Review of “Frontiers of Justice: Disability, Nationality, Species Membership”

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In 2000 Martha Nussbaum published *Women and Human Development: The Capabilities Approach* (WHD), in which she applied the theory of capabilities developed by her and Amartya Sen to questions of justice for women in developing countries, devoting considerable space to religion and the family. In the preface to that book she promised a more comprehensive treatment of the approach and its relevance for other questions of justice in a subsequent book. She compared the relationship between the two books to the relationship between a 10K race and a marathon: the promised book was to be the marathon. The present book, *Frontiers of Justice* (FJ), is at least a partial fulfillment of that promise. It undertakes to show that the capabilities approach offers a better way to deal with disabilities, underdeveloped nations, and animal rights than other approaches.² In what follows I will be treating the book as a theoretical work, but it is much more than that. It is a passionate and detailed discussion of the ways in which the world can be made better for the poor and the disabled, and much of what it has to offer lies in the passion and in the details, none of which can be conveyed in this review.

In WHD Nussbaum set out to distinguish the capabilities approach from utilitarianism, and to show its superiority. In FJ her target is Rawls and contractarianism generally. The theoretical conclusions of the book can be summed up in three propositions:

1. The traditional social contract approach to political theory, based upon the idea of mutual advantage among roughly equal contractors, does not adequately deal with the problem of securing justice for the disabled, for underdeveloped nations, or for animals.

The three categories all pose challenges to the contract tradition, since the disabled and animals are not equal in power or resources to fully capable and competent human beings, and the nations of the world are not even roughly equal.

2. The addition of Kantian restraints upon the contractors, as in Rawls’ Veil of Ignorance, is not enough to mitigate the harshness of the outcome of the contracting situation for these problem areas.

Among other things, the Kantian conception of the person requires that the contractors be fully rational, a requirement that excluded the mentally disabled and animals from participation.
3. The capabilities approach can do better, at least with respect to these three problems, but only if a certain list of capabilities is privileged over others.

The capabilities approach starts from two premises: (1) that all should be brought to a position of rough equality (rather than that all are roughly equal); and (2) that equality is to be measured not in subjective states or in material goods, but rather in the capability to be and to do various things. Jones and Smith might both own bicycles of similar value, but if Jones’s legs are paralyzed this equality of ownership does not translate into equality of capability (even if, for some reason, Jones is just as happy as Smith to own a bicycle). Smith can use his bicycle to get around, but Jones cannot. People differ in their ability to convert goods into the ability to act, and in the end it is the ability to participate, the ability to be and to do, that matters. Any theory, whether a maximizing theory like utilitarianism or a maximin theory like Rawls’ theory or an egalitarian theory, which measures social progress in terms of material goods or subjective satisfaction therefore falls short of an adequate theory.

But not every capability is equally valuable. It might be helpful for us to start by distinguishing Nussbaum’s approach from that of Amartya Sen, who pioneered work with capabilities.

I. The Capabilities Approach.

Consequentialist approaches to distributive justice are distinguished according to what it is that they seek to maximize, or to maximin, or to equalize. The utilitarian wants to maximize utility, which may mean any number of things, including happiness, a subjective state, or satisfaction of desires—which may be either objective or subjective, or may involve both subjective and objective considerations. (In at least one way of understanding the satisfaction of desires, Jones’ desire for a Mercedes Benz is satisfied only if (a) Jones desires a Mercedes Benz; and (b) Jones has a Mercedes Benz. It is not necessary, for his desire to be satisfied, for him to be aware that he has the car; it is enough that he has the car. Suppose, for example, that unknown to him Jones was left a Mercedes Benz in the will of a recently deceased relative. His desire is satisfied though he is not yet aware of it. In that understanding, satisfaction is purely objective. On the other hand, “satisfaction” may also refer to a purely subjective state; in one such sense his desire may be satisfied if he mistakenly believes that he has the car.)

