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Agency as responsiveness

Suryapratim Roy



European University Institute  
**Department of Law**

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## **Abstract**

In this article I seek to de-tether the idea of agency from the epistemic pursuits of philosophers and legal scholars working on adaptive preferences and moral responsibility. What is common to such scholars is a move away from conceptualising agency as individual acts of conscious deliberation. While I support a shift in the way agency is understood, I do not find in their work an account of locating and promoting agency as a primary good. For instance, while findings from various psychological sciences are endorsed for their objective findings on individuals, there is little guidance on what such findings mean for how people negotiate social spaces. As a first step, I suggest that an appropriate paradigm for agency would be responsiveness rather than adherence to responsibility. I then proceed to identify properties of a responsiveness paradigm, concentrating on transpositional deliberation, mediation and intelligibility.

## **Keywords**

Agency, adaptive preferences, Behavioural Law and Economics, positional objectivity, responsibility, rule of law

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## Introduction<sup>1</sup>

‘Agency’ is a word that easily lends itself to scholarly commentary and exploration. All disciplines that deal with the human condition – whether they are categorised as humanities or legal studies or natural sciences or social sciences – have something to say about this word. Given this tremendous amount of interest, there could be two possibilities in taking the discussion forward on agency – the first is that given the plethora of meanings, the word has little utility as an abstract term. If that is the case, rather than attempting to discern its true meaning, a more meaningful exercise in empirical research or informed commentary would be to populate it with particulars in order to say something useful. The second possibility is to see if agency does serve an organisational purpose: in the event things can be said or understood under the shadow of a coherent concept of agency, then it may make sense to retain its position as an abstract concept. To attain and maintain the position of a general concept, it needs to have a meaning that is coherent. Or at the very least, its features or components must be intelligible to observers and users, irrespective of their subjective positions. The first option – of viewing agency as a category to be populated by particulars – is a tempting alternative; to resist the inclination to generalise based on preconceptions is one of the crucial political lessons of the twentieth century. There is, however, a difficulty in adopting this tack. As we shall see, there is a certain conceptual understanding of agency that animates empirical and rigorous theoretical work on agency. To put it in a sentence, there seems to be a preference for viewing agency as a characteristic or set of traits that satisfies moral responsibility. I find this way of thinking about agency intuitively problematic; when I try to ‘feel’ the significance of the word ‘agency’, it gains currency as a phenomenon that makes an individual or a collective assert their place in the world. In this article, I want to flesh out this intuition; and to do so, I try to locate it within the work of scholars who have also been occupied with the concept of agency. Such an endeavour does not involve an exhaustive review of what everyone says about agency. Rather, I draw on an approach taken by Miranda Fricker and Martin Krygier; scholars who speak to different communities, but have a similar understanding of the intimate relationship between method and practice regarding the issues they write on.

Fricker, known primarily for her work on epistemic injustice, has recently turned her attention to the idea of blame, culminating in a recent ‘paradigm based explanation’ of the concept of blame.<sup>2</sup> She moves away from the traditional philosophical practice of providing a genealogical account of blame, and ‘imagines her way’ into a paradigmatic ‘portrait of the practice of blame.’ This allows her to arrive at a conception of ‘Communicative Blame’ that is not restricted to whether blame is good or bad, but one that serves an instrumental function of increasing ‘the alignment of the blamer and the wrongdoer’s moral understandings.’ Krygier’s legal scholarship has concentrated on conceptualising the Rule of Law. In his framework, Rule of Law is an ‘in so far as’ reality that can be observed in a social setting,<sup>3</sup> where the Rule of Law can be said to exist in so far as there is no arbitrary exercise of power, including the possibility of contesting the exercise of power. In articulating this conception of a ‘Rule of Law’ reality, Krygier clarifies that he follows a ‘teleological rather than an anatomical approach’ to the Rule of Law, and it is this teleology of being free of the arbitrary exercise of power that defines his scholarship. In both these two accounts, the properties of blame and the Rule of Law are intimately linked to the conceptual paradigms in which they are situated. The two conceptual paradigms articulated are teleological in nature, as against being genealogical or anatomical.

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<sup>1</sup> This paper greatly benefited from the comments of the participants of the 2015 Human Development and Capability Association Conference (Washington, 11 September 2015). I also wish to thank Richard Bronaugh, Ance Kaleja, Dimitry Kochenov and Lien Pham for their insightful comments.

<sup>2</sup> Miranda Fricker, What’s the Point of Blame? A Paradigm Based Explanation 9 *NOÛS* 1 (2014).

<sup>3</sup> Martin Krygier, Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares? 50 *NOMOS* 64 (2013).

Following their lead, I seek to articulate a paradigmatic conceptualisation of agency as responsiveness, and subsequently adopt an anatomical approach to identify properties of such conceptualisation.

Much like Fricker and Krygier, the way I can explain my conceptualisation is to distinguish it from other scholarly frameworks. This endeavour is primarily motivated by my apprehension that in some of the leading accounts of agency, the concept of agency is subsumed into other concepts such as the enhancement of autonomy and the achievement of well-being, and does not have a voice of its own. While agency is conceptualised as being instrumental to the attainment of primary goods such as autonomy or well-being, it is not viewed as a primary *epistemic* good. Why is this a problem? Without going into the theoretical value of exploring the politics of representation as an end in itself, I find that there is an implicit ‘adherence to responsibility’ paradigm within which agency is conceptualised. For instance, in discussions on agency by legal scholars working on Behavioural Law and Economics (BLE), findings from various psychological sciences are endorsed for their objective findings on individuals. While such findings are utilised to design policies, there is very little guidance on what such findings mean for how people negotiate social spaces and collective choices. This illustrates why I think some conceptualisations of agency are privileged over others, and that identifying and seeking alternative characterisations is a valuable exercise. To this end, I first situate conceptualisations of agency in the Capability Approach to Human Development (CA), philosophical compatibilism, and BLE. I then advocate a conceptual shift in viewing agency as *responsiveness rather than adherence* to structures within which individuals operate, using the distinction between Law and the Rule of Law as an analogy. Subsequently, I identify three features of an ‘agency as responsiveness’ paradigm – deliberation, mediation and intelligibility.

## Viewing agency from ‘somewhere’

### *The issue of adaptive preferences*

When I know what I value and I cannot achieve it, then the CA steps in and says that the point of any external intervention<sup>4</sup> is to assist with converting my ‘beings’ and ‘doings’ into achievements.<sup>5</sup> Ideally, I should know what I want and how to achieve it, but not have the wherewithal or support system to do so. The CA takes into account the possibility that this conversion process is not always simple. If I am a producer of maize and I wish to earn from it, all it might take is a safe paved road to sell my produce in the nearest profitable market. Sometimes the problem may be more structural, such as the need to negotiate with middle-men who like to hoard food and enhance prices. The structural problems may not always be identifiable; perhaps I am unaware that the demand for maize is about to take a downturn due to a case pending at the World Trade Organisation, or due to economic recessions occurring in complex ways in faraway lands. To identify such complex mediators is a compelling task and it is not difficult to see why policy-makers and social scientists need to step in.

The value of deliberating on ‘beings’ and ‘doings’ – or choosing to be or do – in this framework is not unconditional; questions regarding choice and control point to the libertarian limits of the CA. Suppose I wish to sell maize to subsidise a narcotics business I’ve been itching to start, then would it

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<sup>4</sup> There is no escaping an external standpoint in the CA even if the focus is not policy-design; the discipline of evaluation is inevitably invoked to address the conceptual and empirical questions that inform the CA. Sen speaks about the discipline of evaluation in relation to comprehensive outcomes in Amartya Sen, *Consequential Evaluation and Practical Reason*, 97 *JOURNAL OF PHILOSOPHY* 477 (2000). The fact of conceptualising an individual and how she may get the most out of her life implies that we adopt an epistemic standpoint to situate the individual within public spaces. This does not mean, however, that the CA necessarily substitutes the judgement of the individual: just because we speak about an individual does not mean we speak in place of an individual. However, as we will see, identifying Adaptive Preferences potentially has the danger of conflating the two.

<sup>5</sup> For the centrality of this idea to the CA, see Amartya Sen, *Development as freedom* (2001).



make sense to mobilise public funds to build a road for my benefit? Or take the example that'll help me launch into what I wish to concentrate on: Suppose I'm a woman and I need to produce maize to disproportionately feed my husband and undernourish myself, then would you consider my 'beings' worthy of achievement? You may say that if my husband beats me up if I don't feed him disproportionately, then perhaps I need to first free myself from coercion before I can 'be'. But what if (i) I feed him disproportionately to keep him happy so he might agree to my attending night-school?<sup>6</sup> Or, what if (ii) he doesn't beat me at all, but I feel obligated to feed him disproportionately? In both (i) and (ii), one thing is clear: your diagnosis may not be right about what I value and why I value them. You could interject by saying that though there's no physical harm or coercion, (ii) is worse than (i) as I don't really know what I want, and I'm simply perpetuating oppression. But if I don't know what I want, then is there any point in deliberating about my beings and doings?

