. I will argue that this standard does not suffice for legitimately holding people responsible because it fails to account for deficits in autonomy-competence that fall short of psychopathology.

I will also argue that welfare conditionality produces unjust and counter-productive outcomes. Likening the test for welfare conditionality with the distinction Ronald Dworkin⁹ draws between brute luck and option luck in his egalitarian theory of justice, I will argue that that welfare conditionality is vulnerable to four objections. First, that the task of drawing a clear line between responsibility-attracting choices, on one hand, which were made freely and competently, and, on the one other hand, choices that are not morally-blameworthy because they are borne of impaired autonomy-competence, will frequently not be possible. Second, that in trying to draw this line it will be necessary to make intrusive and demeaning inquiries into the applicant’s circumstances; inquiries that Elizabeth Anderson rightly exposes as

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dignity-infringing. 10 Third, that drawing such a line and abandoning those whose welfare need is attributable to their own agency will leave people destitute and vulnerable to exploitation. And, finally, insofar as it is harmful to the interests of the applicant and innocent third-parties (particularly children), holding people to account for past irresponsible behaviour might mean that they lose whatever capacity they would otherwise have to assume responsibility in the future. Therefore, the principle of welfare conditionality tends to perpetuate the kind of imprudent agency that, ironically, it claims to disincentivise.

In Chapter 3, I take up the challenge of delineating a broader notion of personal autonomy that, unlike MCA capacity, can account for the conceptual gap through which the vulnerable sub-optimal choosers highlighted in Chapter 1 can fall. I start by thinking about what autonomous decision-making actually might consist in. Upon consulting relevant common law principles and considering the MCA’s commitment to secure the best outcomes for incapacitated persons, I conclude that what we expect an autonomous agent to be able to do is to make and enact decisions that promote her best interests. Accordingly, I defend an ability-view, as opposed to an outcome-view that claims an agent is autonomous only insofar as she makes decisions that are consistent with certain prescribed values.

In cashing out the notion of best interests I take inspiration from Nussbaum’s ‘ten central capabilities’, which she argues each human being needs to live a life of dignity. 11 Similarly to Wolff and de-Shalit – whose qualified appeal to Nussbaum’s list forms the basis of their ‘genuine opportunity for secure functionings’ view of

disadvantage\textsuperscript{12} - I will argue that it provides the beginnings of a default menu that captures a range of interests that most human beings naturally aspire to and value, and which personal autonomy functions to promote.

Having sketched out the idea of autonomous agency as the ability to make and enact choices that promote our best interests, I then ask what skills and dispositions such agency requires. Acknowledging my indebtedness to Diana T. Meyers and Paul Benson whose work has greatly advanced a competence-based model of personal autonomy,\textsuperscript{13} and drawing on the case study materials in Chapter 1, I will articulate and defend a range of normative competencies. Whilst it includes the predominately information-processing skills required for MCA capacity, it goes substantially beyond them by including a deeper level of evalulative skills and executive dispositions. I will suggest that the development of these competencies, and their resilience to adversity, is contingent upon (or at least aided by) a range of self- and other-regarding attitudes. These self-regarding attitudes – self-esteem and self-confidence – are, I argue, the bedrock of autonomy-competence, since they inspire a sense of hope and possibility, motivate us to make plans and carry them out, and enable us to trust our own judgements. But an awareness of and concern for the interests of others is also of critical importance. The other-regarding attitudes I enumerate – a sense of justice and empathy – are the prerequisites for pro-social behaviour that make our lives go better. In contrast, anti-social behaviour leads to social ostracisation and criminal and legal sanctions that exclude us from the support and care we need from others, and which hinder our access to welfare goods and services critical to our wellbeing.


I conclude this chapter by situating the notion of autonomy that emerges from my analysis between the two broad models of autonomy that dominate the literature: the *normatively non-substantive model* and the *normatively substantive model*. I demarcate these key positions and then defend a model which combines the best of both, namely, a weakly substantive model. On this view, an autonomous agent may choose whatever she wants; what matters is her *ability* to identify what is of value to her and the course of action that best promotes it, and to make those choices effective. This model amply accommodates the notion of autonomy-competence that started to take shape in Chapter 1 in the course of discussing the evaluative and executive deficits common to sub-optimal decision-making, and which is developed into a competency account in this chapter.

So understood, autonomy-competence explains the gap between moral failure and mental incapacity: whereas a morally-failing agent has both MCA capacity and autonomy-competence, and the mentally-disordered agent can lack both, those who occupy the intermediate terrain will often have MCA capacity but will, to some degree, lack autonomy-competence. Accordingly, autonomy-competence provides a more just and defensible threshold of responsibility in a social welfare context than MCA capacity.

In Chapter 4, I turn my attention to a serious objection that could be levelled against my weakly substantive view; namely, that insofar as autonomy-competence relies on normative content it is at odds with the liberal state’s commitment to liberal neutrality and is thus objectionably perfectionist. More specifically, the worry that in stipulating the kinds of skills and dispositions required for autonomy-competence, and in enacting policies that aim to promote them, the state must take a stand on certain controversial questions of the good. Whilst I acknowledge the threats of
extreme (or monist) perfectionism – according to which the state may promote policies in accordance with one particular comprehensive doctrine of the good - and agree that the state should avoid it, I argue that a more moderate (pluralist) form of perfectionism is defensible. The question I consider, then, is whether even moderate perfectionism is at odds with liberal neutrality.

The idea of liberal neutrality is greatly contested. Neutrality sceptics argue that it is implausible since the very notion of neutrality is itself deeply value-laden, or that it is undesirable since strict adherence to it would result in the demise of prized aspects of culture, or prevent the state promoting valuable ways of life. Meanwhile, proponents of neutrality disagree over what it means in practice. Rather than entering into the myriad debates concerning the plausibility of these mainstream formulations of neutrality and taking a view on which, if any, is correct, I argue that the autonomy-enhancing policies prompted by my competence view of autonomy are compatible with a wide (and possibly the whole) range of liberal views. I therefore present two lines of argument against the perfectionist objection. First, I grant for the sake of argument that neutrality of justification – the formulation which is widely regarded to be the most defensible – is achievable, but demonstrate its compatibility with my ability view and the public policies it motivates. I do so by arguing that they are the means of securing the two moral powers upon which Rawls’ political liberalism relies, namely the capacity to form and revise a conception of the good, and the capacity to form and act upon a sense of justice.¹⁴ Accordingly they are not only compatible with and necessary for a Rawlsian overlapping consensus, but also, ex hypothesi, neutrality of justification. In this sense my view is, arguably, not perfectionist at all. I think this a strong argument, but in case others disagree, I

forward a second line of argument that highlights three strategies for reconciling moderate perfectionism and liberalism.

In Chapter 5, I introduce and evaluate an existing state intervention that exemplifies the kind of autonomy-enhancing policy my view motivates: Family Intervention Projects (FIPs). I will show how the FIP model of intervention is a hands-on approach to welfare that works intensively and in partnership with parents and children to help them to develop the kinds of skills and dispositions that will help their lives to go better. As such, it is an ability-building approach that can foster the kind of autonomy-competencies I am interested in. FIPs work with very disadvantaged families with multiple and complex problems, many of whom face high-level sanctions, such as eviction, as a result of their irresponsible and anti-social behaviours. By addressing the root causes of these behaviours, rather than simply dealing with their effects, FIPs have proved to be an effective means of improving them. I highlight five key ‘family intervention factors’ that distinguish the FIP Model of intervention: the provision of a dedicated worker; practical support; a common purpose and agreed action; considering the family as a whole; and, a persistent, assertive and challenging approach. Research indicates that the latter element – also known as ‘sanction-backed support’ – is particularly critical to the success of an intervention when working with ‘hard-to-reach’ families. This ‘sanction-backed support’ is captured within the terms of the FIP proposal: face the sanctions that your behaviour has triggered, or avoid them by engaging with a support plan designed to improve those behaviours. (As I will go on to consider in Chapter 6, it is also the most controversial.)

I will show how the FIP Model charts a course for a promising approach to dealing with the sub-optimal decision-making of people whose autonomy-competence
is underdeveloped or has been damaged by life crises. However, I acknowledge a significant worry voiced by critics of the policy, namely, that some families may only agree to engage in this intensive support to avoid sanctions which would otherwise be imposed, predominately eviction or having one’s children taken into care. This is a particular concern where, in addition to a loss of privacy, engagement involves agreeing to adhere to a range of on-going freedom-limiting measures, such as curfews. Is the FIP Model, then, essentially a wolf in sheep’s clothing: coercive perfectionism dressed up as voluntary empowerment?

In answering this question, I consider the reflections of those parents who have experienced such intervention, and practitioners who defend the threat of sanctions as a necessary lever to engage hard-to-reach families. On this basis I conclude that the FIP Model should be understood as a sheep in wolves’ clothing: whilst it operates within the context of threats and sanctions, it is ultimately empowering. Nevertheless, it remains the case that some families’ (initially) reluctant acceptance of freedom-restricting measures may well fall short of voluntary choice. To the extent that the threat of sanctions ‘encourage’ families to engage when they would not otherwise do so, it is necessary to question whether they are being subjected to objectionable coercion. In considering the views of practitioners who potentially wield coercive power and those of families who are potentially subject to it I merely peel back some of the layers of complexity that attend the question. In Chapter 6, I will answer it, using four different theoretical approaches to judging coercion claims.

Coercion is a contested concept, and whilst we might agree that it has something to do with exercising power over others to ‘encourage’ them to do what we want them to, a range of disagreements come to the fore when we try to be more
precise. A particular question which attaches to my inquiry into the FIP Proposal is how we can distinguish between persuasive offers (that are not coercive) and volition-sapping threats (that are). I will also ask if there any circumstances in which state coercion is justifiable, or whether it is always wrong for the state to influence people in this way.

There is a great diversity of coercion (and coercion-related) theories, which provide a range of different responses to these questions. In order to simplify matters I organise these within a schematic conceptual map that distinguishes between coercer- and coercee-focused theories and between theories that hold that coercion is never (or hardly ever) justifiable and those that argue that it is merely prima facie immoral. The four quadrants that emerge from these distinctions when they form a set of conceptual axes yield four key positions. All are problematic in their own ways. However, I will not attempt to resolve these difficulties, nor take a stand on which approach is most defensible. Such a task is a thesis in itself. Instead, I will show on all four approaches – which are representative of the dominant positions discernable in the literature – that the FIP Proposal is either not coercive, or that it is justifiably so. A number of key factors are relevant to this conclusion, particularly the following: the proposal extends the options available to the family by providing an opportunity for them to avoid sanctions that will otherwise be executed; it provides families with prudential reasons to do what they are in any event obliged to do, and so does not infringe their rights; engagement is at least retrospectively endorsed; the ultimate aim of the intervention is to empower, not to control, by developing the skills and experience required for personal autonomy and responsibility and effective parenting; and, irrespective of these matters, without such intervention the rights and interests of the children will be harmed.
I conclude with some remarks pertaining to the public policy implications that can be drawn from my analysis of the FIP Model and its autonomy-enhancing (and coercive) potential. In particular, I will highlight the importance of developing autonomy-enhancing interventions that appropriately balance support and enforcement in order to limit the necessity for coercion, and bring about sustainable change in the lives of sub-optimal choosers.
Chapter 1

Between Moral Failure and Mental Incapacity

That was a memorable day to me, for it made great changes in me. But it is the same with any life. Imagine one selected day struck out of it, and think how different its course would have been. Pause you who read this, and think for a moment of the long chain of iron or gold, of thorns or flowers, that would never have bound you, but for the formation of the first link on one memorable day.\(^\text{15}\)

1.1. Introduction:

All of us have made imprudent decisions and wished we hadn’t. All of us have been (and will continue to be) hasty or reckless from time to time, or perhaps regularly in certain aspects of our life. But some of us, I suggest, \textit{routinely} make decisions that tend to make our lives go badly, to the extent that they can become trapped in deprivation and a revolving door of state intervention. In this chapter, I will shine a light on the phenomenon of \textit{sub-optimal decision-making} and argue that it cannot be adequately understood simply in terms of either moral failure or mental incapacity.

I will fully articulate these terms in due course, but for now let me offer a brief gloss for the purpose of orientation. By moral failure I mean to capture the sense in which an agent is blamed \textit{appropriately} for some wrongful and/or harmful act or omission.\(^\text{16}\) In contrast, the term mental incapacity has a very specific legal definition, as set out in the Mental Capacity Act 2005, according to which a person

\(^{15}\text{Dickens, Charles (1861) \textit{Great Expectations} - Chapter IX, final paragraph}\)

\(^{16}\text{So, if I intentionally trample on your flower bed out of envy it would be reasonable for you to blame me and hold me to account for the damage I cause. But if I trip over on an uneven path and flatten your petunias by accident then blame would not be reasonable. You may be annoyed, but it would not be appropriate to censure me for tripping in the way you might appropriately do if I maliciously danced on your petunias.}\)
lacks mental capacity if she is unable to make a particular decision for herself, at the
time it needs to be made, because the functioning of her mind or brain is impaired.\textsuperscript{17}

I will argue that there is an intermediate terrain between these two explanatory poles, and identify it in terms of impaired autonomy-competence, which leaves some individuals ill-equipped to make and enact choices that promote their best interests.

I will start by elucidating what I mean to capture by the term \textit{sub-optimal decision-making} using a set of case studies – both social welfare- and health-related - which exemplify a range of background circumstances in which it appears to be manifest, and the deleterious impact it can have on people’s lives. I will then locate it on a continuum of personal autonomy between moral failure and mental incapacity, where agents satisfy the current legal tests of mental capacity but are nevertheless ill-equipped to make and enact choices that promote their wellbeing. I will contend that their failure to advance their interests is not negligence or carelessness, but a matter of deficiency, before going on, in Chapter 2, to claim that social welfare policies that fail to acknowledge this gap are unjust.

\subsection*{1.2. Sub-Optimal Decision Making}

By the term \textit{sub-optimal decision-making}, I mean to refer to decision-making that is not favourable to the decision-maker’s best interests, where this is attributable to underdeveloped or impaired decision-making skills. Underdeveloped skills, I suggest, are often ascribable to factors that damage a person’s emotional, intellectual and social development as a child, for example lack of stability, poor nurturing, and abuse. However, for those of us lucky enough to have enjoyed ‘\textit{good enough

\textsuperscript{17}§2 of the \textit{Mental Capacity Act} 2005.
and avoided trauma, our developed skills are still vulnerable to impairment as a result of ill-health and destabilising personal crises. I will say more about these skills and dispositions in Chapter 3, but for now let me highlight some cases which might help to make this notion of *sub-optimal decision-making* clearer. These cases are real and exemplify a range of scenarios all too familiar to those who work on the frontline of social welfare and health care services. Now, whilst I will claim that none of the case studies can be explained simply by reference to moral failure or mental incapacity, I recognise others may disagree with me. They might argue that some of the cases are explicable with reference to one of these positions (and therefore they do not illustrate a gap), or that it is impossible to judge one way or the other without further information. I concede that some cases are stronger than others and that in the absence of fuller information I make assumptions that necessitate a degree of equivocation in my treatment of them. However, in real-life contexts our judgements are frequently hampered by finite information and the incomplete picture it sketches. In several of the case studies there is so much more information we would wish to have, but it is not available. Importantly, it is similarly unavailable to those on the frontline of public policy who must judge things like intention, motivation and causation. The need to fill in the incomplete picture, then, seems unavoidable and, I think, defensible, provided we do so with reasoned and reasonable assumptions, and that any benefit of the doubt is given to the individual in question. I believe that my assumptions fulfil these criteria. Nevertheless, despite the fact that there is room for disagreement in relation to some of the case studies, I

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18 Drawn from Winnicott’s concept of the "good-enough mother", which amounted to the ‘ordinary devoted mother...an example of the way in which the foundations of health are laid down by the ordinary mother in her ordinary loving care of her own baby’, Winnicott, D.W.(1978 [1964]) *The Child, the Family, and the Outside World* (Middlesex: Penguin Books), pp. 17 & 44.

19 They will also be important for the construction and explication of my view of autonomy in Chapter 3.
believe that my reader will agree that *at least* one of them cannot be explained with reference to moral failure or mental incapacity, although different readers might disagree about which case this is. On this basis, the gap is proven to each reader, and therefore our disagreements need not be settled.

1.3. **Case Studies:**

Stuart Shorter\(^\text{20}\)

“‘In 1998, following a five-year jail sentence for robbery, Stuart Shorter’s life reached its lowest ebb. He belonged to the “chaotic” homeless - those whose worlds make no sense. Repeatedly arrested and banned from hostels, he became known as “Knife Man Dan” and lived on “Level D”, the lowest subterranean floor of the city centre multi-storey car park, and the favourite home of Cambridge rough sleepers. It was here that two remarkable outreach workers […] discovered him, and brought him back to sanity - for which he always expressed his gratitude. Off the streets, in a flat, and regarded by local agencies as a great success story […] he took enormous efforts to organise the confusion of his days […]. In 1999, Shorter became a leading figure in the campaign to release […] the Director and Day Centre Manager of Wintercomfort for the Homeless, who had been sent to prison because some of the people they were looking after had been secretly trading drugs on the charity’s premises. To a protest movement that was largely middle-class, academic and at a loss, Stuart brought common sense, street wisdom and straight talking. He negotiated with police to organise marches and vigils, and arranged […] a three-day sleep out of homeless people on the pavement in

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front of the Home Office in London. Stuart Shorter was born in 1968 in a condemned cottage on the edge of Cambridge, his father a gypsy, his mother a barmaid. He was a gentle, conscientious child, but after being molested by a family friend he demanded to be put into a children’s home. It was the greatest mistake he ever made. He became a pupil of a paedophile known as “Captain Hook” who was then working in Cambridge’s children’s homes and who in 1996 was jailed for 18 years. Violence flavoured most of Shorter’s life. As a boy, he would beat his head against tables and walls at every public opportunity “just to make them think I was mad, so they’d leave me alone and stop bullying me about my muscular dystrophy”. His adult life was spent almost entirely in detention centres and prisons where he prided himself on being both unstoppable and unbothered by punishment. “Physical pain is like a release. It takes away what’s going on up in my head.”

**COMMENT:** Stuart was 33 when he was hit by a train just outside his home village. An open verdict was reached. His adult life was characterised by chaos, violence, self-destructiveness and criminality, and it is reasonable to see underlying causation in the abuse he suffered in childhood – both in the family home, and in the care system that was meant to protect him. However, Stuart – once he was supported and housed – managed to achieve a degree of stability that allowed him to become an effective and respected political activist. Still, periodically, he became overwhelmed by memories and rage, and intentionally sabotaged his life, including, on one occasion, setting fire to the flat critical to his stability: ‘I don’t know, Alexander’, he tells Masters, ‘sometimes it gets so bad you can’t think of nothing better to do than
People who struggle with life in this way are commonly deemed responsible for the consequences of such self-destructive impulses, and this renders them vulnerable to the punitive force of the criminal law and disqualification from certain social welfare rights, e.g. access to housing. However, given Stuart’s background, I think his problematic behaviour is attributable to *sub-optimal decision making*. Now, one might think, instead, that it should be attributable to mental illness and if so this speaks of mental incapacity. But three matters count against this view. First, mental illness does not necessarily cause mental incapacity. In fact, the law recognises that individuals subject to compulsory treatment under mental health law may nevertheless have mental capacity in respect of particular decisions. Second, the criminal justice system tried and imprisoned Stuart for his crimes. If he was so mentally unwell that he lacked mental capacity at the relevant times one would have expected him not to be charged or tried, or to have been hospitalised rather than punished. Third, his activist career provides evidence that for substantial periods of time he enjoyed mental capacity, such that he was able to make decisions, irrespective of any underlying mental illness. I would reject any contention that Stuart’s agency could be attributed to moral failure on the grounds that it would fail to acknowledge the enormity of the damage he suffered as a child and runs counter to the reasonable assumption that this damage would in all probability impair his agency. Accordingly, this case is, I think, strongly indicative of *sub-optimal decision-making*.

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22 “Many people covered by the [mental health law] have the capacity to make decisions for themselves. Most people who lack capacity to make decisions about their treatment will never be affected by the [mental health law], even if they need treatment for a mental disorder.” (Department of Constitutional Affairs (2007) *Mental Capacity Act 2005 Code of Practice* (2007 Final Edition) (London: TSO), ¶13.2.) Hereafter, I will refer to this document as the MCA Code of Practice.
Ms Moran

Ms Moran is a young woman with two children, aged three and two. She has mental health problems and chronic poor coping skills. She had a secure tenancy of a Council house, which she left because of domestic violence from her former partner. (She had done so twice before.) She and the children went to a Women's Refuge, where she signed a licence agreement. Breach of any of the terms of this licence agreement – for example, by failing to pay the accommodation charge or for engaging in disruptive behaviour – could lead to the family being required to leave. Ms Moran and the children were provided with one bedroom and a private toilet. They also had access to shared bathing and kitchen facilities. The family spent much of their time indoors in their room. Twelve days later the family was evicted from the refuge. Ms Moran had lost her temper with staff and began to shout and scream. The precise circumstances surrounding this altercation are unclear, but it was related to Ms Moran's discovery that someone had taken food she had brought for her family from the communal fridge. When she failed to calm down, the manager of the Refuge called the police to remove her (and her children) from the premises. Ms Moran's licence was revoked on the grounds that her behaviour had been threatening, and she was deemed intentionally homeless.

COMMENT: The local housing authority sought to disqualify Ms Moran from a right to rehousing under homelessness law because she lost her temper. Underlying this decision was the presumption that she was able to control it, in line with the

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23 This case study is based on Birmingham City Council v Ali and others; Moran v Manchester City Council [2009] UKHL 36.
24 The legislation underlying the test for intentional homelessness will be introduced and explained in detail in Chapter 2, but, in brief, the basic idea is that one can be found to lack entitlement for social housing if one's need is due to decisions that were made with mental capacity and could have been avoided.
terms of her licence agreement. But we might wonder if this presumption was over-
optimistic. Ordinarily, she is known to display poor coping skills, but her current
circumstances could reasonably have been expected to exacerbate this. Fleeing
domestic violence (again) and coping with the emotional impact of this trauma on her
and her children whilst being accommodated in a crowded alien space, Mrs Moran
would have been under considerable stress. It would seem that any vestiges of self-
control she possessed were simply insufficient to cope with a further setback. Now,
one might argue that all this goes to show is that Mrs Moran has a bad temper which
she failed to control, and that this is a case of moral failure. Given the limited
information available it is perhaps difficult to distinguish between moral failure and
sub-optimal decision-making. In this case, however, the information available does
give reason to suppose that the effects of Mrs Moran’s history could have impaired
her ability to manage her anger.

MC

‘MC is a young woman aged 24 years. She has had a sad and troubled life.
When aged only 15 she was forced by a boyfriend to have sexual intercourse
with him against her will. It was a traumatic event. It was compounded about
a year later when she suffered a brutal attack at the hands of a so-called family
friend who raped her in her parents’ home. This time the police were involved
but she was too unwell to give evidence. She had begun to suffer depression
and in May 1996 attempted suicide by taking an overdose of paracetamol
leading to her admission to […] hospital as a result. She received some
psychiatric care but only for a short period. All of these events led to a

25 This case study is composed of excerpts taken from the transcript of a Court of Appeal case C v
deterioration of her relationship with her parents and she determined to leave home. Thus it was that [...] the local authority granted her a tenancy of a bed sit [...]. Arrears of rent began to build up during the first year of that tenancy. From time to time she was in employment but it was not regular. She was unable to pay her gas, electricity and telephone bills and incurred debt to catalogue companies. When not employed she failed to claim housing benefit and the arrears began to grow and she was warned that the local authority would be forced to serve notice seeking possession but she took no action upon that warning. Meanwhile [...] she had met a young man and hoped to have a stable relationship with him. When she became pregnant, he left her and she was very distressed. During this time attempts were made to resolve the housing problem but all efforts made by the local authority came to nought because the claimant failed to attend meetings and failed to comply with arrangements to pay her rent. Eventually proceedings were taken against her in the County Court leading to a suspended order for possession being made in February 1999 but she failed to make the rent payments and payments towards arrears which the court ordered. Her baby was born [and] she was given a date for eviction which was postponed to give her a last opportunity to submit claims for income support and housing benefit. She did not do so and [...] she was evicted from her flat. Initially she stayed with her parents then moved in with a sister. Eventually she was granted accommodation at a hostel with a mother and baby unit where she prospered. She applied [...] as a homeless person and the local authority embarked upon their statutory duty to make such enquiries as were necessary to satisfy themselves whether she was eligible for assistance. Nearly a year had elapsed after her eviction when [...]
the Homeless Persons Unit of the London Borough of Lewisham informed [her] that they had concluded that she [...] had become homeless intentionally.’

On appeal, MC’s doctor submitted the following opinion:

This young woman though not mentally ill in the clinical or formal sense has in my opinion quite significant personality problems in that she is unusually anxious and to some extent unstable. [...] It seems fair to say that the [two rapes] have cast a dark shadow over her [...] It is my opinion that this led to her leading a disjointed and chaotic lifestyle during which she drank to excess and because of which was unable to think straight and to keep her affairs in order.

**COMMENT:** It is clear that MC did not take advantage of multiple opportunities to save her tenancy, but it is not clear is whether she was able to do so. The presumption was that she was careless of the repeated warnings of eviction and homelessness, but in the context of the trauma she suffered, and her associated depression and alcoholism, her inaction could be interpreted as a dispiritedness – a lack of motivation verging on executive paralysis. Given the evidence concerning MC’s long history of failing to manage her affairs appropriately and her GP’s view that she was not mentally ill, MC is, in my view a strong case of *sub-optimal decision-making*. However, some might question whether her chaotic life should be attributed to moral failure; could it be that her she was just lazy and irresponsible, and believed (or at least hoped) that someone would assume responsibility for her? However, I believe that the information regarding her background circumstances paints a different picture; not one of negligence, but of dysfunction.
M is 17 years old “the youngest of her mother's five children by different fathers. The family spent many years in unsettled and temporary accommodation. On her own account the mother (who had spent her own childhood in local authority care) had tremendous difficulty controlling her children. M was excluded from school at the age of 14 and never returned. Her mother has been ill for many years with a stomach complaint which was eventually diagnosed as an inoperable malignant tumour. M was expected to look after her mother but at the same time left ‘to get on with her own thing without supervision'. Early in 2005 she became involved with the criminal justice system. Soon afterwards, the relationship with her mother broke down [and she was told to leave the family home].”

In a letter to the Council, M’s mother stated that M ‘is no longer able to stay in my home as she has broken every rule laid down to her’. M’s mother refused to engage in mediation, with a view to M’s returning home, and so the local authority eventually placed her in a hostel for young people. However, she was subsequently evicted because she broke hostel rules. She is found intentionally homeless and the Council refuses to provide further accommodation. M is at risk of rough-sleeping.

**COMMENT:** As a carer for her mother, and then as a homeless person following eviction from the family home, M had to look after herself from a very early age. But this does not necessarily mean that her independent living skills are well-honed. Rather, in the absence of a stable and nurturing home environment, it has resulted in obvious problems following rules, controlling her impulses, and responding to people

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26 Case study adapted from *R (On The Application of M) (Fc) V London Borough of Hammersmith and Fulham* [2008] UKHL 14.

27 ibid.. As per judgement of Baroness Hale, at para. 5.
in authority. The absence of ‘good-enough parenting’, one might argue, has placed M on a gloomy trajectory of social exclusion, in which her recklessness threatens to disqualify her from the social welfare goods she needs to even have a hope of making her life-course different. One might argue M’s behaviour is due to the kind of carelessness typical of youth, and that as such her self-defeating agency might suggest incapacity. However, MCA capacity applies from age 16 onwards, and there is nothing in M’s narrative to indicate that mentally she functions at younger age. Perhaps, then, her recklessness is better understood as moral failure. However, whilst I agree that immaturity should not necessarily exempt someone from responsibility for their behaviour, it is surely reasonable to suppose that young people like M – who lack a nurturing and supportive family and have gone through a care system which cannot hope to replace this (and which can sometimes compound the damage) – will face a greater challenge than an average young person in terms of managing their behaviour. Accordingly, what little we know about M should at least gives us reason to pause before we dismiss her case as moral failure.

Mr Gibbons

Mr Gibbons is a single man and had been the sole carer of his daughter for some time. In 2007 [his] life started to fall apart. His mother died in the summer of 2006 and his father died in August 2007. In the interval between

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28 In other words, there is presumption that 16 and 17 year olds have MCA capacity.
29 Stein’s review of a body of research spanning twenty years concludes young care leavers are more likely to be socially excluded than other young people, and many experience periods of difficulties securing and sustaining employment and accommodation. The success of their transition to adulthood depends on a number of factors, particularly how vulnerable and emotionally damaged they are and their ability to respond to and benefit from support. Whilst some are able to ‘move-on’ successfully, some manage to ‘survive’ despite difficulties, and others become ‘victims’, who are more likely to get into trouble and experience homelessness and benefit dependency - Stein, M (2006) ‘Research Review: young people leaving care’, in Child and Family Social Work, Vol. 11, 273:279.
30 This case study is composed of extracts from the transcript of Gibbons v Bury MBC [2010] EWCA Civ 327.
those two bereavements, Mr Gibbons spent time looking after his father. He also started drinking heavily. As a result of these matters Mr Gibbons lost his job in August 2007. By this time he had fallen into arrears with his mortgage payments. Mr Gibbons apparently did not apply for state benefits to cover his mortgage interest. He decided to sell his property so as to clear the mortgage debt. [...] He was left with a net sum of £23,395 after selling the property and paying off the mortgage. [...] Mr Gibbons and his daughter then moved into rented property. The rent was £495 per month [and] his only income during this period was child benefit. He remained out of work and was spending quite heavily on drink. As a result the capital sum [following the sale of property] was steadily used up [and Mr Gibbons eventually] fell into arrears with his rent. The agents subsequently wrote to Mr Gibbons requiring him to vacate the property [which he did before a possession order was made, moving into a caravan. On applying to the local authority under homelessness law, he was found intentionally homeless].

**COMMENT:** Mr Gibbons suffered a double bereavement and was unable to cope with its emotional impact. Perhaps, for some reason or reasons, he was less resilient than another individual might have been in coping with these events. He “self-medicated” with alcohol, and mismanaged his affairs to the point of destitution. But prior to these losses, he managed to bring up his daughter alone, hold down a job, get a mortgage, buy a house and maintain mortgage payments. Mr Gibbons’ ability to manage his affairs, it would seem, was impaired by a damaging series of life events. I think this is a strong case of sub-optimal decision-making. Where a previously competent and responsible agent starts to mismanage their affairs to this degree it speaks against simple moral failure – particularly where such background factors
attend. On the other hand, one might wonder if alcohol intoxication can cause mental incapacity, but whilst it is certainly theoretically possible, such incapacity would be temporary and fluctuate, i.e. when sober Mr Gibbons would not lack capacity, and when intoxicated he would lack capacity only of it impaired his decision-making to the requisite degree. Accordingly, in practice a finding of mental incapacity seems unlikely – as suggested by this case.

Miss B

Miss B is 24 years old and has been diagnosed as having a personality disorder and suffering from post-traumatic stress. She was sexually abused throughout her childhood, and compulsively punishes herself. Having been admitted to a secure psychiatric unit, the only means of punishment available to her is self-starvation. Her weight is dangerously low and, although her intent is not suicide, she has refused treatment. She says that what she needs is to punish herself and for people to understand why. B’s doctors ask the court to sanction force-feeding, and on reviewing B’s written and oral evidence, the judge notes that she is both impressively intelligent and self-aware. Despite this, the Appeal Court judge questions her capacity to make a ‘true choice’ in refusing to eat: ‘I am as impressed as the [lower court] judge was by her intelligence and self-awareness. It is however this very self-awareness and acute self-analysis which leads me to doubt whether, at the critical time, she could be said to have made a true choice in refusing to eat. [...] I find it hard to accept that someone who acknowledges that in refusing food at the critical time she did not appreciate the extent to which she was

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31 As we shall later in this chapter, the bar is set high.
32 This case study is based on B v Croydon HA (aka LB v Croydon HA) [1995] 1 FCR 332 and CA [1995] 2 W.L.R. 294.
hazarding her life, was crying inside for help but unable to break out of the routine of punishing herself, could be said to be capable of making a true choice as to whether or not to eat.’

**COMMENT:** Miss B understood the implications of her refusal to eat, but did not appear to adequately appreciate the consequences for her, i.e. that her life was at great risk. This case illustrates how trauma can impact on one’s self-respect to such an extent that it can impair one’s ability to genuinely appreciate the consequences of a particular choice on one’s own life. However, given her personality disorder, one might argue that Miss B’s case is an instance of mental incapacity. I concede that her case is borderline for this reason. Indeed, the judges disagreed about whether or not Miss B had capacity in relation to the matter at hand; whilst the lower court judge initially ruled that she had capacity, the appeal court judge did not accept this (albeit obiter dictum, since the need to review the earlier ruling that she had mental capacity was obviated by the appeal court’s ruling that she could be force-fed under mental health law\(^{33}\)). This underlines a point made earlier; that whilst mental disorder can undercut mental capacity, it need not do so. Someone can be mentally unwell to the degree that she is liable to be treated against her wishes under mental health law, whilst at the same time retaining decision-making capacity. Insofar as Miss B is such a case – and a finding of moral failure is clearly inappropriate - her decision seems to evidence the phenomenon of *sub-optimal decision-making.*

\(^{33}\) This is because English mental health law is risk-based, as opposed to capacity-based.
Mrs Sangermano was threatened with homelessness and with assistance applied for rehousing under homelessness law. On her behalf it was claimed that she was vulnerable on account of her mental condition, her inability to speak English, her lack of contact with her family and her social isolation. The judge held that in this case it was ‘important that one should look at the history of the applicant’. Upon cataloguing the evidence of her inability to manage her own affairs – including a medical assessment that found that she ‘was of subnormal intelligence but that there was no psychiatric disturbance’ - her solicitors argued that Mrs Sangermano came into a ‘very special category of persons who clearly need to have help and assistance’ to cope with the demands of life. The local housing authority decided that she was not vulnerable on the basis of mental illness or mental handicap, and therefore not entitled to rehousing. On appeal the judge commented: ‘I can conceive of cases where somebody, although in the medical category or the Mental Health Act category of subnormal would not, in terms of the Housing (Homeless Persons) Act be vulnerable, but I have no doubt in this case when you have a lady with her record of incompetence who is subnormal and who is incapable of, on the evidence, articulating properly either in English or indeed in Italian, then you have someone who, properly instructing itself, no local authority could, in the special circumstances of this case, come to any conclusion other than that she is vulnerable.’