In Rawls’ work, once the demands of liberty and fair opportunity are satisfied it is resources, including income and wealth, that are to be distributed so as to maximize the holdings of the least advantaged. An purely egalitarian theory may promote equality of utility, or of resources, or of something else entirely. The quantities to be maximized or equalized in a given account of justice may be called the “currency” of that account. See Robert Hockett and Matthias Risse, “Primary Goods Revisited: the ‘Political Problem’ and Its Rawlsian Solution,” Cornell Law School Legal Studies Research Paper No. 55 (2006), p. 1.

There are standard objections to each form of currency. To take just two examples, a utilitarianism that would maximize subjective utility must deal with the fact that resources are more efficiently steered toward those who can most easily derive happiness or satisfaction from them and away from those who have most the most difficulty--for example, the disabled. On the other hand, an egalitarianism that would equalize subjective utility must give more resources to the one with more expensive tastes (for example, the lover of fine and expensive wines), and fewer to the one with
cheaper tastes (in Sen’s example, the “tamed” housewife, with lowered expectations for herself). It takes more resources to bring the one with expensive tastes up to the level of happiness that is achieved more cheaply for the one with less expensive tastes.

For reasons of this sort, Sen has argued for a currency of capabilities, defined as ways of being and doing. An egalitarianism of this sort would not aim at promoting an equality of some subjective state, or an equality of goods, but rather an equality of capability: equality of mobility, equality of ability and opportunity to communicate with others, equality of ability and opportunity to engage in leisure activities, equality of ability and opportunity to participate in political activity, and so on. Concern with capability thus has to be distinguished from opportunity: a young woman might have the opportunity to get an advanced degree without having the financial means. But it must also be distinguished from “functioning:” everyone need not be making use of each of their capabilities. It is conceivable that someone may have the capability to participate in elections without actually doing so.

It is easier for some people to convert resources into capabilities than it is for others. Someone who is physically disabled may require more resources to reach the same level of mobility as others. A theory of justice that depends on equalizing capabilities, or some minimum level of capabilities, would direct resources to those who require more to reach certain levels of capability. What the “tamed” housewife would get in the way of resources would depend not on what it would take to make her happy, but on what it would take to make her as capable as others in dealing with the world (whether she chose, in the end, to deal with the world or not). And since it is focused on what people can be and do rather than on their subjective states, it should not be subject to the objection from expensive tastes.

In general, though, Sen has refused to privilege some capabilities over others--that is, he has refused to say that some capabilities are better than others, or that some capabilities are undesirable--and this creates a problem for a theory of justice based upon capabilities. There is a similar problem in hedonistic utilitarianism: If happiness is the good, then all happiness should count in the grand total or the grand average, even happiness caused by the suffering of others, for example. But it is not right, our intuitions say, to encourage the pleasure that comes from suffering, and we should distinguish good happiness from bad happiness. The problem is that it is not easy for the utilitarian to distinguish between acceptable and unacceptable satisfactions without taking a non-utilitarian stand on good and bad states of affairs.

In the same way, as Nussbaum notes, Sen’s reluctance to distinguish good and bad capabilities is an obstacle for a theory of justice.

Sen . . . uses language, again and again, suggesting that freedom is a general all-purpose good, and that capabilities are to be seen as instances of the more general good of human freedom. . . . [But] if capabilities are to be used in advancing a conception of social justice, they will obviously have to be specified . . . . Either a society has a conception of basic justice or it does not. If it has one, we have to know what its content is, and what opportunities and liberties it takes to be fundamental entitlements of all citizens. One cannot have a conception of social justice that says, simply, ‘All citizens are entitled to freedom understood as capability.’ Besides being wrong and misleading in the ways I have already argued, such a blanket endorsement of freedom/capability as goal would be
hopelessly vague. It would be impossible to say whether the society in question was just or unjust. (Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice, “Feminist Economics, volume 9 (2003), pp. 46-47.)

Nussbaum does not share Sen’s reluctance, and gives us a list of ten central capabilities. The capabilities on the list, in my words and in much abbreviated form, are these:

1. Being able to live a life that is worth living for a normal period.
2. Being able to have good health.
3. Being secure against assault, and being free to move from place to place.
4. Being able to use the senses to think, imagine, and reason.
5. Being able to develop emotional attachments to persons and things.
6. Being able to form a conception of the good life.
7. Being able to associate with others, and having the basis of self respect.
8. Being able to live with animals, plants, and the world of nature.
9. Being able to enjoy recreational activities.
10. Being able to participate in politics; being able to hold property.