By highlighting the possibility of an AP, Martha Nussbaum attempts to salvage the property of deliberative democracy that lies at the heart of the CA.<sup>7</sup> The fact that some preferences may seem coerced or inauthentic does not necessarily do violence to the importance of deliberation. But once we start questioning some preferences, the obvious discontent is: where do we stop? Suppose I want to earn and undernourish myself not to feed my husband or start a narcotics business, but because I want to drink in peace, or one day buy a computer to watch pornography? Are my preferences then spurious? This is why scholars such as Bina Agarwal and Uma Narayan find Sen's and Nussbaum's work respectively somewhat patronising – the politics of representation are not adequately negotiated as they substitute the judgement of the subjects they study with their own.<sup>8</sup> Serene J. Khader has relied on feminist theory to arrive at a nuanced view of AP, arguing that the relationship between AP, agency and autonomy can be assessed in terms of a concept of common good.<sup>9</sup> I wish to complement such work here, but find it meaningful to look at agency as a good in itself. I suggest that the spirit of AP – that we cannot take 'beings' and 'doings' or deliberation about 'beings' and 'doings' as a good in itself – tries to address something meaningful drawing on the limits of a libertarian approach to individual engagement. I view AP as a 'wound' of the CA that allows us to reconsider the epistemic orientation of the CA itself, and re-orient it in terms of agency.

### *Arpaly, Sen and Sunstein on agency*

In the writings of philosophers engaged in action theory or philosophical compatibilism, agency seems to serve an instrumental purpose in the fulfilment of moral responsibility. The reason behind the instrumentality of agency assessments appears to be an epistemic one: when we try and assess the value of someone's preferences, the standpoint we adopt is our understanding of morality, and we accordingly levy praise or blame. And then we see whether someone has moral agency to the extent she satisfies, or has some sort of access (through thoughts, actions, emotions, stimuli) to such morality. A compelling account of this way of reasoning is championed by the contemporary compatibilist

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<sup>6</sup> Bina Agarwal has argued an odd preference (more specifically, an overt act of compliance) does not necessarily imply the absence of agency, and could be a covert act of resistance. Bina Agarwal, *Bargaining and Gender Relations: Within and Beyond the Household*, 3 *Feminist Economics* 1, 22-25(1997).

<sup>7</sup> Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (2001).

<sup>8</sup> This is akin to the difficulty Sugden has with Sen's work as well, but only when Sen's broader engagement with CA was interpreted as a way to identify particular capabilities by scholars such as Nussbaum. Mozaffar Qizilbash, *Sugden's Critique of Sen's Capability Approach and the Dangers of Libertarian Paternalism* 58 *INTERNATIONAL REVIEW OF ECONOMICS* 21(2011). As Sugden says: "The idea that 'we' ethical theorists can claim to know better than some particular individual what is good for her seems to open the door to restrictions on freedom." Robert Sugden, *What We Desire, What We Have Reason to Desire, Whatever We Desire: Mill and Sen on the Value of Opportunity* 18 *Utilitas* 33, 34 (2006).

<sup>9</sup> Serene J Khader, *Must Theorising about Adaptive Preferences Deny Women's Agency?* 29 *Journal of Applied Philosophy* 302 (2012); Serene J Khader, *Adaptive Preferences and Procedural Autonomy*, 10 *Journal of Human Development and Capabilities* 169 (2009).

philosopher Nomy Arpaly, who argues that a person may have moral agency even without deliberative access to such agency.<sup>10</sup> Her primary example is Mark Twain's Huckleberry Finn who rescues a black man despite his conscious deliberation; the words he has at his disposal to assess the situation exhort him otherwise as they are shaped by his racist environment. Conversely, one could be blamed for racist acts despite non-racist deliberations. Accordingly, a person may be held responsible for her actions based on subconscious moral agency. I do not necessarily disagree that a person may be held responsible for acts that do not have the weight of deliberation behind it; that would require a more nuanced view. My intervention is limited to the suggestion that irrespective of where we stand on the relationship between deliberation and responsibility, the attribution of responsibility should not be mistaken for the presence of agency.<sup>11</sup>

A person may be held morally responsible for spurious choices (and then required to correct them or be labelled as a person with odd preferences) depending on how such preferences are sized up. But to consider the attribution of such responsibility as the same as praising or blaming someone's agency can lapse into an exercise in solipsism. As Fricker argues, judgements of blame are historically relativised, and any meta-ethical room for moral judgement 'stops short of blame.'<sup>12</sup> To clarify, Fricker (as with other scholars sceptical of philosophical exercises in holding others blameworthy<sup>13</sup> or praiseworthy) does not suggest that we do away with locating and attributing responsibility. Rather, the suggestion is that the attribution of both blame and responsibility is based on considerations that are not characterological, but on whether they 'promote good or ill.' The considerations may be justified on the basis of constructive functionality; for Fricker, blame allows for an expansion of 'the wrongdoer's moral understanding' to allow for a 'proper grasp of the perspective of the wronged party.'<sup>14</sup> Philosophers such as Tamler Sommers complement this view: even when internalised by an agent, responsibility may 'express solidarity, love, loyalty, courage, and moral commitment.'<sup>15</sup>

The attribution of responsibility (either blame or 'public responsibility'<sup>16</sup>) is a process of objectification<sup>17</sup> – that may be functional or constructive – and if we were to view agency as

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<sup>10</sup> Nomy Arpaly, *Merit, Meaning and Human Bondage: An Essay on Free Will* (2006); Nomy Arpaly, *Unprincipled Virtue: An Inquiry Into Moral Agency* (2003).

<sup>11</sup> Elinor Mason finds that in Arpaly's account, "although acting against one's best judgement can be for the best, and may well exhibit a good moral character in some sense, we should not say that it is rational" (emphasis added). Elinor Mason, *Rationality and Morality: Thoughts on Unprincipled Virtue*, 134 *Philosophical Studies* 441, 441 – 442 (2007). I would extend this line of reasoning to agency as well. This connection would be evident if we identify agency with the capacity to reason (such an account is found in Michiru Nagatsu, *Social Nudges: Their Mechanisms and Justification*, 6 *Review of Philosophy and Psychology* 481(2015)), but it is more nuanced if agency does not have to be collapsed into the capacity to deliberate, as is explored in the course of this article. However narrowly or broadly we might view agency, I do not see any reason why someone who 'exhibits a good moral character' should be found to possess agency. Arpaly's distinctive position of viewing agency in terms of 'moral worth' is evident in her reviews of other philosophers working on agency. Nomy Arpaly, *Review of 'Christine Korsgaard, The Constitution of Agency'*, 120 *Philosophical Review* 607(2011).

<sup>12</sup> Miranda Fricker, *The Relativism of Blame and Williams' Relativism of Distance*, 84 *Proceedings of the Aristotelian Society Supplementary Volume* 151, 152 (2010).

<sup>13</sup> Sceptical and metasceptical accounts of blame have been mooted by Bernard Williams, Shaun Nichols, Tamler Sommers, Saul Smilansky, among others.

<sup>14</sup> Fricker, *supra* note 2.

<sup>15</sup> Tamler Sommers, *Relative Justice: Cultural Diversity, Free Will and Moral Responsibility*, 202 (2012).

<sup>16</sup> Iris Young argues that individual responsibility can be justified as political responsibility drawing on power and privilege, but it is difficult to attribute such responsibility in all cases; simply put, 'we lack good conceptual tools for thinking about individual responsibility in relation to structural social processes.' Iris Marion Young, *Responsibility For Justice*, 144 (2013).

<sup>17</sup> The attribution of legal responsibility is no different. J.H.H. Weiler shows how the European Union 're-objectifies' individuals located in Member States. J.H.H. Weiler, 'Van Gend en Loos': The Individual as Subject and Object and the Dilemma of European Legitimacy 12 *International Journal of Constitutional Law* 94, 102 (2014). He also suggests that

instrumental to attributing responsibility, then that would imply that a perfectly objectified person has perfect agency. The CA or AP theory would do well to steer clear of philosophical accounts that collapse agency into responsibility, but rather focus on AP as a heuristic device to identify and correct structural oppression. Attempts have been made by Amartya Sen and Cass Sunstein to guard against collapsing agency into a solipsistic attribution of praise or blame. I seek to show below that despite their considerable efforts to free agency from narrow or solipsistic ends, they have particular ideas of agency to conform to certain epistemic preferences.

The adoption of an external position to expose the limitations of subjective experience and choices is central to Amartya Sen's entire oeuvre: Sen argues that it is possible to arrive at an account of *positional objectivity* of an agent without going into subject-relative choices of agents. The way such positional objectivity acquits itself from charges of 'intellectual despotism'<sup>18</sup> is by taking pains to chart out the *transpositional objectivity* of an *impartial observer* who studies the positionality of agents. The transpositional objectivity and impartiality is gauged by the openness of observers in their attempt to reach 'comprehensive outcomes', deviating from monological accounts of utilitarian 'culmination outcomes' prevalent in welfare economics. The comprehensive account of choices is understood as being composed of three elements: (1) the state of affairs that will emerge from a choice, (2) the role of agents' responsibility in the choices made, and (3) value accorded to relations with particular people affected by such choices and acts. It is in relation to (2) that Sen uses the term agency ('his own agency and his consequent responsibilities are momentous'<sup>19</sup>) to demonstrate that viewing an outcome as a mere culmination of choices without the contributory or participatory element is insufficient. This is in keeping with Sen's careful de-tethering of agency from well-being; agency should not be subsumed into the assessment of well-being.<sup>20</sup> But how is agency objectively assessed if we were to move away from subjective perceptions? Specifically, what transpositional roles are occupied by an impartial observer to provide an account of agency?