COMMENT: Whilst little information is available regarding her background circumstances, and how they may have impacted on the development and sustainment

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34 This case study is based on R v Bath CC ex p Sangermano (1985) 17 HLR 94, QBD.
of her decision-making skills, the case of Mrs Sangermano is representative of a group of vulnerable persons who seem at a loss to manage their own life, despite there being no discernible mental disorder or disability that can explain it. They appear to have legally construed mental capacity but in practice need considerable support in life if they are to avoid destitution, social exclusion and exploitation. In this case, although the appeal judge recognised that Mrs Sangermano was ‘incompetent’ in some sense, he did not rule that she lacked mental capacity. However, I concede that this case may be borderline, in the sense that it could be attributed to mental incapacity. In any case, moral failure is beside the point here.

Mrs H

‘Mrs H.’s drama is played out in an oncology ward where she has just had a leg amputated below the knee as a last resort treatment for aggressive bone cancer. Mrs H has lost her hair from chemotherapy and she is having to come to terms with the prospect of permanent disability, perhaps eventually [pre-mature] death, although her doctors are fairly confident that her short to medium term prospects for survival are quite good. Her husband has recently left her because her disability would be burdensome and he finds her and her condition an embarrassment. Mrs H’s practical identity involves a conception of herself that is governed by the norms of traditional femininity that are taken as authoritative within her cultural community, and her husband’s abandonment has left her feeling worthless as a person and without a reason to

Mrs H informs her treatment team that she wants to die and that she wants no further treatment if the cancer spreads to other parts of her body.’

COMMENT: As MacKenzie notes, one might understand Mrs H as a woman who does not have a keen ‘a sense of herself as having rights and does not reflect deeply on her practical identity’. Exhausted by the effects of and treatment for life-threatening illness, struggling to adapt to the loss of a limb and disability, and devastated by abandonment when feeling so completely vulnerable, Mrs H has lost the will to live. This overwhelming assault on her femininity and self-esteem can reasonably be expected to impact upon how she weighs-up the pros and cons of her next steps. To be clear, my concern here is whether or not Mrs H was able to make a true choice about her medical treatment, not whether or not the content of that decision lacked value. Whilst I disagree with her decision, this does not give me a right to overrule her decision, however tragic or uncomfortable it might be and however at odds it is with my own values. What I am arguing here is that the kinds of skills and dispositions required for evaluation have been so badly affected by these life events that one cannot speak of her as having made an autonomous choice. However, I do not discount the possibility that Mrs H made a competent decision that should be respected. For this reason, it is a borderline case.

BD

BD was at the time of his death 39 years old. He was found dead at his flat […] . Although without a formal mental health or learning disability diagnosis, he was frequently assumed by professionals and presumably others

36 Ibid., p. 518.
37 This case study is composed of extracts of a Serious Case Review carried out for Dudley Safeguarding Vulnerable Adults Board, in respect of Adult BD, dated 15 May, 2010, retrieved on 4 April 2013 from file:///D:/Users/Student/Downloads/SCR2_Executive_Summary.pdf.
as having one, the other or both. There is evidence that he had the [legal] capacity to make informed decisions about his lifestyle. The cause of his death was formally recorded as accidental following injuries sustained in a fit. He had long-standing health and social problems and had been offered and received assistance by his family, health, social care and other statutory and voluntary agencies. He was diagnosed as having epilepsy prior to his first birthday and from adulthood had a long-standing dependency on alcohol. He had a history of antisocial behaviour which caused him to become regularly to the attention of primary and secondary health services, the probation service, adult social care services, housing services and the police. He was a continuous and frequent user of 999 services [...] His antisocial behaviour brought him to the attention of and sometimes in conflict with the local community. The misuse of alcohol was a frequent and underlying cause of the behaviours that brought him into conflict with almost everybody he had contact with. There is no evidence that BD wished to address the alcohol dependency problems that he had. Indeed there is substantial evidence to demonstrate that he was frequently offered help and equally frequently rejected it. [...] Attacks against BD’s property may have been motivated by racism or his perceived disability. The Police have a record of BD making 320 emergency 999 calls and he had been charged for misuse of the service. In one day [...] BD made 111 emergency calls to the ambulance service alone. On more than one occasion he was prosecuted for misuse of the emergency call and action was taken on more than one occasion to effectively bar his phone. A mental health day centre that BD attended banned him on more than one occasion because of his disruptive and aggressive behaviour.
**COMMENT:** BD was a challenging and disruptive individual who made significant demands on hard-pressed frontline services, but would not engage with interventions offered to help him resolve the underlying problem, i.e. his alcoholism. Despite his vulnerability - as a result of self-neglect and harassment by others – social welfare and health services began to see him only as the sum of his perplexing and trying behaviours. This case exemplifies those time-consuming, budget-busting cases that lead to impasse and then end in tragedy. BD’s alcoholism is likely to have undermined his ability to understand his predicament and properly appreciate the potential consequences of his behaviour, and do so to an extent that he (periodically, at least) loses capacity. However, it is clear from the report that none of the agencies involved with him considered that his behaviours should be attributed to mental incapacity – in fact quite the opposite. Equally, the information available does not lend itself to the view that BD’s conduct should be dismissed simply as moral failure. Whilst his strange behaviours were no doubt exasperating, and notwithstanding the fact that various agencies held him responsible for them, their persistence over time and his marked vulnerability suggest that something else is amiss. Accordingly, I think this is a strong case of sub-optimal decision-making.

**The Watchmans**

This case deals with the appeal against the decision taken by the Watchmans’ local authority that they had made their family intentionally homeless by taking on a mortgage knowing that they would be unable to keep up the repayments. As a consequence of this decision, the family were not entitled to be re-housed by the local authority under the provisions of homelessness law. The Watchmans had originally rented the house in question from their local

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authority. However, despite the fact that they had a history of rent arrears and other debts, they chose to exercise their ‘right-to-buy’ the house using a mortgage which committed them to repayments that were significantly higher than the rent payments there were originally liable for. The following year Mr Watchman lost his job and mortgage arrears built up. The mortgage lender was eventually granted a possession order and the family were evicted from their long-term home. In reaching its decision that Mrs Watchman was intentionally homeless, the local authority reasoned:

‘During your tenancy […] you persistently failed to pay and were late paying rent lawfully due, even though your income was sufficient to cover your rent payments. You made the decision to buy your council property knowing that you already have a problem with your finances. You had difficulties paying your rent for the duration of your tenancy. You accepted the mortgage offer despite the monthly repayments being higher than your existing rent, £100 per month more than the initial estimate of £300 and £50 per month more than the £350 you thought that you could reasonably afford. You also took out an additional home improvement loan for new windows, doors, kitchen, bathroom, fences, patio and landscape garden.’

39 “The Right to Buy scheme was introduced in 1980 [to help people ‘achieve the dream of home ownership’] and gives qualifying social tenants in England the right to buy their home at a discount. Secure tenants of both local authorities and non-charitable housing associations have the Right to Buy if they have been public sector tenants for at least five years. The Right to Buy discount increases with the length of tenancy up to a maximum limit [houses 60% and flats 70%]. To encourage more tenants to take up the Right to Buy and have the chance of owning their own home [the Government has recently announced its intention] to increase the caps on Right to Buy discounts.” Retrieved from the Department of Communities and Local Government website on 15 April 2012 – see http://www.communities.gov.uk/housing/homeownership/righttobuy/ and http://www.communities.gov.uk/news/newsroom/2123185.
COMMENT: The decision to buy their Council home using an unsustainable mortgage product, rather than remaining as tenants for life on a below-market rent level, was clearly not in the Watchmans’ best interests. If we reject the idea that the Watchmans wanted to lose their home, or didn’t care about this potential eventuality, then we must seek another explanation for their spectacularly bad decision. Did they have sufficient appreciation of their own weakness, including their apparent history of failing to manage their finances (as evidenced by their previous rent arrears and other debts)? Whether foolishly optimistic or ruinously short-termist in their outlook, this could signal a critical lack of appreciation of the relative merits and risks of each option and of the discipline of prioritising long-run interests. However, some might argue that this is a clear case of moral failure in which an agent with MCA capacity and autonomy competence recklessly pursues a course of action without properly thinking through the consequences, or knowingly forfeits their long-term interests for short-term gains. In other words, that they had the capacity to make a prudent decision, but just didn’t actualise it. For these reasons, I concede that this is another borderline case.

1.4. Taking Stock

If, as I maintain, these case studies are possible instances of sub-optimal decision-making – where a person is in some sense ill-equipped to make choices that promote her best interests – then they give us an idea of the range of different background circumstances from which it can emerge: childhood trauma (a troublingly common theme), personal crises (such as bereavement), ill-health and disability, domestic violence, and cognitive/executive deficit. We can also see a range of situations in

which *sub-optimal decision-making* can have long-term deleterious effects on an agent’s wellbeing. For example, where a finding of intentional homelessness can disqualify a vulnerable person from help securing accommodation, leaving them potentially roofless and exacerbating their susceptibility to harm; where a self-harming patient with chronically low self-esteem might be judged legally competent to starve herself to death; where an abandoned wife, disfigured by cancer treatment, no longer sees any point in life-prolonging treatment; and where a vulnerable man can be left to die of self-neglect due to his disruptive and challenging behaviour.

Emerging from these case studies are a range of apparent ‘deficiencies’ which help to explain why these persons chose or acted as they did. Those who are alcoholic or who suffer from various forms of mental distress seem to have trouble making prudent decisions due to impaired evaluative capacity, particularly the ability to adequately appreciate their implications. Some seem prone to intense emotional states, and lack the ability to manage them. Others lack motivation, or confidence, to deal with significant aspects of their life. Underlying these apparent deficiencies in deliberative and executive function are traces of low self-esteem, -respect and -confidence, or at least reason to believe that these are contributing factors. And within the texture of their stories we can begin to discern a causal link between these deficiencies and the effects of inadequate parenting and nurture, and destabilising life events, or both.

The critical point is that all of the persons described in the above case studies were (at least initially) deemed to have the requisite mental capacity to make and enact the relevant ‘choice’ and to be held responsible for it. Accordingly, relevant acts and omissions were treated as if they had been actively selected, and it was assumed that an alternative path was available; that the agent *could* have acted so as
to advance their best interest but didn’t. However, I will argue that it is a mistake to conclude that if someone satisfies the legal test of mental capacity that their imprudence or carelessness must be attributable to moral failure. I will propose a different explanation for why some people (such as those represented in the case study selection) are less able than others to enact prudent decisions that safeguard their welfare. I will locate this deficiency on a continuum of personal autonomy, in the neglected terrain between moral failure and mental incapacity. To that end, I will now expound these terms.

1.5. Moral Failure

By the term moral failure, I refer to the sense in which an agent’s acts and omissions are appropriately subject to blame-attribution, in which we morally evaluate the agency of an individual and hold her responsible for a wrongful and/or harmful act or omission. Blaming, and its counterpart, praising, are everyday features of social life, which, in Strawson’s words, amount to expressions of ‘how much we actually mind, how much it matters to us, whether the actions of other people – and particularly some other people – reflect attitudes towards of us good will, affection, or esteem on the one hand or contempt, indifference, or malevolence on the other’.41

But, not all wrongful and harmful acts or omissions are blameworthy, and therefore instances of moral failure. Where there are mitigating circumstances of a sufficiently compelling nature, we will in practice suspend ascriptions of guilt and liability. If you knocked me down in corridor rushing to prevent a child walking into the path of oncoming traffic I would understand why you didn’t stop and not hold you responsible for the damage to my glasses. Recognition that there are situations in

which it is not just to blame or punish an individual for wrongdoing is found in the
criminal law, where diminished responsibility can provide a partial defence to a
charge of murder where there is a causal connection between abnormal mental
functioning and killing.

In the context of the social welfare case studies introduced above, the
attribution of moral failure is apparent in the various sanctions meted out – denial of
housing rights and exclusion from support services – which deny access to the goods
upon which their wellbeing is dependent. These, and other vulnerable applicants of
welfare assistance, are often dismissed as reckless, imprudent or weak-willed. Whilst
I don’t deny that each of our case studies exemplify one or all of these traits, I want to
suggest that at least some of them do not amount to instances of moral failure. This is
because moral failure is about *appropriate* blame-attribution, and it would not be just
to blame all of those individuals described in our case studies.

To appreciate this, one must move beyond the language of recklessness,
imprudence and weakness of will deployed as short-hand for undeserving, and
appreciate the deficiency in skills and dispositions it can signal. Recklessness is not
necessarily a matter of negligence; it can also indicate a carelessness of one’s own
interests due to a distorted view of one’s own worth (for example, as in the cases of
self-punishing Miss B and abandoned Mrs H). Imprudence is not necessarily a matter
of profligacy; it can also indicate a lack of maturity and experience which may, for
example, result in an agent’s unduly optimistic assessment of risk (which may explain
the Watchmans’ unwise decision to buy their home). Weakness of will is not
necessarily a matter of poor discipline; it can also indicate a genuine inability to act in
accordance with one’s own judgement of what is in one’s best interests (as in the
cases of MC’s executive paralysis and Mr Gibbons’ mismanagement). When our
case studies are understood in terms of deficiency, rather than in terms of dissipation, they are more useful in terms of explanation and mitigation, and as a guide to the framing of a just public policy.

It is worth pausing here to note that many of the adults who feature in these case studies are ‘vulnerable adults’ according to the definition used by the state, i.e. each ‘is or may be in need of community care services by reason of mental or other disability, age or illness; and […] is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation’. Similarly, each might be treated as vulnerable in the context of the high court’s inherent jurisdiction to protect vulnerable adults from particular types of harm.

Munby LJ describes this group of persons thus:

In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation, or who is deaf, blind, or dumb, or who is substantially handicapped by illness, injury or congenital deformity.

In my view, the (legally defined) vulnerability of many of the case studies sets them apart from the stereotype of the irresponsible social parasite who could have acted appropriately but was too weak, lazy or careless to do so, and so provides us with another reason to look beyond moral failure as an explanation for their evaluative and executive blunders.

Let me anticipate an objection: lots of people damaged by childhood trauma, poor parenting and difficult life events manage to live judiciously and enjoy success. Isn’t this evidence that the case studies are examples of moral failure, rather than

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42 Note that M is still legally a child, and therefore subject to the relevant protection mechanisms of the state until she reaches majority.
44 Munby J gives a description of the ‘vulnerable adult’ in Re SA (Vulnerable Adult with Capacity: Marriage) [2006] 1 FLR 867, at paragraph 82, emphasising that: ‘it is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive’. 
something else? I do not doubt that there are such – as we may call them – adversity survivors and champions. However, the fact that some people have the wherewithal to overcome such massive disadvantages does not mean that we can reasonably expect this of everyone. To expect this of everyone – at pain of being deprived of life-saving welfare goods – is too demanding. We accept that this is true of supererogatory acts: we can be amazed and inspired by Mother Teresa’s selfless devotion towards the poor and needy, and Nelson Mandela’s capacity to forgive, without imposing such expectations on everyone. We admire adversity overcomers in the same way we admire modern day saints: as exceptional agents who have been able to succeed where most fail. I therefore share Honneth and Anderson’s view that whilst it might be possible to be autonomous despite the presence of social obstacles and a lack of enabling conditions, it is not fair to expect everyone to be so resilient:

It is, of course, psychologically possible to sustain a sense of self-worth in the face of denigrating and humiliating attitudes, but it is harder to do so, and there are significant costs associated with having to shield oneself from these negative attitudes and having to find subcultures for support. And so even if one’s effort to maintain self-esteem in the face of denigrating treatment is successful, the question of justice is whether the burden is fair.45

1.6. Personal Autonomy and Mental Capacity:

In liberal society, we assume that mature human beings, all things being equal, are endowed with certain capacities that dispose them to, and equip them for, self-determination. Indeed, it is claimed that these attributes are what make us distinctively human beings, and as such entitled to enjoy the freedoms guaranteed by liberal rights.46 Accordingly we presume that a person has the capacity for personal autonomy; an assumption that can only be rebutted if it is established that this capacity is in some way impaired. For example, in the UK, personal autonomy is, in

effect, equated with MCA capacity, which all adults are presumed to have (§1(2)). Moreover, the MCA holds that, provided a person is not shown to lack decision-making capacity, she is entitled to choose for herself, irrespective of the wisdom or rationality of that decision (§1(4)), and its potential consequences. In line with the liberal state’s commitment to neutrality on matters of the good, this threshold concept of mental capacity is concerned only with the process of decision-making, and not the content of the decision. In this way, legislators claim to have drawn a value-neutral line between decisions the state should respect, and those it should not.

The Act defines lack of capacity as follows:

A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.47

Within this definition a two-stage test is apparent. First, the diagnostic test: unless P satisfies that diagnostic threshold of having an impairment of, or disturbance in, the functioning of the mind of brain, legally she has mental capacity and all the legal rights that attend that status. The code of practice that accompanies the Mental Capacity Act 2005 helps to outline the kinds of conditions that might satisfy the diagnostic threshold, including 'conditions associated with some forms of mental illness, dementia, significant learning disabilities, the long-term effects of brain damage, physical or medical conditions that cause confusion, drowsiness or loss of consciousness, delirium, concussion following a head injury, and the symptoms of alcohol or drug use'.48

47 §2 of the Mental Capacity Act 2005. Note that similar considerations apply in other jurisdictions, including in the US where mental competence is often framed in a similar way – see Grisso, Thomas, and Paul S. Appelbaum, E.P. Mulvey, and K. Fletcher (1995) 'The MacArthur Treatment Competence Study. II. Measures and Abilities Related to Competence to Consent to Treatment', in Law and Human Behavior, Vol. 19, 126:148.)

If the diagnostic test is satisfied, then the functional test is applied, which defines what it means to be unable to make a decision, thus:

A person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,
(b) to retain that information,
(c) to use or weigh that information as part of the process of making the decision, or
(d) to communicate his decision (whether by talking, using sign language or any other means).

Note, that even if P exhibits difficulties making decisions according to these criteria, she cannot be deemed to be lacking mental capacity unless she also satisfies the diagnostic threshold. Accordingly, one may be unable to use or weigh relevant information reaching a particular decision and still have the legal right to make that decision. This test sets the bar high for a finding of mental incapacity, and rightly so as a matter of general policy, since in satisfying the test a person loses the right to make certain choices for themselves.

In the case of most of those described in the above case studies, the presumption of mental capacity is not rebutted, or even questioned. Only Miss B was judged to fail the legal test of mental competence, and even this only after an initial finding of competence. But then, it is not clear how many of the other case studies would satisfy the diagnostic test. Stuart Shorter had problems with his mental health linked to past trauma, but did this amount to an impairment of, or disturbance in the functioning of the mind of brain? Similarly, it is impossible to predict whether the effects of Mr Gibbons’ alcoholism and Mrs Sangermano’s ‘sub-normality’ would be assessed as such. Mrs Moran, Mrs H and BD were not judged to be suffering from

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49 §3 of the Mental Capacity Act 2005 (my emphasis).
50 As recently confirmed in PC and NC v City of York Council [2013] EWCA Civ 478, see esp. paras. 58 and 60. Given the necessary causal link between mental disorder and decision-making inability, the test for mental incapacity is arguably a three-step test: (1) the diagnostic test; (2) the decision-making test; and (3) the causal link test.
51 Whilst the judge referred to Mrs Sangermano’s ‘record of incompetence’, it would seem that the legal test for mental capacity was not applied.
any significant mental disorder, and MC, in the words of her doctor, was ‘not mentally ill in the clinical or formal sense’. However, whilst there are doubts as to whether these cases met the diagnostic threshold, the important point to note is that even if they had met it, it is likely that they would nonetheless have been deemed to have mental capacity.\(^5^2\) Indeed, the finding of intentional homelessness presupposes that the decisions leading to (the risk of) homelessness were made capacitously. This suggests that the functional abilities – to understand, retain use or weigh and communicate – are insufficient to capture all the kinds of deficiencies we are concerned with.

So, the difficulties making and enacting prudent decisions that the vast majority of our case studies exhibit cannot be attributed to mental incapacity as it is legally defined. It seems to me, therefore, that passing this legal test for decision-making capacity should not be conflated with what it is to be an autonomous agent exercising control over her life. Whilst decision-making capacity (legally construed) is a necessary condition for personal autonomy, the skills it is understood to comprise are not enough to explain the deficiencies exposed by the case studies. Let me explore why this might be.

First, one might think that the test for decision-making capacity, as it is understood, places too much weight on cognitive skills,\(^5^3\) and in so doing can fail to adequately account for the autonomy-diminishing effects of distorted values and strong emotions. Consider, for example, Mrs H who doesn’t see the point in

\(^5^2\) Except perhaps Mrs Sangermano, whose inability to communicate may have been sufficient to satisfy the functional test.

\(^5^3\) I understand cognitive capacities to refer to those capacities necessary for ‘the mental action or process of acquiring knowledge and understanding through thought, experience, and the senses’, as per the OED definition of cognition (retrieved from http://oxforddictionaries.com/definition/cognition, with my emphasis).
subjecting herself to further life-prolonging medical treatment, now her husband has
taken her. The devastating impact of this on her self-esteem can be imagined,
and her decision to refuse treatment is understandable. But is her decision based on
an authentic evaluation of her options, or has her sense of personal value been so
distorted by the scarring effects of treatment and the double-blow of rejection that the
decision-making process has been catastrophically corrupted? It is by no means clear
that the function test can effectively draw that distinction. Miss B. – who would
satisfy the diagnostic threshold on account of her diagnosis of personality disorder\footnote{Certainly, she suffered from a mental disorder as defined in the context of the Mental Health Act 1983 since she was being treated under section and against her will in a psychiatric unit.} – was judged (on appeal) to be unable to make an authentic decision on account of her
compulsive desire to punish herself following childhood sexual abuse. The lower
court held that Miss B. an intelligent and self-aware woman, did have the mental
capacity to refuse life-saving treatment. However, the higher court judge doubted her
ability to make a ‘true choice’, given her inability to genuinely appreciate the
consequences of her refusal.\footnote{Miss B was ultimately fed against her will under the provisions of mental health law since the treatment was deemed to be sufficiently related to her mental illness to count as mental health treatment. As a result her mental capacity became a side issue.} Judicial disagreement, here, suggests that the function
test cannot adequately distinguish between authentic decisions and decisions clouded
by distress and distorted by trauma.

In reply, it could be argued that case law demonstrates that the law can
account for the effects of distorted values and strong emotions. For example, in Mrs
A\footnote{A Local Authority v Mrs A and Mr A (2010) EWHC 1549 (Fam). ‘Mrs A [...] has severe learning
difficulties. Her IQ is 53. She married Mr A in July 2008. He has an IQ of 65, and is clearly of a
controlling nature. She had already had two children who were removed at birth, made the subject
of a care order, and later adopted.’ (Summary extracted from Court of Protection Report 2010 (July
2011)).} the judge found she lacked capacity because her ability to use and weigh was
undermined by emotional pressure from her husband. And in the E case\textsuperscript{57} a compulsive fear of weight gain is taken as the reason why she was unable to use and weigh, and therefore lacked capacity.

However, whilst the ability to ‘use and weigh’ relevant information can be understood to import an evaluative dimension to the test for mental capacity, one difficulty is that it is not obvious what it means to ‘use or weigh’ relevant information. By way of explanation, the MCA code of practice provides two examples of where there is an inability to use or weigh: persons suffering from anorexia whose compulsion overrides their understanding, and persons with brain damage whose impulsivity overrides their understanding. The effect of strong emotions like distress and of values distorted by trauma are hinted at but are not directly acknowledged. In the medical and social care domains, this lack of transparency has led to what has been referred to as the ‘courts’ pragmatic attitude’ to the use or weigh test, which has led to lack of insight, distorted values and strong emotions being taken into account in the courts’ assessment of mental capacity.\textsuperscript{58} All this suggests that the function test is not sophisticated enough to explicate the line to be drawn between authentic decisions and those clouded by distress or distorted by trauma. However, one could reply that it is sophisticated enough - after all, the higher court judge was able to settle the disagreement in Miss B’s case and rule in the extraordinarily vexed matters of A and E. No legal test, nor any associated code of

\textsuperscript{57} A County Council v E (2012) EWHC 1639 (COP). ‘E is a 32-year-old woman who suffers from extremely severe anorexia nervosa, and other chronic health conditions. [...] an urgent application was made to the Court of Protection by her local authority, which was concerned that her position should be investigated and protected. E’s death was imminent. She was refusing to eat, and was taking only a small amount of water. She was being looked after in a community hospital under a palliative care regime whose purpose was to allow her to die in comfort.’ (Summary extracted from the transcript.)

practice, can anticipate all possible scenarios to which they might apply, and where matters are unclear, disagreements can be resolved through judicial appeal mechanisms. Nevertheless, it remains the case that whilst some psychiatrists claim that the assessment of capacity should take into account the role emotions and values play in decision-making, others doubt that the legal test is sufficiently broad to accommodate these slippery concepts, or worry that even if it is, the prevailing lack of clarity will lead to uneven practice.  

In any event, a clearer explanation is available as to why the MCA’s test for mental capacity is unable to explain deficiencies exposed by the case studies: it doesn’t adequately account for executive capacity.  

It is one thing to make a decision and quite another to enact it; for that one needs to feel motivated, be confident and exercise self-control. As seen in some of social welfare case studies, this can prevent an agent from doing something, or not doing something, even if they recognise that it is critical to their wellbeing. MC and Mr Gibbons were not ignorant of the steps they needed to take in order to pay their rent and prevent their eviction; neither does the evidence suggest that they lacked the skills to make the decision to take those steps. Something else was missing which impaired their motivation to execute them. Similarly, Mrs Moran and BD understood that their access to the support services they needed was conditional on certain standards of behaviour. However, they were apparently unable to regulate their conduct: Mrs Moran was overcome by anger and BD was too intoxicated.

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60 I say ‘adequately’ here, since the ability to communicate is an executive function. However, it doesn’t fully account for enacting decisions, which require action other than communication.
Personal autonomy, then, is essentially different from mental capacity. Mental capacity, as understood in current law, is a threshold concept that tries to draw a value-neutral line between capacitous and incapacitous decision-making, whereas personal autonomy is a broader conception of what it is to be a self-determining agent living a life chosen by oneself. It is not just about making decisions, but about being able to make the right decisions for oneself and being able to enact them. This requires more than the largely information-processing skills outlined in the test for mental capacity; it also requires a broader range of evaluative and executive competencies.

However, insofar as the test for mental capacity must strike a balance between safeguarding vulnerability and maintaining neutrality it shies away from enumerating such skills and dispositions. The worry is that to define them would require the state to take a stand on certain controversial issues. A further consequence of its commitment to neutrality is that the outcomes of a particular decision - and how they can impair one’s capacity - are not directly factored into an assessment of mental capacity. It is a functional, rather than an outcome test. As an overall result of this balancing exercise, the legal test for mental capacity obscures the evaluative and executive dimensions of autonomy and its essence as an enduring capacity for self-government. I will later (in Chapters 3 and 4) suggest that a different balance can be struck which does not obscure these matters and is compatible with liberal neutrality.

1.7. Conclusion

In this chapter, I have illuminated the phenomenon of sub-optimal decision-making and located it on a continuum of personal autonomy between moral failure and mental incapacity. I have shown how the mental capacity test is a largely cognitive
legal standard seemingly delinked from the authenticity of motivating values and preferences and unconcerned with executive control. I have therefore claimed that there is a gap between moral failure and mental incapacity, where someone has legally construed mental capacity but lacks autonomy-competence. But does public policy recognise this gap and does it adequately respond to the needs of the sub-optimal choosers that inhabit it? In the next chapter, I will explore this question with reference to social welfare law and the principle of welfare conditionality.
Chapter 2
Rogues, Vagabonds and Sturdy Beggars

[E]very person which is by this present act declared to be a rogue, vagabond or sturdy beggar ... [shall] be stripped naked from the middle upward and shall be openly whipped until his or her body be bloody, and shall be forthwith sent ... to the parish where he was born, if the same be known, ... there to put him or herself to labour as a true subject ought to do.61

2.1. Introduction:

For as long as there have been laws that seek to alleviate the distress of needy citizens, so there have also been laws to distinguish between those deserving of alms and those deserving of punishment (or, at least, of disqualification for welfare services and goods). The first English statute assigning the state a positive responsibility for the care of persons in economic distress was enacted in 1531 in the reign of Henry VIII. It set up a framework of legalised begging for ‘aged poor and impotent persons’ who were considered to be in genuine need, and a system of harsh punishment for the progeny of ‘idleness, mother and root of all vices’, who could be expected to be tied to a cart and whipped.62 Under Elizabeth I, a reformulation of the Poor Law was enacted, which, in furthering the above principles, permitted local taxation to fund poor relief,63 charged overseers of the poor to put the idle to work,64 and instituted Houses of Correction for those who refused to work.65 Whilst the establishment of these were laws was motivated by the growing realisation that

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61 An Act for Punishment of Rogues, Vagabonds and Sturdy Beggars, 1597, 39 Elizabeth I, ch. 4, § 3 (Eng.) (quotation from this old English statute is presented with modified spelling for clarity).
62 An Act Concerning Punishment of Beggars and Vagabonds, 1531, 22 Henry VIII, ch. 12.
63 14 Elizabeth, 1572, ch. 5.
64 Ibid.
65 18 Elizabeth, 1576, ch. 3.
punishing could not control poverty and end destitution, relief was reserved only for
the elderly and infirm who could not help themselves, whilst oppressive measures
were meted out to those regarded as unwilling to work for their subsistence.

This principle of distinguishing between ‘the deserving’ and ‘the undeserving’
poor remains to this day a cornerstone of the modern welfare state. However, the
rogues, vagabonds and sturdy beggars of Elizabethan times are now referred to as
‘scroungers’, ‘skivers’ and ‘shirkers’, and other pejorative terms that, regrettably,
poison contemporary debates concerning the future of state welfare. And instead of
physical violence, the means of subsistence are withheld from them in accordance
with the principle of welfare conditionality, which links entitlement to prescribed
standards of behaviour.

In this chapter, I claim that welfare conditionality, at least as currently
practised, is premised on there being no gap between moral failure and mental
incapacity, and argue that it is unjust to hold those who inhabit the gap responsible
for their plight since the mental capacity they are deemed to have does not suffice for
responsibility. I will also argue that welfare conditionality yields outcomes that are
both counter-productive and unjust; it is punitive and disempowering, harmful to the
interests of innocent third parties, and works on the basis of undignified invasions of
privacy. I will start by outlining the motivation/rationale behind this policy approach
and illustrate its application in the test for intentional homelessness provided under
UK homelessness law. My analysis of this test indicates that current social welfare
policy implicitly conceptualises the capacity for autonomous and responsible
decision-making (and thereby deservingness) as MCA capacity. In this way,

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applicants for welfare assistance whose need is attributed to their own reckless or imprudent choices are disqualified from (full) assistance unless it can be evidenced that such prudential failures were caused by some deficit of legally-defined decision-making capacity. In other words, the threshold of mental incapacity is (at least in practice) deployed to distinguish between deserving incompetents and undeserving freeloaders.

However, as we saw in Chapter 1, there is a set of cases which cannot adequately be explained either in terms of mental incapacity or of capacitous moral failure. I will conclude that the conceptual gap these cases fall through indicates that we need a broader notion of personal autonomy than that deployed within public policy, which I will proceed to carve out in Chapter 3.

2.2. The Principle of Welfare Conditionality

The principle of welfare conditionality originated as a reply to the problem of reconciling (conflictive) commitments to meeting welfare need and incentivising responsibility. This principle holds that eligibility for certain basic publicly-provided welfare goods should be dependent on an individual: (a) not being culpable for the events that led to the welfare need arising in first place (backward-looking); and, (b) meeting any prescribed duties or standards of behaviour for ongoing entitlement (forward-looking).

So-called welfare conditionality is most apparent in the following social welfare safety-nets: homelessness law, where those deemed to have made themselves intentionally homeless are not entitled to re-housing; and unemployment benefits, where those deemed to have made themselves intentionally unemployed and/or to
have failed to take the required steps to secure employment or enhance their employability can also have their benefits cut.

However, the term *welfare conditionality* can be misleading, since all social welfare provision is conditional on something, not least *need*. Accordingly, use of the term *welfare conditionality* to convey the idea of a distinctive type of policy approach to the distribution of welfare goods (distinct, presumably, from non-conditional approaches which in reality may never exist) is a misnomer. If there are differences in approach between particular social welfare policies - and my focus will fall on differences between traditional, safety-net provisions and autonomy-/responsibility-enhancing interventions - then we need to look elsewhere for an explanation. For now let me suggest the difference lies in *how the policy seeks to promote responsible agency*: whilst traditional safety-net policies encourage the internalisation of personal responsibility by stipulating the conditions of entitlement, autonomy-enhancing interventions enable individuals to acquire and develop the skills for personal responsibility. Let’s call these approaches, respectively, ‘hands-off’ and ‘hands-on’. From now on, when I speak of welfare conditionality I mean to refer to *hands-off policies*, and when I speak of autonomy-enhancing interventions to *hands-on policies*.