(FJ 76 - 78. The same list appears in WHD 78 - 80, and in various articles) The better known rights, such as freedom of religion, are intended to be instances of these ten capabilities. Indeed, the list reads very much like a list of human rights, both negative (freedom of movement, freedom of affiliation) and positive (good health, adequate nourishment, shelter), and Nussbaum is very much aware of that. She compares the list to the rights provisions of newer constitutions, and promotes the list as a model of rights. (FJ 154) The question of capabilities as rights, of course, is entirely separate from the question of capabilities as a measure of social progress, and capabilities as rights will require its own separate justification.

II. The Critique of Rawls: The Social Contract Tradition and the Kantian Conception of the Person.

Just as utilitarianism was her target in WHD, Nussbaum’s target in this book is the Rawlsian theory of justice—a theory she concedes is the best political theory we have so far. She finds four problems with his theory, two arising directly from the social contract tradition in which Rawls writes, one from Rawls’ Kantian conception of the person as fully rational, and one from the combination of the two in the theory of primary goods. It is these four problems that cause Rawls to slight the problem of disabilities at the contractual stage, and to defer it to the legislative stage of political development. The same problems afflict his treatment of nations and of animals.

A. The use of income and wealth to index social position. Rawls lists five sorts of primary goods that are used by the contractors in the original position to evaluate the various possible political institutions. Two of these only come into play only after equal liberty and opportunity have been established and we have arrived at the Difference Principle: namely, income and wealth and the bases of self-respect. These are to be distributed in such a way that the least well off will be as well off as possible.

Why does Rawls use income and wealth instead of, for example, capabilities? Because they are measurable, for one thing. If we are concerned not simply to bring the members of society up to a
certain level, but to make sure everyone is as well off as possible, given the accompanying requirement of elevating the least well off, there must be some basis for comparing the holdings of one person with the holdings of another. There is simply no way of comparing different capabilities so that we might conclude, for example, that although in a certain social setting Jones has less of capability C1, he has enough of capability C2 to offset that loss.

For another thing, the differences in capabilities will not be an issue for Rawls; as Nussbaum repeatedly points out, those in the Original Position are of roughly equal abilities, mental and physical. Thus differences in income and wealth or similar fungible goods are as good a measure as any of the relative social benefits enjoyed by members of society—at least those who must be taken into account in the original position. But what about those who are not able to process income and wealth as efficiently as others? What about those who are physically or mentally disabled? That problem will be dealt with later, at the legislative stage. It is not a question of justice for Rawls, as we will see, but a question of charity or benevolence. Much the same is true of animals.

But this deferral to the legislative stage is not innocent, according to Nussbaum.

It skews the choice of primary goods, concealing the fact that health care and other forms of care are, for real people, central goods making well-being possible. . . . Any theory of justice needs to think about the problem from the beginning, in the design of the basic institutional structure, particularly in its theory of the primary goods. (FJ 127)

Is the solution then simply to substitute capabilities for income and wealth as primary goods? That might take us some distance toward justice for all, if it were possible; but given the makeup of the persons in the Original Position it is not possible, according to Nussbaum. And even if it were possible, we would still fall short of complete justice, because of the essential nature of the contract in the social contract tradition.

Nussbaum is not after a social contract solution. Still, any version of the capabilities approach must answer the question of comparability: how do we determine the optimal basket of capabilities when there is no common metric by which to compare losses in one capability with gains in another? Nussbaum’s answer is that the theory she is looking for is at most a partial theory. What she would require is that the constitutional structure lift all members of society to a certain minimal level of capability: for each capability, everyone is to have the same minimum of that capability. No trade-offs are allowed; the question of comparability (among different capabilities) does not arise.