Sen does not provide an explicit answer in this regard, but it appears that the legitimacy of a transpositionally objective account lies in its ability to appreciate and achieve *counterfactual choices*, i.e. 'what one would have chosen if one had the choice.'<sup>21</sup> Maintaining the centrality of counterfactual choices, Sen argues that freedom from epidemic diseases enhances our well-being as well as our agency. The latter because such freedom allows us to lead the lives we would choose to lead. In a footnote, Sen says that if one has 'the odd preference' for having an epidemic disease, then it would not be served by a policy that appreciates and achieves counterfactual choices. In such a case, such an odd preference has to be 'reasonably defensible.'<sup>22</sup> Though an explicit connection is not made, it seems that a preference that cannot be reasonably defended would be an AP; there appears to be no method of distinguishing a preference for malnourishment or a preference to have an epidemic disease from an objective standpoint, as they can both be assessed to be 'odd' if they are not 'reasonable'. The word 'reasonable' here would necessarily be defined by the interpreters of the common good who would circumscribe the language and channels of contestation according to whether standards of reasonableness are satisfied. It is unclear why an objective account of agency should aim at the satisfaction of a counterfactual account of freedom rather than *shaping the epistemic basis and*

(Contd.) \_\_\_\_\_

'effective democratic control' may relax the position of the individual as an object of the law, but how that is to be done is not clear as no thick account of democracy is forwarded.

<sup>18</sup> Amartya Sen, *Rationality and Freedom*, 95 (2002).

<sup>19</sup> Amartya Sen, *The Idea of Justice*, 214 (2009).

<sup>20</sup> Amartya Sen, *Well-being, Agency and Freedom: The Dewey Lectures 1984*, 82 *The Journal of Philosophy* 169 (1985). He clarifies and develops some of the idea in Amartya Sen, *Inequality Re-examined* (1992).

<sup>21</sup> *Ibid*, at 67.

<sup>22</sup> *Ibid*, at fn. 14.

*interpretation of the counterfactual.*<sup>23</sup> If we were to pursue the latter, then a transpositional standpoint would involve identifying mechanisms of rendering intelligible why choices may be considered to be odd, and how to defend such choices before those who determine whether they are reasonable, and if possible, alter the transpositional epistemology of reasonableness.

Having said the above, I think Sen does elsewhere implicitly deal with an idea of agency that lies in *transpositionally exposing 'objective illusions'*.<sup>24</sup> To do so, he looks at dissonance between self-assessed life-expectancy and observed lifespan rates of people in different Indian states, and finds that people in Kerala perceive a much lower life-expectancy than the (relatively high) actual lifespan. On the other hand, people in Uttar Pradesh (that has a low lifespan rate) perceive a higher life-expectancy rate. Sen suggests that this dissonance may be explained by literacy: Kerala has a much higher literacy rate and therefore does not suffer 'the illusion of low morbidity'. It could be suggested that people in Kerala are as ignorant of reality as people in Uttar Pradesh, and the 'positional objectivity' of both people in Kerala and Uttar Pradesh is illusory. However, the illusion of the Keralites appears to help them live longer. Thus, if the culmination outcome is to live longer, then it could be argued that literacy endows Keralites with the ability to develop a *functional illusion*. In a similar vein, Sen notes that Indian women perceive a higher life-expectancy than their predictable lifespan that can be attributed to a deprivation of education and the normalisation of gender inequality. Per Sen, it appears that a transpositional account that may be accessed through education could inform women about the reality of their lifespan and even perhaps the reasons behind their misperceptions. This, to my mind, is Sen's account of agency: information obtained from a transpositionally objective source may lead to revisions in one's deliberation (and women may have a better hold on their social positions) and may also lead to a non-deliberative 'drive' to achieving better outcomes (as with Keralites). If I may put it this way: information may allow individuals to *dispel and/or use their illusions*. However, it is not clear *how* and *what* information may enhance one's agency. Further, I suspect the reason Sen considers some preferences and illusions to be 'odd' but does not devote his energies towards how they may be 'reasonably defended' is because underlying transpositional objectivity is social choice theory that seeks to arrive at a morally defensible account of interpersonal comparisons of choices, and the term 'agency' is understood by virtue of its association with social choice theory. A particular way of interpreting agency in keeping with epistemic preferences is found in BLE scholarship as well.

While BLE scholars do not ferret out transpositional objectivity and impartiality, their motivation is also to 'make life better' for people despite themselves. The basis of BLE is that given people make choices that are not in their best interests, such choices should be 'nudged' or influenced without being too interventionist, or following a 'libertarian paternalist' approach.<sup>25</sup> Sunstein; the most prominent legal scholar and policy-advisor working on BLE; chalked out the political appreciation of preferences prior to his recent scholarship with social psychologists and behavioural economists, arguing against upholding endogenous private preferences as a public good. In arguing that 'a democracy should be free and is perhaps obliged to override private preferences in cases of 'collective judgements', 'intra-personal collective action problems' and notably, preferences that have 'adapted to undue limitations in available opportunities or unjust background conditions',<sup>26</sup> Sunstein refers to and proceeds along Sen's line of thought. However, in his recent scholarship on BLE, he has extended his argument for guiding *all choices*, rather than only those that are 'adapted to undue limitations' as he argues

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<sup>23</sup> Sen provides no interpretative space for shaping the counterfactual; clarifies that it is important to subscribe to 'conformist rules' to communicate 'non-conformist proposals'; ideas need to be 'readily understood in terms of old rules of expression.' SEN, *supra* note 16, at 122. As we shall see below, agency may be found in the clarity of and the ability to adapt to 'conformist rules'. But it would be difficult to accept why agency needs to be confined to such an account without further argumentation.

<sup>24</sup> SEN, *supra* note 18, at 471 – 475.

<sup>25</sup> Cass Sunstein and Richard Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 *University of Chicago Law Review* 1159 (2003).

<sup>26</sup> Cass Sunstein, *Preferences and Politics*, 20 *Philosophy & Public Affairs* 3, 5 – 6 (1991).

(drawing primarily on the findings of social psychologists on the ‘reality’ of how choices are made) that all preferences are inevitably circumscribed.<sup>27</sup> Given that all choices are inevitably shaped by extraneous factors, there is an argument to be made for ‘benevolent paternalism’ of all choices. But on what basis should we decide on when and how to interfere? Per Sunstein (as is true for the entire canon of BLE and behavioural economics), it is to (i) defer to the expertise of some psychologists and economists who can translate such expertise into behavioural models;<sup>28</sup> (ii) but such deference is legitimate only when both the autonomy and welfare of individuals are satisfied.<sup>29</sup> The way autonomy is furthered, or democracy is kept alive, is by allowing people to ultimately make choices for themselves; the point of regulation is to ‘nudge’ such choices keeping in mind the aim of making life better. Sunstein convincingly defends the idea of securing welfare and preserving autonomy by replacing invisible social influences by explicit regulatory nudges.

While Sunstein’s account responds to the non-deliberative satisfaction of consumer welfare or protection from risk, it sorely misses an account of agency. Discussions on agency are located within the tension between autonomy and welfare,<sup>30</sup> and hence agency is not afforded a meaning of its own. This is observable from Sunstein’s unconvincing responses to the charge that regulation along the lines of BLE infantilises people,<sup>31</sup> and makes them beholden to scholars and regulators. Behavioural economics on its own does not have the epistemic tools to pronounce on issues of agency such as self-legislation or how external intervention can enable responsiveness; Daniel Kahneman, arguably the leading figure in the canon of behavioural economics, notes that despite a lifetime of research, ‘...my intuitive thinking is just as prone to overconfidence, extreme predictions, and the planning fallacy as it was before I made a study of these issues.’<sup>32</sup>

Both Sen and Sunstein are fans of democracy and of deliberation. Having said that, in their accounts, people’s subjective situations may be judged to be spurious by objective impartial observers, and shaped by regulation to satisfy welfare. Unlike Arpaly, they seek to adopt a ‘view from somewhere’;<sup>33</sup> this ‘somewhere’, however, is not premised on an account of agency. What is missing is an account of how it may be possible to agentially deal with APs rather than condemn them; it would be preferable to think about an AP as the result of unresponsive agency.

### ***Legal institutions and the possibility of agency***

The reference to corrections and objective counterfactual policies invoke the possibility of an institutional response, and given that formal legal institutions are tasked with maintaining social order and preserving deontological values, it behoves us to consider the role of law. The desirable role of

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<sup>27</sup> I am not alone in this view of the change in Sunstein’s scholarship; see Mozaffar Qizilbash, *Informed Desire and the Ambitions of Libertarian Paternalism*, 38 *Social Choice and Welfare* 647(2012).

<sup>28</sup> A normative position that Sunstein maintains is the importance of expertise in informing moral decision-making, including expert determination of ‘the will of the people’. However, Sunstein provides no theory of how experts may be identified and relied upon; see Martin Kusch, *Towards a Political Philosophy of Risk: Experts and Publics in Deliberative Democracy in Risk: Philosophical Perspectives* (Tim Lewens ed., 2007).

<sup>29</sup> Cass Sunstein, *Nudges, Agency, and Abstraction: A Reply to Critics*, 6 *Review of Philosophy and Psychology* 511(2015).

<sup>30</sup> Sunstein, *supra* note 26, at 8.