With this distinction in mind, let me now return to the *hands-off* policies highlighted above; the traditional, safety-net policies which deny entitlement (or at least full entitlement) to people who are deemed to be responsible for their welfare need, or their failure to take the necessary steps to alleviate it. Defenders of such policies claim that they fulfil two important functions. Firstly, they promote socially

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67 As explained, strictly speaking welfare conditionality is a misnomer. However, since it is such an established term I will continue to use it to refer to *hands-off* policies and legislation.
desirable behaviours, particularly personal responsibility. By using a system of rewards and sanctions (or ‘carrots and sticks’) they are said to promote self-sufficiency and disincentive welfare dependency, thereby enhancing claimant wellbeing, encouraging personal aspiration, cutting public expenditure, and increasing national productivity. Secondly, they help to eke out resources that are scarce due to demand or cost (or both), by means of prioritising ‘the deserving’ and disqualifying ‘the undeserving’.68

These justifications are apparent in records of debates accompanying the passage of current homelessness law through parliament in 1977. The test for intentional homelessness was not in the original bill and was introduced during its passage in response to worries that it was ‘a charter for scroungers and scrimshankers’, which would place an intolerable burden on scarce resources.69 Furthermore, that it would lead to queue-jumping: ‘self-induced homelessness so that a person may take advantage over other citizens in unfair circumstances’.70 The following examination of this test illustrates how the hands-off policy approach operates in practice, and the counter-productive and unjust outcomes it produces.

2.3. The Test for Intentional Homelessness

In the UK, Part VIII of the Housing Act 1996 places local housing authorities under a duty to alleviate a household’s homelessness only where a number of gateway tests are satisfied. First, eligibility: a person is ineligible for any assistance at all if she is not habitually resident in the country or does not have the required immigration

68 This categorisation may also play a legitimating role insofar as perceived fairness is necessary for public support of the welfare state.
69 Housing (Homelessness Persons) Bill, House of Commons debate on 18 February 1977, recorded in Hansard, Vol. 926, cc896-995, Mr Rees-Davies at para 905.
70 Housing (Homelessness Persons) Bill, House of Commons debate on 8 July 1977, recorded in Hansard, Vol. 934, cc1599-674, Mr Rossi at para 1610
status. Second, homelessness: a person is not homeless if they have access to accommodation adequate for her household’s needs which, taking into account prevailing housing conditions, it is reasonable for them to occupy. Third, priority need: a person is only entitled to accommodation under the Act if she has dependent children or if she or a member of her household has a prescribed priority need, for example, that s/he is vulnerable in a housing context due to pregnancy, ill-health, disability, immaturity, discharge from institutionalised care or some other special reason. Fourth is the intentional homelessness test.\footnote{If these four tests are passed, the full housing duty is owed to the homeless person and then a fifth test may be applied to determine which local authority should discharge that duty, i.e. the local connection test.}

Statute provides that a person becomes homeless intentionally if she deliberately does or fails to do something in consequence of which she ceases to occupy accommodation which is both available for her occupation and which it would have been reasonable for her to continue to occupy. Furthermore, it states that an act or omission in good faith, where a person is unaware of a relevant fact, is not to be regarded as deliberate. Case law has drawn a distinction between unawareness of a relevant fact caused by ‘honest blundering and carelessness’ (good faith)\footnote{R. v Hammersmith and Fulham LBC Ex p. Lusi (1991) 23 H.L.R. 260.} and ‘wilful ignorance or shutting one’s eyes to the obvious’ (bad faith).\footnote{F v Birmingham City Council [2006] EWCA Civ 1427.} Thus, in applying this test, a housing authority must identify the cause of the homelessness and, broadly, whether it is attributable to the voluntary, competent agency of the homeless person, or good faith ignorance of a relevant fact, or other factors that indicate that the act or omission should not be treated as deliberate.

The test for intentional homelessness is representative of UK policies born of the principle of welfare conditionality. Unemployment benefits are similarly
administered according to regulations which seek to disqualify claimants whose loss of employment or continued unemployment can be attributed to particular acts or omissions for which they have no good reason.74 ‘Good reason’ for a particular act or omission is not defined, but is understood to include facts which would probably have caused a reasonable person to act as the claimant did. Statutory guidance issued to decision-makers states that the kind of circumstances which should be treated as contributing to good reason includes: domestic violence, mental health conditions or disorders, bullying or harassment, and homelessness.75

Below I will discuss how statutory guidance cashes out the test for intentional homelessness in ways that suggests it comes closer than the ‘good reason’ test to capturing the idea of sub-optimal decision-making, thereby acknowledging the gap between moral failure and mental incapacity. However, as I will show, in practice the concept of mental capacity - not sub-optimal decision-making - is (at least implicitly) deployed to distinguish between acts and omission for which an agent can be held responsible and those for which she cannot.

**Adjudicating Intentional Homelessness**

The Homelessness Code of Guidance issued by government states that the intentional homelessness provision reflects ‘a general expectation that, wherever possible, people should take responsibility for their own accommodation needs and ensure that they do

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74 See *The Jobseeker’s Allowance (Sanctions) (Amendment) Regulations* 2012, and note that the statutory amendments that came into effect in October 2013 brought in a tougher regime aimed at ending what the coalition government calls the ‘something for nothing’ culture. A claimant’s failure to comply with even the most basic job-seeking requirement can lead to their disqualification from benefits for between 13 weeks and three years.

not behave in a way which might lead to the loss of their accommodation’.\textsuperscript{76} The Code illustrates the notion of intentional homelessness so construed with the following examples:

- [where the homeless applicant] has lost his or her home because of wilful and persistent refusal to pay rent or mortgage payments;\textsuperscript{77}
- [where the homeless applicant] could be said to have significantly neglected his or her affairs having disregarded sound advice from qualified persons;\textsuperscript{78}
- [where the homeless person] is evicted because of his or her anti-social behaviour, for example by nuisance to neighbours, harassment, etc.\textsuperscript{79}

These examples remind us of several of the case studies in Chapter 1, for example: MC who both failed to pay her rent and act on the advice of those who were trying to prevent her eviction; and, Mrs Moran whose loss of temper led to her eviction from a woman’s refuge. However, the Code requires local authority decision-makers to have regard to the following circumstances in which an act or omission should not, in general, be considered deliberate (thereby not satisfying the test for intentional homelessness):

- There is reason to believe that the applicant is incapable of managing her affairs, for example, by reason of age, mental illness or disability.\textsuperscript{80}
- The act or omission was the result of limited mental capacity or a temporary aberration or aberrations caused by mental illness, frailty, or an assessed substance abuse problem.\textsuperscript{81}

\textsuperscript{76} MCA Code of Practice, s.11.3. Local housing authorities are required ‘to have regard to’ the Code of Guidance in exercising their functions under homelessness law – s.182(1) Housing Act 1996.
\textsuperscript{77} Ibid., s.11.20 (ii)
\textsuperscript{78} Ibid., s.11.20 (ii)
\textsuperscript{79} Ibid., s.11.20 (v)
\textsuperscript{80} DCLG (2006) Homelessness Code of Guidance, s.11.17 (ii).
The act or omission was made when the applicant was under duress.\textsuperscript{82}

The act or omission was beyond an applicant’s control, e.g. non-payment of rent was due to failures in the administration of housing benefit.

The applicant’s imprudence or lack of foresight led to an act or omission in good faith.\textsuperscript{83}

Closer analysis of this list suggests two categories of non-culpability: first, where the applicant has mental capacity and, second, where the applicant does not. In the first instance, three distinct classes are discernable: firstly, duress (where the capacitous will of P is overborne by external pressure); secondly, good faith where P’s capacity is not actualised (imprudence) or where P errs in judgement (lack of foresight); and, finally, where the relevant act or omission was beyond P’s control, either because physical barriers to managing one’s affairs (e.g. being housebound and unable to post evidence to support a benefit claim) or being misled or let down by others (e.g. giving the letter to someone else who failed to post it). In the second instance – where the applicant does not have mental capacity - a distinction can be drawn between an agent-specific judgement (P is probably incapable of managing her affairs by reason of mental illness or mental disability) and an act/omission-specific judgement (the relevant act/omission was directly caused by P’s mental incapacity or mental illness/frailty).

How does this taxonomy of non-deliberate acts or omissions help us? Well, first, it tells us that policy guidance, in theory at least, chimes with the everyday intuitions that underpin our practice of holding people responsible, specifically those

\textsuperscript{81} Ibid., s.11.17 (iii).
\textsuperscript{82} Ibid., s.11.17 (iv).
\textsuperscript{83} Ibid., s.11.17 (v).
intuitions that tell us when it is not legitimate to hold someone responsible. Secondly, it tells us that a standard of mental capacity plays a role in distinguishing between homelessness-causing acts and omissions that are deliberate and those that are not. What standard of mental incapacity is this? No standard is specifically referred to in the Code. Mental health (or the lack of it) is signalled as a cause of homelessness, a factor which can give rise to a priority need for assistance on the grounds of housing vulnerability, and as a matter which should prompt a housing authority to seek the advice and input of a specialist services.

Third, this taxonomy also reveals that a lack of foresight and imprudence on the part of a mentally capacitous agent can lead to acts and omissions that should be regarded as non-deliberate. This potentiality – which can in effect render some mentally capacitous decisions non-blameworthy – suggests that the test of intentional homelessness is constructed on a competence test broader than the test for mental capacity. Furthermore, insofar as it can excuse conduct potentially attributable to *sub-optimal decision-making*, it could be seen to undermine my contention that welfare conditionality does not acknowledge a gap between moral failure and mental incapacity.

However, there is a huge difference between the test for intentional homelessness *as it is practised*, and the test as it is sketched out in theory. This is for a number of reasons. Firstly, whether or not a person is intentionally homeless is a decision for the local authority to make and it is allowed a high level of discretion in this. One authority’s decision could vary from another, and a decision cannot be overruled by the courts unless there is some procedural irregularity attaching to it (such as failing to make relevant inquiries) or if the decision reached is so
unreasonable that no reasonable authority would make it.\textsuperscript{84} Secondly, resource-constrained local authorities with an interest in rationing housing will tend to apply a high evidential threshold in respect of the test in order that they can limit the number of households they are obliged to rehouse. (As I will demonstrate below, using the case of MC, this evidential threshold can amount to ‘compelling’ medical evidence of mental incapacity at the relevant time.) Third, although local authorities must have regard to the circumstances listed in the Code in which an act or omission should not generally be regarded as deliberate – including imprudence and lack of foresight - this requirement is simple to meet, merely by recording that such guidance has been taken into account when reaching a decision.

This all suggests that each authority has substantial leeway in interpreting guidance and choosing how generously they wish to apply it, and that this discretion can be used to ration scarce resources.\textsuperscript{85} It is noteworthy – although not conclusive – that in a ten year period, during which affordable housing resources have become increasingly scarce, the rate of intentional homelessness findings has doubled.\textsuperscript{86} Therefore, in the context of measuring the extent to which homelessness law acknowledges the gap between moral failure and mental incapacity, and can, thus, avoid punishing those who lack autonomy-competence, what occurs in practice is a better point of reference than what may be allowed for in theory. And in practice, decision-making and executive deficits short of legally-constructed mental incapacity,

\begin{footnotes}
\item[84] That is, grounds that amount to ‘a point of law’ in accordance with administrative law.
\item[85] For research that suggests that this is precisely what happens, see Hilditch, Martin (2010, 1 October) ‘What Are the Odds?’, in Inside Housing, retrieved on 31 March 2014 from http://www.insidehousing.co.uk/what-are-the-odds?/6511885.article.
\item[86] According to government statistics (Table 770), in 2003 4% of eligible homeless households in priority need were deemed to be intentionally homeless, whilst in 20013 the figure had risen to 8% - see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16586/Table_770.xls.
\end{footnotes}
are rarely, if ever, enough to dissuade a resource-limited housing authority from making an intentional homelessness decision. For evidence of this, we need only consult the case studies in Chapter 1, which include five people who were deemed ‘intentionally homeless’ by local housing authorities:

- **MC** - the troubled single mother who consistently failed to take the necessary steps to ensure that her rent was paid and who was evicted from her Council home due to her arrears;
- **Mr Gibbons** – the bereaved alcoholic who mismanaged his affairs and was evicted due to rent arrears;
- **M** - the 17-year old care-leaver who was evicted from a supported housing scheme because she kept breaking the rules;
- **Mrs Moran** - the victim of domestic violence who along with her children was evicted from a women’s refuge because of her temper; and
- **The Watchmans** – the couple who in buying their council house failed to anticipate future affordability issues and who were evicted on the back of mounting mortgage arrears.

Lack of foresight, imprudence, poor judgement, executive failures and lack of control feature prominently in these cases, but all relevant acts and omissions were deemed to be deliberate.

If the government wanted to acknowledge this gap, it would need to stipulate – perhaps by way of a statutory instrument – that certain groups of people known to be less capable of managing their affairs should be exempt from the intentional homelessness test, e.g. under 18s, care leavers, those suffering from serious mental illness (including severe depression) and people with addictions. Or, less generously,
it could simply issue guidance to the effect that a lower evidential threshold should apply in such cases, in recognition of the vulnerability of these groups. The fact that it does neither, is a failure to acknowledge the gap.

In summary, then, whether a relevant act or omission should be regarded as deliberate, is a decision for the local authority to make. The local authority must gather relevant information, base their decision on this, and give the benefit of any doubt to the applicant. But – and this is key – it is for the local authority to decide if: (1) the applicant’s ability to manage their affairs prudently was impaired; and (2) this impairment directly caused the relevant act or omission. Case law is testimony to the fact that strong evidence of serious mental disorder, at the relevant time, is generally required to make a case that an applicant is ‘incapable of managing her affairs’ or that a relevant act or omission is attributable to ‘mental incapacity’. Whilst it is not clear what standard these terms of art imply, it is reasonable to hold that the concept of MCA capacity is (at least implicitly) deployed to distinguish between relevant acts and omissions for which an agent can be held responsible and those for which she cannot.

To underline the importance of drawing a distinction between theory and practice, and how MCA capacity is implicitly deployed to distinguish between deliberate and non-deliberate acts and omissions, I now turn to the case of MC and the way in which intentional homelessness test was adjudicated in her case.

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87 It is a strange feature of homelessness law that applicants who are in priority need for housing because they are vulnerable in a housing context (i.e. when homeless, they are less able to fend for herself than an ‘ordinary homeless person’, so that s/he would be likely to suffer injury or detriment, in circumstances where a less vulnerable homeless person would be able to cope without harmful effects) may nevertheless be regarded as competent in the context of the intentional homelessness test.
2.4. Case Study – The ‘Unhappy Circumstances’ of MC

You will recall that MC was raped twice between the ages of 15 and 16, and following these events became depressed and attempted suicide. Her doctor reported that she had personality problems linked to this trauma; that she was unstable, chaotic and, because she drank to excess, was unable to keep her affairs in order. Despite being given various opportunities to deal with her mounting rent arrears, she failed to take the necessary action and so was evicted. She was found intentionally homeless and subsequently failed to apply for a review of this decision by the statutory deadline. Despite the availability of fresh evidence regarding her difficulties managing her affairs, the local authority rejected her request to extend this deadline and review her case. MC’s legal representatives appealed against this decision as far as the court of appeal, where it was dismissed. The critical issue was whether the evidence concerning her inability to manage her affairs was sufficiently strong to suggest that the original decision should be reversed.

Here are the details of MC’s case as recorded in the official transcript, which speak to the following key issues I want to highlight: (1) the threshold test for ‘mental (in)capacity’ and ‘(in)ability to manage affairs’ is basically MCA capacity; (2) evidencing the satisfaction of this (or any) test retrospectively can be demanding; and, (3) the application of this threshold test demands investigations which can be intrusive and damaging to the dignity of the applicant.

8. […] In coming to [the conclusion that MC was intentionally homeless] the acting Senior Housing Adviser wrote:—

“I have taken into consideration other information you provided about your well-being, you stated that you were drinking and that you were suffering
depression. Investigations have shown that there is no evidence that you were depressed or being treated for this and there is no evidence to suggest that your overdose was a suicide attempt. By your own mitigation you did not seek any treatment for your drinking problem and you stated that this is where your money was being spent, again on investigation we have no evidence of your alcohol problem.

You also stated that you were raped, while I appreciate this traumatic assault on you must have been devastating, all of this took place when you were 16 years old in 1994, well before your being given a tenancy, and at the time of the rape you were referred for counselling and to the Child Guidance Unit of which you never kept to the appointment.

Your case has now been concluded that you are intentionally homeless [...] You have the right to request a review of this decision [...] within 21 days”.

9. The applicant was vague as to her response to that letter and it is not at all clear what approaches she made to the local authority or what she said when she did approach them. She did see her general practitioner who wrote a letter dated 8th February 2001 setting out the history of the two assaults upon her and saying:—

“Since then she has been more vulnerable and emotionally labile. From the records I can see that on 13th May 1996 she attend Casualty at Lewisham Hospital having taken an overdose of Paracetamol tablets. The blood test did show an abnormal level of Paracetamol and therefore she was kept under observation and given a follow up appointment later on and was also referred to see a psychiatrist for her emotional problems. Both these incidents have left
a scar on her life and periodically she gets depressed and a feeling of guilt complex. I do not think she will ever recover fully to her normal self.”

For some reason or other, possibly lack of money to pay the doctor's fee, she did not collect that report for months. […] For one reason or another it took until 16th July for her to attend on the Homeless Persons Unit seeking help […]

10. […] the local authority [refused to accept an out-of-time review and referred her to social services].

11. The applicant consulted solicitors and they wrote on her behalf on 31st August 2001 making a formal request to extend the time for a review of the decision of 24th January 2001 on the ground that her age and mental state were such that she was not able properly to deal with her affairs such as completing housing benefit claim forms. In that letter the solicitors explained that the applicant was still unwell and extremely vulnerable, having “great difficulty in coping with everyday life”. Her failure to explain the lapse in time between her consulting her general practitioner and forwarding his report to the local authority was said to show that her inability to deal with matters was continuing. The solicitors reserved the right to submit further medical evidence once notified that the council agreed to an out of time review. […]

The claim for judicial review and the unusual ensuing events

[…]

13. The local authority eventually responded [stating that they would not conduct an out-of-time review]
Consideration was given to the general practitioner's letter,

“but it is in no way compelling evidence that Ms C has problems attending to
the administrative affairs in her life. Given the events that occurred in Ms C’s
teens, I would have thought it self evident that Ms C may not “recover fully to
her normal self”, but there is no causal link drawn between these events and
an inability to cope with financial and administrative matters, and the doctor's
letter does not link these matters in any way.”

[...]

15. On 24th January 2002 the applicant's solicitors wrote to the legal
department of the local authority enclosing a copy of the report prepared by
Doctor Browne. This report had in fact been written three months earlier on
19th October 2001. He recounted the history he had taken from the applicant.
He expressed the opinion that:—

“This young woman though not mentally ill in the clinical or formal sense has
in my opinion quite significant personality problems in that she is unusually
anxious and to some extent unstable. Some of these problems undoubtedly
stem from the two unfortunate episodes related above, i.e. the two rapes. It
seems fair to say that these have cast a dark shadow on her life and have
caused a psychiatric/psychological mental state amounting to something near
to post-traumatic stress disorder. It is my opinion that this led to her leading a
disjointed and chaotic lifestyle during which she drank to excess and because
of which she was unable to think straight and to keep her affairs in order ... 
As a result of my examination and having thought carefully about the matter, I
am of the opinion that this young woman did not make herself intentionally homeless as alleged by Lewisham Council. I believe that her disturbed mental state rendered her unable to manage her affairs in any meaningful way over that period.”

[...]

21. The local authority duly considered the request made to them in the light of Doctor Browne's report [but refused to reverse its decision, stating].

“I remain of the view that no proper explanation has been provided for the failure to seek a review [in time]. I do not find [Doctor Browne’s] report particularly compelling. I have found it to be generalised, non-date specific, and based almost entirely on what Ms C has told him.”

He went on to point out that the relevant period was when the rent arrears arose, principally in 1999 to April 2000. He took the view that whereas incapacity, for example due to old age, mental illness or handicap, would be a good reason that word suggested that more was required than “being simply depressed or having difficulties coping. The test is a high one”. He pointed out Doctor Browne did not focus on the particular periods during which the arrears arose. He agreed that the applicant was having “a very difficult time” in the aftermath of the assaults upon her leading to her being admitted to hospital in May 1996 but he pointed out that was more than a year before the tenancy was even granted. He pointed out that she did pay the rent from time to time and that things really began to go wrong only in 1999. She obtained housing benefit and had held down employment for long periods suggesting some ability to manage her affairs. [...]
“I continue to conclude that the original [intentional homelessness] decision was correct, and that any review as might take place would not stand a good prospect of success. [...]”


“Irrespective of whether she worked or not, it remains a fact in my opinion that she has instabilities and frailties of personality which surfaced over the period in question and which make her clearly in my eyes a person in need of help with her daily affairs. ... Again, in the period in early 2001, when she was late in making an appeal, the information I have is that this was due to her state of acute distress due to losing her place in a hostel but more importantly as a reflection of her enduring frail mental capacity to deal with such crises.”

This unhappy tale typifies the challenges faced by vulnerable individuals who must provide evidence to satisfy a local housing authority that the failures that led to their homelessness were not deliberate, but rather symptoms of deeper problems which prevented them from adequately managing their affairs. In MC’s case, the local authority wanted medical evidence that at the material times she was unable to manage her affairs, which was not available because MC was not examined by a medical practitioner at those points in time. The effects of the trauma she suffered earlier in her life and subsequent depression were considered historic and not directly relevant by the local authority. But even if MC had been medically assessed as not coping at the material times, the local authority were nevertheless entitled to judge
whether the resulting evidence was sufficiently weighty to draw a causal link between
the relevant acts and omissions and MC’s state of mind. As discussed above, a high
evidential threshold is often applied by local authorities as a means of eking out
scarce resources, and unless such decision are deemed ‘Wednesbury unreasonable’
(so unreasonable that no reasonable authority acting reasonably could have reached
it) the court cannot not overrule it.

Let’s take a look at the evidential threshold which was applied in MC’s case.
The appeal court judge handing down judgement in MC’s case observes that the local
authority reviewing officer ‘took the view that whereas incapacity, for example [due
to] old age, mental illness or handicap, would be a good reason that word suggested
that more was required than “being simply depressed or having difficulties coping.
The test is a high one”’. 88 I wish to suggest that the test implied here is that of mental
incapacity, along the lines defined within the MCA, and that a successful appeal
demands evidence that such incapacity was present throughout all the relevant
periods. This is a demanding evidential threshold, and one which many vulnerable
people – including MC – are unable to satisfy. Accordingly, they are deemed
responsible for their plight and underserving of public assistance.

Here I should clarify that I am not suggesting that MC’s behaviour should be
medicalised. Although there are cases where sub-optimal decision-making is due to
psychopathology – be it psychosis or severe depression – many people who are found
intentionally homeless are judged to be mentally competent and their decisions are
judged not to have been affected by mental disorder. And I am willing to grant that a
good number of these judgements are not mistaken. What I am proposing is that we

88 Ibid., para 21; my emphasis.
recognise and appropriately respond to the terrain between capacitous moral failure and mental incapacity, within which people satisfy legal tests of mental capacity but nevertheless are so poorly equipped to make choices that promote their wellbeing that they should not be deemed (wholly) responsible for their consequences. Once we recognise this gap, we can see that MCA capacity does not suffice for responsibility.

So, taking stock, we have seen that $\text{hands-off}$ welfare conditionality restricts public assistance according to some prescribed standard of deservingness. In the case of housing the homeless, this is imported through the test of intentional homelessness. Whilst the test envisages circumstances in which an applicant’s homelessness-inducing behaviour should not be deemed intentional, we have seen in the case of MC that this generally demands compelling evidence of MCA incapacity during the relevant period. This supports my claim that $\text{hands-off}$ welfare conditionality does not – at least in practice – recognise the gap between moral failure and mental incapacity.

But we have also seen that the application of this deservingness test requires an in-depth investigation into the private lives of those who need help. We can see from the transcript extracts reproduced above, highly sensitive details of MC’s life were exposed to scrutiny and judgement, and that pleas were made regarding her incompetence. This motivates an important objection to $\text{hands-off}$ welfare conditionality: can entitlement be judged without invading the privacy and assaulting the dignity of the welfare applicant? MC’s case suggests not.
2.5. **The Assault on Dignity**

The practical difficulties that arise when social welfare policies attempt to distinguish between deserving and undeserving applicants for assistance echo similar difficulties found in philosophical debates concerning equality and responsibility. How to appropriately balance the value of equality against that of responsibility is a well-rehearsed dispute between the (broadly) libertarian opponents of social welfare provision and their (broadly) egalitarian counterparts. Critics argue that the beneficiaries of welfare provision are shielded from the responsibility of meeting their own needs, and that the freedom of others is impaired when they are forced to fund such provision through compulsory taxation. In reply, those advocating the provision of social welfare goods argue that they are necessary pre-conditions for the (the exercise of) autonomy and that, consequently, society has a duty to build and support the institutions that underpin them. This debate reveals a tension inherent within the liberal ideal of autonomy, between, on the one hand, the idea of non-intervention, freedom to choose and responsibility, and, on the other, socio-economic rights and effective choice.

In an effort to resolve this tension, Dworkin defends the distinction between ‘brute luck’ and ‘option luck’, as a means of justifying egalitarian policies that seek to compensate individuals who are disadvantaged through no fault of their own (bad brute luck) and justifying inequalities that flow from the exercise of autonomous choices (bad option luck). In this way, he defends egalitarianism from the libertarian criticism that egalitarian redistribution is unjust because it both fails to

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hold people accountable for the choices they make in life and forces the hardworking prudent to pay for the reckless choices others make. Welfare conditionality can be seen to draw a similar line for the same reason, and, as I will now show, faces the same kind of objections.

As intuitively appealing as the brute/option luck distinction might sound, it is vulnerable to three key objections, all of which echo those highlighted by Elizabeth Anderson in her seminal paper: *What’s the Point of Equality?*.\(^{92}\) I will call these the Indeterminability Objection, the Demeaning Inquiries Objection, and the Abandonment Objection. The first concerns the complexities of judging whether the relevant state of affairs were freely chosen or attributable to factors beyond the control of the agent. In other words can the line between brute and option luck be clearly drawn? Consider, for example, the alcoholic suffering from liver damage who cannot support himself because he is unfit for work and who needs expensive medical treatment. On one hand, it could be argued that he chose to drink, and either didn’t seek or respond to rehabilitation. Consequently, his need can be attributed to option luck, and the state should not force others to pay for his choices. On the other hand, it could be argued that the alcoholic’s addiction can be attributed to his childhood trauma and that his drinking was a form of self-medication, prompted by the need to escape painful memories. Such circumstances are not chosen, but are dealt us by fate. In order to determine if a person’s need has arisen as a result of brute or option luck a great deal of personal background information will be required. It is far from clear that such information will be available, or that it will be sufficient to enable a decision to be reached, certainly with any confidence that it is the correct decision. This is particularly so in cases where complex needs and vulnerability are present. For

example, in the case of MC above we note the difficulties of sourcing evidence pertaining to her mental state at the relevant time and establishing firmly what the causal nexus of her decisions were.

This leads to the Demeaning Inquiries Objection: in order to make determinations that are fully informed by background information, the state will need to carry out investigations which will be both intrusive and demeaning. Applicants will have to expose their lives to judgemental scrutiny, and draw attention to their inadequacies and failures in order to stand a chance of securing welfare assistance. As Anderson points out, such supplications and the intrusive inquiries into a person’s circumstances are assaults upon human dignity.93 Recall again MC, and how the details of her rape, suicide attempt and vulnerability were scrutinised and judged. Wolff aptly describes this unavoidable implication of luck egalitarianism as ‘shameful revelation’ and observes how in trying to reconcile need and responsibility Dworkin has created a different tension, this time between two egalitarian values: fairness and respect.94

Now, it might be possible to operationalise the brute/option luck distinction in order to avoid the first two objections. Perhaps, second-best approximations of what choices should be attributed to brute luck could be deployed to avoid indeterminability, e.g. the consequences of decisions made by persons affected by mental illness or incapacity should be regarded as brute luck. The test for intentional homelessness and its associated guidance could be understood as an exemplar of such a mechanism, albeit one that risks people falling through the net. Short of dispensing

with the brute/option luck distinction, I suspect the only way to ameliorate the problem of dignity-assaulting inquiries would be means of deploying second-best approximations (which limit the background information and evidence needed) and sensitive interviewing.

However, the Abandonment Objection is perhaps the most difficult to rebut. It concerns the hardship people will suffer if their need is attributed to option luck. Those who have made errors of judgement as well as those who have been imprudent will be left to fend for themselves as best they can in a society from which they are excluded and a market place in which they cannot compete. Their health and life will be endangered and we might think that such drastic sanctions are not justified, even if we want to accept some place for responsibility in our overall policy. Welfare goods, such as housing, are so basic, and the detrimental effects of lacking them are so predictable and grave that some think that abandonment is a step too far. Moreover, even if we were willing to abandon individuals like MC, this will often mean abandoning their children and other innocent third parties too, who will also – through no fault of their own – be left without recourse to the basic necessities of life. Employing the brute/option luck distinction thereby would cause deprivation and misery, and damage to the life chances of children, young people and other innocent third parties. Such third parties suffer directly from the abandonment – for example, MC’s child’s well-being and life chances will be detrimentally affected if her mother is unable to provide her with a stable and adequate home. Or they can be affected

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96 For instance, MC may have to move around friends and families or sign up for accommodation which is unfit for human habitation, this being all she can secure in the private rented market. These are forms of ‘hidden homelessness’, where people are living outside mainstream housing but are not (legally) owed a homelessness duty and are therefore not accounted for within local and national
more indirectly, as would be the case if MC’s child were taken away from her and placed with a foster family or in a children’s home.

Now, a number of replies may be made to this worry. Barry and Miller argue that most inequalities will not be attributable to bad option luck in the real world given the disparity in market opportunities, and that accordingly abandonment will rarely arise. Vallentyne suggest that the quality of unsuccessful risks is relevant and that bad option luck could be compensated if the gamble taken was rational. Arneson’s argument that since people’s capacity for prudence varies according to their background circumstances and natural talents, can also be seen a reply to the Abandonment Objection: since these are factors beyond an agent’s control, they are matters of brute luck and therefore it follows that imprudence amounts to brute luck and should be compensated. However, these replies chip around the edges of the abandonment objection, without eliminating it because it can still be envisaged that some people will be abandoned as a result of the brute/option luck distinction. Barry and Miller don’t rule out abandoning imprudent, but advantaged, persons; Vallentyne is prepared to abandon reckless risk-takers; and Arneson’s insight doesn’t rule out cases of competent irresponsibility. Segall and Barry claim to avoid the


100 My view, you might think, will also tolerate the abandonment of such individuals, and possibly even innocent third parties. However, this implication can be avoided by a commitment to a social minimum that will ensure that even competently irresponsible citizens have access to the welfare goods upon which autonomy-competence is contingent. This social minimum will fall short of what may be provided for those who lack autonomy-competence – and perhaps ought to – but it should be sufficient to prevent the kinds of deprivation that are injurious to health and welfare, and, thus, autonomy-competence. Protecting the interests of innocent third parties may, as a matter of justice,
Abandonment Objection completely by deploying an additional consideration: for Segall, the principle of solidarity, which permits society to hold imprudent persons accountable whilst at the same time not allowing them to become destitute\(^1\) and for Barry an egalitarian value that guarantees all citizens an equal set of basic capabilities\(^2\). However, insofar as this move would result in option as well as brute luck being compensated, it erodes the luck egalitarian’s commitment to reconciling need and responsibility. In effect, it transforms a responsibility-sensitive theory of welfare entitlement into an unconditional one, where tests like that of intentional homelessness have no place.

Taking stock, then, Dworkin’s brute/option luck distinction has prompted objections concerning associated assaults on dignity and harsh outcomes, and the same objections apply to welfare conditionality which mirrors this distinction. I want to add one more objection against both.

### 2.6. The Autonomy-Competence Objection

It is not possible to say what happened to MC and her baby, but she would have been left to meet her own needs as best she could in the private rented sector. Intentionally homeless people, given their circumstances and/or track record of sustaining accommodation, are hugely disadvantaged in the housing market, particularly where there is an insufficient supply of affordable rented housing. They are therefore likely to end up living in sub-standard housing, or staying in overcrowded accommodation with friends or family, or queuing up for short-term hostel placements, or worse still, require a higher level of public assistance. For example, children’s outcomes should not be substantially diminished by the failures of their carers.


sleeping rough on the streets. The effects of homelessness and poor housing, particularly on child development, are well-documented\(^{103}\) and it is not difficult to imagine the impact these hardships and disadvantages can have on anyone’s ability to exercise control over their lives and advance their best interests. With these factors in mind, one further argument against *hands-off* welfare conditionality policies, like the test for intentional homelessness, comes into sharp relief: that holding people to account for allegedly irresponsible behaviour in the past might mean that they lose whatever capacity they had to assume responsibility in the future. Furthermore, that children who grow up without a decent home, brought up by parents who cannot manage their lives prudently, and are effectively punished for this incapacity, risk growing up with similarly impaired autonomy-competence. *Hands-off* policies thereby risk perpetuating rather than breaking damaging cycles of intergenerational social exclusion and sub-optimal agency.

### 2.7. Conclusion

In Chapter 1, I demonstrated with the aid of a range of case studies that there is a gap between moral failure and mental incapacity, populated by those who have legally-defined decision-making capacity but who have impaired autonomy-competence. In this present chapter, I have shown that current social welfare policies founded on the principle of conditionality do not recognise this gap (at least not in practice) and instead distinguish irresponsibility and undeservingness according to MCA capacity—a standard which does not suffice for legitimately holding people responsible because it fails to account for deficits in autonomy-competence that fall short of

psychopathology. I have also shown how they infringe the dignity of applicants and can yield counter-productive effects. By abandoning *sub-optimal decision-makers*, such policies leave them (even) less able to take responsibility or impair (still further) their capacity to make responsible choices. Insofar as this is true, we are faced with an important question; (how) can we hold people responsible for their past choices, whilst not undermining their capacity to make responsible choices in the future?