B. The requirement of mutual advantage needed to motivate the original contractors. The motivation behind the social contract is (at least for many in the tradition) to escape a harrowing state of nature and achieve mutual advantage through cooperation. The constitutional aim, therefore, is rooted in self interest. This motivation is not, according to Nussbaum, an essential feature of the social contract. The aim could be, for example, to create a context in which everyone could flourish to the extent possible. Generally, however, the tradition has rejected the idea that benevolence might motivate the contractors. Rawls accepts advantage as motivation out of a desire for theoretical parsimony, constraining it with the veil of ignorance: No one in the Original Position is interested in the interests of others, except insofar as they are part of his own interests. Because of this restriction, the parties to the contract will not be concerned with those who cannot contribute to the advantage of all, and especially those whose consideration would require investment that would
not pay off. They will not be concerned about the “unproductive” members of society--at least not at the contracting stage.

Why not, then, simply add benevolence, if it will take the contract closer to one that is truly just for the disadvantaged? Because to do so would require “a willingness to sacrifice not only one’s own advantage, but also the advantage of the group” (FJ 122) and that would undermine the project itself:

[Adding benevolence as a motivating factor], Rawls objects, would greatly complicate and perhaps render indeterminate the whole question of what principles would be chosen. But if the benevolence added were sufficiently deep and inclusive, the change would also require the approach to depart so far from the idea of a contract for mutual advantage that there would be no point to using the metaphor of social contract at all. (FJ 123)

Nussbaum does not rule out the possibility that some form of contract theory, without the restricting motivation, might do the job. But it is not her intention to provide such a theory. Her aim, instead, is to show that her list of central capabilities, together with the rule that each person is to have at least the minimum level of each, will guarantee justice in each of the three cases she is dealing with.

She must deal, however, with the charge of intuitionism, in two forms. The first form of the charge is that her choice of capabilities--her particular list of ten--is based on intuition only. Her answer to that charge is that every theory at some point must be intuitionistic. Rawls’ own theory rests on considered judgments, a form of intuition; they simply come in at a different point, in reflexive equilibrium in setting up the Original Position. The second form of the objection is that with a list such as she provides, and no method for ordering the list, any balancing of intuitions against one another will have to be based on intuition merely. Her answer to that form of the charge (which she takes to be the more serious) is, as we have seen, that the capabilities are not to be balanced, at least not until the minimal level has been reached. Each person is to be provided with the means for reaching the same level of capability.

It seems to me that the first version of the charge is really the more serious, and I am not satisfied that Nussbaum has answered it. It is one thing to test a theory’s predictions against our intuitions, when the predictions involve concrete cases. We may be inclined to reject utilitarianism, or at least to modify it, because of the implication that in certain concrete circumstances we should punish the innocent. It is another to accept the theory itself on the basis of a direct intuition: to argue, for example, that utilitarianism is self-evidently true, so that its predictions should direct our feelings about cases rather than the other way around. Nussbaum has presented a list of central capabilities without any method for testing any one of them, or any method for testing the claim that justice requires that minimal levels of each be attained by every human member of society. What intuitions support the claim that expending endless resources to bring the severely disabled up to some minimum level is better than expending those same resources to raise many people much farther along the scale of capability, for example? We need not accept the faulty reasoning of _The Bell Curve_ to realize that trade-offs sometimes make sense, even in connection with the most basic level of the most basic capabilities.

C. _The circumstances of justice that (partly) define parties in the original position_. The nature of
the primary goods to be distributed under the Difference Principle is determined in part by the nature of the contracting parties: They are free, equal, and independent. They are not only equal in some moral sense; they must be “roughly equal” in physical capacity and power—a constraint that Rawls takes from the tradition. Thus it is not just an assumption that will set the Rawlsian stage for a more or less egalitarian outcome. According to Nussbaum:

[I]t also does crucial work inside each social contract theory, explaining how political principles come out the way they do. The rough equality among the parties is crucial to understanding how they contract with one another, why they would make a contract in the first place, and what they hope to gain from the social contract. (FJ 31)

[T]he idea is that people will get together with others and contract for basic political principles only in . . . circumstances in which they can expect mutual benefit and in which all stand to gain from the cooperation. To include in the initial situation people who are unusually expensive or who can be expected to contribute far less than most to the well-being of the group . . . would run contrary to the logic of the whole exercise. (FJ 104)

Rough equality thus goes hand in hand with mutual advantage.