<sup>31</sup> Lepenies and Malecka argue that nudges dilute agency as they take away the ability of people to self-legislate. Robert Lepenies and Magdalena Malecka, *The Institutional Consequences of Nudging – Nudges, Politics, and the Law*, 6 *Review of Philosophy and Psychology* 427 (2015). Sunstein replies that nudges preserve the freedom of choice, and the effects of nudges are overstated, but he does not address the question of agency. Sunstein, *supra* note 27.

<sup>32</sup> Daniel Kahneman, *Thinking Fast and Slow*, 417 (2012).

<sup>33</sup> The reference is to Thomas Nagel’s *The View from Nowhere*. Sen quotes Nagel that a view is more objective than another if it “relies less on the individual’s makeup or position in the world” (quoted in SEN, *supra* note 17 at 157). However, Sen disagrees with Nagel’s apprehension of adopting an objective position without lapsing into ‘agent-relative’ perspectives. SEN, *supra* note 16 at 481.

law in the CA would be to function as the mediator that converts beings and doings into achievements; for BLE, it would be securing welfare without the necessity of agents having direct control. In Sen's general philosophy, an institutional intervention may be justified in situations where people sacrifice control over their lives without losing freedom.<sup>34</sup> This way of reasoning is akin to Joseph Raz's Normal Justification Thesis: Law is the mediator that people employ to achieve the ends that they have reason to value.<sup>35</sup> Once such employment is put into effect, then per the Pre-emption Thesis, people sacrifice some reasons in favour of law. Unlike philosophical accounts of adherence to moral responsibility, law's 'intellectual despotism' is easier to digest because law's transpositional objectivity is theoretically legitimate. Thus, following Raz, we allow law to judge us and hold us responsible because structurally the law looks after us. Individual enjoyment of institutional praise (say for instance subsidies for using renewable energy or tax cuts for charitable donations) or blame (all forms of punishment and fines) operate under the shadow of legal responsibility.

Admittedly, we cannot assume that the law and legal institutions would exist only to make our (the reader would surely enjoy the scope for abuse in defining the term 'our') lives better. But what Raz highlights is the possibility of assessing the legitimacy of law, and contest the law or any legal institution should that not be the case. There is a reason why Raz's position has been characterised as philosophical anarchism; there is an assumption that there is no *a priori* obligation to obey the law. Theoretically, if there is any other collective enterprise or institution that can help us fulfil what we want better than the law can, then we would do better to subscribe to such an enterprise. Practically, in order to do so, law has to be overcome. If we are really upset with the law, then an insurrection may be warranted. On a smaller scale – and what actually goes on in legal systems that allow for the contestation of decisions made by legal institutions – the law is interpreted in a manner to accommodate some preferred understandings of what the law should be like. This is why in critiquing the CA, constitutional law scholars are puzzled by why proponents of the CA do not pay sufficient attention to the role of authority in shaping preferences and fulfilling capabilities.<sup>36</sup> If we were to agree with Raz that for law to be law, it needs to be a legitimate authority, then the implication is that there could be other authorities assessed to be legitimate that shape our preferences and mediate their fulfilment. I seek to show that the assessment of legitimacy need not be a deliberative enterprise, but rather the deliberation lies procedurally in identifying an enterprise, institution, person, or even body of knowledge – any mediator – as authoritative. So this suggests that agency to deal with collective life does not need to collapse into responsibility. As a next step, I want to shift from the identification of the properties of agency to its characterisation: I seek to characterise agency as *the faculty of responsiveness*. Riding on such characterisation, an essential property of agency would be to facilitate responsiveness to responsibility rather than the imposition and determination of responsibility.

### **Agency as responsiveness, not adherence**

The idea of AP has been subject to empirical scrutiny<sup>37</sup> and subsequent analytical scrutiny of the empirical findings.<sup>38</sup> There is one empirical study that I wish to engage with to highlight the

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<sup>34</sup> The point of any institution per Sen appears to be their role in fulfilling our counterfactual decisions: "Many freedoms take the form of our ability to get what we value and want, without the levers of control being directly operated by us. The controls are exercised in line with what we value and want (i.e. in line with our 'counterfactual decisions' – what we would choose), and in this sense they give us more power and more freedom to lead the lives that we would choose to lead." Sen, *Inequality Re-Examined*, 64.

<sup>35</sup> Joseph Raz, *Authority*, 115 – 141 (1990).

<sup>36</sup> Robin West, *Human Capabilities and Human Authorities: A Comment on Martha Nussbaum's Women and Human Development* 15 *Thomas Law Review* 757(2002).

<sup>37</sup> Uma Narayan and Sandra Harding, *Minds of their own: Choices, Autonomy, Cultural Practices, and Other Women*, in *A Mind of One's Own: Feminist Essays on Reason and Objectivity*, 418 (Louise M. Anthony and Charlotte E. Witt eds., 2002); Harriet E. Baber, *Adaptive Preference* 33 *SOCIAL Theory and Practice* 105(2007).

theoretical issues that deserve an interrogation of agency. Willy Oppenheim studied the demand for girls' schooling in rural Pakistan; to this end, he interviewed consenting parents and their daughters about how they value schools and what they learn.<sup>39</sup> Several responses were evidently gendered, where teenage girls and their parents felt that boys should learn things that prepared them for the world outside, and girls should inculcate values that prepared them for the household. Further, Oppenheim concentrates on one case where a mother felt her daughter should pursue higher studies for reasons intimately linked to 'a pragmatic assessment of family needs' rather than 'any ideal of individual freedom.'<sup>40</sup> This same mother also believed that education would allow her daughter to have opinions regarding marriage and family. Unless the mother is rationalising her gendered opinion and we cannot trust her (that is a distinct possibility), it seems that freedom and privileging of family interests can be compatible. There is another instance of an articulate girl with opinions on equality, but who is nonetheless prepared to give up her school for marriage as even her desire for schooling is a desire of her father's, and should he make a marriage request, she would comply.

Drawing on AP theory, if we were to categorise the responses of the teens as gendered, coerced, choice-deflating, then they would be adaptive. As AP theory does not have an account of non-deliberative choices or inconsistent deliberation, we are unsure what to make of the inconsistent responses. Oppenheim suggests that rather than viewing such responses as adaptive, perhaps it is important to reconsider the assumptions of AP theory itself, and consider viewing the privileging of family interests over individual interest as authentic preferences made by autonomous individuals. But does that mean all opinions voiced by the respondents should be respected? Or is there something to Sen's view that we may get accustomed to a 'limited life' and take pleasure in choices borne out of oppression?<sup>41</sup> Khader breaks this impasse by disassociating AP from a conception of 'real' procedural autonomy, and arguing that a preference may be assessed to be adaptive if it does not correspond with a conception of what is good.<sup>42</sup> So there is no denying we size up people's preferences, but the standpoint for doing so is neither our subjective understanding of what is good nor an objective account of the individual's internal processes. Thus, neither self-appointed moral police nor a nefarious neurosurgeon can impose a conception of AP. Rather, those who seek to instrumentally assess preferences for satisfying a conception of the good must base their transpositional standpoint on APs with regard to the satisfaction of what is good, and disregard some preferences accordingly. Khader's account refreshingly clears the patronising air around AP by disassociating choices and autonomy. In this regard, Khader's account corresponds with the work of Peter Strawson who sought to offer an 'objective attitude' to understanding an individual where someone's actions or opinions<sup>43</sup> are either appreciated or criticised without praising or blaming the 'real self.'

However, such an account should not be mistaken for an account of agency, and I suggest it is worthwhile to have a conception of agency as an integral part of a conception of the good. My chief concern with the politics of identification of APs is not that it is unethical to get into someone else's

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<sup>38</sup> Khader, *Adaptive Preferences and Procedural Autonomy*, supra note 9.

<sup>39</sup> Willy Oppenheim, *Girls' Schooling, Capabilities, and 'Adaptive Preference' in Rural Pakistan* 1 *Human Welfare* 1(2012).

<sup>40</sup> *Ibid.*, at 8-9.

<sup>41</sup> SEN, supra note 18, at 634.

<sup>42</sup> Khader, *Adaptive Preferences and Procedural Autonomy*, supra note 9, at 185.

<sup>43</sup> Peter F. Strawson, *Freedom and Resentment in Free Will*, 72 – 93 (Gary Watson ed., 2003). As Strawson did not exclude speech-acts, I assume that actions include the voicing of opinions. In this regard, I do not view speech-acts as instances of deliberation such as talking to oneself or writing a diary without an audience in mind. Notes scribbled in private could well be influenced by implicit and imagined audiences, but there is neither the intention of translating them into an action, or the scribbles being translated into an action despite one's intention. A tricky case would be a situation where the scribbler unintentionally leaves her diary 'visibly hidden' or subconsciously awaits a discovery.

head to decide whether some preferences are good and some are bad,<sup>44</sup> but that even if some preferences pass the categorisation test and are labelled good preferences, there is no reason to believe that they represent an agentic individual. At the same time, as Oppenheim shows, those preferences that are construed to be adapted according to some subjective assessment could well be exercised by agentic individuals. The question therefore arises – how do we think about preferences in terms of agency in addition to preferences in terms of a conception of the good?