In the UK, it is not clear to me that this challenge has been addressed by policymakers (at least not adequately). I will make some progress in this respect and in the next chapter I start by considering our need for a broader notion of autonomy that can account for the conceptual gap through which the vulnerable, sub-optimal choosers can fall. I will advance an ability-account of personal autonomy and then, in Chapter 5, showcase an autonomy-/responsibility-enhancing public policy intervention motivated by this view.
Chapter 3
Autonomy-Competence

He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold his deliberate decision.\textsuperscript{104}

By nature all men are equal in liberty, but not in other endowments.\textsuperscript{105}

3.1. Introduction

In the previous chapters, I exposed a gap between moral failure and mental incapacity, and then demonstrated how the narrow conception of personal autonomy underpinning social welfare policies fails to account for it. In this chapter, I will defend a broader conception of personal autonomy that can account for the deficiencies illustrated by the case studies, thereby capturing the gap in terms of a deficit in autonomy-competence. I will situate this view of autonomy on the philosophical terrain between non-substantive and strongly substantive theories, and within a family of views that place emphasis on the kinds of agentic skills and personal dispositions conducive to genuine self-determination.

I propose to understand autonomous decision-making (contrasted with merely mentally capacitous decision-making) as a process in which an adequate range of good enough decision-making skills can be deployed to identify and select options that promote our (self-identified) best interests, and in which regulative control can be exerted to ensure those choices can be enacted. These decision-making skills go


beyond the predominantly information-processing skills upon which England and Wales’s legal test for mental capacity focuses; they include a broader range of evaluative and executive competencies. The development of these competencies, and their resilience to adversity, is – I would suggest - contingent on (or at least aided by) a range of self- and other-regarding attitudes. I will argue that the capacity for personal autonomy, so understood, (what I refer to as autonomy-competence) is the proper basis for holding people responsible for imprudent conduct damaging to their social welfare, not mental capacity.106

I will conclude by acknowledging a serious objection to my position, namely that insofar as it relies on normative content it is contrary to the liberal state’s commitment to neutrality. I will reply to this objection in Chapter 4, before going on to consider in Chapter 5 what type of public policy is required to address the kinds of deficit in autonomy-competence illuminated by the case studies.

3.2. Best Interests

An appropriate starting place for the task of this chapter is to think about what autonomous decision-making consists in. What is it that we expect agents to be able to do in order to qualify as autonomous? We saw in Chapter 2 that mental capacity under the Mental Capacity Act 2005 (the MCA) consists in a number of largely-cognitive decision-making skills. But since – as I have argued – these criteria do not capture the kinds of deficits illuminated by the case studies, what more might autonomous (as opposed to merely mentally capacitous) agency consist in? The

106 I do not propose that this is the notion of autonomy that underlies moral and legal responsibility for crimes, and I remain here agnostic on the question of whether any notion of autonomy underlies such responsibility.
surrogate decision-making standard enshrined in the MCA provides us with an important lead.

Under the MCA, the right to choose for oneself is contingent upon having legally-construed decision-making capacity. Where an adult lacks the capacity to make a particular decision for herself, the Act provides that certain decisions can be made for her and that such proxy decisions should reflect her ‘best interests’. The idea that surrogate decision-making should produce the best outcome for an incapacitated person has a long history in British common law, where the concept of best interests has become synonymous ‘with the concept of what is best for the person’. The MCA, building on this legacy, stipulates a framework within which best interest judgements should be formulated, but does not specify what these ‘best interests’ are. However, case law – concerned with the adjudication of best interests - tells us that they cover a wide range of generic human concerns.

If one asks what has to be taken into account in considering the best interests of any human being [...] the answer is a very wide ranging one: his health, his care needs, his need for physical care and his needs for consistency. There is, of course, more to human life than that, there is fundamentally the emotional dimension, the importance of relationships, the importance of a sense of belonging in the place in which you are living, and the sense of belonging to a specific group in respect of which you are a particularly important person.

These concerns include Dworkin’s notion of ‘critical interests’. Distinct from our interest in experiencing pleasure and satisfaction through the things that we do (knitting, playing cricket, and so on) critical interests concern securing those things

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109 See §4 of the Mental Capacity Act, 2005.
we value and care about having. This must surely include access to social welfare goods, such as decent housing, at least as a precondition for satisfying such critical interests.

Case law also tells us that the best interests standard requires that prudent decisions should be made, even if these are at odds with the express wishes of the incapacitated person:

I cannot see that it would be a proper exercise for a third party decision-maker consciously to make an unwise decision merely because P would have done so.\(^\text{112}\)

Here, an unwise decision is understood to be one which goes against ‘ordinary prudence’,\(^\text{113}\) that is, the kind of prudence which can be expected of a ‘reasonable man’.\(^\text{114}\)

Given the MCA’s commitment to secure best outcomes for incapacitated persons, and its concern with prudent decision-making, it seems reasonable to work on the basis that an autonomous agent should be able to make and enact decisions that promote her best interests. Accordingly, I will defend a view of autonomy that consists in an agent’s ability to make decisions for herself that promote her best interests. These interests, I will argue, encompass our feelings, wishes, preferences, beliefs and values, and the means upon which their realisation is contingent. In other words, they pertain to our conception of what is desirable and valuable in life, and our possession of the internal and external goods that are necessary for us to effectively pursue them. By way of illustration, consider a relatively uncontroversial desire, to be healthy, and the fact that the satisfaction of this desire is conditional on, *inter alia*,

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\(^\text{112}\) Lewison J in *Re P* [2009] EWHC 163 (Ch).

\(^\text{113}\) Chadwick LJ in *Masterman-Lister v Brutton & Co (No.1)* [2002].

\(^\text{114}\) *R v Camplin*, A.C. 705 (1978) - ‘[a reasonable man] means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today’. 
having shelter from the elements; both the end (good health) and the means to that end (decent housing) are interests that we are minded to safeguard.

Before sketching out an account of these best interests, let me anticipate an objection; namely, that I am advocating a form of orthonomy, according to which (broadly) an agent’s desires and actions are motivated by beliefs that are in line with what is truly desirable. I acknowledge that if I were to make such a claim, then this would present a steep argumentative burden. (Is there a defensible way in which to determine what elements are good for everyone, and in drawing-up an objective list of such goods are we not promoting some form of objectionable perfectionism?) But I am arguing for something else: not that an agent’s autonomy-status is contingent upon coherence between her beliefs and what is objectively desirable, but, rather, that it is contingent upon her beliefs cohering with what is desirable to her insofar as it provides the means to secure the most important interests she identifies. I am agnostic as to whether or not there are such things as objective interests, but if there are a list of things that are universally good for human beings then I think it likely that at least some of those interests indexed to what actually matters to an individual will form a subset of them.

Two questions arise at this point. Firstly, what competencies are required for this self-identification of best interests? I contend that MCA capacity is not enough, and in the next section I will describe a range of normative competencies conducive to self-identification that go beyond that standard. Secondly, what if someone lacks the required level of competence? In this situation, will someone’s best interest be unknowable? No; because I believe it is possible to generate a list of interests that people will, in general, care about most, and that we can refer to this list where self-identification is not possible. Nussbaum’s ‘ten central capabilities’, which are
suggested by the capabilities approach of distributive justice, provides a good place to start compiling such a list which can be used to inform public policy.\textsuperscript{115} They are:

1. \textit{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. \textit{Bodily Health}. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. \textit{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. \textit{Senses, Imagination, and Thought}. Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.
5. \textit{Emotions}. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. \textit{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. \textit{Affiliation}.
   a. Being able to live with and toward others, to recognize and show concern for other humans, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
   b. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and species.
8. \textit{Other Species}. Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. \textit{Play}. Being able to laugh, to play, to enjoy recreational activities.
10. \textit{Control over one's Environment}.
   a. \textit{Political}. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
   b. \textit{Material}. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Nussbaum defends this list of ten central capabilities by asserting that they are moral entitlements, and by arguing that each of them is required if a human being is to achieve a life that is ‘not so impoverished that it is not worthy of the dignity of a human being’.\textsuperscript{116} The list draws on cross-cultural research into what people want to be and what they want to be able to do, and as such has some empirical credibility. Wolff and de-Shalit’s qualified appeal to Nussbaum’s list - to form the basis of their ‘genuine opportunity for secure functionings’ view of disadvantage - adds to this credibility.\textsuperscript{117} Upon cross-checking Nussbaum’s list against the experience of individuals who could generally be considered disadvantaged, and against other empirical studies, Wolff and de-Shalit generally endorse the list’s comprehensive and inclusive nature. However, they suggest that its emphasis on distributive justice and on individuals as ‘receivers’, fails to account for the interest some people have in actively participating in their communities. They also suggest that disadvantaged people struggle with but nevertheless value the capability to act within the law and to understand it. Accordingly, they extend Nussbaum’s capabilities to rectify these omissions,\textsuperscript{118} and conclude that it is modified form her list can be understood as ‘components of well-being; dimensions by which people can be advantaged or disadvantaged, both relatively and absolutely’.\textsuperscript{119}

I believe that Nussbaum’s list provides the beginnings of a \textit{default menu} that captures a range of interests that most human beings naturally aspire to and value, and which personal autonomy functions to promote. Importantly, it provides a reference point to identify a person’s best interests if she lacks the capacity to identify them for

\textsuperscript{118} They add ‘doing good to others’, living in a law abiding fashion, and understanding the law.
\textsuperscript{119} \textit{Ibid.}, p. 61.
herself. I accept, however, that some autonomy-competent agents may choose to opt out of some (formulation) of these capabilities; for example a Benedictine monk who voluntarily takes a renewable vow of unconditional obedience is unlikely to prize having ultimate control over his environment, at least not in day-to-day affairs. Whilst this is not necessarily a problem for the position I am sketching out, a principled limit may need to be imposed on permitted opt-outs in accordance with public reason.\footnote{120}

Having defended my view that an autonomous agent should be able to make and enact decisions that promote her best interests, and cashed out a preliminary list of best interests in terms of Nussbaum’s capabilities, I now turn to the skills and dispositions upon which such agency is contingent.

3.3. Normative Competencies

In Chapter 1, I set out ten case studies to illustrate the phenomenon of sub-optimal decision-making, where an agent makes decisions that are not favourable to her interests and this can be attributed to underdeveloped or impaired decision-making skills. I wish to argue that in exploring the self-harming and self-defeating agency of these seemingly legally capacitous individuals we can enrich our understanding of the skills and dispositions that are conducive to autonomous and responsible decision-making (autonomy-competence). Furthermore, that considering the background circumstances attending such cases can help us to think about ways in

\footnote{120 Public reason requires that all political principles be justifiable to, or at least reasonably acceptable to, all who are subject to them. This is short of consent, but can avoid unsustainable appeals to the truth. For further exposition, see Quong, Jonathan (2013) ‘Public Reason’, in Edward N. Zalta (ed.) \textit{The Stanford Encyclopedia of Philosophy}, retrieved on 24 February 2014 from \url{http://plato.stanford.edu/archives/sum2013/entries/public-reason/}. Public reason may, for example, draw the line at opting out of life for reasons that cannot be publicly justifiable and where an otherwise healthy life can be lived.}
which autonomy-competence can be stunted by childhood instability, lack of nurturing, and the cumulative effects of a broad range of disadvantages, and impaired as a result of destabilising life events. Using this narrative material, I want to distinguish four decision-making skills, the scope of which extends beyond the predominately cognitive abilities enumerated within the MCA, and two executive dispositions required for regulative control which the Act entirely fails to account for. Here, I acknowledge my indebtedness to Diana T. Meyers and Paul Benson who have done much to advance a competence-based model of autonomy and whose work has influenced me greatly.\footnote{Meyers, Diana T. (2004) ‘Decentralising Autonomy: Five Faces of Selfhood’ in her Being Yourself (Lanham: Rowman & Littlefield Publishers, Inc.)) and Benson, Paul (2005) ‘Feminist Intuitions and the Normative Substance of Autonomy’ in Taylor, J.S. (2005) Personal Autonomy (Cambridge & New York: Cambridge University Press). Benson’s research places emphasis on an agent’s attitude towards her own self-worth and authority, whilst Meyers highlights the significance of introspection, memory, imagination, communication, critical reasoning, self-nurturing, resistance to pressures to conform, and political collaboration. It is clear that they are both focused on competencies beyond the predominantly information-processing skills stipulated within legal definitions of mental capacity.} Broadly, we agree that a range of skills and dispositions (that go beyond the predominantly information-processing skills stipulated within legal definitions of mental capacity) underpin autonomous decision-making. However, my view is distinct from their views because it understands autonomy in terms of an agent’s ability to pursue their self-identified best interests. I will then go on to explain how these normative competencies are underpinned by certain self- and other-regarding attitudes that are particularly vulnerable to trauma, social exclusion and emotional distress.

(a) Decision-Making Skills

You will recall that all of the persons described in the case studies were (at least initially) deemed to have decision-making capacity and accordingly were held responsible for their putative choices. As discussed, the abilities necessary for achieving legal competence predominately concern information-processing skills, i.e.
a legally competent person must be able to: (1) understand all relevant data pertaining to the decision in hand; (2) retain it long enough so that it can be used in the decision-making process; (3) use and weigh that information in reaching a decision; and, (4) communicate that decision. I do not doubt that these skills are necessary for or conducive to competent, responsibility-attracting decision-making, only that they are not sufficient. I question whether these skills are construed broadly enough to capture the deficits of evaluative capacity illustrated by the case studies and find them unable to adequately account for deficits of executive capacity that are also apparent.

I will deal with the latter concern in the next section on regulative control. First, let me propose four distinct but interrelated decision-making skills which I believe better capture the kind of evaluative capacity necessary for autonomy-competence and, thereby, the responsibility in question: understanding, critical reflection, appreciation and reasoning. An autonomous agent (who is sufficiently competent to identify her own best interests) starts by comprehending the nature and facts of the choice in hand, then interrogates her intuitive reaction to these particulars, before using this factual and emotional data to imagine how she (and others) might experience the potential consequences of the choice. So equipped, she then weigh-ups the different options and fixes on the course of action she should take.

Whilst understanding (broadly, the ability to grasp the relevant facts) and reasoning (broadly, the ability to weigh-up the relevant data and resolve on a course of action) are abilities accounted for within the MCA’s function test, it is questionable whether critical reflection and appreciation are (at least adequately). The former concerns a person’s ability to know herself, to reflect upon the thoughts and feelings that are engaged by the choice in hand, and to either endorse or repudiate them. The latter concerns a person’s ability to foresee and imaginatively experience the potential
harms and benefits of each option – for herself and others, not just abstractly. One should also bear in mind that even if these abilities are adequately captured under the MCA’s function test, any deficits in a person’s possession of them will only count in an assessment of mental capacity if they are caused by an impairment or disturbance in the mind or brain (the diagnostic test).

**Understanding:**
On my view, an agent is autonomous in respect of a particular decision if she is able to choose the option that promotes her best interests. Consequently, she must be in a position to make a reasoned choice that serves that end. This requires access to the relevant information, and the ability to gather and retain it in order that it can be used in the decision-making process. As suggested by the process sketched out above, the agent must be able to grasp the nature of the choice and all the relevant facts pertaining to it.

These information-gathering skills are obviously constrained by a number of factors/circumstances, particularly intellectual impairment. But understanding can be similarly impaired by mental distress and the effects of substance misuse, both of which can rob an otherwise competent agent of the levels of concentration, perception and memory needed to identify, gather and process relevant data. Take for example Mr Gibbons who prior to suffering successive bereavements managed to hold down a job, financially manage and bring up his daughter alone. His subsequent emotional distress and (related) fall into alcoholism can be seen to damage his awareness of the emerging financial crisis about to engulf him, the options open to him, and the information he would need to evaluate them, including specialist advice regarding his housing options and welfare rights. The effects of alcohol may also have interfered with his ability to retain information and process it. If so, he would not have been
able to make fully-informed choices with regards to his financial and housing problems. Similarly, BD’s alcoholism was such that it is not clear if he had any perception at all of the situation he was in and of the potential consequences of his behaviour. In this sense, his actions did not appear to be prompted by choices, but rather were habitual.

These information-gathering skills seem to be amply covered by the MCA’s function test, but only if the diagnostic test is first satisfied. It is questionable (as argued in Chapter 1) whether either Mr Gibbon or BD would satisfy the diagnostic test and, assuming not, then their difficulties with understanding would not amount to mental incapacity.

**Critical Reflection**

Once the nature of the choice and all the relevant information is known and understood, an agent must then consider her reaction to these particularities, that is, the thoughts and feelings that are engaged by it. What preferences or values come to the fore? Does she endorse or repudiate them? This stage is critical for authenticating the decision - for making a decision that flows from the agent’s *own* values and preferences rather than from those of others. In this way, the agent is able to make a choice that promotes *her* best interests (not the interests of others), as *she* determines them (not as others determine them). Critical reflection then demands self-awareness and self-knowledge and the willingness and ability to review and revise our beliefs. An impaired capacity to interrogate and endorse their emotional response

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122 This is not to say that critical reflection is simply a solipsistic process of profound introspection, devoid of others’ input. After all, the values and beliefs we consult are largely constructed through our interactions with others. Furthermore, it is not a process which is blind to the interests of others, since an agent’s own interests may be served by giving weight to the interests of others. See Martin, Martin, Fabian Freyenhagen, Elizabeth Hall, Tom O'Shea, Antal Szerletics & Vivienne Ashley, (2012, 5 December) ‘An Unblinkered View of Best Interests’, in *BMJ* 2012;345:e8007, retrieved on 14 February 2014, from [http://www.bmj.com/content/345/bmj.e8007.pdf%2Bhtml](http://www.bmj.com/content/345/bmj.e8007.pdf%2Bhtml).
to the decision in hand is evident in the cases of Miss B and Mrs H. Both concern life-limiting decisions, where the underlying motivation appears to be influenced by the action of others. Miss B is starving herself because she wants to punish herself for the violation she suffered as a child, whilst Mrs H is refusing further life-saving cancer treatment because she feels her life no longer has value now her husband has abandoned her. As sympathetic observers we want Miss B to accept that it is not her fault that she was sexually abused and Mrs H to accept that her life is no less valuable than it was before her husband left her (or, at any rate, still valuable). If they were able to, perhaps they would make a different decision, but the point is that they are so damaged by these events that they lack the necessary evaluative baseline. This baseline, which I will come onto in due course, is self-esteem.

It seems to me that the MCA’s use and weigh criterion does not adequately capture this evaluative dimension because it does not account sufficiently for the substantiation of what is being used and weighed. It is too focused (in practice, at least) on the process of using relevant information (including one’s wishes, preferences and values) without giving adequate attention to its authenticity. Consider MC: to the extent that she could be said to have used and weighed the advice she was given on how to prevent her eviction, her failure to act could be attributed (at least in part) to poor self-esteem. Perhaps the low value she placed on her life – probably due to the past trauma that was continuing to blight it - tipped the scales in favour of her doing nothing. Similarly, we might wonder if Mrs H’s treatment refusal was the result of a weighing-up process in which she counted her life as having little value as a result of her husband’s abandonment of her. On some level, both could be said to have used and weighed relevant information in deciding how to act. Nevertheless, would we really want to say that the values in play in that
process were authentic? On the contrary, I think there is reason to think that the
decisions in question were influenced by alien values borne of external events, and
the strong emotions and trauma they have triggered.

As observed in Chapter 1, Section 6, there is real disagreement as to whether
or not the use or weigh criterion is sufficiently capacious to accommodate the impact
of strong emotions and trauma on decision-making, particularly the way in which
they can distort evaluation. However, even if Mrs H – whose decision-making could
be said to be impaired by strong emotion - satisfied the MCA’s function test on this
basis, it is by no means clear that she would satisfy the diagnostic test (as argued in
Chapter 1, Section 3).

**Appreciation**

Having gathered and understood the relevant information, and critically
reflected upon her emotional and evaluative response to it, an agent concerned with
promoting their best interests must then be able to imaginatively experience the
potential harms and benefits of each option and to identify those she wishes to avoid
and those she wishes to pursue. To do this, an agent must be able to apply
information and rules to their own circumstances, and to foresee potential
consequences. This is, I think, the sense in which the use and weigh criterion is
typically understood. The case studies suggest, however, that appreciation-
undermining factors are often not (clearly) attributable to conditions that would
satisfy the diagnostic test. Let’s therefore consider three evident barriers to
appreciation: impulsivity, psychopathology and intoxication.

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123 It is also similar to the standard of appreciation that is utilised for the purpose of testing mental
competence according to the provisions of US law. The ‘gold standard’ MacCAT-T assessment tool of
capacity tests appreciation in relation to belief not knowledge and characterises it as ‘the ability to
apply the information abstractly understood to his or her own situation’ - see. Grisso, T. & P. S.
Appelbaum (1998) *Assessing Competence to Consent to Treatment* (New York: Oxford University
Press), here at p. 88.
The concept of impulsivity covers a wide range of ‘actions that are poorly conceived, prematurely expressed, unduly risky, or inappropriate to the situation and that often result in undesirable consequences’.\(^{124}\) It is a barrier to appreciation insofar as it typically leads to acting without an appropriate level of deliberation and choosing short-term over long-term gains\(^{125}\) and these behaviours relate to various underlying factors, including immaturity and emotional distress. Consider the case of 17-year-old M, who was ejected from the family home because of rule-breaking and then evicted from the hostel she was subsequently placed in for the same reason. Her evident inability to regulate her conduct according to prescribed rules suggests that she was unable to anticipate the likely consequences of not doing so, i.e. eviction and homelessness. Alternatively, we must assume that M knew the consequences and simply wasn’t motivated to avoid them. Either way, she could be said to lack foresight as a result of her immaturity: in the first instance she may lack the necessary experience to predict likely outcomes, whilst in the second she may be unable to imaginatively experience what it is to be roofless; the misery of material deprivation, personal insecurity and social exclusion. Impulsive behaviour also accompanies emotional distress. Stuart Shorter’s self-sabotaging behaviour – setting fire to his prized flat – isn’t motivated by a rational assessment, but rather as a knee-jerk reaction to overpowering anger and pain: ‘sometimes it gets so bad you can’t think of nothing better to do than make it worse’.\(^{126}\) But, as argued in Chapter 1, M’s age-appropriate immaturity would not satisfy the diagnostic test, and Stuart Shorter’s disturbed behaviour is unlikely to.


\(^{125}\) Impulsivity can also impair critical reflection and other aspects of decision-making. However, the case studies suggest that it is particularly damaging to appreciation, hence my focus on it here.

Second, psychopathology can also hinder appreciation. Depression, for example, can impair an agent’s ability to look forward. Unless we are able to envisage a future and our place in it, adequate appreciation of the relative merits of what should do now is beyond us.\textsuperscript{127} This may have played some role in Mrs H’s decision to refuse further, potentially life-saving treatment, but there is no reason to believe that she would satisfy the diagnostic threshold. The case of Miss B illustrates how another form of psychopathology – compulsion – can prevent an otherwise intelligent and insightful woman from seeing and feeling an emotional response to the imminence of her own death. The comments of Hoffman LJ – who heard the appeal against the lower court’s decision that Miss B had the mental capacity to refuse force-feeding – bear this out:

\begin{quote}
I find it hard to accept that someone who acknowledges that in refusing food at the critical time she did not appreciate the extent to which she was hazarding her life, was crying inside for help but unable to break out of the routine of punishing herself, could be said to be capable of making a true choice as to whether or not to eat.\textsuperscript{128}
\end{quote}

It is possible (perhaps probable) that Miss B would have satisfied the diagnostic threshold, but whether she satisfied the function test was a question that yielded different views. Nevertheless, given that the court was in the end able to settle the matter, I will concede that this second dimension might be captured by MCA capacity.

Third, the case studies draw attention to how the effects of alcohol abuse can also undermine the capacity for appreciation. In the case of BD, his reckless and uninhibited conduct (lying in the road, aggression, misuse of emergency services) is indicative of entrenched behaviour patterns devoid of appreciation of how his behaviours would bear on his own life (or, indeed, on those of others). Intoxication impairs an agent’s ability to concretely feel the potential harms of certain courses of

\textsuperscript{128} \textit{B v Croydon HA} [1995] Fam 133.
action or inaction and could be said to deaden the capacity to experience such emotional responses. As observed in Chapter 1, alcohol intoxication can cause mental incapacity. Indeed the MCA Code of Practice lists ‘the symptoms of alcohol or drug use’ as an example of an impairment or disturbance in the functioning of the mind or brain that can satisfy the diagnostic threshold. Furthermore, it is clear how intoxication can impair decision-making abilities to an extent that the function test is also satisfied. However, as the Code also acknowledges, incapacity borne of intoxication will commonly be temporary and fluctuate, i.e. when sober a person would not lack capacity, and when intoxicated he might, but only if it impaired his decision-making to the requisite degree. It seems therefore that in theory MCA capacity can account for intoxication. However, in practice – as demonstrated in the case of BD – it doesn’t always, possibly due to the fact that intoxication-induced incapacity is generally temporary and fluctuating.

**Reasoning**

The final stage of the decision-making process requires the ability to weigh-up the pros and cons of each option, judge the likely impact they will have on one’s best interests and then identify the course of action which best promotes them. The more complex the decision, the greater the agential skill required to reach a decision. Reasoning requires the ability to process information and identify options that will enable us to achieve our desired ends. As in the case of understanding, these skills are limited by intellectual impairment and particularly vulnerable to emotional distress and intoxication, all of which can make instrumental rationality too difficult or demanding. The MCA’s function test fully accounts for this ability, but it is

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129 I take this to mean symptoms of alcoholic intoxication, rather than symptoms of brain disorders associated with alcoholism, such as Korsakoff’s syndrome, where capacity is more likely to persist over time, rather than fluctuate.

130 MCA Code of Practice, para. 4.12.

questionable whether any of the reasoning-impaired cases in Chapter 1 would also satisfy the diagnostic threshold.

Now, it may be argued that I have neglected to include in this list of decision-making skills the ability to communicate a decision – an ability required for legal competence. This ability is critically important, since our legal right to enact our choices is contingent upon our ability to tell others what that choice is and why we have made it. However, it is a competence of a different order to those I am addressing here – communicating a decision is predominately an executive function that follows a decision being reached. Perhaps communicating a decision can also amount to a deliberative function; it could be that in some cases we might only discover what we really want once we communicate a decision. However, the ability to communicate is primarily an executive, rather than a deliberative function, so will be addressed under that rubric. This is not to say that communication with others during and after the decision-making process cannot form part of the deliberative process. Oftentimes, we form, and come to understand the formation of, our values and beliefs through discourse with others, i.e. being exposed to a different points of view and being challenged to justify our own. Equally, we often consult others and take their views into account when reaching a decision.

In summary, then, an agent requires both information-processing and evaluative capacities in order to self-identify her best interests and select and enact a course of action that (best) promotes them. I have argued that the ability to critically reflect and appreciate, as I have cashed them out, are not (fully) captured by the decision-making skills enumerated within the MCA. I now want to claim that the development and exercise of these skills are advanced by an agent’s possession of a range of dispositions, and I shall come on to these other- and self-regarding attitudes
in a moment. But first, let me say something about the regulative control an agent must have in order to pursue a course of action that promotes her best interests.

(b) Regulative Control

It is one thing to be able to identify what course of action is in our best interests, but quite another thing to be able to act in accordance with that judgement. Whilst an agent’s autonomy-status with respect to a particular choice is not contingent upon her actually making and enacting a choice that promotes her best interests, it is contingent upon her ability to make and enact such a choice. Regulative control in this respect is broadly about self-motivation; it is about confronting, making and enacting particular choices because they advance our best interests not (simply) as a response to threats of punishment or the promise of reward. Two executive dispositions – or, rather, their absence - are apparent in the case studies: self-control and resilience. These dispositions are not – as seen in Chapter 1 – covered by the existing legal test for mental capacity, where communication is the only executive function specified.

Self-control:
Self-control is about being in control of our self and the ability to corral our desires, preferences, emotions and behaviours within the parameters demanded by our best interests and other commitments. Self-control makes it possible for an agent to effectively apply the ideals and values that they subscribe to – rules that protect their interests and the interests of others – and to live faithfully in accordance with their principles.

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\[132\] Self-control presupposes that complete lack of control over the world (or a fixed perception of such) might make self-control impossible. Recognising this, Wolff and de-Shalit’s notions of ‘planning blight’ and ‘paralysis of the will’, account for situations in which people fail to make plans that are rational or abdicate planning completely when they feel the world is beyond their control – Wolff & de-Shalit (2007) Disadvantage, p. 69.
Now, it is true that self-control is a disposition that, at least on occasions, fails most of us. Often we will know what is in our best interests – not to eat that cream cake or smoke that cigarette – and at a push we can act in accordance with our desire to do what is in our best interests. But we don’t. We shrug our shoulders and give in without a fight, tempted by these short-lived and later-regretted pleasures. But I want to suggest that his kind of weak-willed agency is qualitatively different to those who habitually fail to act in accordance with their considered judgements about what is in their best interests; those who are subject to addiction, those who feel worthless, or who have been ground down to apathy by misfortune, or overwhelmed by rage, and those who are too immature or impulsive to exercise self-discipline. In my view, the sub-optimal agency displayed by many of the case studies illustrates the causes and effects of impaired self-control. The overwhelming rage of Mrs Moran (a victim of long-term domestic violence) and Mr Shorter (irreparably damaged by relentless childhood sexual abuse) prevent them from appropriately regulating their conduct on a much greater scale than the phenomenon of everyday failures to act on one’s best judgement. The dispiritedness of MC (the unstable, self-harming and alcoholic victim of rape) saps her motivation to protect her interests. The challenging and disruptive behaviour of BD (perpetually intoxicated and refusing intervention) is beyond his control so long as his alcohol addiction holds him in sway. The impulsive and immature behaviour of M (a youth who experienced a childhood lacking in nurture and stability) leaves her poorly-equipped for self-control. Even if these people recognise the consequences of their conduct, or of their acts and omissions, they are unable to regulate their behaviour. This suggests that such instances of self-defeating agency may be better understood as failure to enact ‘good’ choices, rather than intentional ‘bad’ choices.
**Resilience:**

Mindful that misfortune strikes us all and that when it does it can disrupt our usual capacity, I would suggest that regulative control requires a certain ability to roll with the punches when things go wrong. Resilience is necessary to insulate an agent’s motivation to exercise self-control, even when her experience suggests that the sacrifice is not worth it. Take for instance Mr Gibbons whose autonomy-competence was impaired by successive bereavements. Whilst another person might have coped, Mr Gibbons suffered a breakdown of his ability to manage his affairs. This is not to say that Mr Gibbons was weak-willed, only that he was for some reason less resilient to its emotional impact. In contrast, consider Mr Shorter and his nightmarish childhood. Whilst he periodically lost control on account of his rage, the fact that he survived and overcame the trauma he experienced to the extent that he could achieve the degree of stability he did suggests considerable resilience. Perhaps this can be attributed to the survival techniques he developed as a child, or to the kind of support he received from those who rescued him from the subterranean car park that was his Bedlam. In any event, resilience of this order is a feature of regulative control that can perhaps help to explain the phenomenon of adversity-overcomers, who manage to achieve against all the odds.\(^\text{133}\)

Regulative control as I understand it – self-control and resilience – relies on a number of dispositions. Firstly, we must see our self as an agent who has responsibility for our own life, who is a fair target for the reactive attitudes of others, i.e. praise and blame.\(^\text{134}\) Secondly, we must have optimism; the ability to look forward to a future of better possibilities, and so be motivated to delay immediate

\(^{133}\) See previous remarks on adversity survivors and champions in Chapter 1, at §1.5.

gratification for long term interests, to persist in the pursuit of our goals, and to wield control over our emotions. This leads me on to the ‘secure base’ of a range of self- and other-regarding attitudes, none of which are captured within the test for MCA capacity, at least not explicitly and adequately.

(c) Self-Regarding Attitudes:

The first, and most critical, self-regarding attitude is self-esteem, according to which we value ourselves and see or experience ourselves as worthy of good things, such as love, respect, happiness, success, etc. Secondly, self-confidence, according to which – as I will understand it here – we believe in our right to self-authorship and in our judgemental competence to exercise it\textsuperscript{135}.

To understand why these attitudes are required for autonomy-competence, it is helpful to consider the consequences of a deficit in them. I would suggest that an agent who does not consider herself worthy to enjoy good things is less likely to make choices aimed at securing her best interests – at the limit, even to be unable to pursue her best interests at all. This may be because she has a distorted view of what is in her best interests, and/or what she is entitled to secure or preserve. At best, her choices are likely to be less optimistic and ambitious; she will probably aim low, settle for less, and adapt her preferences and aspirations accordingly. At worst, it may not occur to her to even consider what her best interests might be. She is less likely to take care of herself physically and/or mentally, and less likely to make prudent choices that advance her interests. For example, she may be less able to privilege long-term goals over short-term pleasures; she may not think she deserves them, or that they are achievable. She may not \textit{think}; or, put otherwise, she may not

be minded to *think about the future*. If this is the case, then she will be less likely to nurture her normative skills and dispositions and secure/maintain the socio-economic circumstances that are critical for autonomy and responsibility, e.g. decent housing, adequate income, supportive relationships, good health, etc. We can imagine her life becoming a vicious circle; the less she expects, the less she gets; the less she gets, the less she expects. Dreams, hopes, aspirations become limited to immediate, foreseeable pleasures; she is blinkered to the future, and can only live in the moment.