Arpaly is also of the opinion that it is worthwhile to speak of agency outside a Strawsonian framework, and in terms of responsiveness.<sup>45</sup> To do so, she argues that praise or blame can be levied on someone's non-deliberative choices and opinions, and we can suspend judgement about an agent's motives while deciding whether to praise or blame her for her actions. This is where I part company with Arpaly. Based on discussions earlier in the article, I do not think that responsiveness should be thought about instrumentally in relation to praise or blame. Punishments and rewards – based on good choices and bad choices – operate within the framework of public good, and agency lies in responding to the levy of particular punishments and rewards as well as structures that formulate such punishments and rewards. Thus, while she engagingly and clearly speaks about the relationship between deliberation, judgement and responsibility, her work is not – contrary to the title of her book – an 'inquiry into moral agency'. It is an inquiry into moral responsibility. The difference between adherence to responsibility and responsiveness to responsibility may be explained by analogously describing the difference between Law and the Rule of Law.

It may appear that the terms 'Law' and 'Rule of Law' are interchangeable. However, there is a significant difference between the two.<sup>46</sup> While providing a devastating critique of the privatisation of property through law in eighteenth century England, the historian E.P. Thompson simultaneously lauded the inherent value of the Rule of Law.<sup>47</sup> The contemporary Marxist-anarchist anthropologist David Graeber argues along similar lines.<sup>48</sup> The distinction is most clearly articulated and ferreted out by Krygier who argues that lawyers should not be trusted with the Rule of Law,<sup>49</sup> focusing on the Rule of Law as a good independent of – and he argues that one should pains to keep them separate – Law. The primary distinction is that while Law establishes power, the Rule of Law keeps a check on it. The blurring of this distinction is what makes 'Rule of Law initiatives' by organisations such as the World Bank spurious. By way of an example, a Rule of Law initiative could be the establishment of a courthouse in a post-conflict State, but there is no reason to believe that this courthouse would provide a meaningful forum to contest power, rather than assist with its perpetuation. As noted earlier in the article, Krygier explains that the Rule of Law can be 'felt' in a society by virtue of whether individuals do not constantly feel subservient to arbitrary instances of power. Thus, formal legal institutions may seem transparent or democratic, but they do not necessarily assist in constituting a society that feels comfortable in recognising and contesting power. Admittedly, several properties of the Rule of Law need to be thought through (not least of which is what constitutes arbitrariness; something Krygier recognises) and the idea of extending the idea of power to discursive power and identifying implicit power structures requires detailed inquiry. But for the purpose of this article, I wish to highlight the

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<sup>44</sup> This is the primary concentration of Sen's efforts; utilitarian economics as well as Kenneth Arrow's Impossibility Theorem avoids inter-personal comparisons of utility owing to the belief that what goes on in another's head is inscrutable.

<sup>45</sup> Arpaly, *Unprincipled Virtue*, supra, note 10.

<sup>46</sup> For a recent account of how the European Union has a lot of law without necessarily the Rule of Law, see Dimitry Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?* *Yearbook of European Law* (2015, forthcoming).

<sup>47</sup> For an account of Thompson's engagement with Law and Rule of Law, see Daniel Cole, *An Unqualified Human Good: E.P. Thompson and the Rule of Law* 28 *Journal of Law and Society* 177 (2001).

<sup>48</sup> David Graeber, *The Utopia of Rules: On Technology, Stupidity and The Secret Joys of Bureaucracy* (2015).

<sup>49</sup> Martin Krygier, *Why the Rule of Law is Too Important to be Left to Lawyers* 4 *Law of Ukraine: Legal Journal* 18 (2013); Martin Krygier, *Four Puzzles about the Rule of Law: Why, What, Where? and Who Cares?* 50 *NOMOS* 64 (2013).



distinction between the construction and perpetuation of power of one hand, and a check on the exercise of power on the other.

Drawing on this distinction, the law imposes responsibilities on people; scholars have rightly pointed out that this is why neuroscience or physicalism have limited explanatory power in providing an account of the life of the law,<sup>50</sup> as law is concerned about responsibility. The Rule of Law, however, is more interested in how such responsibility may be assessed and negotiated. As to how this is done is not explained; Raz points out that the Rule of Law appears to have only a ‘negative value’ of keeping a check on power.<sup>51</sup> Having said that, it was not for nothing that the Rule of Law consciousness allowed people to approach courts in England to question the exercise of power by legislative and executive institutions. Admittedly, courts are also prone to capture by specific interests and exercises of private power. But in a counterintuitive way, this is precisely where the development of an account of agency may be located – if a party can successfully use the court system to *strategically negotiate the imposition of responsibility in particular instances*, and even theoretically structurally delegitimise a government, then the party has legal agency. However if a party cannot do so – and to the extent that it cannot – it does not possess legal agency. As to how this agency is exercised is irrelevant to the *fact* of agency: a party may bribe judges, afford good lawyers or shape the law itself. Some means of exercising such agency may correspond with a conception of the good, and may then be categorised as *moral agency*. For instance, bribing a judge is generally not considered to be an instance of moral agency, but it seems that being able to afford a good lawyer is. Much like the identification of good preferences and bad, the assessment of how to exercise agency can only be legitimised by a claim to a conception of the good. Relativism does creep in with regard to the identification of good means to achieve good ends; this does not however affect the desirableness of the fact of agency. In relation to AP, when Sen says ‘discontent is replaced by *acceptance*; *hopeless* rebellion by *conformist* quiet’<sup>52</sup> or when Elster has a problem with ‘the *adjustment* of people’s aspirations to feasible possibilities,’<sup>53</sup> they are invoking a conception of agency, and find a problem with people merely *adhering to* rather than *responding to* situations. But could there be an objective account of agency as responsiveness? I turn to this issue in the following section.

## The exercise of agency

To briefly recap, I started with the idea that a libertarian idea of freedom is prone to critique, and the CA has developed AP theory to apply a somewhat deterministic account to weed out some preferences that seem intuitively spurious. It was suggested that the identification of some preferences as ‘not real’ is a problematic endeavour, given that such identification can be damaging both to preferences that are identified as adaptive as well as those that are not. This questions the conceptualisation of AP itself. Khader shows that it might be worthwhile to maintain a conceptualisation of AP, and the standpoint we adopt to identify some preferences over others is a conception of the public good. While I agreed with this assessment, I sought to argue that such an account was not a helpful conceptualisation agency, a property that can be considered to be integral to all choices, whether they satisfy a conception of the good or not. A better way to think about spurious choices or non-deliberative choices is when such choices do not accommodate the operation of agency. To make this argument, I begun clarifying how agency may be conceptualised. In this regard, drawing an analogy with the difference between adhering to Law and responding via the Rule of Law, I disassociated agency from

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<sup>50</sup> Michael Pardo and Dennis Patterson, *Philosophical Foundations of Law and Neuroscience*, 4 *University of Illinois Law Review* 1211(2010); Stephen Morse, *Avoiding Irrational Neurolaw Exuberance: A Plea For Neuromodesty*, 3 *Law, Innovation and Technology* 209 (2011).

<sup>51</sup> Joseph Raz, *The Authority of Law*, 228 (1979).

<sup>52</sup> SEN, *supra* note 19, at 309 (emphases added).

<sup>53</sup> Jon Elster, *Sour Grapes: Studies In The Subversion of Rationality*, 219 (1987) (emphasis added).

adherence to responsibility, arguing instead that agency entails responsiveness to responsibility. Such an account, however, would not provide any guidance on how to locate and develop agency; what is needed is an anatomy of responsiveness that may be transpositionally observable, and it is this endeavour that I seek to commence in this section.

We usually associate responding with ‘answering’ through words or actions, and that suggests we deliberate and then act. But we have seen from the discussion on AP as well as Arpaly’s compatibilist account that we cannot take for granted that our words and actions are our own, and the same constraint would kick in when we respond. Responsiveness is different from the act of responding, as it implies an interest in the capacity to respond. Thus, we do not need to take for granted a conception of us being perfectly rational respondents, or that responses are generated in neutral conditions. Rather, being responsive to a particular situation or to meet the requirements of responsibility (legal, moral or otherwise) is inevitably informed by circumstances that are mostly unintelligible during an act of responding. Given the unintelligibility of informants of our responses, we could misinform or mislead ourselves by attempting to deliberate on the circumstances, and the link that might have to our actions.<sup>54</sup>

The idea that the information-deliberation-judgement nexus is the sole or even primary indicator of agency has been questioned over the years, but has received substantial interest of late owing to philosophers trying to come to grips with the popular findings of cognitive and social psychologists regarding – as John Bargh and Tanya Chartrand would put it – the ‘unbearable automaticity of being.’<sup>55</sup> My endeavour is not to rehearse tired irreconcilable issues regarding conscious agency and the operation of intuition, but to point out that (1) judgement through deliberation may not be a complete or sufficient basis for responsiveness, and (2) judgement through deliberation may prove to be a regressive step in cultivating responsiveness.<sup>56</sup> Drawing on psychological studies on intuition, Richard Holton has argued that contrary to the popular belief that judgement precedes choice, it could well be that choices precede judgements; i.e. we retrospectively use words to legitimise or make sense of the choices we have already made.<sup>57</sup> Within a responsibility paradigm, this means that we can be praised or blamed for actions we don’t deliberate on. For an agency paradigm, this implies that our responses are not necessarily mediated by deliberation. This seems like a disheartening statement, as we might have agency but such agency would be unintelligible to us; it is tempting to give in to the adage that ‘Luck Swallows Everything’<sup>58</sup> or agree with one of Nussbaum’s respondents that destiny requires abusive marriages,<sup>59</sup> and opt for subservience to higher powers. But I would stop short of being *that* fatalistic.

To begin with, I have suggested that agency extends beyond deliberation, and needs to be cultivated in a responsive rather than adherence to responsibility paradigm. This is already a step forward from unhelpful theorising about authentic and inauthentic preferences. I now proceed to indicating how

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<sup>54</sup> In this regard, Arpaly convincingly argues that Akrasia is entirely possible; i.e. we may be wise to act against our best judgement.

<sup>55</sup> John A. Bargh and Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 *American Psychologist* 462 (1999).

<sup>56</sup> Take the idea of ‘informed judgement’ for instance. In a recent workshop, I asked Cass Sunstein whether there is something odd about the fact that his books on Behavioural Law and Economics (that demonstrate our predictably irrational decision-making and argue in favour of expert psychology-based-policies to nudge our actions) are bestsellers. In other words, we choose to read books about the limitations of choice that we cannot do anything about. Might that not have a negative effect on our self-governance? Recent psychological studies show that reading about the absence of free-will have a negative impact on our actions. See Roy F. Baumeister, E. J. Masicampo, and C. Nathan DeWall, *Prosocial Benefits of Feeling Free: Disbelief in Free Will Increases Aggression and Reduces Helpfulness*, 35 *Personality and Social Psychology Bulletin* 260 (2009).

<sup>57</sup> Richard Holton, *The Act of Choice*, 6 *Philosophers’ Imprint* 1(2006).

<sup>58</sup> Galen Strawson, ‘Luck Swallows Everything’ *Times Literary Supplement* (London, 26 June 1998), at 8.

<sup>59</sup> Nussbaum, *supra* note 7, at 112.

responsiveness may be thought about in a ‘beyond instance-based deliberation’ framework. This would require a re-think of how deliberation is conceptualised, mediators that shape deliberation, and the possibility of agency without deliberation as an integral property.

### ***Transpositional agentic deliberation***

Unlike John Locke’s emphasis on deliberation as a value in itself; endorsed by contemporary action theorists who write on the exercise of practical reason and planning agency,<sup>60</sup> I argue that deliberation may be considered a value in itself for well-being or for having a conception of the ‘real self’, but not necessarily for agency. As Holton shows, what might matter for agency is choice, but not choice arising out of pre-meditated deliberation. Holton implicitly introduces the element of time – he uses examples of quick decisions, or ‘deciding on your feet’ (quite literally, such as with respect to a fireman’s gut inclination).<sup>61</sup> Arpaly is of the view that some non-deliberative instinctive judgements may be judged to be more moral than deliberated judgements, such as Huck Finn’s ability to transcend the racist discourse of his surroundings. So there are factors that shape choice, without having to influence the intermediate step of judgement. In both these accounts, however, there seems to be *no framework for having access to choice without judgement*. To situate this absence in Sen’s vocabulary, there is no transpositionally objective account of non-deliberative agentic choices. Such choices may be observed or blamed, but much like adaptive preferences, the factors that condition and inform such choices remain unintelligible.

The way out identified by Paul Katsafanas is one of deliberately having a hand on ‘drives’ (ala Nietzsche) that lead to particular choices.<sup>62</sup> Thus, the way to have a hold on the habitual or the instinctive is to relate them to the general motivators or social forces that influence them. In this process, the element of control features by appreciating the objectivity of the general, rather than being blindsided by the unintelligible determinism of the particular. This way of reasoning would satisfy action theorists of a Bourdieusian bent (explicated further down in this section), where knowledge of how objective social fields shape the *habitus* should be where agency may be found. Even in this setup, relating the particular to the general entails: (1) the fact of interpretation: we assume that deliberative agency lies in interpreting the particular in light of the general, and (2) a retrospective interpretation of the particular, and how it fits the general, which allows for only an *ex-post* assessment of agency. Both the general and the particular are brought into the picture by trying to interpretatively have a grip on the good reasons that shape choices. For the relationship between good reasons and choices to be understood as acts of agentic deliberation, they need to have persuasive value for what to say or do for future events, or where some insight is gleaned regarding how deliberation works. In addition to the obvious *ex-post* issue, the difficulty is that the interpretative act may be an unhelpful delusion about the nature of the self or how the world works. Very simply, it may be a form of imagined agency without there being any objective responsiveness. For instance, I may think that the way I can engage morally in my everyday dealings is by relying on a preferred Holy Book before I make choices, and from my *ex-post* reflection on the relationship between the Holy Book and my actions, I come to the conclusion that some passages are more useful than others for future *ex-ante* actions. This conclusion is surely not sacrosanct. To begin with, I could be making it up. The reality could be completely different from my attribution, and my attribution could be little more than moral amusement or having a ‘sense of agency’. But I would like to suggest that even if we are inventing interpretative myths, they are not necessarily dysfunctional. We could well be able to respond to or contest moral responsibilities based on our myths. The construction of a language to name and order one’s experiences, even if they do not correspond with a physical or social language of truth, is

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<sup>60</sup> See for instance Michael Bratman, Intention, Practical Rationality, and Self-Governance, 119 *Ethics* 411 (2009).

<sup>61</sup> Holton, *supra* note 57.

<sup>62</sup> Paul Katsafanas, Nietzsche on Agency and Self-ignorance, 40 *International Studies In Philosophy* 5 (2006).

integral to agentic behaviour.<sup>63</sup> The way we negotiate with the world is through functional illusions, as Sen would agree.

Pierre Bourdieu would surely object to the above; per Bourdieu, when it comes to language or speech, it is the agency of social fields (predominantly the market) that defines the act in speech-acts, and all interpretation is simply a conduit for social fields to inform the habitus in which we operate. So not only does myth-making or *ex-post* interpretation not bestow the actors with agency, but that such myths are required pawns of powerful actors in social fields.<sup>64</sup> But if the particular (be it conscious deliberation, unconscious action or *ex-post* interpretative speech-act about drives) is always a beast of social burden, then would agency be possible at all? We need to understand that in Bourdieu's world carved out of Marxist theory, mastering any practice would only perpetuate the field that informs the *habitus* within which such practice is located. To respond to moral responsibility would be nothing more than a way of perpetuating the contours of such responsibility. Thus, if you are on top of your game, that means you=0, game=1.<sup>65</sup> This might imply that I am again tediously bringing you back to the fatalistic strain that runs through this article. I would suggest otherwise, and I have a strange way to relate what we have been talking about to agency: we have no duty to revolt.<sup>66</sup> There seems to be no reason why I *have to* change the social burden that I bear; rather I may wish to be a beautiful beast that bears this burden.<sup>67</sup> In this case our agency does lie in the knowledge of the objectively social and the interpretation of the objectively social into particular acts; there may be no need to contest the embodiment of objectification that makes me spend on straightening my hair, engaging a plastic surgeon or cultivating a British accent, as long as such acts allow me to fulfil my social burdens.

Agency would lie in deliberately, unconsciously or interpretatively understanding objective social burdens and becoming the beast that satisfies such burdens. The Rule of Law would allow us to question the coherence and clarity of the burdens that we are expected to bear, as well as obstructions to the satisfaction of such burdens. To take this discussion to its natural end, Krygier argues that the Rule of Law ensures that we don't have to go about our daily lives constantly afraid of a gun that might unexpectedly emerge and take us out (or any such arbitrary exercise of power). Now, it could be argued that we are allowed to live only because a governor or government needs someone to govern. If the government takes us out, then how would social fields perpetuate their existence and designation? Per Raz, the law should instrumentally serve us by satisfying what we have reason to value. Per Krygier, while we go about satisfying what we have reason to value, the Rule of Law keeps a check on the exercise of power by legal institutions. But neither would have an account of our instrumentality in perpetuating the reasons that social fields make us value. So, though we cannot be legally killed or discriminated against without reason, our survival and bounded ideas of discrimination constitute the *habitus* that is important for the perpetuation of social fields. Having said that, there is no reason to believe that we do not value survival or formal equality, and we would like to have agency to maintain such values.

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<sup>63</sup> Darian Leader, *What Is Madness?* 305 (2011).

<sup>64</sup> See Pierre Bourdieu, *Outline of A Theory of Practice* (1977).

<sup>65</sup> To continue the game analogy a bit, David Graeber has recently argued that the purpose of a formal game is to thwart a sense of imaginative play by allowing people pleasure in following and subscribing to rules. Graeber, *supra* note 48, at 111–115.

<sup>66</sup> Drawing on the ideas of Max Stirner, David Leopold argues that questioning the duty to obey the State does not collapse into a positive obligation to eliminate the State. On the contrary, a moral obligation to revolt could do violence to the possibility of reconciling the goals of an individual and the demands of social institutions. David Leopold, *A Left-Hegelian Anarchism*, 8 *The European Legacy* 777, 781 (2003).

<sup>67</sup> The question is not whether I want to put myself into Nozick's experience machine that provides me excellent experiences without my consent, but that I may be able to hold the architects of the Experience Machine to task should it fail to provide me excellent experiences. See Dan Weijers, *Nozick's Experience Machine is Dead, Long Live the Experience Machine!* 27:4 *Philosophical Psychology* 513 (2014).