We can discern these consequences of low self-esteem in our case studies. Recall first Miss B, who needs to punish herself for falling victim to childhood sexual abuse. Her attitude to herself is so far short of self-esteem that she is unable to appreciate the life-threatening harm she is doing to herself. Whilst her intellectual capacity is impressive, her evaluative capacity is severely diminished because she sees herself as broken, dirty and culpable. Then there is Mrs H, disfigured and fatigued by gruelling treatment for cancer. Rather than seeing her husband’s abandonment of her as his weakness and failure, she sees it as an indictment of her own worthlessness. Consequently in weighing-up the continuation of life-saving treatment she no longer sees a point in subjecting herself to treatment and in effect surrenders her life to fate.

But self-esteem is not enough. An agent who values herself enough to possesses dreams, hopes and aspirations may be unable actualise them if she lacks *self-confidence*. Self-confidence is an attribute that is often used to describe an agent who is forthright and assertive, and who is well-placed to *explain* what she wants, if not to *get* what she wants. Self-confidence in this sense can be over-rated, insofar as a propensity to over-value our rights and deservingness can be as unhelpful to
securing one’s best interests as self-effacing timidity. Instead, what I mean to convey here is the sense in which promoting one’s best interests requires us to have a sense of our self as a self-determining, authoritative rights-holder. Without that sense, an agent may not believe that she has the right to pursue her best interests, the capacity to realise them, or assurance that the judgement regarding their worth is reliable.

Consider the case of a freed slave. Emancipated, she now faces the possibility of realising her dreams and aspirations. Perhaps these were all that kept her going through her long years of servitude. Unused to choice and struggling to shed the sense of herself as a chattel and a second-class being, we may predict a lack of self-confidence that is likely to substantially hamper her efforts to assert herself and her interests. Perhaps Mrs Moran, a long-term victim of domestic violence, who returned to her abusive husband on several occasions, dreamt of living in safety and comfort with her children, but lacked the confidence to take the necessary steps to fully achieve it. You might think that Mrs Moran’s temper, which resulted in her eviction from the woman’s refuge, is evidence of self-confidence, but I would suggest that it can be the opposite; that anger is often a display of fear when one does not feel in control and frustration when we are unable to assert our own rights and interests. I suspect that this may in part account for Mrs Moran’s lack of self-control. Consider also MC, who was living chaotically and unable to take advantage of the advice and opportunities she had been given to save herself from eviction. MC seems very far from the paradigm of a self-determining agent, confidently taking steps to protect her interests and advance her goals. Instead, she comes across as bystander in her own life, who at times of crisis turns to others for rescue and a voice, namely her GP and her lawyers. Given her history of rape, it is likely that her self-confidence (and self-
esteem) would be similarly diminished and that this was likely contributor to the
deficit of her executive capacity. We see, then, with the aid of both of these
examples, how lack of self-confidence can impair decision-making capacity and
regulative control.

In summary, self-regarding attitudes are the bedrock of autonomy-
competence: they inspire a sense of hope and the possibility of a worthwhile future;
they motivate us to make plans and carry them through; and they allow us to trust our
own judgements. Finally, let’s now look at two other-regarding attitudes.

(d) Other-Regarding Attitudes
These are, firstly, a sense of justice, according to which we recognise the interests of
others and are disposed to treat them fairly, and, secondly, empathy, according to
which we are disposed to put ourselves in their shoes. Together, they help us to
reflect upon the moral duties we owe to each other, and motivate us to act in
accordance with them. Now, these attitudes may seem out of place in the context of a
discussion about the prerequisites for identifying courses of action that promote our
best interests. However, they are not so out of place when we understand that these
attitudes are conditions for prosocial behaviour, and - insofar as prosocial behaviour
makes positive relationships and interactions with other people possible - they can
make our lives go better. This, in part, explains the inclusion of various other-
regarding interests in Nussbaum’s list of central capabilities, for example: having
caring attachments that support out emotional development (emotions), having
empathy and respect for others in order that we can live in cooperation with them
(affiliation) and being able to participate politically and to enjoy the protection of
liberal rights (control over one’s environment). If it is reasonable that people value
these things – and I think it is – then it follows that they need the right sort of other-
regarding attitudes in order to protect them. Anti-social behaviour, in which the interests of others are not recognised or respected, can lead to social ostracisation and criminal and civil sanctions. These consequences can exclude us from the support we need from others and hinder our access to the social goods critical for our wellbeing – as evidenced by the application of the principle of welfare conditionality in several of the case studies.

Accordingly, these other-regarding attitudes equip us with the ability to imaginatively experience the plight of others and identify what is morally right and wrong. It is highly questionable whether M and BD were so equipped. M’s apparent inability to regulate her behaviour in accordance with the conditions upon which her accommodation was provided may well owe itself to her failure to appreciate its consequences for others, which could range from nuisance and annoyance (disturbing neighbours by playing loud music) to placing others at risk of harm (smoking in her room, letting strangers stay overnight). BD’s misuse of emergency services put the lives of those who genuinely needed immediate assistance at risk, but I doubt that he would even have considered this possibility, or appreciated it when it was brought to his attention. What can account for this apparent inability to properly account for the rights and interests of others; this carelessness, belligerence, selfishness? I wonder whether a sense of one’s invisibility to others might help to explain it; M’s invisibility to her mother, who failed to nurture her, used her as a carer, and then ejected her from her home when she rebelled; BD’s invisibility to care services who forgot his vulnerability and began to see him only as the sum of his perplexing and trying behaviours.
I am invisible, understand, simply because people refuse to see me. […] When they approach me they see only my surroundings, themselves, figments of their imagination – indeed, everything and anything except me.  

When one doesn’t feel respectable or respected, is it any wonder if we cannot adequately feel and demonstrate respect for others? This speaks to the idea of relational autonomy, according to which our agency (or lack of it) is shaped and sometimes distorted by the way we are viewed and treated by others.

Let us pause here to take stock. So far in this chapter, I have argued that an autonomous agent must be able to make decisions that promote her best interests, and I have suggested that Nussbaum’s ten capabilities provide us with a default menu that captures a range of interests that most human beings value. Drawing on the case studies, which exemplify instances of sub-optimal decision-making, I have also enumerated a range of skills and dispositions that that an agent needs to be able to identify her best interests and to make and enact decisions that promote them. I now consider what model of personal autonomy can best account for these normative competencies and the view of autonomy-competence that is taking shape.

3.4. Autonomy-Competence

Two broad models of what autonomous agency amounts to and the conditions for its exercise dominate the literature: the normatively non-substantive model and the normatively substantive model. I will start by demarcating these key positions, and then defend a model which combines the best of both.

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Non-substantive theories are concerned with the process by which an autonomous decision is made and hold that a person is autonomous if and when she makes choices in accordance with a prescribed procedure, or her choices cohere with her settled outlook or value-set in the way prescribed. Insofar as such theories refrain from making autonomous agency contingent upon certain normative commitments (values, preferences, goals, etc.) they are said to be consistent with the principle of liberal neutrality which hold that the state should not promote any particular conception of the good. Substantive theories concede that the internal conditions defended by non-substantivists – typically, decision-making skills and authenticity – are necessary conditions for autonomy, but resist the view that they are sufficient. Accordingly, substantivists add other conditions to the mix, including external enabling conditions, and in so doing import normative content. For this reason, substantive accounts are often dismissed as an anathema to personal autonomy on the grounds that they express or rely on perfectionist standards at odds with the doctrine of liberal neutrality, and that they tolerate (and even demand) intrusive levels of paternalistic interference with an individual’s right to self-determination.

Before going on to discuss these two positions in more detail, let me first pause to acknowledge what in some sense can be understood as a third position: relational autonomy. Relational autonomy is an ‘umbrella term’, insofar as it comprises a range of accounts that adopt different views concerning the conception of the ‘self’ in question and the role social relations play in the development and exercise of autonomy, i.e. whether social relations of a certain sort are constitutive of

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139 For an overview of this doctrine and its relevance to public policy (matters I will address more comprehensively in Chapter Four), see Raz (1986), The Morality of Freedom, pp.110-64.
autonomy or merely of contributory benefit. Whereas an individualist model of autonomy is essentially concerned with an agent’s capacity to make independent judgements in isolation from the influence of others, the relational model places emphasis on the inescapable role ‘relatedness’ plays in how people value themselves and the authority they assign to their agency. Central to this conception of autonomy is an agent’s attitude towards herself – self-respect, self-trust, self-esteem and other affective attitudes that underpin the capacity for self-interpretation, i.e. working out which desires constitute reasons for action. The relational model thereby helps to account for the ways in which repressed socialisation and oppressive life conditions can lead to the internalisation of autonomy-diminishing values; values that can directly influence an agent’s dispositions and capacities. To illustrate this, consider the case of a liberated slave whose adaptive preference for unconditional obedience has rendered her content to live according to the will of others and prevents her from seeing herself as a free agent. Despite her endorsement of her servility, the notion that she is an autonomous agent defies our common intuitions.

However, although relational autonomy is often distinguished from non-substantive and substantive theories of autonomy, it is not a ‘stand-alone’ model. Rather, it is a potential ‘add-on’ feature that can attach to both positions. Relational autonomy can be content-neutral or substantive. For example, Christman’s non-substantive conditions of competence and non-alienation can be understood to depend on certain relational conditions, whilst Mackenzie’s offers ‘a weak substantive,

141 Ibid., p. 527.
relational approach to autonomy that grounds an agent’s normative authority over
decisions of import to her life in her practical identity and in relations of inter-
subjective recognition’.¹⁴⁴ Accordingly, I have not sought to distinguish relational
autonomy from these two key positions.

(a) The Normatively Non-Substantive Model

The non-substantive territory can be carved up according to two internalist
conditions. Firstly, endorsement: a form of authentication often cashed out in terms
of the interplay between first-order preferences (a mere desire to want to do X) and
second-order preferences (a considered desire to want to want to do X).¹⁴⁵ We act
autonomously only if we act on desires that we can endorse with higher order
preferences. Insofar as this fits with a familiar, common-sense view of decision-
making, we might find the endorsement account intuitively attractive. Indeed, it
might be one model for the ability of critical reflection I introduced above. However,
it is vulnerable to a powerful objection: how can we be sure that our higher-order
desires are authentic to us and not manipulated by others? For example, childhood
religious indoctrination can seriously impair an individual’s capacity to form an
independent set of values upon which to live, and might influence higher-order
desires as much as lower-order ones.¹⁴⁶

The second internalist condition seeks to remedy this weakness: Christman’s

historical criterion for autonomous agency. According to this condition a person is

¹⁴⁵ See, for example, the hierarchical accounts of Frankfurt, Harry (1971) ‘Freedom of the Will and the
Cambridge University Press).
¹⁴⁶ As is apparent in essays included in Caws, Peter and Stefani Jones (eds.) (2010) Religious
Upbringing and the Costs of Freedom: Personal and Philosophical Essays (Pennsylvania: Penn State
University Press).
autonomous in relation to some value or commitment provided that she is sufficiently competent to subject it to sustained critical reflection, and were she to do so, she would not be alienated from it. ¹⁴⁷ However, it is not clear that this non-repudiation condition can offer adequate protection for those whose autonomy is diminished by direct manipulation and oppressive socialisation, or who are affected by psychopathology. The worry here is that Christman cannot cash out the skills and dispositions that are required for critical reflection in a normatively neutral way. ¹⁴⁸
To see this, first consider the language he uses to describe what is required for such critical reflection: an ‘[...] accurate conception of herself [...]’ and ‘[...] normal cognitive functioning’. ¹⁴⁹ Then note that critical reflection is an ability, which, qua ability, has an in-built standard that one can fall short of, or even fail to meet entirely. To make the possession of this ability a condition of autonomy, is to endorse the (contestable) judgement that this standard should be authoritative in a certain context. With this in mind, we could not even make sense of critical reflection as ability of, and thereby constraint on, autonomous agency, if we conceived of it in a completely norm-free way. Indeed, Christman admits as much when he writes:

Defining a "constraint" necessarily involves specifying (if only implicitly) the range of human actions and pursuits that such constraints make impossible [...] The very meaning of constraint presupposes a range of normal (and perhaps morally valued) action types that humans are thought to pursue. ¹⁵⁰

Insofar as he cannot make sense of critical reflection on non-substantive grounds, he and, mutatis mutandis, other proponents of non-substantive conceptions of autonomy lack the resources to distinguish between those who have successfully

¹⁴⁸ In the remainder of this paragraph, I draw on Fabian Freyenhagen’s ‘Autonomy’s Substance’, unpublished manuscript, 2013.
resisted such threats and are able to critically reflect upon their values and commitments, and those whose internalisation of certain ideologies and oppressive norms has impaired this ability to critically reflect on their desires, values and preference set. Given this problem I believe we need to look to a more substantive model.151

(b) The Normatively Substantive Model

Let me start by distinguishing between strongly and weakly substantive models of personal autonomy. Strongly substantive theories import normative substance by placing direct constraints upon the content of an autonomous agent's preferences, whereas weakly substantive theories stipulate certain conditions that are necessary for authenticity and independence in the development and appraisal of desires – conditions related to an agent’s political, social and economic status and personal psychology – that cannot be captured in a way that does not import normative substance at this level (the abilities necessary for autonomy). This way the latter constrains the content of autonomous choices only indirectly.

**Strongly Substantive Model**

Despite its regular evocation by proponents of liberal neutrality – who generally favour the non-substantive model – a review of the literature reveals that there are very few contemporary fully-articulated genuinely strongly substantive accounts of

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151 A further objection to the non-substantive model – but one which I will not deal with here - concerns its focus on internal conditions for autonomy - competence and authenticity – and their failure to adequately account for the common sense view that if we have severely limited options due to economic hardship and/or social exclusion we are likely to fall short of autonomy. As Oshana notes, personal autonomy is a socio-relational phenomenon, ‘a condition of persons constituted, in large part, by the external, social relations people find themselves in’ - Oshana, Marina (2006) *Personal Autonomy in Society* (Aldershot, Hants.: Ashgate), pp. 81-102. This is a particularly important consideration when considering the autonomy-competence of disadvantaged and vulnerable individuals, as exemplified by many of our case studies.
autonomy. However, Young defends a conception of autonomy that is not wholly contingent upon an agent’s reflective and evaluative capacities; one which places limits on what an autonomous agent is permitted to choose. According to Young, although autonomy has both intrinsic and instrumental value, its intrinsic value is ascendant. He defends this view with the claim that most people would agree that, all things being equal, it is better to make decisions about our own lives than to be subject to the will of others, irrespective of the value of the object of our choices. It follows, he argues, that in valuing autonomy so highly we are committed to defending, preserving and enhancing it. Accordingly, where a person wishes to engage in activity which will impair their future ability to live autonomously, intervention is justified. In this way, Young links a strong commitment to the value of autonomy with the defensibility of strong paternalism. Young’s account of his brand of autonomy-defending strong paternalism takes its lead from J.S. Mill. Despite the fact that Mill claims that individuals are generally the best judge of what is in their best interests, he nevertheless provides an exception to that general rule: ‘The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom’. Young relates this to his claim that local autonomy is a legitimate target of strong paternalism where the latter preserves future freedoms necessary for global autonomy. Consider the kind of activities that could lead to a long-term, irrevocable relinquishment of autonomy. This may well

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152 For a discussion on the range of substantive theories of autonomy see Benson (2005) ‘Feminist Intuitions and the Normative Substance of Autonomy’.
fall short of the paradigm case of willing slavery and include, for example, the pursuit of extreme sports where individuals risk serious injury and long-term impairment.

So, depending on how the relinquishment of autonomy is cashed out, the strongly substantive model is potentially very demanding, in terms of both the constraint this may place on what an autonomous agent can choose, and the burden on the state to police its citizens’ choices to the extent that it is able to defend their global autonomy. The opportunity to make unwise decisions (short of those that are autonomy-relinquishing) is, I think, a valuable part of what it is to be a free agent. Paternalist constraints on what one may choose – however well intended – inevitably rob us of the chance to decide for ourselves what is in our best interests and to enjoy the sense in which we have chosen well, or the pleasures and excitement of our occasional recklessness. And we would soon resent the intrusiveness of a state that must monitor our choices to know when to intervene. For these reasons, we should not, I think, adopt a strongly-substantive model.

**Weakly Substantive Model**

Weakly substantive accounts, in contrast, refrain from placing *direct* constraints upon the content of an autonomous agent’s preferences. Instead, they claim to impose only indirect constraints by stipulating competencies necessary for autonomous judgement. Nonetheless, these accounts are substantive insofar as the competencies they list import normative content. According to Benson’s weak substantive account, these competencies rest upon an agent’s attitude towards her own self-worth and authority, but he also highlights the agentic skills of ‘introspection, communication, memory, imagination, analytical reasoning, “self-nurturing”, resistance to pressures to conform, and political collaboration’ suggested by Meyers’s normative-competency

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account of autonomy. Whilst these do not impose direct restrictions upon what an autonomous agent can value or prefer without forfeiting some degree of autonomy, normative content is imported indirectly, ‘through values subsumed in its description of autonomy competencies’, e.g. Meyers’s skill of ‘self-nurturing’ implies the value of self-worth. Benson maintains that a weakly substantive theory (unlike a strongly substantive theory) permits a person to autonomously choose things that are wrong, or bad, or against their best interests, but only if that person had the competencies necessary to choose what is right, good and in their best interest.

An autonomous agent can choose whatever she wants; what matters is her ability to identify what is of value to her and the course of action that best promotes it. Under this scheme of indirect constraints, then, I remain an autonomous agent even if I decide to act contrary to my best judgement and, say, bake cakes instead of writing up this thesis. If, however, my cake-baking is motivated by a debilitating crisis of confidence, in which I am despairing of my capacity to produce academic work of any merit at all, then my choice might not be autonomous insofar as my emotional crisis undercuts my ability to pursue the course I most value.

The conception of autonomy-competence I defend takes the best of the non-substantive model (i.e. its concern with the *process* of decision-making, rather than *content* of the decision-reached) and combines it with the best of the weakly substantive model (i.e. its imposition of a normative standard for autonomous decision-making, albeit one which attaches to the competence of an agent rather than the content of her choices). In so doing, it links ‘autonomous choice’ with

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158 Ibid.
‘competent choice’, and not (as the strongly substantive model does) with some, inescapably controversial conception of ‘right choice’.

3.5. Objections

I conclude by anticipating a number of objections that may be raised against the view of autonomy I defend.

Firstly, that it is overly-demanding in that it sketches out a model of autonomous decision-making that is not a routine feature of our daily lives. Personal autonomy, as we experience it, often manifests itself in unreflective, programmatic conduct, and not merely in a conscious, deliberative process. This is an important point since it suggests that in trying to understand autonomy, we should not confine ourselves to the paradigm decision-making procedure – that would be to over-intellectualise and to expect too much of our everyday decision-making practices. Similarly, it suggests we should not look merely to ‘loaded’ decisions, such as medical consent decisions, where the presence or absence of personal autonomy is (apparently) most critical. The ‘small decisions’ – which we are more likely to navigate programmatically – and their cumulative effect can influence, and even dictate, the course of our lives; for good and ill. On the view I defend, whether or not this programmatic conduct is autonomous will depend on the extent to which it flows from the skills and dispositions I have articulated. But is this repertoire of skills in itself too demanding? I think not. I am not arguing that to be autonomous an agent must possess an optimal measure of all the decision-making skills, and that this can be achieved only if one has been lucky enough to have benefitted from a stable childhood which has endowed them – to an optimal level - with a complete set of self-nurturing and pro-social dispositions. (The phenomenon of adversity-overcomers
tells us otherwise). I mean only to suggest that, all things being equal, these dispositions typically encourage the development and exercise of an ‘adequate’ range of ‘good enough’ decision-making skills necessary for autonomy agency. Furthermore, many of these normative competencies need not be consciously deployed, indeed self-esteem is an example of a disposition that functions as a background condition that can influence conscious and unconscious agency.

Personal autonomy, then, as I understand it, is not an all or nothing ideal – it admits of degree – and the key issue on my view is whether or not a particular agent possesses a sufficient range and depth of skills and dispositions to make a particular choice at the time it needs to be made. The more complicated and the graver the potential consequences of the choice, the more equipped an agent has to be to make it autonomously. However, if the normative competencies I enumerate are demanding, then this is, in my view, a reasonable response where deficits in autonomy-competence can lead to serious harm to an agent’s interests.

Before leaving the demandingness objection, let me also clarify that although I am founding autonomy-competence upon the ability to act in accordance with one’s best interests, I am not arguing that an autonomous agent always does ‘the right thing’, or that an agent doing ‘not the right thing’ is sufficient evidence that autonomy-competence is lacking. On the contrary, autonomous agents frequently do things that they regard as ‘not the right thing’, including things that are in some sense self-harming or self-defeating. Consider Matt, a former heavy smoker who has quit for health reasons and is proud to have been nicotine-free for 6 months. One night down the pub, against his better judgement, and much to his shame, he buys and

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As explained in Chapter 2, Section 5, my view makes room for competent irresponsibility. In footnote 100, I comment on how, as a matter of policy, we might respond to the welfare needs of those who have failed morally in their obligation to protect their own interests.
smokes a pack of cigarettes. In this case, Matt’s actions do not cohere with his desires, nor with the beliefs underpinning them. He has chosen not to smoke again, but has failed to make his choice effective (at least on this occasion). Does Matt’s lapse mean that he lacks autonomy-competence? The facts suggest otherwise: he knows what is in his best interests and how to promote them and wants to act accordingly, and has successfully managed to do so for 6 months. His lapse, it could be argued, is not due to a lack of capacity, but rather due to his failure to actualise that capacity. The important point here is that it is the *capacity* for personal autonomy that is determinative of the autonomy-status of an agent or of a particular choice or action, not whether or not that capacity is realised.

But this, you may think, leads to a second worry: is autonomy-competence a standard that can be operationalised? On a practical level, how are we to determine whether irresponsibility is due to a failure to actualise autonomy-competence or deficits in autonomy-competence? This worry is trickier to answer, but I believe that drawing the line requires us to: first, look back at past decision-making and to judge whether or not there is evidence of general autonomy-competence; and, second, look at the present choice-situation and judge whether there are any factors which may impair autonomy-competence. Where legally recognised decision-making capacity is not compromised by mental disorder or intellectual impairment, but someone nevertheless routinely make choices that make her life go badly, the question of sufficient autonomy-competence should arise. In other words, whilst such circumstances are not necessarily evidence of an impaired ability to make decisions that promote one’s best interests, they give us a reason to doubt and investigate it.
Finally, I come to a weightier objection, namely, that insofar as it specifies the various skills and dispositions it requires and the interests it serves, my view of autonomy-competence is objectionably perfectionist. I take up this challenge in the next chapter.

3.6. Conclusion:

In this chapter, I defended the view that in order to be autonomous an agent must be able to make and enact decisions that promote her best interests, and suggested a range of critical interests that, I argue, most people value. I then showed that in order to understand what is in our best interests, and adopt the course of action necessary to promote them, we need more than the legally defined decision-making capacity; we need other dispositions and skills. Even if a person can understand, retain, and use and weigh relevant information and communicate a decision, this does not yet show that they have the capacity to make effective choices that promote their best interests. For this they also need, amongst other things, the ability to critically reflect, motivational skills and self-esteem – none of which are captured or guaranteed by meeting this legal standard.

With reference to case study materials, I have enumerated a range of skills and dispositions conducive to autonomous and responsible agency which can be captured by a weakly substantive model of personal autonomy. I have shown that when these skills and dispositions are underdeveloped, or have been damaged, deficits in autonomy-competence can arise that can impair our ability to make choices that promote our best interests. Thus, my conception of autonomy-competence explains the gap I exposed between cases of moral failure and mental incapacity. Whereas a morally-failing agent has both decision-making capacity and autonomy-competence,
and the mentally disordered agent can lack both, those who occupy the intermediate terrain will often have legally recognised decision-making capacity but will, to some degree, lack autonomy-competence. Furthermore, this conception of autonomy-competence provides a more just and defensible basis for responsibility in social welfare contexts. In the next chapter, I deal with the worry that it is objectionably perfectionist.
Chapter 4
The Perfectionism Objection\textsuperscript{160}

To go wrong in one’s own way is better than to go right in someone else’s.\textsuperscript{161}

4.1. Introduction

In Chapter 3, I defended a model of autonomy that is able to account for the deficits of autonomy-competence which explain the gap between moral failure and mental incapacity, as exemplified by the case studies set out in Chapter 1, and illuminated in Chapter 2. I now turn my attention to a serious objection that could be levelled against this weakly substantive view; namely, that insofar as it relies on normative content it is at odds with the liberal state’s commitment to neutrality and is thus objectionably perfectionist.

Perfectionism, broadly, is the idea that the state should favour certain ethical ideals and in so doing encourage its citizens to live worthwhile lives; more precisely, it is the view that there are ‘objectively better or worse ways of living’ and the claim that the state should encourage people to live better lives by adopting policies that promote relatively worthwhile conceptions of the good and discourage relatively worthless ones.\textsuperscript{162} Typically, the principle of liberal neutrality is understood as a safeguard against perfectionism insofar as it requires the state to be strictly impartial.

\textsuperscript{160} With particular thanks to Timo Jütten and Jörg Schaub for their helpful feedback on an earlier draft of this chapter.
between rival conceptions of the good. However, the task of conceptualising and justifying such neutrality has proved far from straightforward.

A comprehensive analysis of the broad array of disagreements which attach to ‘neutrality discourse’ is beyond the scope of this project, and it is, in any event, unnecessary for my present purpose. Instead, in this chapter I will reply to the perfectionist objection by showing that the autonomy-enhancing policies prompted by my competence view of autonomy are – at least in certain circumstances – compatible with a broad range of liberal views pertaining to neutrality and perfectionism.

Whilst I will contend that my view is not perfectionist (and do so using resources that many liberals avail themselves of), I present other lines of defence for those who disagree or judge it to be less innocent than it appears. I start with some necessary groundwork – an explication of perfectionism and the problems of conceptualising and justifying liberal neutrality – before presenting two lines of defence against the perfectionist objection: the first granting that neutrality of justification is achievable, and the second sceptical of its plausibility.

### 4.2. Perfectionism

As outlined above, perfectionism is, broadly, the view that it is a proper role of the state to promote valuable conceptions of the good life. Worries about perfectionism, so understood, take three general forms. First, that the state cannot (be trusted to) implement policies that reliably track the good. Reasonable disagreements abound as to what is valuable and worthwhile; what gives the state the authority/capacity to arbitrate conclusively in these matters? Second, that it usurps personal sovereignty insofar as perfectionist policies interfere with an individual’s
ability to decide for herself what is valuable and worthwhile and then to pursue that conception of what is valuable or worthwhile. Third, the fiscal burdens of promoting a particular conception of the good will inevitably fall on those who do not value it, perhaps to the extent that they cannot pursue their own conception of the good, at least not to the same extent.\footnote{Patten refers to this as the fiscal objection (ibid., p. 266).}

However, anti-perfectionist worries such as these are often based on ‘vague’ or ‘inconsistent’ ideas of what a perfectionist state would amount to,\footnote{Chan, Joseph (2000) ‘Legitimacy, Unanimity and Perfectionism’ in Philosophy and Public Affairs, Vol. 29, No. 1 (Winter 2000), 5-42, here p. 8.} which in turn can give rise to misleading images of an oppressive state blithely undercutting personal sovereignty in order to exert maximal control over its citizenry. Chan’s analysis of ‘the good life’ and the means of promoting a particular conception of it,\footnote{Ibid.} however, helps us to recalibrate our understanding of what a perfectionist state might amount to.

According to Chan, the term ‘conceptions of the good life’ may refer to four types of judgements; firstly, judgements about \textit{agency goods} (such as reason, courage, integrity, etc.); secondly, judgements about \textit{prudential goods} (such as human relationships, knowledge, etc.); thirdly, local comparative judgements on particular ways of life within which these agency and prudential goods are ranked; and, fourthly, judgements concerning comprehensive doctrines that require complete ranking of such goods and ways of life.\footnote{Ibid., pp. 11-14.} Whilst the latter judgements are controversial and challenging to establish, Chan claims that the remaining three are not, or at least less so. The value of agency and prudential goods are widely shared, according to Chan – something I am inclined to accept as these goods substantially
overlap with the default menu of capabilities I list in Chapter 3, which, following Nussbaum’s influential work, I argued is likely to be accepted by almost everyone. Securing consensus on local judgements concerning the comparative value of these goods and different ways of life might be less easy, but Chan points out that at least some such judgement will be uncontroversial, e.g. the judgment that the life of John (talented, wise, respected and cared for) has greater value than the life of Mark (a drug addict whose whole life is consumed by the task of scoring his next hit).

From this analysis, Chan draws the distinction between two types of perfectionism: *extreme* perfectionism, which holds that the state may promote policies in accordance with one particular comprehensive doctrine (and is in this sense ‘monist’); and, *moderate* perfectionism according to which the state may promote policies based on non-controversial judgements concerning agency and prudential goods, and local comparative judgements regarding particular ways of living (which is pluralist by being compatible with a range of comprehensive doctrines). Whilst the former – *monist perfectionism* – should be rejected on the grounds that comprehensive doctrines cannot provide a rational or legitimate basis for policy judgements, the latter – *pluralist perfectionism* – is defensible since it promotes non-controversial goods and discourages ways of life that are deficient in them. On this view, there are ‘ways of life that are roughly speaking ‘good enough,’ [such] that the state need not discriminate further between them’,\(^{167}\) whereas the state may properly intervene between John’s way of living and that of Mark.

My view of autonomy-competence is, in Chan’s terms, a form of moderate, not extreme perfectionism, since it allows that a plurality of good ways of life can be autonomously chosen. Provided that a person is competent to select and adopt a way

of living in accordance with her self-identified best interests, the state should respect her choices as autonomous, even if they are deemed unwise or unworthy. In Chapter 3, I set out a default menu of the sort of non-controversial (or unlikely to be controversial) agency and prudential goods conducive to autonomous decision-making, allowing that individuals may modify and prioritise this menu in their own way. Consequently, my view does not aim for particular perfectionist outcomes, but rather it is an ability view that is concerned with securing the conditions for autonomous agency. This makes it weakly perfectionist in a different sense still: insofar as it stipulates the abilities required for autonomous agency it imports normative substance, but this normative substance is less restrictive than if one were to stipulate that certain outcomes have to be chosen or insist that the abilities would have to be exercised for a decision to count as autonomous. The question then is this: is even moderate and weak perfectionism incompatible with the liberal commitment to neutrality? To answer this question we need to take a closer look at this commitment.

4.3. **What is Liberal Neutrality?**

The roots of liberal neutrality can be detected in Mill’s *On Liberty* [1859], within which he champions individuality as a crucial element of wellbeing. According to his ‘very simple’ harm principle:

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\text{[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant [...] Over himself, over his body and mind, the individual is sovereign.}^{168}
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More recently Rawls influential theory of political liberalism - understood as a kind of neutrality - has dominated liberal thinking. Political liberalism, Rawls maintains, asserts the priority of the right over the good and ‘seeks common ground – neutral ground – given the fact of pluralism’.  

The idea of liberal neutrality has become a battlefield upon which two broadly-constituted armies vie for supremacy. On one side, neutralists claim that the state should be scrupulously impartial between rival understandings of the good. In practice, this implies that the state should not (aim to) promote the good without societal consent or consensus, nor should it rely on particular conceptions of the good in order to justify policy and practice. On the opposing side, anti-neutralists (or neutrality-sceptics) claim that neutrality, understood in the terms cashed out above, is either incoherent or undesirable. Liberal neutrality, they argue, is implausible since the very notion of neutrality is itself deeply value-laden. This aside, strict adherence would result in the demise of certain prized aspects of our culture and prevent the state from promoting valuable ways of life. Whilst the pro-neutrality position was ascendant in the 1970s and 1980s, neutrality scepticism is ‘quickly becoming a consensus position’.

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172 This is a necessary oversimplification of the critique, since the literature features a range of distinct disputes that have been prompted by differing conceptions of what liberal neutrality actually consists in. As a consequence, ‘what some authors defend under the heading of neutrality is not the same as what others attack’ (Arneson, Richard (2004) ‘Liberal Neutrality on the Good: An Autopsy’ in S. Wall & G. Klosko (eds.) (2004) Perfectionism and Neutrality: Essays in Liberal Theory (Oxford: Rowman & Littlefield Publishers) pp. 190-208, p. 192).
Whilst the term liberal neutrality broadly denotes the idea that the liberal state should not pursue policies that favour one conception of the good over rival conceptions, what it means in practice is a complex question which I will approach using Arneson’s influential three-fold distinction.¹⁷⁴ Arneson distinguishes between neutrality of aim (according to which the state should not pursue policies which aim to make one conception of the good (or way of life) more successful than others); neutrality of effect (according to which the state should not pursue policies that lead to any conception of the good (or way of life) being advantaged over others, or advantage adherents of any conception of the good (or way of life) over adherents of others¹⁷⁵); and, neutrality of justification (according to which the state should not pursue policies that are justified on the basis of an appeal to any particular (favoured) conception of the good (or way of life)). All three ways of conceptualising and justifying liberal neutrality are vulnerable to challenge.

In line with most commentators, let me start by rejecting the plausibility of neutrality of effect on the grounds that all policies inevitably bring about unequal effects, even the least controversial policies, such as those designed to protect our basic liberties. As Rawls, citing Berlin, observes: ‘there is no social world without loss […] values clash and the full range of values is too extensive to fit into any one social world’.¹⁷⁶

The leaves neutrality of aim and neutrality of justification, which can be applied singly or together as a ‘package ideal’, which Arneson articulates thus:

Given the nature of human good, the state should never aim to promote any controversial ideals of the good and its policies (except for this very doctrine being proposed) should not be

¹⁷⁵ This can be understood in terms of popular acceptance of the policy or how easy it is for its supporters to pursue it Patten calls these, respectively ‘popularity’ and ‘realizability’ (Patten (2012) ‘Liberal Neutrality’ p. 256).
such as to be justifiable only by appeal to the claim that some ideal of the good is superior to any other.\footnote{Arneson (2004) ‘Liberal Neutrality of the Good’, p. 193-4.}

One might, therefore, understand neutrality of aim as a particularly demanding sub-variant of neutrality of justification: neutrality of justification \textit{plus} a prohibition against using public policy means aimed at achieving certain non-neutral ends. However, whether taken singly or together, both formulations of neutrality give rise to a key objection – if public policy justification and aims must be free of notions of value, then what \textit{should} guide policymaking? In reply, various writers argue that state judgements need not be value-free, provided those values are shared by all (i.e. are not controversial) or that they survive reasonable disagreement. Hampshire, for example, claims that irrespective of divergences in conception of the good, we all want to avoid – almost at all costs – certain primary evils (‘massacre, starvation, imprisonment, torture, death and mutilation in war, tyranny and humiliation’).\footnote{Hampshire, Stuart (2000) \textit{Justice is Conflict} (Princeton, New Jersey: Princeton University Press), p.43.} Rawls pins his hopes on the possibility of building an overlapping consensus whereby reasonable people who hold different conceptions of the good agree on certain basic laws, albeit for different reasons which are inherent within their own moral viewpoint.\footnote{Rawls, John (1993) \textit{Political Liberalism}.} The extent to which unanimity and consensus is possible, however, is the topic of much debate.

Taken individually, these two formulations are also problematic. One might point to potential difficulties in determining the motivating aims of legislators and think the justifications for state action provide a more plausible basis upon which to judge neutrality. Klosko and Wall claim that for this reason ‘we do well to construe \textit{[appeals to neutrality of aim]} as the claim that the state should not justify what it does
by invoking controversial claims about the worth or value of different conceptions of the good [i.e. neutrality of justification]. However, despite being the ‘dominant formulation’, one might think that neutrality of justification is also troublesome insofar as provides the state with a smoke screen behind which it may pursue non-neutral policy aims:

[The neutrality of justification formulation] allows as consistent with neutrality that the state might conceivably be justified in pursuing policies that are nonneutral in aim. To take a simple example, one might adopt a policy that aims to promote Roman Catholicism over other religions in a case where this policy has a sound neutral justification, say the achievement of civil peace.

So, we see that all three mainstream formulations – including the aim/justification package ideal – have implications that give us reason to wonder whether liberal neutrality is achievable, and desirable, in practice, and, if so, how. Obviously, this worry is not a decisive reply to the perfectionist objection, nor, is it meant to be. Instead of entering into this debate, I will claim that the autonomy-enhancing policies that emerge out of my competence view of autonomy are compatible with a wide range (and possibly the whole range) of liberal views – at least in certain circumstances – and that, accordingly, I don’t need to take a view on which (if any) conception of neutrality is correct.

Below, I will present two lines of argument against the perfectionist objection. Firstly, I will grant for the sake of argument that what is widely considered to be the most defensible form of liberal neutrality, i.e. neutrality of justification, can be achieved but demonstrate its compatibility with my view of autonomy and the policies it implies. Secondly, I will argue that if neutrality (even of justification)

181 Ibid., p. 8.
cannot ultimately be achieved, my view of autonomy is nevertheless compatible with liberal views committed to respect for autonomy and pluralism.

4.4. Variant 1: Neutrality of justification is achievable

Recall that according to neutrality of justification the state should only pursue policies that can be supported by sufficiently weighty reasons acceptance of which does not require appeal to (the value of) any particular conceptions of the good. This approach is favoured by many neutrality proponents, and Rawls’ influential idea of an overlapping consensus provides a resource for how this can be achieved. As noted above, Rawls claims that people who hold different reasonable comprehensive doctrines (concerning life, good and bad, right and wrong, religion, etc.) can nevertheless share certain fundamental ideas and agree on particular political principles. If it is correct that policy judgements based on non-controversial values, or values that survive reasonable disagreement, do not breach the requirements of neutrality of justification, then insofar as reasonable people holding different conceptions of the good can agree on certain matters, the state may legitimately promote them.

Now, one might argue that my view of autonomy and the policies it motivates are based on values that are so controversial that they could not attract such consensus, notably the normative competencies I enumerate beyond the largely cognitive legal decision-making capacities. However, I want to argue that not only is my view compatible with Rawls’ political liberalism, but that it is a precondition for

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it. Rawls’ political liberalism derives from his political view of free and equal persons in possession of two moral powers: the capacity to form and revise a conception of the good, and the capacity to form and act upon a sense of justice.\textsuperscript{184} Since my ability view of autonomy and the autonomy-enhancing policies they motivate can be seen as a means of securing the necessary abilities for these two moral powers, they are compatible with and necessary for a Rawlsian overlapping consensus, and \textit{ex hypothesi}s, compatible with neutrality of justification.\textsuperscript{185}

To appreciate this, recall the information-processing and evaluative skills I suggest are critical for decision-making. In order to form and revise a conception of the good, an agent must be able to: identify, gather, understand and critically reflect upon relevant information; endorse those values that play a role in such reflection; and appreciate how different courses of action can impact on one’s own life. Accordingly, the decision-making skills I articulate are all required for Rawls’ first moral power. Recall next the other-regarding attitudes I enumerate (a sense of justice and empathy) and those dispositions necessary for regulative control (self-control and resilience) – all of which an agent will need to attain Rawls’ second moral power, namely, the ability to form and act upon a sense of justice. We need to recognise the interests of others and to be able to imaginatively experience their situation and how our conduct can impact on it, and we need to be able to wield self-control, such that we can effectively apply the ideals and values we subscribe to. These competencies need to be insulated from the demotivating effects of destabilising life-events. All of these skills and dispositions are underpinned by the two attitudes to self which I have argued form the bedrock of autonomy competence: self-esteem (according to which

we value ourselves and experience ourselves as worthy of good things) and self-confidence (according to which we believe we are entitled to live our lives on our own terms, and that we are competent to do so). Both are encapsulated within Rawls’ conception of self-respect, which he contends is ‘perhaps the most important primary good’.

In this sense, my view is, arguably, not perfectionist at all: it is concerned with securing the preconditions of justice, and not promoting a particular conception of the good (and perfectionism is, normally, defined as being only about the latter). For similar reasons, the autonomy-enhancing aim of the public policies suggested by my view is consistent with neutrality of aim also. The aim to foster normative competencies is a second-order (non-perfectionist) aim to enable people to identify and then pursue their self-identified best interests, as opposed to a first-order (perfectionist) aim that stipulates what those interests are.

Insofar as my view on this variant is not perfectionist, the three objections I raised above are not engaged. By way of an overlapping consensus, there is (supposedly) a means to identify the right amongst a plurality of views, which (amongst reasonable people) would not be controversial; enforcing the right is not at odds with personal sovereignty since it is understood to be inherently limited by the right (and its necessary preconditions); and, the costs of enforcement are legitimate insofar as they advance a political conception of justice that is based on an overlapping consensus.

Nevertheless, perhaps others will find fault with my arguments here; they may, for example, object on the grounds that the repertoire of normative competencies I enumerate go beyond that which is required for Rawls’ two moral
powers. Or they might feel that my view is less innocent that it might at first appear because the acquisition and deployment of these skills and dispositions cannot help but transform the way in which we interact with our conception of the good, even if we select it for ourselves. I am inclined to resist both lines of attack: on the first point, I believe that I demonstrate that all the skills and dispositions I suggest are implied by Rawls’ schema; and, on the second, it doesn’t matter if they impact on how we self-identify and pursue our life plans since I am not defending neutrality of effect because this formulation is, for reasons already given, impractical.

Nevertheless, in case I am wrong, my second line of argument proceeds from the perspective that neutrality – even of justification – cannot ultimately be achieved, and highlights three strategies for reconciling perfectionism and liberalism, all of which are compatible with my view.

4.5. Variant 2: Neutrality is not achievable

Whilst not exhaustive, these three strategies track the key moves in the field. The first claims that neutrality is only one liberal value amongst many, and downgrades it as an instrumental value that should give way to the intrinsic value of personal autonomy. The second eschews neutrality and claims that respect for pluralism is what really matters. The third eschews neutrality in favour of a better understanding of anti-perfectionism which prohibits the promotion of only first-order values, and not the promotion of second order values like personal autonomy.
A. Neutrality is only one value amongst many:

According to Wall & Klosko, most writers claim that the principle of liberal neutrality is an absolute prohibition on non-neutral state action.\(^{186}\) On this view, liberal neutrality is not merely one consideration among others, but an overriding constraint on legitimate government policy. Patten refers to this as the ‘upstream’ view of neutrality.\(^{187}\) However, an alternative view is that whilst neutrality is important, it ‘is not the liberal’s only desideratum’.\(^{188}\) Accordingly, in some situations neutrality may justifiably be overridden in the interests of other commitments. The obvious questions here are: what commitments, and in what circumstances? As Wall and Klosko note,\(^{189}\) there is surprisingly little guidance on these matters within the literature, except that as ‘the nerve of liberalism’\(^{190}\) and a value at the heart of a political conception of justice,\(^{191}\) neutrality should be viewed as a weighty principle that is not easily overridden.

Patten articulates a ‘downstream’ view that seeks to explain not only why neutrality is generally required, but why in certain circumstances it may be suspended. According to his view, there is one fundamental non-neutral value, the existence of which commits the state to neutrality, albeit in some limited domain. Patten claims that:

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\text{it is in virtue of being guided by a particular, justifiable, liberal value – what I call “fair opportunity for self-determination” – that the state has a weighty, if defeasible, reason to be neutral between conceptions of the good.}^{192}
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The value of ‘fair opportunity for self-determination’ is itself not neutral, but on Patten’s view it is an unavoidably controversial commitment of liberalism. Whilst generally state neutrality advances this value, Patten acknowledges that there are some circumstances in which it does not. For example, we might think that in the context of education ‘fair opportunity for self-determination’ is better secured by direct promotion of a particular policy – for example, compulsory education - rather than by strict neutrality.

But Patten’s view is only one amongst others that appeal to a non-neutral defence of a limited, ‘downstream’ conception of neutrality. Prominent amongst them is Mill’s appeal to a particular conception of wellbeing – his particular brand of Utilitarianism – to defend his views on state neutrality,\(^{193}\) namely, the views that the state should generally be neutral but that in respect of some issues – such as irrevocable contracts\(^{194}\) – it need not be.

Liberal neutrality, then, should be seen as a means to an end and not as an absolute prohibition capable of trumping all other values; it is of instrumental value at the level of individual policy insofar as it safeguards other values (such as personal autonomy and welfare), but is not valuable for its own sake. Whether this other value (or values) is Patten’s fair opportunity for self-determination or Millian utility, this downgraded notion of neutrality is, at least in principle, compatible with the view I advocate. The autonomy-enhancing policies favoured on my view foster the capacity necessary to formulate, enact and keep under review a particular conception of the

\(^{193}\) Mill (1859) ‘On Liberty’,

\(^{194}\) Mill, J.S. ([1852]1970) *Principles of Political Economy with some of their Applications to Social Philosophy* (Harmondsworth: Penguin) - ‘A second exception to the doctrine that individuals are the best judges of their own interest, is when an individual attempts to decide irrevocably now, what will be best for his interest at some future and distant time’ (Book V, Chapter XI, §10).
good and safeguard the welfare of individuals insofar as autonomy-competence enables people to select ways of living that advance their best interests.

B. **Pluralism, not neutrality, is what really matters:**

A second strategy whereby perfectionism and liberalism can be reconciled argues that what really matters is that we respect reasonable pluralism, not that we cleave to some formulation or other of neutrality. Chan makes a similar point when he introduces the distinction between extreme (monist and coercive) and moderate (pluralist and non-coercive) perfectionism and defends the latter as a legitimate and, indeed, necessary function of a state committed to securing the conditions for personal autonomy.  

Raz’s liberal perfectionism exemplifies moderate perfectionism, so understood: it is entirely consistent with pluralism because it does not seek to impose one single conception of the good. He argues that there is a ‘logical gap between pluralism and neutrality’, in which the liberal can respect personal autonomy without committing herself to neutrality. Thus, whilst Raz’s view excludes certain harmful ways of life (and is to that extent non-neutral), it does not impose any single view of what ways of life are valuable (and thereby respects pluralism). The liberal’s commitment to individual freedom, when properly understood as a commitment to ensuring the conditions for personal autonomy, ‘permits and even requires governments to create morally valuable opportunities, and eliminate repugnant ones’. What counts as repugnant will be uncontroversial among many citizens, but some will still reject such judgements as non-neutral. (Unlike Rawls and his followers, Raz accepts that this disagreement makes the judgements non-neutral).

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Raz shares Mill’s (implied) commitment to the ideal of personal autonomy, understanding it as ‘the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.’ Consistent with the liberal tradition and its commitment to a negative conception of freedom, Raz agrees that autonomous decision-making demands freedom from state interference. Coercion, he argues, treats the victim like a ‘non-autonomous agent, an animal, a baby, or an imbecile’. Similarly, manipulation ‘perverts the way the person reaches decisions, forms preferences or adopts goals’. However, Raz argues that controversial ideals need not be coercively imposed. Instead they could be promoted through mechanisms designed to encourage or discourage certain behaviours. Raz concedes that there may be instances when the state must employ coercive means, but this should be permitted only in accordance with his perfectionist version of Mill’s harm principle: ‘using coercion invades autonomy and thus defeats the purpose of promoting it, unless it is done to promote autonomy by preventing harm’. Here, Raz opens up another logical gap, this time between ‘perfectionist political action and the coercive imposition of contentious ways of life’.

Accordingly, it is reasonable to suppose that Raz would be sympathetic to the kind of policies I advocate that aim to equip individuals with the skills, motivations and opportunities to live valuable, autonomous lives (in which they are able to make choices that promote their best interests). Although he would want to avoid the use of coercion or manipulation as much as possible, and certainly in the imposition of contentious ways of life.

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198 "It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where not the person’s own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress". Mill (1859) ‘On Liberty’, p.63.
controversial ways of life, Raz allows that in the interests of autonomy, coercion is permissible.

Two key points should be highlighted here. Firstly, recall that Raz’s view excludes certain harmful ways of life, but does not impose any single view of what ways of life are valuable. In line with my view, the value of personal autonomy, and the legitimate role of the state’s securing the conditions for it, determines those ways of life that public policy should aim to encourage and distinguishes them from those that it should aim to discourage. Secondly, where possible coercive measures should not be deployed to encourage or discourage particular ways of life, given that coercion is generally an anathema to personal autonomy. Still, in both Raz’s and my view, the promotion of public policies conducive to personal autonomy – such as policies which enhance autonomy-competence and extend opportunities for choice – can be legitimate even if they force taxpayers to fund such intervention and deploy the threat of sanctions to motivate people to accept and engage with them. I will consider these matters further in Chapter 6, when I consider the objection that the kind of autonomy-enhancing policies I espouse are objectionably coercive. However, what I want to emphasise here is that state interventions that can be construed as coercive may nevertheless be legitimate in the interests of defending/enhancing a pluralistically conceived personal autonomy. Like Raz, I accept the dangers of corruption, the risk of fallibility and the counter-productive tendencies of ‘full-blooded perfectionist policies’ (even valid ones).\(^{204}\) Accordingly, I share his view that perfectionist interventions should be legitimated, where possible, by consensus, say along the lines suggested by Rawls, and that the coercive powers of the state should be minimised.

C. Autonomy-Minded Perfectionism, not Neutrality

The third and final strategy I want to highlight is suggested by Colburn.\(^{205}\) He argues that the traditional debate between ‘autonomy-minded’ perfectionist liberals and ‘neutrality-minded’ political liberals is founded on an error, and that on the best understanding of anti-perfectionism the conflict between these two positions will be found to be illusory.

Colburn defines both sides of debate with the use of two claims. First, The Autonomy Claim: ‘the state ought to promote autonomy, [where autonomy is understood as] a value which consists in an agent deciding for herself what is a valuable life, and her living her life in accordance with that decision’.\(^{206}\) Second, Anti-Perfectionism: ‘the state ought not in its actions intentionally promote any value or putative value’.\(^{207}\) Whilst perfectionist liberals are committed to the endorsement of the Autonomy Claim and the denial of Anti-Perfectionism, political liberals are committed to the endorsement of Anti-Perfectionism and the denial of the Autonomy Claim. Colburn argues that both claims are compatible, if we understand anti-perfectionism as a prohibition against promoting first-order values, and autonomy as a second-order value.

The success of Colburn’s strategy depends on whether he is able to defend the distinction he needs to draw between first- and second-order values. He does so persuasively by introducing the notion of variables that track individual preferences, which he elucidates within the context of a related, but different, distinction between content-neutral and content-specific values. Whereas a content-specific value fully specifies the state of affairs that is valuable (‘All that is valuable in life is to be able to

\(^{206}\) Ibid., pp. 43-4.
\(^{207}\) Ibid..
play Bach’s Cello Suites flawlessly’), a content-neutral value does not (‘What is valuable in life is satisfaction of desire’).\textsuperscript{208} Content-neutral values are ineliminably incomplete insofar as they do not specify a particular state of affairs, but instead are sensitive to, for example, individual preferences, i.e. with regards to the value statement ‘What is valuable in life is satisfaction of desire’, what is valued is whatever is desired by an individual at the relevant time. Thus, the specification of content-neutral values contains variables which track, for example, individual preferences. Second-order values contain second-order variables that track other specifications of value, e.g. ‘what is valuable is what my parents’ value’. These are distinct from first-order values which don’t.

Anti-perfectionists, according to Colburn, tend to eschew the state promotion of first-order values, but autonomy is not best understood in the liberal context as such a first-order value. Rather, as defined above, it is ‘a value which consists in an agent deciding for herself what is a valuable life, and her living her life in accordance with that decision’, and as such is a second-order value. Moreover, Colburn claims that the only reasonable understanding of anti-perfectionism is in terms of a prohibition against the promotion of first-order values. He justifies his position in the first instance by noting that anti-perfectionists ‘almost invariably have the state promotion of first-order values … as their target’.\textsuperscript{209} But he then offers a stronger argument: whilst some second-order values might offend our anti-perfectionist intuitions (e.g. the value of tracking our parents’ values), not all of them will, whereas all first-order values will offend our anti-perfectionist intuitions because it is in their nature to fully specify what is valuable.

\textsuperscript{208} Ibid., p. 51.
\textsuperscript{209} Ibid., p. 57.
The autonomy-enhancing aims of the policies I espouse are compatible with first-order anti-perfectionism since they follow from a conception of autonomy as a second-order value. Autonomy understood as the ability to make decisions which promote one’s interests is a content-neutral and second-order value which contains a second-order variable (self-identified best interests).

4.6. Conclusion

In this chapter I have answered the charge that insofar as my conception of autonomy-competence relies on normative content it fails to comply with the liberal commitment to neutrality and is thus objectionably perfectionist. I have done so by demonstrating how my view of personal autonomy, and the autonomy-enhancing policies it motivates, are compatible with the most defensible formulation of neutrality and with three key neutrality-sceptic views that attempt to reconcile perfectionist and liberalism. Admittedly, non-liberal views might object to some or all of the above strategies. However, since the context of the problem we are addressing – the legitimacy of autonomy-enhancing public policies – is mainly a liberal one, I am not overly concerned by this objection. Nevertheless, it should be noted that insofar as these strategies empower individuals to autonomously choose their own path, they do in fact leave room for some non-liberal ways of life – those that can be part of an overlapping consensus on a political conception of justice (variant 1) or that are protected by downstream neutrality (variant 2A) or that are compatible with the perfectionist version of the harm principle (variant 2B) or with autonomy-minded liberalism which understands autonomy as a second-order value (variant 2C). I now move on to examine a real-world example of the kind of autonomy-enhancing policy espoused by my view – Family Intervention Projects.
Chapter 5

The FIP Model – Parenting the Parents

It’s a question I often ask meself: what would I do with me? And I don’t know the answer. I don’t know what I’d do except run away.\(^\text{210}\)

5.1. Introduction

In Chapter 3, I proposed a view of autonomy-competence that is better able to account for the phenomenon of *sub-optimal agency* than the narrow conception upon which the legally-defined test of decision-making capacity is founded (discussed in Chapters 1 and 2). Having defended my conception of personal autonomy against the challenge that it is objectionably perfectionist (Chapter 4), in this chapter I now examine a state intervention that exemplifies the kind of *autonomy-enhancing public policies* it motivates: *Family Intervention Projects* (FIPs).\(^\text{211}\) From this practical perspective, I will revisit worries regarding the oppressive potential of my conception in the next chapter.

FIPs work with very disadvantaged families with multiple and complex problems, many of whom are facing high-level sanctions – such as eviction – as a result of their anti-social and problem behaviours.\(^\text{212}\) By addressing the root causes of


\(^{211}\) Note that here I use the term ‘Family Intervention Projects’ to include a range of similar interventions that share the same model, including those referred to as family intervention services, troubled families projects, etc.

\(^{212}\) Historically, such families have been known as ‘problem families’, a term that has been commonplace in public and political discourse since the 1940s. According to a 1943 pamphlet by the Women’s Group on Public Welfare, this group was conceptualised as being ‘on the edge of pauperism and crime, riddled with mental and physical defects, in and out of the court for child neglect, a menace to the community, of which the gravity is out of all proportion to the numbers’, cited in Parr, Sadie (2009) ‘Family Intervention Projects: A Site for Social Work Practice’, in *British Journal of Social*
such behaviours, rather than simply dealing with their effects, FIPs have proved to be an effective means of reducing them. Recall the distinction I drew in Chapter Two between hands-off and hands-on social welfare policies. In contrast with policies that use only sanctions to enforce pro-social and responsible standards of conduct, FIPs provide a balance of support and enforcement (‘sanction-backed support’) aimed at tackling the underlying causation of anti-social and irresponsible behaviours. I will call this the FIP model. Whereas hands-off policies stipulate the standards of conduct required for entitlement to social welfare policies, but do not directly intervene to build capacity, the FIP model exemplifies a form of hands-on policy, which works intensively, and in partnership, with parents and children to help them to develop the kind of skills and dispositions that will help their lives go better. It is therefore a skills-building approach which can help people develop the ability to make decisions that promote their best interests, and as such is a means to foster the kind of autonomy-competence I am concerned with.

However, one might worry that the FIP Model is essentially a wolf in sheep’s clothing: coercive perfectionism dressed up as voluntary empowerment. In response, I want to defend the FIP model as a hands-on policy intervention that is vastly superior to the hands-off policies which currently dominate social welfare provision in the UK. In contrast to the blame-attributing, entitlement-stripping effects of hands-off welfare conditionality, I will defend the hands-on potential of the FIP model as a means of enhancing autonomy-competence, and thereby, personal responsibility.

Work, Vol. 39, 1256:1273, p. 1258. As Parr notes, concern about the impact of such families on society led to the emergence of social work.

I will proceed as follows. After reporting generally on the evolution of FIPs and the core features of the FIP Model, I will provide a case study of a particular project. With this background information in hand, I will then consider the autonomy- and responsibility-enhancing potential of the FIP Model. I will conclude by highlighting qualitative data concerning the practice of ‘sanction-backed support’ and how it is experienced by families. This will set the scene for Chapter 6, in which I will address the charge that the FIP model is objectionably coercive.

5.2. The FIP Model

In the UK, FIPs evolved as a policy response to anti-social behaviour. Combating anti-social behaviour has been key political issue since the late 1990s, and in 2003 the Anti-Social Behaviour Act was introduced and implemented by Anti-Social Behaviour Unit (ASBU). The ASBU identified the need for a combined approach of enforcement and support to address the deep seated underlying problems of those families who were disrupting their local communities. FIPs were spawned by this dual approach, and were modelled on the pioneering Dundee Families Project established in 1996 by the housing and social work departments in Dundee to assist families who were homeless, or at severe risk of homelessness due to their anti-social behaviour.214 In 2009, a raft of other projects were established using a similar model of intervention to address child poverty (focusing on workless households) and youth crime (focusing on families with children at risk of offending).

Research has shown that the most common reasons for such intervention include: anti-social behaviour (58%), poor parenting (43%), children being at risk of

offending (29%), children at risk of exclusion from school or having serious attendance problems (33%), the family being at risk of homelessness (26%), and no one in the family being in work (29%). Data collected concerning the profile of families referred shows that 64% were lone parent families, 31% of families contained someone with a physical or mental disability, 32% of families contained children with special educational needs, 75% of families were workless, 36% of families were in debt (of which 54% had rent arrears), and 81% of families had problems with family functioning. According to various different studies, a significant proportion of the families referred to FIPs are affected by a range of ‘impairments that fall within the legal definitions of disability’. For example, Nixon et al’s 2006 government-commissioned study of six pioneering projects around the UK found that 59% of adults suffered from depression, whilst a further fifth of families contained adults who were diagnosed with mental health problems, such as schizophrenia and obsessive-compulsive disorder.

In her report Listening to Troubled Families, Louise Casey, underlined a number of common social factors which emerged during her research:

The most striking common theme that families described was the history of sexual and physical abuse, often going back generations; the involvement of the care system in the lives of both parents and their children, parents having children very young, those parents being involved in violent relationships, and the children going on to have behavioural problems, leading to exclusion from school, anti-social behaviour and crime.

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In these circumstances, it is not difficult to understand why these troubled families are derailed by difficult life events, which most families can be expected to eventually recover from. After her marriage ended, Jill’s life fell apart:

I was very depressed, I hadn’t been out of the house for nearly two years. Yeah I wasn’t washing, I wasn’t keeping myself clean, nothing […] I slept in bed all day and like got up when Leah got home from school, and then just basically laid on the sofa, I just didn’t have any life or enthusiasm to do anything at all.  

Similarly, recall Mr Gibbons, one of our case studies from Chapter 1, who was unable to cope with the emotional impact of bereavement, began drinking heavily, lost his job and mismanaged his financial affairs to the point of destitution.

The persistent and assertive style of work modelled by FIPs has proved to be a highly successful means of engaging ‘hard-to-reach’ families, thereby reducing the problems which triggered their referral for intervention and improving the children’s future ‘outcomes’. For this reason, the FIP Model became the keystone of the UK government’s Troubled Families Programme.

In 2011 the Troubled Families Programme was launched largely in response to the Summer Riots of that year. The overall aim of the programme is to ‘turn

[219] Ibid., here at p. 20.
[220] By ‘hard-to-reach’ I refer particularly to groups that slip through the net because they are overlooked or ‘invisible’, e.g. people with mental health problems and those who are resistant to engaging with service providers because they are suspicious, over-targeted or disaffected.
around’ the lives of the 120,000 ‘troubled families’\textsuperscript{224} in the UK who according to government research are causing problems to their local community and costing the state £9 billion annually, of which £8 billion covers only the cost of reacting to the problem. Emphasis is placed on four key objectives: getting children back into school, putting adults on the path back to work, reducing crime and anti-social behaviour and reducing public sector expenditure. The \textit{FIP Model} of intervention was heralded as the best means of achieving these ambitions.

The \textit{FIP Model}, therefore, has become a key feature of a broad range of different projects – local and national – that are designed to engage vulnerable individuals and families who have proved hard-to-reach. They may be called different things (e.g. Family Recovery Projects, Family Intervention Programmes, etc.) and vary in foci (e.g. poverty, worklessness, parenting, criminality/anti-social behaviour, etc.), and they may intervene in different settings (outreach support to families in their home or dispersed support within a residential unit). They may be funded by different bodies (central government, local authorities, charities) and subject to diverse administrative requirements. However, insofar as they replicate the following ‘family intervention factors’ they exemplify what I call the \textit{FIP model} of intervention:

(1) A dedicated worker;

(2) practical support;

(3) common purpose and agreed action;

(4) considering the family as a whole; and

\textsuperscript{224} These ‘troubled families’ were defined as families who satisfied 3 out of the 4 following criteria: involved in youth crime or anti-social behaviour; have children regularly truanting or otherwise absent from school, have an adult on out-of-work benefits; and cause high costs to the taxpayer.
(5) a persistent, assertive and challenging approach.225

This final factor is of critical importance and potentially controversial insofar as it is closely associated with the policy of sanction-backed support. Whilst engagement is said to be voluntary – in the sense that families can in principle decline – refusal may not be a palatable option if seriously bad consequences are likely to follow. Eviction from one’s home and one’s children being received into care are powerful threats, and consequently critics have raised doubts about the apparently voluntary agreement to engage. In this sense, families referred to a FIP are given a choice: face the sanctions that your behaviour has triggered, or avoid them by engaging with a support plan designed to address them. I shall call this ‘the FIP proposal’.

The above survey of the FIP model – the aims it evolved to satisfy and the core features critical to its success – is, however, too abstract to serve our purposes. In order to appreciate how this form of intervention can enhance personal autonomy and responsibility we need to take a closer look at how sanction-backed support is deployed in practice. To that end, I now provide a case study.

### 5.3. Case Study – Ormiston Families and Children Trust

In order to inform my theoretical research into autonomy-competence, I undertook some empirical/qualitative research into the autonomy- and responsibility-enhancing potential of the FIP Model and was privileged to speak to a range of FIP practitioners

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225 As defined by the Troubled Families Programme, DCLG (2012) Working with Troubled Families, p. 6. These core factors are defined in different ways, e.g. White, Clarissa et al (2008) Family Intervention Projects list eight, but they tend to boil down to these five factors.
and one of the parents they have helped.\textsuperscript{226} Whilst not scientifically robust, this material will, I hope, furnish the reader with a fuller understanding of the context in which things can go wrong for some families and what it is that FIPs are able to do to help put them right.

Ormiston Families and Children Trust is a leading children’s charity in the Eastern region and runs a FIP in Great Yarmouth, an area noted for its high level of social deprivation. The project is funded by the local authority, and works in partnership with statutory agencies including police, social services, housing, probation/youth offending team, education and health, all of which are able to refer families for support. Referral criteria relate to anti-social behaviour and youth crime, where high-level sanctions are imminent, such as eviction, child protection proceedings to receive children into care, and criminal proceedings.

\textbf{5.3.1. Profile of Referred Families:}

The families referred to FIPs for support tend to fall into hard-to-reach sections of society and exhibit ‘top-end’ needs, both in terms of their range and complexity and the level of statutory concern they generate. For many, the referral to the project marks the end of the line, where all else has failed to bring about required change. Many families have been subject to ‘revolving door intervention’, where short-term intervention has only brought about short-term resolution ending in relapse and need for fresh intervention. A high proportion of problems they face, I was told, are ‘intergenerational’, in that they are handed down from parent to child. As a

\textsuperscript{226} Here I gratefully acknowledge the support of Ormiston Families and Children Trust who allowed me to interview its staff and made it possible for me to talk with consenting service users about their experience of receiving support. The Trust subsequently gave a presentation explaining their work at an Essex Autonomy Project workshop I helped organised to explore topics relevant to this thesis: \textit{Between Moral Failure and Psychopathology: Autonomy and Responsibility in Social Welfare Policy} (18-19 May 2012, University of Essex).
consequence, families tend to be well-known to statutory and voluntary agencies. Multiple interventions, where several different agencies are involved at one time, are common, and in the absence of key worker co-ordination, this has in the past led to chaotic, contradictory and ineffective intervention. As a result, the families’ experiences of statutory services is often poor. A high proportion of referrals received by the FIP involve mental health issues and/or substance misuse.227

5.3.2. Assessment and Support Planning

Following referral an initial meeting is scheduled, to which the family, the referring agency and all other relevant agencies are invited. During this first meeting, parents are confronted with a catalogue of claims and complaints made against them, and the sanctions that will be applied if they do not co-operate are spelt out to them. At the end of the meeting, a list of priority changes demanded/required by professionals is drawn up. If the parent(s) agree to engage with the intervention proposed, an assessment of the family’s support needs is then undertaken. This assessment adopts a ‘whole family’ (holistic) approach, which accounts for the circumstances and needs of every member of the family and the internal dynamics in play. From this a support plan is drafted and agreed with the family. The assessment and associated support plan are kept under constant review. Significantly, in addition to the demands of other agencies, the assessment and support planning process is concerned with what the family wants. Often these are the same as – or at least consistent with - what the professionals want.

227 This summary replicates the findings set out in Casey (2012) Listening to Troubled Families.
5.3.3. Using Sanctions with Support
In line with the core features of intervention listed above, the manager of Ormiston’s FIP believes that the following framework is critical to the success of their work in Great Yarmouth:

- Assertive and persistent support, plus
- Effective multi-agency co-ordination, provided by a
- Dedicated key worker, who adopts a
- Whole-family (holistic) approach,
- Using sanctions with support, and
- Working intensively, and
- For as long as necessary.\textsuperscript{228}

FIP Practitioners will make frequent visits to a family’s home – planned and unplanned. They will be available out of hours if things go wrong and can’t wait. They will get to know the family and will explore the underlying causes of the problems they are experiencing. They will provide the family with the practical support they need to adhere to the terms of their support plan, e.g. helping to set up routines, organise appointments and meetings, and sorting out benefit problems. They will assertively remind the family of their responsibilities under the support plan and will not give up when they meet resistance or things go wrong. In so doing they will build a relationship with the family, which research has shown is critical to progress.\textsuperscript{229}

\textsuperscript{228} Note that these factors boil down to the five key factors I highlight above as the defining qualities of FIPs.
\textsuperscript{229} White, et al (2008) \textit{Family Intervention Projects}. 
5.3.4. Four Key Areas of Input

When asked to summarise what the families referred to them lack and what they try to provide, the FIP workers I interviewed described four key areas of input.

Firstly, parenting: many parents who are struggling to parent adequately have not themselves benefitted from adequate parenting, and as a result are ill-equipped to provide their children with the kind of nurturing environment required for their emotional, intellectual and social development.\(^{230}\) Key workers therefore adopt a parenting role – which they described as ‘parenting the parents’ – thereby providing them with a secure base from which to develop their own parenting skills and from which they can begin to think differently about themselves and their lives. The support provided by key workers is based on the ‘authoritative parenting model’ which strikes a balance between nurture (responsiveness) and sanction (demandingness).\(^{231}\) This is generally thought to be the ideal parenting model.\(^{232}\) In contrast, parenting is dysfunctional where it is sanction-heavy, too permissive or too careless. In Chapter 1 I noted how many of the case studies had not enjoyed what I called ‘good enough parenting’ and suggested that this may account for their seemingly underdeveloped decision-making skills. For example, recall M, the irresponsible and impulsive care leaver, whose mother (in care herself as a child) was unable to effectively parent. I went on to suggest in Chapter 3 how the absence of parental nurturing (and even more so the presence of parental abuse) can impair the

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\(^{230}\) Casey’s interviews also illuminate this problem, e.g. ‘Chris also says that he feels his parents didn’t know how to be a parent either, “...probably because they weren’t brought up like it I suppose” – see Casey (2012) Listening to Troubled Families, p. 15


development of the kind of self- and other-regarding dispositions critical for autonomy-competence, particularly, self-esteem and self-control.