### *Mediating dispositions*

The discussion on Bourdieusian theory may leave a bitter taste for the CA and AP theory. What about Sen's suggestion that our choices may be deflated in the wake of oppression? How is the discussion in the section above useful for solving the problem of APs? In Bourdieu's world, all preferences and actions are performative, and in one sense adaptive. However, from the discussion above, we can still see merit in identifying the objective moral good, the contours of moral responsibility, and how we can be on top of our game in satisfying such responsibility (rather than just adhering to it without any subjective interpretation of how it relates to us). But can the 'social' or common good *itself* be negotiated? In this respect, Sen would argue that knowing the objective social or attaining clarity of the power structures may provide us agency. However, there appears to be no clear basis for such a claim. Much like having second-hand knowledge of neural determinism or cognitive biases may have precious little agentic value, the same could be said for the social. Rather, the suggestion that the objective social is constructed provides space for the idea that the objectivity can be agentially reconstructed (per Judith Butler), or even that the social does not enjoy a static objectivity, and agency lies in constituting such objectivity (per Bruno Latour), as discussed below.

Judith Butler tried to rescue the discursive agency of language from Bourdieu's social field-*habitus* nexus by arguing that the reterritorialization of words such as 'we' or 'women' from their operation in dominant discourse has the potential to endow the new appropriation-by-interpretation with agency. The concentration on 'potential' rather than the automatic endowment with agency is highlighted because not all interpretations turn out to be effective expropriations. A new interpretation must be an authoritative one for an earlier objectivity to be displaced; it needs to have an 'authority-producing effect'. Butler does not explain how an alternative 'authority-producing effect' may be identified or put in place that would engender a rearticulated social objectivity; we are left with 'the exposure of the prevailing forms of authority and the exclusions by which they proceed.'<sup>68</sup> This is not an insubstantial conclusion in itself; viewing the naturalised objectivity of the social as an instance of authority with its own preferences would allow rethinking a choice as something that is not natural, but the enactment of a ritual evidently circumscribed by authority, up for assessing as illegitimate and thereby amenable to moral change. It is not difficult to apply this way of reasoning to formal law: the authority of a constitution in the shadow of which laws are made is up for assessment, amendment and revision; the act of voting is conceptualised as performance of a ritual rather than an expression of freedom. I see Butler's critique and situating the role of authority as an interpretive event for thinking about AP and agency in three significant ways:

1. the *fact* of authority can be conceived as an essential property of 'beings' and 'doings', and how they are translated into achievements. The legitimacy of authority can undoubtedly be subjectively deliberated, retrospective interpretative myths may be constructed to assess their role, but could also be objectively studied.
2. AP theory is concerned with deflated choices made under oppression, with the difficulty that such choices lack agency as agents lack deliberative access. The idea of a deflated choice is not too different from the psychological finding of 'learned helplessness.' The replicable mediator for learned helplessness; as Stanley Milgram had pointed out; is authority.<sup>69</sup> Though recent research has sought to locate responsibility based on cultural identity and critique Milgram's work on how people's morality is predictably influenced by authority, it does not take away the key finding that authority mediates moral agency. To identify, reinterpret and replace authority seems to be the way to recover agency in making choices.

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<sup>68</sup> Judith Butler, *Performativity's Social Magic*, in *Bourdieu: A Critical Reader*, 123 – 124 (Richard Shusterman ed., 1999).

<sup>69</sup> For the relationship between authority and learned helplessness, see Neera K. Badhwar, *The Milgram Experiments, Learned Helplessness and Character Traits* 13 *The Journal of Ethics* 257 (2009).

3. In Raz's account of legal authority, we assess the legitimacy of such authority by its capacity to achieve what people have reason to value. I suggest a more comprehensive account of authority is to see it as a property of constituting what people have reason to value.

Admittedly, I used the word 'mediator' somewhat flippantly above to support the suggestion that authority is prevalent in agency. Bruno Latour, among others, would surely have a problem with such usage especially in a Bourdieusian context; drawing on semiotics, Latour argues that 'mediator is all.' By this, he seeks to argue that mediators confer agency onto people and things in any activity, and this way of thinking is reflected in his critique of Bourdieu's work. Latour argues that there is no such thing as the objective 'social' that can be epistemologically predetermined before agency 'happens.'<sup>70</sup> It is through association with myriad mediators that people and things acquire agency; thus, agency happens through the operation of *actants* and then such agency is simultaneously observed or retrospectively discovered.

Without going into the tensions regarding Latour's work, the idea that agency happens by association with mediators – and objects could also therefore possess agency – could imply that any endeavour to arrive at a p concept of human agency is misplaced. The response to this possibility would need me to stress on what I have hinted at before: agency serves a functional purpose in negotiating responsibility and moral spaces, and from this point of view, agency is social. To clarify, the fact that individuals operate in relational spaces and therefore are social does not mean that I support the ontological objectivity of social fields. I am partially inclined to agree with Latour that the social is influenced by associative mediators, but I am only interested in the 'beings' and 'doings' of individuals.

In the Milgram experiments touched on above, people appeared to relax their moral compunctions in administering electric shocks when an authoritative figure in a 'grey lab coat' suggested otherwise. The 'grey lab coat' has now become a proverbial proxy for authority. Applying Latour, the grey lab coat would be a mediator that brings into play the aesthetics of the laboratory, teacher-student relationships, the authority of science, strains within psychological methods, among others. The concentration on mediation complements the critical strain that informs political psychology; take for instance the view that economic gain and political power may have been the motives of colonial expansion, but the actual journeys, translations and retentions of the colonial situation were brought about by mediating *actants*: ambivalent complicitious-revolutionaries, religious interactions, hierarchies of knowledge.<sup>71</sup> Epistemic mediation goes to the heart of discontents with AP theory: there is hardly any disagreement with the idea that deflated choices are not a good indicator of freedom, but the difficulty arises when a preferred universality of scholarly engagement mediates the way the agency of subjects is appreciated.

### ***The issue of intelligibility***

We touched upon the idea of using language to legitimise choices that we have already made, or what may be referred to as moral confabulation. Jonathan Haidt (2001) has concentrated on the idea of moral dumbfounding, i.e. how ex-post rationalisation rarely captures the operation of intuitions, emotions or unconscious judgements regarding moral action. The difficulty for agency seems to be the idea of *unintelligibility*, i.e. the operation of conscious deliberation does not seem to provide access to the reality of choices, and hence does not provide us opportunities with cultivating mechanisms for effective responsiveness. Added to this is the problem of *misleading intelligibility* where conscious

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<sup>70</sup> Bruno Latour, *Reassembling The Social: An Introduction To Actor-Network Theory*, 141 – 156 (2005).

<sup>71</sup> See Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism* (1983).

rationalisation may distort the operation of our unconscious choices in responding to responsibility.<sup>72</sup> A discussion on misleading intelligibility may be good way to approach the idea of intelligibility.

There are times when we ‘feel’ we have agency that does not correspond with an outcome;<sup>73</sup> and this may point out that there is something amiss. This intuition has been sought to be explored by both philosophers and cognitive psychologists by concentrating on the idea of ‘sense of agency’. As the phrase implies, there may be only a *sense*, without there actually being any real agency. Tim Bayne finds that this ‘sense’ may be nothing more than a sensory perception that produces agentive experiences, akin to other bodily perceptions such as hunger or thirst, and hence very different from judgement or implementation of judgement.<sup>74</sup> The feeling of being in control that may not correspond with actually being in control may be something that we value in itself; take for instance the observation that if the science of free will is interpreted to mean that there is no self-control, then this interpretation has a negative effect on our respect for moral responsibility.<sup>75</sup> At the same time, there is no basis for assuming that a ‘sense of agency’ may correspond with actual agency; it may result in very different attributes such as optimism biases or deflating assessments of self-worth. The problem of misleading intelligibility shows that real agency may be unintelligible. How do we go about dealing with the problem of misleading intelligibility and the unintelligibility of agency? The value of education is central to the CA, and the idea of developing a choice architecture is central to BLE. Combining the two – but significantly differing from both – we can think of a choice architecture that ‘educates’ automatic behaviour. In this conceptualisation we move away from collapsing education into formal institutions as well as collapsing choice architecture into designs laid out by expert architects that agents subscribe to.<sup>76</sup> Instead, we turn to scholarship on agentically educating moral intuitions.

The case of a white policeman pulling out his gun unconsciously on a black man is a paradigmatic example of an immoral intuitive choice. Several versions of this example abound, and problematically even in relation to choices where there is opportunity for deliberation such as preferring male musicians for an orchestra,<sup>77</sup> or not hiring male Indian students in Western universities because they are all rapists.<sup>78</sup> How are we to handle these situations other than blaming individuals for their actions? Hanno Sauer argues in favour of the possibility of education of intuition through *ex-post* deliberative reasoning.<sup>79</sup> He acknowledges the possibility of retrospective rationalisation or confabulation (akin to the sense of agency discussed above), but argues that it is possible for *ex-post* deliberation to affect future intuition through the operation of feedback loops. Though he speaks to different scholars when he reasons this way, this way of thinking is not too different from deliberatively shaping ‘drives’ that inform individual instances (discussed earlier).

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<sup>72</sup> Timothy D. Wilson and Jonathan W. Schooler, Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions, 60 *Journal of Personality and Social Psychology* 181(1991); Baumeister, Masicampo and DeWall *supra* note 54.

<sup>73</sup> Here I view outcome as a term that extends to the accumulation and mobilisation of different forms of capital as conceptualised by Bourdieu, *supra* note 64.

<sup>74</sup> Tim Bayne, The Sense of Agency, in *The Senses: Classical and Contemporary Philosophical Perspectives*, 356 (Fiona Macpherson ed., 2011).