Secondly, aspiration: many parents referred to FIPs don’t have plans for the future and consequently tend not to think beyond today. This kind of ‘planning myopia’ is not amenable to policies that try to regulate behaviour with the threat of sanctions, since such policies works on the basis that people can see far enough ahead to predict outcomes and what they will mean for them. Key workers therefore help parents to reflect on their futures, the options available and the desirability or otherwise of their likely consequences. This can also be seen to chime with our case studies, where the challenged and self-neglecting BD seemed wholly unconcerned with tomorrow and where Mrs H’ appeared to lose the ability to envisage a future for herself after her husband left her. In contrast the Watchmans did aspire to a future - of home-ownership – but were seemingly unable to fully predict the risks that attached to it. In Chapter 3 I suggested that instances of planning failure, like these, may be attributable to an inability to imaginatively experience a future, and/or the potential harms and benefits of particular course of action, i.e. a lack of appreciation.

Thirdly, trust: parents have frequently been let down, particularly by their own parents but also by statutory services, many of which demand change but cannot (or do not) adequately support it. As a consequence, statutory welfare services can come to be viewed as the enemy and not as a potential ally for families who need them. Accordingly, families don’t ask for help when they need it and they do not accept
help when it is offered. Developing trust, therefore, is key to helping parents accept the support they need to change their lives.233

Finally, self-esteem and empathy: many parents do not value themselves and do not feel valued by others, and this directly impacts on their decision-making and their attitude to others. Families are sometimes genuinely surprised by the realisation that other people can be affected by what they do. Key workers therefore work with parents to help them make choices that promote their best interests and to show them how their decision-making can impact on others. Many of the case studies in Chapter 1 can be seen in terms of deficits in self-esteem and empathy and their ruinous impact on autonomy-competence. For example, Miss B, a victim of childhood trauma, who cares for herself so little that she punishes herself to within an inch of her life, and BD who is blind to the impact his challenging behaviour has on others. On my view, self-esteem and empathy are dispositions that are most critical to the development and exercise of autonomy-competence, they enable to both select courses of action that track our best interests and to enact them.

Given these potential gains, the FIP Model this sounds like a promising approach to dealing with the sub-optimal decision-making of people whose autonomy-competence is underdeveloped or has been damaged by life-crises. However, some commentators worry that the assertive, sanction-backed support provided by FIPs can, in effect, amount to a form of punitive authoritarianism, where

233 Casey’s interviews also illuminate the transformative power of trust: ‘And I think, maybe because I talked through all my personal stuff, that I felt I could trust her [the support worker], do you know what I mean...She asked me things, though, that no one else ever asked me, you know things like life, my drugs, and what it’s made me feel like. She wanted to know. Probably not so that she could just help me, but help other people as well which I thought were really good, and it was just nice to know that she actually gave a stuff about helping me rather than just getting what she needed done, done’ – see DCLG (2012) Working with Troubled Families, p. 17.
key workers fulfil the role of monitors rather than supporters. In particular, they worry that families are coerced into accepting support and signing-up to a freedom-limiting contracts set by statutory agencies who threaten severe sanctions if people do not sign up.

5.4. Criticisms of FIPs

Critics fear that the dual approach of support and enforcement is, at worst, really only a sugar-coated regimen of discipline and surveillance and, at best, that there is at least the potential that the support and enforcement elements will conflict. Two main aspects of the intervention are the focus of anxiety: initial engagement and ongoing sanction-backed support that can involve significant restrictions on liberty. With regard to the first, critics worry that families are coerced into accepting support and signing-up to targets set by statutory agencies who threaten sanctions if they do not. Here, their target is the FIP proposal.

The second aspect of intervention concerns the liberty which families in effect relinquish during the intervention. This can be particularly acute when support is provided in residential ‘core units’, where curfews and limits on permitted visitors are applied. But even under ‘dispersed’ support arrangement – where families are supported in their own home – the potential degree of interference with their liberty should not be underestimated. For example, according to the terms of the support plan, families may be bound to permit key-workers to access and inspect their home on demand. Due to these worries, FIPs are seen by some as a form of ‘coercive welfare’, according to which the domestic sphere is co-opted as ‘arena of

There is also an issue of fairness here, insofar as the lives of some people will be subjected to higher levels of scrutiny than others, just because they have been less lucky (in a brute luck sense). These are serious concerns insofar as it is suggestive of an overreaching state veering towards social control. This is troublesome for my claim that FIPs exemplify an autonomy/responsibility enhancing approach to sub-optimal decision-making.

I want to suggest that the FIP Model is not necessarily coercive; much depends upon how the support and enforcement elements are balanced and upon the conception of coercion deployed. However, even if they are coercive, I want to argue that certain forms of coercion are not, all things considered, morally objectionable and in fact may be legitimate insofar as they enhance an agent’s autonomy/responsibility capacity. Specifically, I want to suggest that the capacity for autonomy/responsibility in certain aspects of an agent’s life may need to be developed through a process of paternalist coercion. Whereas some people in need of such support have sufficient insight to recognise this and take steps of their own to bind themselves to a contract under which they forfeit certain freedoms, others do not and need to be ‘nudged’ or compelled with the threat of sanction.

I will explore these issues in Chapter 6, where I will deal with the objection that the FIP Model is unjustifiably coercive and as such at odds with the idea of an autonomy-enhancing public policy. However, first I anticipate this task by examining in closer detail the practice of ‘sanction-backed support’ and how such interventions are experienced, particularly by those who have accepted (under the threat of sanctions) a significant loss of their liberty.

Whilst the experience of parents is not a decisive factor when we judge the coercive nature of intervention (due, for example, to the potential presence of adaptive preferences\(^\text{236}\)), it is nevertheless a relevant factor. Furthermore, it is relevant to judgements concerning the justifiability of certain forms of coercion. To that end, I have assembled some qualitative data which speaks to the issues. It is drawn from four key sources: (1) Louise Casey’s report *Listening to Troubled Families* (July 2012); (2) Department for Communities and Local Government report *Working with Troubled Families* (December 2012); (3) Sadie Parr’s 2011 case study project tracking the experience of five women referred for intensive family support within a residential unit; and (4) my own exploratory interviews with practitioners from a local FIP, and a parent who had been supported by them.

### 5.5. A Sense of Compulsion

Those subject to FIPs often report a sense of compulsion:

> [The family intervention project] was forced on me basically, with like a boulder out of the sky… I think it got to the point I was literally losing my house.\(^\text{237}\)

And they describe how daunting and invasive the initial planning meeting is:

> God, I felt like I was on a firing line, do you know it felt like, it’s all of the bad things, you don’t really want to be told all the bad things, because you know it’s happening… you think, ‘My god, I want to die. This is not me really’. But that was the thing, and that’s what they did, you got so many barriers up because you knew they was judging you, that you wouldn’t even allow them to come in, because here we go again, I’m not as good as the person with two parents, I’m not as good as the person that’s got [a job], because I ain’t got a job and it’s all this, because I’ve gone through all this, now you’re judging me.\(^\text{238}\)

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\(^{236}\) As Nussbaum notes, the subjective view of people who have grown accustomed or conform to unfavourable life circumstances may be an unreliable source of data concerning their happiness. This is because people may adapt to adverse conditions as a means of survival/coping – see, for example, Nussbaum, M. (2000) *Woman and Human Development* (Cambridge: CUP).


Also, FIP Practitioners have been described by families as ‘challenging’, ‘bolshy’, ‘forceful’ and ‘nagging’.  

[The FIP practitioner would] be there hammering on your door… and they’d come in, they’d say, ‘Right. Have you got the kids up? Are they washed? Have they brushed their teeth? Have they done their hair?’ By the time they threw all that at you, you’re thinking to yourself, my god, what’s going on here, you know. But they pushed, they do push you quite hard to get it done.

This impression is not surprising, since the initial role of practitioners is to make it clear that if families do not engage with the support offered then they will tough consequences. Whilst this challenging approach ‘can feel uncomfortable’, the DCLG claims that the evidence clearly show that families ultimately appreciate the support workers’ tenacity. The following statement supports this:

She was never knocked back. We flung everything at her: distant relatives turning up, losing the dog, being burgled. Matty on parole – she just kept on coming back and saying to me that she knew it was difficult but that I had to take the kids to school and collect them. Regular as clockwork she’d come. It became a joke, ‘there’s Jo!’; they’d say as she rang the bell. When I tried to pretend that there was nobody at home she just leant on the bell and shouted through the letter box. She was the first person to come out with it and say we could lose our house, she was also the first person who ever really helped.

Similarly, participants express how ‘a boulder out of the sky’ was required to make them see how bad things had got and that change was needed.

“…at first you don’t know what you need as well, even though you think you know, you don’t know…because you are right there smack in the middle, you don’t really see it. In the end you don’t see…you see yourself as the victim. We lived next door to ASBO children, then mine became worse than them…a few years earlier I would have been mortified. …I thought it can’t go on like this. I needed a shake…and sometimes you do need that, and just because you need help doesn’t mean you’re no less than anybody else.

The above comments suggests that families can feel ‘forced’ into engaging with a FIP, but that retrospectively they might be glad of it (and the assertiveness it

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243 DCLG (2012) Listening to Troubled Families, p. 26-7 (Lindsey). ‘ASBO’ is an acronym for Anti-Social Behaviour Orders, which are used to prohibit conduct which has caused or is likely to cause harm, harassment, alarm or distress.
involves), given the positive changes it brought about. Other participants speak of welcoming intervention, for which they having been crying out for some time:

I knew there were problems and wanted them fixed … I was beginning to wonder if there was help out there … Certain agencies don’t listen … I tried to say what I felt I needed but wasn’t being listened to … they didn’t give me answers, just judged from the side lines.244

No-one helped me at all…no-one even put me on a parenting course or anything. I mean I’ve been on one now, I’ve achieved the certificate and everything, so has my missus and that was from [the Family Intervention Project] helping us. I mean…no-one even came in and said this is – you are doing this wrong or you are doing that right, don’t do it like this, do it like that – no-one.245

So, whereas some families perceive FIPs as a push, other families have been desperately seeking such levels of intervention. It seems, therefore, that whether support is experienced as coercive is not a determined decisively by the FIP proposal alone. The degree of insight that families have (into their problems and the nature and degree of intervention they require in order to effectively address them) is also a relevant factor; the less insight a family has, the greater the likelihood that they will see the FIP proposal as coercive, and, conversely, the more insight a family has, the lesser the likelihood of seeing it that way.

5.6. The Views of Providers

Let us now consider engagement and the potential for coercion from the perspective of providers. How much, if at all, are they aware of such potential as they work with families? And insofar as they recognise elements of their sanction-backed support as coercive, how do they justify them?

Ormiston FIP practitioners acknowledged that whilst engagement is voluntary, refusal to engage could result in the enforcement of high-level sanctions which could be construed as coercive. The first instance in which coercion may arise

244 My interview notes with ‘Brian’, a parent who was being helped by a key worker from Ormiston Children and Families Trust FIP in Great Yarmouth.
245 DCLG(2012) Listening to Troubled Families, p. 16 (Chris)
is when parents are ‘encouraged’ to attend a case conference. The second is when parents are ‘encouraged’ to sign up to support plan, particularly when this plan requires a family to pursue change where they do not accept there is a problem (for example, where social services think parenting is a problem, but the parents do not), and where it stipulates restrictions on freedom.

However, the practitioners I interviewed did not see it as their role to ‘strong-arm’ parents to attend meetings and agree to a support plan; rather they saw it as their role to make sure that the family understood and appreciated the consequences if they did not, and to encourage and facilitate compliance. Nevertheless, they accepted that by dint of reference to the sanctions that might otherwise be enforced, that it is possible, and perhaps even likely, that parents will comply where they may not otherwise do so.\textsuperscript{246} So, they accepted that at the beginning parental engagement may, in some sense or to some extent, be coerced.

One might wonder if this highlights a relevant distinction between forcing someone to make a decision against their will and forcing someone to confront the potential consequences of the choices they have. The latter happens in the case of FIPs, but – at least the providers feel – is legitimate and distinct from the former, which they would be more worried about taking. This kind of scenario similarly plays out in other areas of life. Say, for example, my friend relays some tragic news to me, and despite being in a highly distressed state I rush to my car intending to drive away. Worried that I am not safe to drive, my friend stands in my way and cautions me not to until I am calmer, reminding me of the harm I can do to myself and others. In this way I am given an opportunity to weigh these risks and postpone my car journey. If on the other hand, my friend forces me to give her my keys at pain

\textsuperscript{246} Which, as we shall see in Chapter 6, would be seen as coercive on one prominent view of coercion.
of smashing my car to smithereens with a baseball bat, then she is forcing me to decide not to drive.\textsuperscript{247}

Insofar as their intervention is deemed coercive, the practitioners raise an important point which bear on its legitimacy. First, since families are generally ‘hard-to-engage’, the threat of sanction is often necessary, at least in the first instance, to provide an opportunity for them to properly consider their options. However, in their experience the need for coercion is generally short-lived. As families see how their engagement brings about positive improvements in their life, they become motivated by this rather than the threat of sanctions. Here one parent underlines this assertion:

I thought I am going to have to get this sorted. I am going to have to let [the Family Intervention Project] get involved...there is no way on earth that I am losing my daughter or my son...I thought, these kids are mine...And I just worked with them, in a way I am glad that I let them into mine and my kids’ lives and sort things out. And then it got to the point, this particular day, for some strange reason things just snapped and just clicked into place and it was like I am going to do this, I am going to have to tackle things head on.\textsuperscript{248}

While not decisive on its own, this, retrospective endorsement arguably shifts the burden of proof to those who want to argue that the FIP proposal is illegitimate.

With that in mind, let me conclude this chapter by looking at a study that focuses on families who were experiencing sanction-backed support in the most restrictive of settings setting, such as a residential unit managed by a FIP. Individual properties within such units are let on a license under which families – parents and children – agree to abide by strict rules which include restrictions on visitors and curfews. Project workers control access to the unit, thereby enforcing these rules.

\textsuperscript{247} Here, one might also reflect on Mill’s vignette concerning the dangerous bridge, and how to respond to the person who is about to cross it unaware of the risks. Mill argues that since the person has an interest in not crossing a dangerous bridge (and would not desire to do so if he were aware of the risk) it is permissible to forcibly stop that person from crossing the bridge – see Mill, John Stuart (1859)\textit{On Liberty}, Chapter 5.

\textsuperscript{248} DCLG (2012) \textit{Listening to Troubled Families}, p. 29 (Lindsey).
Here, I want to explore how aspects of surveillance and discipline that can form part of the FIP contract can tip sanction-based support towards a regime of coercive enforcement. Will parents in these circumstances also come to retrospectively endorse such intervention?

5.7. Sanction-Backed Support or Coercive Enforcement?

Parr’s case study tracks the experiences of five women referred for intensive family support, and draws on interview material to gauge their perspective regarding *inter alia* the controlling and disciplinary qualities of such intervention. Several of the women Parr interviewed worried that project workers were primarily concerned with surveillance and were sceptical about their being there to ‘support’ them. One woman in particular – called Fran – described the pressure she felt to project the image of a ‘in-control’ coping parent, believing that if she failed to do so staff would inform social services that her children were ‘at risk’.

> [I]f I had any major problems, and [project worker] thought I wasn’t coping, she’d tell social services ... say if I was getting really ill and I couldn’t cope any longer, then she was to tell them, you know, ‘we’ll come and take all your children’. I worry about that, gosh, it’s very ...., I’m just struggling to get myself better.

As Parr notes, this suggests a potential conflict between support and enforcement roles of the project worker: the enforcement element may hinder the development a relationship of trust between the project worker and the family.

The conditions of tenure within the core unit constituted serious restrictions on liberty, including curfews and rules that restrict visitors and require families to allow project workers to enter their ‘homes’ on demand. One woman – Cathy – in particular spoke about these restrictions, and her reluctant acceptance of them:

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The weirdest part is about, I mean the worst and best part is, is that the workers are lovely and I don’t see ‘em as like, but sometimes I suppose when they come up and I’m busy doing something it irritates me that like I’ve got to let them in really. But they are really nice and do you know what I mean.

They only thing that I feel might become an issue is that I have to be in for ten ... I got invited to me friend’s engagement party and I asked them whether or not I could stop out and they said I could stop out until half eleven if I want, so, do you know what I mean? They did worry in case that might be as issue with me, but it isn’t. Maybe it might come up sometime, but I actually just feel safe and okay.

None of the women appeared to resist these constraints upon their liberty. Parr suggests three factors that might explain their lack of resistance. Firstly, they were homeless and vulnerable when referred, and the project has provided them with something they needed and wanted; somewhere safe and stable to be. Secondly, the relationships of trust that have developed between the project workers and families seem to have ameliorated the discomfort of enforcement. If so, then the potential conflict between support and enforcement did not actually materialise, but instead support and enforcement worked in tandem. Thirdly, the threat of sanctions – losing their place in the project, homelessness, child protection proceedings, etc. – dissuades the women from resisting the terms of their tenure.

However, one woman – Fran – felt the punitive potential of family intervention insofar as she was effectively punished due to her inability to control the behaviour of her three sons when they were outside the unit. Midway through Parr’s research, Fran was evicted from the project. Despite her desire and motivation to comply with the terms of her ‘contract’ with the project, she could not deliver on this undertaking despite her best efforts.

I think I did everything I could ... They’ve got all me notes down when I’ve phoned the Police [to inform them her sons had breached their ASBO] ... So I don’t think I made myself intentionally homeless. I don’t ‘cos I wanted to stop there, I liked it there, I’d got really nice friends.

251 Ibid., p. 726-7 (my emphasis).
252 Ibid., p. 727
253 Ibid., p. 728.
Parr notes the pressure staff put on Fran and how this impacted on the balance between the support and enforcement elements of the project’s ‘twin track approach’:

[T]he dual role of ‘support’ and enforcement was clearly in conflict for Fran and it was difficult for her to develop a trusting relationship with project workers who were also threatening her with enforcement action and homelessness. As such, Fran worried about the rationale for project workers’ visits, who sometimes arrived in pairs, something she found particularly oppressive.\(^{254}\)

Fran felt that the terms of her support contract were imposed rather than negotiated, but according to views expressed by the other women, project staff did for the most part manage to deliver interventions in a way that did not feel stigmatising, punishing or invasive. Parr notes that this was because they felt that they were negotiated rather than imposed; the product of a discussion in which their views were listened to and valued. Parr notes a ‘reluctant acceptance’ rather than ‘explicit resistance’ to the interference in their private lives.\(^{255}\)

Although it is undeniable that intensive family support entails a degree of surveillance and enforcement, this should be balanced against the befriending and emotional support project workers provide. Parr’s research suggests that this is highly valued by the women, who as a result have come to see project workers as acting in the families’ best interests. Significantly, the women feel that this ‘therapeutic’ aspect of the project worker’s role has been helped increase their self-esteem and confidence.\(^{256}\)

What they’ve actually done here is made me feel good about meself. I’ve never felt good about meself for a long time, you know, in anything with the kids, nothing.\(^{257}\)

Consequently, whilst project workers undoubtedly fulfil to some extent an enforcement role, at the same time they managed (with the exception of Fran) to

\(^{254}\) Ibid., p. 726.  
\(^{255}\) Ibid., p. 727.  
\(^{256}\) Note here that according to my view, self-esteem and confidence is critical to the development of normative competencies upon which autonomy-competence is contingent.  
\(^{257}\) Ibid., p. 729. (Cathy)
successfully fulfil a befriending role, thereby enabling the women to feel increasingly competent in their ability to manage their lives. As Parr observed, the trust between project worker and family helped to mitigate the experience of discipline and surveillance.\textsuperscript{258} Furthermore, despite reservations about constraints on their liberty, all the women (bar Fran) were glad they had been referred and were receiving support:

\begin{quote}
I wanted somebody to just sort me life out for me. I didn’t feel strong to do anything ... somebody to tell me what to do every minute of the day, what to do with the kids, what to do with me ... I wanted someone to do that. I think I wanted to go back to, I mean, I wanted to, I hadn’t had a good childhood, yeah, I think I wanted to be mothered and take all responsibility off me. I couldn’t cope at all.\textsuperscript{259}
\end{quote}

This quotation presents a woman apparently beaten by life, who voluntarily chooses to delegate her autonomy to a mother-figure – a practitioner who appropriately balances rules with nurture, helping her to live a better life.

Taking stock, this qualitative material suggests that whether or not family engagement is perceived as coerced or voluntary is a matter not wholly determined by reference to the \textit{FIP Proposal}. In other words, the use of sanctions is not decisive by itself; other factors appear to be relevant, including the degree of insight families have with regards to their need for support. I have suggested that the greater the insight, the more voluntary the engagement seemed. Insight, then, motivates self-binding. The material also suggests that sanctions are not necessarily used as a bludgeon with which to compel compliance, but, rather, that they can be used skilfully – as leverage – to provide families with the opportunity to make an informed choice regarding engagement. However, the potential for conflict between the enforcement and support elements of \textit{the FIP Model} cannot be denied (as apparent in the case of Fran).

But whilst the controlling and disciplinary quality of some forms of intensive support

\begin{footnotes}
\item[258] \textit{Ibid.}, p. 727.
\item[259] \textit{Ibid.}, p. 730. (Cathy)
\end{footnotes}
is clear, the material considered suggests that the sharp edges of such intervention can be softened by a practitioner’s nurturing and therapeutic approach and that there are high levels of retrospective endorsement. Nevertheless it remains the case that families’ (initially) reluctant acceptance of freedom-restricting measures may well fall short of voluntary choice.

5.8. Conclusion

The FIP Model exemplifies the kind of autonomy- and responsibility-enhancing public policies which my conception of autonomy-competence motivates. It addresses the root causes of problems behaviours (including sub-optimal agency), rather than simply responding punitively to its effects. It provides vulnerable, disadvantaged and troubled individuals with the opportunity and means to make their lives go better by helping them to develop a range of skills and dispositions that are conducive to autonomy-competence. However, to the extent that the threat of sanctions must be used to ‘encourage’ a family to engage with the support plan offered, one might worry that they are subject to objectionable coercion. I have considered this worry by reflecting on the views of practitioners who (potentially) wield coercive power, and those of the families who are (potentially) subject to it. In so doing I have merely peeled back some of the layers of complexity that attend this question and, in so doing, laid the groundwork necessary for a fuller investigation. In the next chapter I will consider what we mean when we talk of coercion, and consider whether the FIP Proposal undermines the autonomy of the families subject to it.
Chapter 6

A Sheep in Wolves’ Clothing?

*People are changed not by coercion or intimidation but by example.*

6.1. Introduction:

In Chapter 5, I showcased the *FIP Model* as a *hands-on* state intervention with autonomy- and responsibility-enhancing potential. I argued that insofar as it encourages the development of the skills and dispositions conducive to autonomy-competence it provides an effective means to tackle the underlying causes of *sub-optimal decision-making*. However, in this chapter I deal with the objection that the *FIP Model* is essentially a wolf in sheep’s clothing: coercive perfectionism dressed up as voluntary empowerment.

Families referred to a Family Intervention Project (FIP) are faced with a choice: face the sanctions that your behaviour has triggered, or avoid them by engaging with a support plan designed to improve those behaviours, i.e. ‘the *FIP proposal*’. Is the *FIP proposal* coercive? On one hand, we might think that it is a *conditional offer* that allows the family to avoid the sanctions that would be enforced absent the offer, and an offer that they are within their rights to refuse. Therefore, it is not coercive. On the other hand, we might think that it could be a *coercive threat* if it amounts to an offer that, in effect, the family cannot reasonably be expected to refuse, e.g. where refusing to engage would result in their children being taken into care. Confused, we might wonder if it is a hybrid of both - a conditional offer and a coercive threat. Unresolved, we might question if it even matters, where such

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260 Anon.
intervention is necessary to protect the wellbeing and interests of vulnerable people and children, whose lives will otherwise (in all probability) be blighted.

If we are to adjudicate between these conflicting intuitions, we need to be clear what we mean when we talk of coercion and what it is that is morally objectionable about it. This is no simple matter; coercion is a contested concept. Whilst we might agree that it has something to do with exercising power over others so that they do what we want them to do, there is considerable scope for disagreement when we try to distinguish coercion from compulsion, and persuasive offers from volition-sapping threats. Furthermore, whilst some adopt an absolutist view according to which coercion is intrinsically immoral, others maintain that in some circumstances, or for some purposes, coercive intervention is justifiable. Still more disagreement attends the question of what these circumstances and purposes might be.

I do not aim to resolve these various disputes here; such a task is beyond the scope of one chapter of a thesis concerned with a different question. Instead, I will analyse concerns regarding the potential coerciveness of the FIP proposal using four different theoretical approaches that I claim are representative of the key positions discernable within the literature. I will conclude that on each of the views, it is arguable that the FIP Proposal is either not coercive, or that it is justifiably so. First, however, I will summarise the arguments upon which it is claimed that the FIP Proposal is coercive, and provide a brief and general introduction to the conception of coercion.
6.2. The FIP Proposal

In Chapter 5, I anticipated the objection that the FIP Proposal is unjustifiably coercive by examining the practice and experience of the sanction-backed support it embodies. I highlighted two main criticisms of the FIP Proposal: firstly, that it amounts to a coercive threat which yields forced, rather than voluntary, engagement; and second, that ongoing engagement (with sometimes high levels of freedom-limiting forms of discipline and surveillance) is maintained by means of an enduring coercive threat.

Whilst not a decisive factor, the research I presented in the previous chapter suggests that parents subjected to this kind of sanction-backed support often report a sense of compulsion. However, many of those who initially felt forced, subsequently described how glad they were of it given the positive changes it brought about in their lives – even when they had been subjected to freedom-impinging levels of surveillance and the threat of harsh sanctions. This kind of ex post facto reconsideration is what I mean by my use of the term ‘retrospective endorsement’. The research also showed that some parents welcomed intervention from the outset – despite its challenging and assertive approach – because they appreciated that without it they were unable to deal with the problems that were damaging to their lives and to those of their children. One woman, however, experienced only the punitive force of the FIP Proposal and did not endorse her acceptance of it retrospectively or otherwise. Her experience highlighted the importance of striking the correct balance between support and enforcement. It is clear, then, that a number of complexities must be borne in mind when considering if the FIP Proposal is coercive and, if it is, whether it is justifiably so. These relate not only to the inevitable messiness of real-life, but
also to the seemingly irresolvable theoretical disputes that relate to the conceptualisation of what coercion actually is.

6.3. What is Coercion?

Historically, coercion has been understood in a variety of ways – as ‘a kind of necessity’ (Aquinas, 1273 - *The Summa Theologica*); a ‘power to constrain those who would otherwise violate their faith’ (Hobbes, 1651 - *Leviathan*); a ‘hindrance to freedom’ and a violation of rights (Kant,1797 - *The Metaphysics of Morals*); and, ‘an interference in choice’ (Mill, 1859 - *On Liberty*). However, by consulting a range of common intuitions, we can form a clearer view of what this term is generally used to convey.

- Coercion forces us to choose things that we would otherwise not choose.
- Coercion exploits our vulnerability to another person’s advantage.
- Coercion makes us feel like we have no choice.
- Coercion forces us to sacrifice one thing for another, when we would want to have (and could otherwise have) both.
- We are vulnerable to coercion when we depend on others for something which is critical to our wellbeing.
- Coercion forces us to conform, and punishes us when we resist.
- We are coerced by the law.
- Coercion is legitimate when it is used to enforce (just) law.

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This list is not exhaustive but is, I think, sufficient to illuminate coercion as an exercise of power that one person (or group of persons) deploys in order to influence the will (choosing) of another; an exercise of power which may be regarded as a legitimate law-enforcement tool or as an abuse of power when used by the strong to limit the freedom of the weak. Anderson’s broad definition of coercion nicely sums up these different facets of coercion:

[A] use of a certain kind of power for the purpose of gaining advantages over others (including self-protection), punishing non-compliance with demands and imposing one’s will on the will of other agents.\footnote{Anderson (2011), ‘Coercion’.

However, beyond such generalities, the concept of coercion is contested. The literature is vast and complex, and, as already noted, it is beyond the scope of this chapter to adjudicate between rival accounts and resolve on the most defensible approach. However, whether or not the FIP Proposal is (justifiably) coercive ultimately depends on the conception of coercion that we operate with. Accordingly, I will now introduce four key positions discernable in the field, and then – in the two subsequent sections – assess the coerciveness of the FIP Proposal in relation to each of them.

\section*{6.4. Four Key Positions}

As Anderson notes, there is a great diversity of approaches to coercion within recent literature, and so ‘making generalizations about this body of work will undoubtedly be tendentious’.\footnote{Anderson, Scott (2008) ‘Of Theories of Coercion, Two Axes, and the Importance of the Coercer’ in \textit{Journal of Moral Philosophy}, Vol. 5, No. 3, 394:422, here at p. 395.} In order to simplify matters, I follow his lead and turn to the aid of a schematic conceptual map in order to organise coercion (and coercion-related)
theories according to two sets of distinctions that dominate the literature. First, the distinction between coercer- and coerced-focused theories, where the former judges a proposal on the basis of how the coercee (and her rights and options space) is affected, and where the latter judges a proposal on the basis of the coercer’s actions and intentions. Second, the distinction between theories of coercion that hold that coercion is intrinsically immoral and is never (or hardly ever) justifiable, and those that hold that coercion is only *prima facie* immoral and can be justified in some circumstances.

Where these distinctions are used to form a set of conceptual axes, four key positions emerge: (1) coercer-focused theories that hold that coercion is intrinsically moral; (2) coercer-focused theories that hold that coercion is *prima facie* immoral; (3) coerced-focused accounts that hold that coercion is *prima facie* immoral; and, (4) coercer focused accounts that hold that coercion is intrinsically immoral. I will cash out these four positions, respectively, with reference to the approaches adopted by four theorists: Nozick’s ‘pressure approach’, Wertheimer’s ‘rights approach’; Anderson’s ‘enforcement approach’, and Shiffrin’s ‘autonomy approach’.

### 6.4.1. Nozick’s ’Pressure Approach’

Nozick’s conception of coercion has proved highly influential and many theorists have adopted this framework (explicitly or implicitly) since the publication of the text.

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264 However, we deploy different axes: Anderson carves up the territory in terms of the coercer/coerce-focus distinction (as I do) and the non-moralised/moralised baseline distinction (instead of the intrinsically/prima facie immoral distinction I use).

introducing it in 1969. Accordingly, it is a dominant representative of a coercee-focused account which does not provide for the possibility of justified coercion.

Nozick suggests a list of necessary and sufficient conditions for judging whether P coerces Q which focus on how Q is affected by P’s proposal. Notably, coercion takes place only when P makes a conditional threat with which Q acquiesces, and coercion arises only if P violates or infringes Q’s rights – there is no allowance for the possibility of justified state coercion since this would amount to the legitimation of rights violations (something Nozick rules out). On Nozick’s analysis, P’s power and purpose, and the means he deploys, are irrelevant in themselves; they matter only insofar as they impact on Q’s rights and acquiescence.

Nozick maintains that conditional threats coerce, and contrasts such with force, which compels, and conditional offers, which provide opportunities for free choice. (On this view, the FIP Proposal is either a conditional offer or threat; it would not qualify as direct compulsion.) To determine whether or not a conditional proposal is a threat or an offer, we should look at the conditional which contains the least desirable consequent, and compare it to a baseline (the relevant alternative state of affairs): if it makes the agent worse off, it is a coercive threat.

This all seems fine until we come to realise that fixing the baseline can be considerably trickier than at first it seems. Firstly, should the baseline be normative or non-normative, i.e. should it refer to a state of affairs which is morally right to expect, or one which is statistically likely in the circumstances. According to Nozick,

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268 This does not mean that the state is not permitted to punish justly convicted offenders by means of imprisonment or to threaten potential offenders with imprisonment. It means only that such actions do not count as coercive on Nozick’s view.
the baseline amounts to the ‘normal or natural or expected course of events’. He
claims that this non-normative reference point will typically converge with the
normative one, but acknowledges (with reference to his powerful *Slave Case* ) that
that they can diverge. In the case of divergence, Nozick argues that we should
consult the preferences of the proposal-recipient, who — Nozick maintains — will want
to understand ‘normal’ as meaning ‘moral’. Some critics question why the proposal-
recipient’s preferences should not be the controlling factor in all cases; others argue
that we should always look to a moralised baseline.

A second worry about Nozick’s ‘pressure approach’ relates to the counter-
intuitive results of not taking into account the power, means and ends of the proposal-
maker. By failing to account for how a proposal can capitalise upon the vulnerability
of the recipient, Nozick effectively turns a blind eye to the potential exploitation of
weakened parties. This fact speaks to the worries expressed by some commentators
that the FIP Model is coercive perfectionism dressed up as voluntary empowerment.

In reply, one might argue that whilst exploitation might be morally
objectionable, it still does not amount to a coercive threat. However, for many of
us, our intuitions insist that an exploitative proposal founded on unequal power

270 *The Slave Case* goes like this. A routinely beats B, his slave, every morning, irrespective of B’s
conduct, deservingness, etc. In this context, A proposes not to beat B the following morning if B will
do X, an act B finds distasteful. According to a non-normative baseline, concerned with what
normally happens, B is made better off by the proposal because it offers her a way of avoiding the
beating she would otherwise suffer as a matter of routine. However, according to a normative
baseline, concerned with what is morally required, B is made worse off by the threat to beat her,
since A is morally required not to beat B in any event. (Nozick, Robert (1974) *Anarchy, State, and
271 For example, see Gorr, Michael (1986) ‘Toward a Theory of Coercion’, in the *Canadian Journal of
(Amsterdam: Rodopi).
272 See the ‘rights approach’ exemplified in § 6.4.2. below.
relations ought to be conceived of as a coercive proposal. Imagine I am drowning and require rescue and that the only person who can do so (‘P’) insists that I must first agree to pay her £5k, despite the fact that she can do so at little, if any, cost to herself – financial or otherwise. I agree to do so because otherwise I will drown. P’s exploitative demand (‘your money or no rescue’) is coercive, one might think, because P has power over me (my life is in her hands) and my unavoidable dependency upon P for rescue allows her to impose an unreasonable alternative (rescue only for enrichment), where a reasonable alternative would have easily been available (unconditional rescue or rescue with compensation for the reasonable costs of rescue). However, whether or not P proposes an unreasonable alternative and does so exploitatively are not questions that Nozick’s approach can adjudicate. In the next section, I turn to Wertheimer’s ‘rights approach’ to coercion, which is perhaps better equipped to account for such factors.

In summary, on Nozicks’s view, a proposal is coercive if it violates the rights of the recipient by making her worse-off than she was in a baseline position (typically the pre-proposal condition). And coercion is never justifiable.

### 6.4.2. Wertheimer’s ‘Rights Approach’

Wertheimer builds on Nozick’s theory, but whereas Nozick is awkwardly uncommitted to a moralised baseline, Wertheimer argues that coercion claims ‘involve moral judgements at their core’, particularly: a judgement about whether A has the right to make such a proposal to B and whether or not B should resist it. Wertheimer’s theory is the most prominent moralised baseline account of coercion,

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and sets ‘the current standard and starting point for continued scholarship in this area’. It distinguishes coercion with reference to the rights of the coercee (like Nozick), but allows that coercion may in some circumstances be justifiable. Thus, Wertheimer’s approach is representative of coercee-focused approaches which hold that coercion is only *prima facie* immoral.

Whilst Nozick founds his approach on philosophical ‘intuition-pumping’, Wertheimer refers to US case law, in which cases of coercion (duress) have been adjudicated. Most such cases, he claims, support a moralised, two-prong test for coercion, which can be used to distinguish between coercive threats and conditional offers:

A coerces B to do X if and only if

(1) A’s proposal creates a choice situation for B such that B has no reasonable alternative but to do X [*choice prong*]

and

(2) it is wrong for A to make such a proposal to B [*proposal prong*].

Proposals that are not wrong under the proposal prong should be understood as offers, and do not create a coercive situation.

For Wertheimer, coercion claims are ‘emphatically and technically contextual’, and in each context a coercion claim has: a particular point, whether descriptive or normative; and, is underpinned by correlative truth conditions specifying what must be true for the coercion claim to be valid. Wertheimer’s project concentrates on the context of private contractual engagements, where the

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279 Therefore, the proposal prong should come first when testing a particular coercion claim.
truth conditions pertain to contractual duress. But another context highlighted by Wertheimer is of interest to us: that of state coercion, where inducements are deployed and these are thought to be either inappropriate or so great that they would be irrational to refuse. As he observes, this context is evident in the kind of paternalistic coercion deployed by the state to encourage its citizens to live healthier lifestyles. It seems to me that this is analogous with our present concern – the use of coercion to encourage socially desirable behaviours in the domain of social welfare – and accordingly I will judge the FIP Proposal on the basis of this context and (what I take to be) its attendant truth conditions.

Understood in this context, the proposal test rests on judgements relative to the rightness of the proposal, where rightness is understood only in terms of the coercee’s rights. On this view, coercive threats reduce the range of available options whereas conditional offers extend the range, when contrasted with the moral baseline. In other words, similar to the Nozickean view, proposals that make the recipient worse off in terms of the choices they ought to have – say, by forcing her to sacrifice one right in the interests of preserving another – are wrong. The choice test (in the context of state coercion) distinguishes between situations in which a proposal-recipient has and does not have a reasonable alternative but to succumb to the offer. Again, the focus is on the coercee – this time on her option set. Note that on Wertheimer’s view, ‘B acts voluntarily when B succumbs to a proposal that A has the right to make, even if it is one which B finds unattractive and would prefer not to receive’. Accordingly, in a state-inducement context, the choice prong’s appeal to ‘no reasonable alternative’ should be understood in terms of the cost to B’s welfare interests if B does not succumb. Accordingly, whilst the proposal-recipient is legally

281 Ibid., p. 301.
entitled to refuse the offer (and is under no obligation to engage with intervention planned), it may nevertheless be debatable whether the cost to her welfare interests of doing so will in practice leave her with no reasonable alternative but to succumb.

So, the proposal prong requires us to distinguish between wrongful and rightful proposals, whilst the choice prong requires us to cash out what it means to have ‘no reasonable alternative’ but to succumb to a proposal. Such requirements demand a moralised baseline. Unfortunately, Wertheimer falls disappointingly short of explaining where this moralised baseline should be fixed. This, he argues, ‘requires nothing less than a complete moral and political theory’, a task he argues is beyond the scope of his project.\(^{282}\) He does contend, however, that the moral baseline should allow us to take into account the extent to which the proposer can harm the interests of the proposal-recipient, i.e. the power the proposer wields over the recipient.

The idea of coercion contexts provides for the possibility of justified coercion in some circumstances (notably, state coercion). Wertheimer draws a distinction between contexts in which a threat necessitates the recipient doing something which she would not otherwise be obligated to do (such as giving up her money to save her life), and contexts in which the state deploys its coercive power to give the recipient ‘prudential reasons to do what he is morally obligated to do in any case’\(^{283}\) (such as the threat of imprisonment as a reason for paying his taxes). The key point is that whilst in the former context the coercive threat changes the recipient’s moral status (e.g. by denying his right to private property), in the latter context the coercive threat does not. Rather, the state is recognising the recipient’s moral status as a member of

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society, and the obligations that attend that status. This notion of justified state coercion relates to the state’s requiring certain behaviours as a matter of law:

Whereas coercion claims often indicate moral disapproval, this is not so here, where we may want to distinguish between actions taken in response to certain legal prohibitions and those that are not or to distinguish between legal processes which involve punishment and those that do not (as in the distinction between coercion, regulation and taxation) […] Although the truth conditions of coercion claims are often quite problematic, here they are quite straightforward. A statute or court order will do.

The idea of coercion contexts, whilst allowing for the possibility of justified coercion, presents a practical, challenge: insofar as coercion contexts yield different truth conditions, it is unclear if his approach ‘provides any prescriptive guidance in the sense that it tells us when a given set of conditions is coercive and when it is not’. Hill argues that in claiming that the truth conditions for coercion vary with the context, Wertheimer must mean that the concept of coercion is dependent upon the perspective of the viewer.

In summary, on Wertheimer’s view, a proposal is coercive if it:

1. Violates the rights of the recipient by making her worse-off than she was in the baseline position;

AND

2. Leaves the recipient with no reasonable alternative but to succumb, given the costs to her welfare interests if she does not.

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284 However, it may still be that the second case will amount to coercion, albeit a different notion of coercion given the different contexts.

285 Ibid., 186-7. However, this is not to say that all state coercion is justified simply because the state is doing it; we cannot dismiss the possibility of the state deploying its superior power over its citizens in morally objectionable ways. I assume that Wertheimer would wish to draw the line between justified and unjustified state coercion, and that in order to do so, we would need an account of what the state is morally permitted to do.

State coercion is justifiable, but only if it is deployed in order to give the coercee prudential reasons to do that which she is, in any event, morally obligated to do and, thus, does not alter the coercee’s moral status.

6.4.3. Anderson’s ‘Enforcement Approach’

In contrast with Nozick and Wertheimer, both of whom deploy the notion of a baseline with which to test a coercion claim, Anderson proposes a non-baseline approach that distinguishes threats from offers with reference to the nature or extent of the pressure that is exerted on a coercee’s will.\(^{287}\)

According to Anderson, coercion is ‘a kind of activity by a powerful agent who creates and then utilizes significant disparity in power over another in order to


\[^{288}\text{Ibid., p. 6.}\]

constrain or alter the latter’s possibilities for action’. It is concerned with a range of paradigm activities in which powerful agents are able to directly disrupt the ability of others agents to act, or (more commonly) to influence their ability to act with the threat of such direct intervention. These are characteristically concerned with preserving social order and ensuring justice, e.g. the criminalisation of certain activities and associated powers of arrest and detention. Significantly, the subject of these enforcement activities – the coercee – need not feel pressured in order for coercion to occur, thereby avoiding the problem of adaptive preferences. Anderson cashes out his ‘enforcement approach’ with the following criteria:

1. The coercer enjoys the advantage of a power differential over the coercee – for which the coercee is not responsible – and utilises it to substantially constrain the coercee’s practical possibilities (either by direct use of power or by means of a threat regarding use of power).

2. The coercer is willing and able to deploy power against the coercee, which the coercee is unwilling or unable to deploy against the coercer.

3. The coercee immediately loses some possibilities of action or regards it as necessary to acquiesce with coercer’s demands because it is necessary to avoid outcomes portended.

4. Acts of coercion are coincident with the utilisation of a power differential aimed at constraining or altering actions of others.

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291 Anderson’s examples include police powers (e.g. powers of arrest), criminal law (e.g. penal sanctions), civil law (e.g. enforcement of contracts); and unlawful violence (e.g. men who use violence to impose themselves sexually on woman), ibid., p. 7. Here he also notes: ‘Other cases may be counted as coercion according to their likeness to these kinds of examples.’
292 Ibid., pp. 7-8.
However, in the context of state inducements, the power imbalance between citizen and the state is unavoidable. Does this mean that the state, on Andersons’ view, always acts exploitatively (and therefore coercively) when it deploys public policies aimed at empowerment and/or encouraging socially desirable behaviours? And that the more disadvantaged one is in society, the more one will be subject to coercion? This is particularly relevant when we consider that many of those families who receive the FIP Proposal are dependent upon the state for housing. Anderson’s comments, as follows, are relevant to these questions:

A person can find oneself holding power over someone else through the latter’s own imprudence or just bad luck, but this way of coming into power over another does not normally generate the sort of concerns that the enforcement approach aims to track. […] Of course, one can act badly in exploiting the predicament of someone in weakened circumstances […] Thus, in addition to the powerful agent’s possession of the relevant sort of power, we need to describe coercion in terms of the coercer’s intentions to acquire and then employ such power to constrain broadly the activities of others.  

Whilst these comments particularly concern coercion between individuals, I think the significance of underlying motives is equally relevant in the context of state coercion (which is our focus). The state, by its very nature, is coercive. It always intends to acquire and employ power to constrain broadly the activities of its citizens, and the FIP Proposal exemplifies a means by which this can be achieved. Indeed, as Anderson notes, his ‘enforcement approach’ has the advantage of helping to explain the importance of state coercion and its legitimacy when deployed in the interests of social order and justice.

Society as whole needs to be able to prevent and inhibit various forms of disruptive, anti-social behaviour (e.g., murder, theft, rape) in order to provide the basic stability and safety that allow strangers to live in relatively cooperative and harmonious interaction with one another. […] When individuals or groups disregard law, morality and prudence, and cause

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293 Ibid., p. 11.
mayhem or employ coercion themselves, society will need to be able to check and discourage such behaviours effectively.²⁹⁵

The question, then, is how we distinguish between justified and unjustified state coercion. Anderson’s comments suggest that this turns on the issue of what the state aims to achieve by its utilisation of power. Accordingly, we might say that if it is to empower, then it is justifiably coercive; if it is to control, then it is not. However, control and empowerment are not always easy to separate since the ultimate aim of empowerment sometimes requires short- to mid-term constraints on the activities of the subject, as is apparent in the in the FIP context. If they can be theoretically separated, then the test for justifiable coercion hinges on the ascendant motivation and/or ultimate aim.

In summary, then, whereas the ‘pressure approach’ and the ‘rights approach’ see coercion from the coeercee’s perspective – one is coerced when one is being forced to do something one does not want to do and/or when one has no reasonable alternative – the ‘enforcement approach’ disregards the perspective of the coeercee and holds that an agent can be subject to coercion even when they do not feel any pressure to act in a particular way. This has the advantage of avoiding the problem of fixing a defensible baseline, which troubles Nozick’s and Wertheimer’s approaches, and at the same time accounts for the power, ends and means of the coercer. However, it far from clear that it can find a convincing way of determining whether a particular activity is coercive or not without reference to the effect it has on an agent’s situation. Whilst it can draw on paradigm examples of power differentials deployed to constrain, disable or underline an agent’s ability to act, are they sufficient for this purpose? For example, is a parent engaged in an intensive family support plan necessarily coerced as a result of the legal powers wielded by statutory agencies, or is

it possible that she might be voluntarily engaged for her own reasons, i.e. because she wants to secure a better life for her family?

In summary, on Anderson’s view, a proposal by the state (or sanctioned by it) is coercive insofar:

1. The proposal recipient is disadvantaged by a power imbalance that exists between herself and the state;

   AND

2. The state uses this power imbalance in order to constrain her practical possibilities.

Coercion is justifiable, but only if the state constrains the activities of the coercee in order to pursue legitimate aims, such as to empower her (i.e. empowerment is the ultimate aim).

6.4.4. Shiffrin’s ‘Autonomy Approach’

The final position I want to illuminate, is one which is coercer-focused and holds that coercion is intrinsically immoral and almost always unjustifiable. In order to illustrate this position, I will draw on Shiffrin’s motive-centred view of paternalism, namely that ‘paternalist doctrines and policies convey a special, generally impermissible, insult to autonomous agents’.\(^\text{296}\) Given that paternalism can be understood in terms of coercion for a person’s own good, and Shiffrin’s desire to defend personal autonomy from autonomy-disrespecting interventions – both of which are particularly relevant here – the liberty I have taken is, I think, justified.

Used in this way, Shiffrin’s approach is representative of coercer-focused accounts which hold that that coercion is intrinsically immoral.\(^{297}\)

For Shiffrin, paternalism is not contingent on the violation of an autonomy right, or the diminishment of some freedom or other – this, after all, can be inadvertent – but rather on \textit{behaviour} that aims to supplant an agent’s judgement or action within a domain which is legitimately under her control.

The essential motive behind a paternalist act evinces a failure to respect either the capacity of the agent to judge, the capacity of the agent to act, or the propriety of the agent’s exerting control over a sphere that is legitimately her domain.\(^ {298}\)

Shiffrin enumerates four criteria according to which A is paternalistic toward B:

(a) A’s behaviour is aimed to have (or to avoid) an effect on B or a sphere of her legitimate agency.

(b) A’s behaviour involves the substitution of A’s judgment or agency for that of B’s.

(c) A’s behaviour is directed at interests or matters that are under B’s legitimate control.

(d) A’s behaviour is undertaken on the grounds that A considers her own judgement and agency in relation to these interests or matters is (or is likely to be) superior compared to B’s judgment or agency.

Shiffrin maintains that anyone who values autonomy will ‘have a special reason to resist paternalism toward competent adults’.\(^ {299}\) Although she resists the

\(^{297}\) An equivalent coercion account which focuses on its autonomy-invading potential might be that of Mark Fowler, who suggests that the test of a coercive threat is that it violates the coercee’s autonomy - see Fowler, Mark (1982) ‘Coercion and Practical Reason’, in \textit{Social Theory and Practice}, Vol. 8, 329:355. However, this is more coercee-focused than coercer-focused account, hence my appropriation of Shiffrin.


\(^{299}\) \textit{Ibid.}; my emphasis.
view that paternalism is ‘necessarily, all-things-considered-wrong’, she maintains that it is ‘pro-tanto morally problematic’. Indeed, she does not mention any cases where it would not be problematic. I take this to mean, implicitly, that autonomy-invading coercion is almost always wrong if it usurps a competent person’s right to exercise agency in particular domains. Consequently, in assessing a coercion claim, the competence of the coercee and the motive of the coercer are both factors of particular importance.

Shiffrin doesn’t specifically define what she means by ‘competence’; does she mean a legal standard of decision-making capacity like that of the MCA, or something broader like my view of autonomy-competence? If she means the latter, one might argue that the FIP Proposal is not coercive, since the parents in receipt of it are not sufficiently competent to exercise agency in relevant respects (I come back to this below). The second factor is similarly tricky to apply in practice, since (as previously discussed) it is not always easy to identify the true motive of the coercer. If the ultimate aim of the intervention is to enhance autonomy-competence, then it would not evince the kind of disrespect of autonomy that Shiffrin suggests characterises paternalist coercion. If it is to exert non-autonomy-based perfectionist standards, then it would.

In summary, on Shiffrin’s view, a proposal is coercive if it fails to respect the autonomy-competence of the recipient, by:

1. Supplanting her judgements on matters that fall within her own legitimate sphere of control;

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300 Ibid. She clarifies: ‘This conception allows for the logical possibility that rights, for example, may be overcome and still be thought of as rights; that is, the cases in which the claimed right, for example, does not, all-things-considered win the day, are not ‘written into’ the concept of the right’ — at p. 221, fn. 25.
AND

2. Does so on grounds that the proposer believes that her judgements are better than the recipient’s judgements in this matter.

Coercion is (almost) never justifiable.

Taking stock, then, I have exposed four key approaches to assessing coercion claims that dominate the literature, and sketched out a theoretical account representative of each. It is apparent that each position faces challenges. However, I need not resolve these challenges, nor take a view on which approach is most defensible. Instead, I need only show that on all four approaches, the FIP Proposal is either not coercive, or that it is justifiably so. In the next section I set out arguments to support the first reply, and in the following section I will set out arguments to support the second.

6.5. Reply 1: The FIP Proposal is NOT Coercive

The following arguments, singly and together, defend my claim that, on a number of influential conceptions of coercion, the FIP Proposal does not coerce families into engaging with an intensive family support plan.

(i) The FIP Proposal is a conditional offer, not a coercive threat

Nozick and Wertheimer’s approaches both lend themselves to this view, insofar as they can acknowledge the extent to which the FIP Proposal extends the options available to the recipient and in that sense makes her better off than she was pre-proposal. Specifically, the recipient now has the opportunity to avoid sanctions, which would otherwise be enforced.
Intuitively, we might feel that a proposal which takes advantage of a family’s dependence on the state for important welfare goods is exploitative, and that the power, ends and means of the proposer should also be taken into account when assessing a coercion claim. On this basis, the FIP Proposal might amount to an offer than cannot be refused because there is no reasonable alternative.

Wertheimer’s (unfixed) moralised baseline can in theory account for such abuses of power differentials. If, as I suggest, ‘no acceptable alternative’ should be understood in terms of the costs to welfare interests, then it is debatable whether the loss of housing and care of one’s children is too high a price to pay for refusing to engage with support. But unless the proposal prong is also satisfied (which the first paragraph above implies is not the case), this would not suffice on Wertheimer’s view to make the FIP proposal coercive.

On Nozick’s and Wertheimer’s view, the FIP Proposal is straightforwardly not coercive but in the event that their views are rejected, I refer to further arguments in this and the next section.

(ii) Engagement with the FIP Proposal is voluntarily chosen

The research outlined in Chapter 5 suggests that the FIP Proposal is not always experienced as coercive and that some families positively welcome it. Also, many of the women interviewed who felt that they had little choice at the time of the proposal, given the risk of losing their home and children, retrospectively endorsed their compliance. Accordingly, the FIP Proposal does not necessarily rule out voluntary choice. There is no doubt that for
some families the FIP Proposal can be experienced as a hard choice, but not all hard choices erode autonomy.\textsuperscript{301} The FIP Proposal can provide an opportunity to assert autonomy (think of those women who were crying out for support to enable them to live a better life) and to build autonomy (think of those parents who spoke of the beneficial impact support had had on their lives). In line with Nozick’s notion of ‘consenting adults’, the (hard) choice to engage with the FIP Proposal can be seen as an exercise in self-ownership, the underlying motivations of which are no concern of the state.\textsuperscript{302}

(iii) The recipient of the FIP Proposal is not autonomy-competent; therefore it does not infringe her autonomy

This claim rests on Shiffrin’s motive-centred view of paternalism, according to which (roughly) behaviour that aims to usurp or disrespect a competent agent’s autonomy is objectionably paternalist. On this view, the FIP Proposal is not coercive (or, more precisely, it does not amount to an autonomy-invading, paternalist coercion) if the recipient’s autonomy-competence is deficient in the relevant respects. Here, I refer to the normative competencies set out in Chapter 3, particularly self-esteem and self-confidence in one’s right and competence to self-govern, both of which underpin the kind of decision-making skills and dispositions upon which, on my view, autonomous and responsible agency is contingent. This is illuminated within the qualitative materials outlined in Chapter 5, specifically the following comment: ‘I wanted

\textsuperscript{301} Wertheimer suggests that ‘making a hard choice may constitute an important and positive assertion of autonomy’ – (1987) Coercion, here at p. 233.

somebody to just sort my life out for me. I didn’t feel strong to do anything’.

Far from disrespecting the recipient’s autonomy, the proposal is a manifestation of the state’s respect for autonomy and its desire to nurture it.

6.6. Reply 2: The FIP Proposal is Coercive but is Justifiably So

The following arguments, singly or together, defend my claim that insofar as the FIP Proposal coerces families into engaging with an intensive family support plan, it does so justifiably.

(i) The FIP Proposal doesn’t infringe rights or reduce options

Pre-proposal, the recipient faces only one potential future (the enforcement of sanctions). Post-proposal she faces two, including one which will allow her to keep her home and her children. Now, that choice between enforcement and support may, depending on the circumstances, be a hard choice and one which the recipient might prefer to avoid. But the ‘hardness’ of the choice arises out of the pre-proposal events that triggered the sanctions, not out of the FIP Proposal. Even if it can be argued that a power differential or the cost of refusal undermines genuine, voluntary choice, it does not alter the fact that the recipient’s options are extended by the proposal and that she will have prudential reasons to accept an offer of support aimed at enabling her to discharge her civic, parental and tenant responsibilities.

(ii) The FIP Proposal merely forces P to face up to her options, not to make a particular choice among them.

This point follows on from the first. Insofar as the FIP Proposal extends the recipients options, it forces her to make a choice, but this is not the same as forcing her to make a particular choice. Whilst both might involve coercion, they take place within a different context and this makes them normatively different, to the extent that the former is justifiable. Typically, the FIP provider is a third party commissioned by and distinct from the state, whose role in the first instance is to ensure that the recipient is aware of the options available to her and the consequences that attend them. This third party can be neutral in any ongoing friction that may exist between state and family and is therefore better able to create a relationship of trust with the family, in which they are willing to be informed and guided regarding the nature of the proposal and implications of the options before them. This can provide a space and opportunity for reflection, where previously there has been neither.

In a way, the competence-building approach of the FIP Model begins from the proposal, insofar as it enables the recipient to recognise the prudential reasons she has to accept the offer. This is qualitatively different from a choice-situation in which a powerful state can be experienced as badgering a family and pushing them to succumb to the proposal by emphasising the costs of refusal; an approach which is not conducive to reflection. Forcing the recipient to face up to her options in a conducive choice-situation is justifiable provided that it enables her to decide for herself and act on the basis of her own prudential reasons, whereas forcing the recipient to make a particular choice disrespects her (potential for) autonomy.
(iii) **P retrospectively endorses the FIP Proposal**

The evidence of retrospective endorsement outlined in Chapter 5, suggests two things: first, that at the time of the proposal the recipient’s reticence to engage might flow from judgements distorted by deficits in autonomy-competence; and, second, the recipient’s retrospective endorsement of her subsequent compliance might flow from improved autonomy-competence brought about by the support she complied with – ‘In a way I’m glad that I let them into mine and my kids’ lives […] it got to a point [when] things just snapped and clicked into place and it was like I am going to do this, I am going to tackle things head on’.  

Dworkin’s notion of volitional paternalism is perhaps helpful to consider here, insofar as it concerns coercive intervention that helps people ‘achieve what they already want to achieve’. Dworkin illustrates this idea with references to seat-belt laws that can be understood as a policy designed to coerce people into achieving a level of safety the state assumes they would wish to have, and which they would reasonably regret not having were they in an accident. In the same way, we may understand the FIP Proposal as a form of coercive volitional paternalism, which the recipients (by virtue of their retrospective endorsement) can be expected to reasonably regret not receiving. Whilst one must be wise to the problem of adaptive preferences, evidence of retrospective endorsement – if linked to improved autonomy-competence -

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304 Department for Communities and Local Government (2012, July) *Listening to Troubled Families* (London: DCLG), here at p. 29 (Lindsey).
provides a good basis upon which to justify coercion in this instance. This leads me to my fourth argument.

(iv) **The FIP Proposal is the gateway to autonomy-enhancing intervention (and is justifiable to liberals)**

Coercion is generally viewed as an anathema to autonomy and as an objectionable means by which the state can advance its autonomy-infringing perfectionist and paternalist ends. *The FIP Proposal*, however, exemplifies how it can be justly deployed in the interests of autonomy-enhancement. Insofar as *the FIP Proposal* can be understood to coerce parents to engage with this intervention, I argue that it is justifiable given the subsequent benefit to their autonomy-competence.

*The FIP Model* of hands-on intervention exemplifies the kind of autonomy-enhancing public policies prompted by my view of autonomy-competence. In Chapter 4, I responded to the worry that my view is objectionably perfectionist. I demonstrated, however, that my view was compatible with all main liberal viewpoints. Consequently, *the FIP proposal* is not a means to objectionably perfectionist ends.

I reject the view that paternalism and autonomy are always in competition; paternalism can sometimes come to the aid of autonomy. Consider, for example, the paternalism deployed by parents towards their children, and teachers towards their students. In relevant respects, the subjects’ judgement is emergent but not fully developed, and paternalism is ultimately aimed at increasing those powers of judgement, not supplanting them. A parent has authority over her children and will make certain
decisions for them until they are mature enough to critically reflect upon their options, together with their potential harms and benefits. These decisions can be enforced with threats of punishment (albeit that there might be constraints on or even prohibition against certain forms of punishment, such as corporal). A parent’s intervention can protect her children from the worst excesses of youth by defending their best interests and preserving an environment in which their decision-making capacities can develop to maturity. Teachers similarly act in ways that promote their students’ wellbeing. Mindful of their limited cognitive and emotional development, teachers decide what, when and how to teach their students, and do so within an authoritative framework. Children do not have the freedom to refuse to study basic literacy, and engagement with teaching can be coerced with the threat of punishment. Paternalism, then, can be autonomy-fostering, even when it is coercively imposed, and where paternalism is autonomy-fostering it is justifiable.

(v) The ultimate aim of the FIP Proposal is to empower and not control. Here I am mindful that on Anderson’s view that the exercise of state power, whilst unavoidably coercive, is justifiable provided that it is used to constrain the activities of the coercee in order to pursue legitimate aims. Since the ultimate aim of the FIP Proposal is to empower, rather than control – even if this requires short- to mid-term constraints - the FIP Proposal is justifiably coercive.
(vi) The rights and interests of the children override general prohibition against coercion

Such is its force, my final argument could be understood as an ‘if all else fails’ justification for any coercive power wielded in the FIP Proposal. Quite simply, that without it the rights and interests of the children will be harmed. Some children face the prospect of homelessness or being taken into care, two of the most destructive events that can inflict harm on child development and wellbeing. Should we simply put this down to ‘collateral damage’; a matter of regret but at a price worth paying to protect their parents from the injustice of coercion? Or should the rights and interests of the children override a general (not absolute) prohibition against coercion? I defend the latter position with an appeal to Mill’s ‘very simple’ principle: ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others’. And I think that Wertheimer would join me in my view that the FIP Proposal is justifiably coercive on this basis. Recall, his distinction between unjustifiable coercion that changes the recipient’s moral status, and justifiable coercion that does not. The FIP Proposal recognises the recipient’s status as a parent, tenant and citizen, and merely requires the recipient to attend to the obligations of each status in order to avoid sanction. In so doing, it can advance the interests and wellbeing of children who will otherwise suffer.

6.7. Public Policy Implications

I now want to conclude this chapter with some final remarks pertaining to implications of this above analysis for policymakers who want to design autonomy-enhancing interventions that are as non-coercive as possible. In the discussions above, I highlighted three key issues that may be relevant to the coerciveness of a FIP intervention. Firstly, the motivation behind the state’s referral of a family for FIP intervention is central to the assessment of coerciveness (at least on some views of it) and whether any coercion deployed is justifiable. Referral criteria should clearly state legitimate aims and these should guide ongoing work.

Secondly, the distinction between the state’s enforcement role and the FIP provider’s support role is significant. Whilst the FIP provider enables the family to appreciate the options contained within the FIP Proposal, it is not the enforcer – the state is. Admittedly, (at least sometimes) the FIP provider is an agent of the state and is required to report refusal/non-compliance to this commissioning authority, but its primary role is to provide support. Building a firewall of some sort between these respective roles may help a relationship of trust to build between family and key worker, a factor considered critical to the success of intervention, and would provide the opportunity for the family to voluntarily choose to engage, thus avoiding the need for coercive force.

Thirdly, the balance between sanction and support may determine whether a family's engagement is essentially coerced or voluntary, and, in turn, this may influence how successful the outcomes are, and how sustainable they are post-intervention. Forcing people to change their behaviour by threatening sanctions like eviction rarely produces successful and sustainable outcomes. However, without
such sanctions, it can be difficult to engage people in support programmes designed to facilitate behavioural change. The *FIP model* has the potential to resolve this dilemma by striking an effective balance between support and sanction, such that it secures effective opportunities for sustainable change without recourse to unjust and counter-productive levels of coercion. Consequently, policymakers need to be aware of factors that might skew this critical balance and in so doing undermine the legitimacy and efficacy of intervention. For example, the government's 'payments-by-results' funding of its troubled families programme: could such a payment model unwittingly transform the *FIP model* into a more coercive and less supportive intervention, more likely to produce short-term compliance rather than sustainable change? In particular, one might worry that increasing the rate of successful outcomes (and thereby payments) will be achieved through more coercive and less supportive interventions. Furthermore, one might also worry that it will prove a perverse incentive for providers to avoid working with the most troubled, chaotic families, because it will probably take longer to achieve successful outcomes in these cases.

### 6.8. Conclusion

In summary, the FIP Proposal offers a family: (a) the opportunity to avoid sanctions which will otherwise be executed; (b) the support they need to develop the skills and dispositions required for personal autonomy/responsibility and effective parenting, and thereby; (c) the chance to escape social exclusion and live as full members of society. As such, it is (overall) freedom-enhancing and not (unjustly) coercive. The means it deploys (the offer of suspension of sanctions, the sometimes liberty-restricting interventions) renders the family better off than if the offer had not
been made, and the intent of the offer is to secure for the adults and children better opportunities for living happier, healthy and safer lives and for reaching their full potential. In these circumstances, the FIP proposal does not change the moral status of the recipient, nor infringe her rights. Rather it provides her with good reasons to accept help aimed at equipping her to discharge her concomitant obligations, most importantly to parent her children adequately.
Social welfare policies have the potential to enhance people’s ability to make choices that safeguard their best interests, but in effect, more often than not, they seem to diminish it – ironically in the cause of promoting personal responsibility. In this thesis, I have claimed that a different approach is called for; one not wedded to traditional *hands-off* forms of welfare conditionality that exclude the undeserving imprudent from support. Welfare conditionality so construed mistakenly assumes that the unwise decisions of mentally (and legally) competent individuals are necessarily culpable, and as a result it tends to be autonomy-diminishing and costly, both in human and material terms. I have suggested that a *hands-on* capacity-building approach - which appreciates the neglected area between moral failure and mental incapacity – is better able to address the kind of autonomy deficits that can lead to imprudence and recklessness.

The suggestion of such a paradigm shift is inevitably controversial. At a time of austerity and cuts to public services, society seems to have limited tolerance for welfare claimants, even for the so-called ‘deserving’ poor. Those who are in some way responsible for their misfortune can expect even shorter shrift, particularly those with a track record of welfare dependency. Why should the state help such people when they, apparently, do not help themselves? And, even if it should, can it afford to continually bail people out of the messes they get themselves into? I am mindful of the force of these worries, but would argue that many of those in question have experienced appalling abuse, neglect and deprivation in childhood and are disadvantaged by ill health and disability. Their lives have to a great extent been fashioned by these unlucky returns from life’s natural lottery, and, as a matter of
justice, any reckoning of blame, deservingness and entitlement should account for this. This doesn’t mean that people with ‘bad backgrounds’ should simply be excused for their self-defeating behaviours, only that we need to appreciate the causes of their sub-optimal agency and design policies that can hold them accountable for the costs of their past choices, without at the same time (further) undermining their ability to make more prudent choices in the future. Rather than asking if we can afford to adopt this approach, we should, I think, ask if can afford not to. Unless we can empower and motivate such people to exercise more responsible agency, I fear we will constantly be ‘bailing them out’, and their children, and their children’s children. In the words of J. S. Mill: ‘If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences.’

However, in our efforts to empower we must be careful not to deploy undue coercion. My analysis of the autonomy-enhancing potential of the FIP Model indicates that striking the right balance between enforcement and support is critical if coercion is to be avoided or, at least, kept to a legitimate minimum. With this in mind, the quasi-parenting approach of FIP key workers is instructive. Recalling my ambition to give a voice to the dispossessed who motivate this inquiry, it is apt to end with the words of one of their number telling us why this kind of hands-on approach made a difference where traditional hands-off policies had failed.

[My key worker] asked me things, though, that no one else ever asked me, you know things like life, my drugs, and what it’s made me feel like. She wanted to know. Probably not so that she could just help me, but help other people as well which I thought were really good, and it was just nice to know that she actually gave a stuff about helping me rather than just getting what she needed done, done.

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