<sup>75</sup> Eddy Nahmias, Why ‘Willusionism’ Leads to ‘Bad Results’: Comments on Baumeister, Crescioni, and Alquist 4 *Neuroethics* 17(2011).

<sup>76</sup> For a critique of the implication of BLE scholarship that individual agents live out the designs of third-party experts, see Qizilbash *supra* note 7.

<sup>77</sup> Mazahrin R. Banaji and Anthony G. Greenwald, Blindspot: The Hidden Biases of Good People, 146 – 147 (2013) 146-147.

<sup>78</sup> Louise Osborne, ‘German Professor Rebuked for Rejecting Intern over ‘India’s Rape Problem’’, *The Guardian*, March 9, 2015.

<sup>79</sup> Hanno Sauer, Educated Intuitions, Automaticity and Rationality in Moral Judgments, 15 *Philosophical Explorations* 255 (2012).

In the initial years of conducting Implicit Association Tests (IATs), Mazharin Banaji and Kent Greenawald found that participants' subjective opinions of being sensitive about race and gender were contradicted by their intuitive responses to matching words and pictures in IATs (or there was moral confabulation in their stated preferences). The researchers themselves found that despite repeated testing, they were not moral learners: 'Awareness of hidden biases did not seem to help us to eradicate them.'<sup>80</sup> The primary change they observed was when one of their students started 'counterstereotypic' priming prior to these tests, whereby some groups were exposed to pictures of famous black people or women in masculine roles, as against those who were exposed to both stereotypes as well as neutral images such as insects or flowers.<sup>81</sup> The results were a revelation for them, as at least temporally there seemed to be a change in intuitive moral responses. The conclusion they arrive at that the general problem with psychological experiments – that of the temporary effect of priming – is difficult to overcome, requiring a moral manipulation of individual instances.<sup>82</sup> The way out they suggest may be drawn on a study that found IAT participants associate 'female' with 'leader' and 'math' when students have sustained exposure to women faculty members. The conclusion seems to be that sustained exposure to counterstereotypes in social contexts would be the way forward in educating intuitions.

Thus, transpositional objectivity does not lie in information broadening generally as Sen suggests, but in *sustained exposure to counterstereotypic actors in traditional roles of authority*. It might appear that I am unnecessarily steering the discussion back to the relationship between agency, authority and mediation, but consider this: the *fact* of sustained exposure to counterstereotypes would have been a sufficient explanation if mere exposure was successful. This is not the case as is borne out by the fact that mixed-race schooling or the mingling of sexes is not enough to shape intuitive responses away from conservative in-group morals. In keeping with the shaping of responses by authority indicated by the Milgram experiments, I suggest that the *nature* of exposure is of paramount importance.<sup>83</sup> Drawing on the discussion on the influence of authority, and how such influence may be captured in processes of mediation, I suggest the efforts of choice-architects may be concentrated on exposing and providing tools for the negotiation of mediators and principals in positions of authority.

## Conclusion

In the examples provided above, the animating question was how an individual can be gender and race sensitive given one's sensitivity may be unintelligible, and deliberation may lead to misleading intelligibility. To be praised or blamed for being sensitive or insensitive is an important exercise in being held accountable for moral responsibility, but I hope it is clear that my thesis on agency involves identifying attributes of and developing responsiveness to responsibility rather than being held responsible. Such responsiveness would involve identifying and developing moral preferences and choices. But couldn't preferences that reveal gender and race sensitivity also be considered as adaptive preferences; in other words, isn't a moral preference adaptive? Following Khader, if gender and race sensitivity are attributes of a conception of the good, then preferences that correspond with such sensitivity are not deemed to be APs. Even if notions of the good differ over time and space, responding to such notions contextually is still responsive agency. But this brings us back to Bourdieu and Butler – how do we reinterpret the coordinates of public reason that sets the parameters of

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<sup>80</sup> Banaji and Greenwald, *supra* note 77, at 149.

<sup>81</sup> For a recent synthesis of her work on the subject, see Nilanjana Dasgupta, *Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit prejudice, Stereotypes, and the Self-concept in Advances In Experimental Social Psychology* (P.G. Devine and E.A. Plant eds., 2013).

<sup>82</sup> *Ibid.*, at 152.

<sup>83</sup> I cannot at this stage suggest whether an imagined 'sense of authority' would be enough for us to steer our moral agency, primarily because there is no research on such a concept.



responsibility? The explanation we have given so far is to be able to negotiate the mediators that shape agency, forms of authority that influence the operation of mediators and functionally interpret the associations that go with them. This may suggest that our agency is theoretically infinite, especially if the process of negotiation includes the possibility of rewriting the co-ordinates of public reason, or the rules of the game.

Here I would like to remind the reader that our concern is moral agency, rather than agency simpliciter. Take for instance Milan Kundera's explanation of the agency of a novelist. He argues that the greatest novelists are able to reinterpret the art of the novel, not to mention create mechanisms for the appreciation of a novel as an art form: 'it is by tearing through the curtain of pre-interpretation that Cervantes set the new art going; his destructive art echoes and extends to every novel worthy of the name; it is the identifying sign of the art of the novel.'<sup>84</sup> It is worth noting that for Kundera, the novelist's agency is restricted to 'the art of the novel'; this is why he takes pains to de-tether the art of the novel from the novelist's biography as well as 'social responsibility.'<sup>85</sup> Thus the novelist's agency is limited to the life of art, and to that extent is tethered. But where does responsiveness come in, and do we need to be concerned with a 'moral' qualifier? As Kundera says, the judgement as to whether a person is adjudged to be a novelist is decided by the vagaries of history, as well as the transcendence of the temporal. Time in this regard is associative: socially recognised authorities influence the kindness of time as they mediate the validation and visibility of the novelist; by way of an example, Kafka may have been lost to the world were it not for the visibility engendered by Max Brod within the German literature circuit. Further, while becoming a novelist, I would ordinarily be required to satisfy moral responsibility in general; even without going into the complexities of weighing preferences and situationist accounts of primary goods, I would need to behave civilly in public, look after family members (if I do not operate in an individualist culture, and relax the idea that dependent social relations are created out of free will)<sup>86</sup> or add to the economy (the need to earn may even be a *legal* responsibility<sup>87</sup>). To return to AP, it may seem that a novelist's agency is morally less interesting than the agency of a submissive wife. I disagree, and this is why I think the idea of AP provides a 'wound' in the CA to allow an inquiry into agency. I may have had, for instance, a terrible math teacher at school, and received undue encouragement<sup>88</sup> from my struggling poet-father. I convinced myself as a result that I am capable of being only a novelist. Accordingly, I may have a strong 'sense of agency' when I see my words on paper; I am also happiest not when I work for a living or sing the national anthem or have sex, but when I write a chapter that may possibly be lost to the world, or not fit into a canonical idea of what the novel should be. Following Katsafanas and Sauer, I would use 'feedback loops' to decide whether I should be a novelist and how I can simultaneously balance this vocation with the pursuit of other activities that make up the common good. I hope I have been able to show that it is possible for a transpositional observer to adopt objective standpoints in relation to responsive agency: the role of authority, mediators in general, privileged interpretive associations, potential to contest responsibility. The ambivalent novelist is left to her subjective devices to create and invoke associations that allow negotiation and replacement of mediators.

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<sup>84</sup> Milan Kundera, *The Curtain: An Essay In Six Parts*, 92 (2006).

<sup>85</sup> *Ibid.*, at 88 and 99.

<sup>86</sup> For the inevitability of culture in the creation of moral responsibility see Sommers, *supra* note 13.

<sup>87</sup> In the European Union, the law on free movement is tethered to the capacity to earn. See Suryapratim Roy, *Justice as Europe's Signifier in Europe's Justice Deficit?* 90 – 92 (Dimitry Kochenov, Andrew Williams and Gráinne de Búrca eds., 2015). Further, while aspirant migrants are repeatedly allowed to drown to enter some countries, acquiring citizenship or residency by investing into several countries is no big deal. Ayelet Shachar argues that substantive mobility is available only to the 'olympic citizen.' Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 *Yale Law Journal* 2088 (2011). Further, countries such as India that criminalise homelessness without providing social support indirectly make it illegal to live without an income.

<sup>88</sup> Rather than the meagre explanatory power found in the terms 'praise' and 'blame' in relation to the construction of choices, Miranda Fricker develops a framework of 'credibility excess' and 'credibility deficit' that mediate the politics of speech. Miranda Fricker, *Epistemic Injustice* (2007).

Finally, with respect to the constraints of morality on infinite agency, I take a step back and see what some of the scholars we have discussed are getting at. The CA approach itself was sparked off by Sen when he critiqued ‘utilitarian equality, total utility equality and Rawlsian equality’ for providing an insufficient account of equality.<sup>89</sup> In BLE scholarship the primary justification for ‘soft paternalism’ for shaping people’s choices is not because people are flawed (that is the finding of behavioural economics, but is not the normative basis of BLE) but because people’s choices are inevitably influenced by forces that are discursively more powerful than their own deliberation. At the cost of far too liberal a reinterpretation, BLE scholarship is motivated by the value of people being *equally free* to make themselves better off. I suggest therefore that unlike agency for other purposes, moral agency inevitably operates in the shadow of equality. All forms of moral agency operate in the shadow of the value of equality, but they do not necessarily have to adhere to a particular interpretation of it.

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<sup>89</sup> Amartya Sen, *Equality of What?* in *Tanner Lectures on Human Values*, Volume 1 (S. McMurrin ed., 1980).