Nussbaum, of course, wants to include the weak and the disabled in any deliberation about the basic institutions of society. To let them into the Original Position works against mutual advantage, and another motivation would have to be found to salvage a contract theory that included these folks. But Nussbaum’s is not a contract theory, and does not suffer from these constraints.

D. The Kantian conception of the person. In addition to the basic difficulties of the traditional social contract, with roughly equal individuals working for mutual advantage, the Rawlsian contractors have another constraint: they must be fully rational, and possessing both a sense of justice and the capacity for a conception of the good. Were they not rational, original deliberation would be impossible. Furthermore, the contractors are contracting for persons very much like themselves in this respect. As Nussbaum puts it, those by whom the contract is made are also those for whom it is made. The society that is being set up is therefore a society of rational beings. Just as there is no consideration of those who are not roughly equal in capacity and power at the state of choosing basic institutions, so there is no consideration of those who are less than fully rational, whether human beings who are mentally disabled, or nonhuman animals.

Not that the weak and mentally or physically disabled or animals will not eventually be the object of consideration in Rawls’ theory. Such consideration simply comes at a later stage, as we have seen. Great disparities in ability, either mental or physical, will be taken into account at the legislative stage. But why? Why not include them at the bargaining stage?

The real issue for the contractarian . . . is the relative rarity of the non-‘normal’ impairment (defined as not normal just by reference to their relative rarity); this rarity entails that expensive and difficult arrangements will have to be made to make work and public space fully accessible to people who have them, enabling them to be ‘normally’ productive. Such expenditures, in general, greatly outweigh the return in economic productivity made possible by the full inclusion of people with ‘abnormal’ impairments.
We must set up our society to accommodate normal people, without the less common handicaps, people who will be productive; and from the surplus they create we can fund, legislatively, programs for the disabled. To put it that way, though, makes clear the role the disabled will play in our society: they will be dealt with from the surplus, if any. They will be the objects of charity. Certainly if any alternative approach is available, we ought to consider it; if any way to treat the disabled as partners in a common enterprise exists, we should give it a hearing. The question, then, is to what extent Nussbaum has given us such an alternative.

III. Capabilities and Disabilities.

The concern with disability is with both physical and mental disability, but Nussbaum concedes that here, for the purposes of this discussion, she is more interested in mental disabilities. Her substantive approach to disability begins by making two assumptions that distinguish it from the social contract tradition: She takes benevolence as one of the motivations for cooperation, and she bases human dignity not on the rationality of persons alone, but also on their animal nature, involving as it does vulnerability and need.

We can now connect the two fundamental departures from contractarianism, by saying that this new conception of what is dignified and worthy in the human being supports the departure from [mutual advantage as motivation]. We do not have to win the respect of others by being productive. We have a claim to support in the dignity of our human need itself. . . . Productivity is necessary and even good; but it is not the main end of social life. (FJ 160)

What is the main end? It is “[l]iving with and toward others, with both benevolence and justice.” And a life of that sort is marked by special regard for the ten capabilities.

How can this particular list of capabilities be defended? The list of capabilities can be attached to different conceptions of the good life, and they will prove to be acceptable, Nussbaum insists, to many across a wide (but perhaps not universal) range of cultures--“internationally, across lines of tradition and religion.” (FJ 163)

The claim that is made by the use of this single list, then, is not that there is a single type of flourishing for the human being, but rather, that these capabilities can be agreed by reasonable citizens to be important prerequisites of reasonable conceptions of the person as a political animal, both needy and dignified; and thus these are good bases for an idea of basic political entitlements in a just society. (FJ 182)

But what about those who do not value--indeed, who disvalue--the central capabilities? One of her examples is the Amish, who do not participate in elections and who do not value the ability to vote.

Let me try to reply as follows: These people have chosen to live in a pluralistic democracy and to show respect for its values. . . . To that extent, they are different from other members of their religious group whom we could imagine. These others may of course exist inside a pluralistic democratic society, and their choices will be protected;
but their view will not count as one of the reasonable comprehensive views, since it does not express respect for the different views of their fellow citizens. (FJ 184 and footnote 21)

What the capabilities have in common, then, is that they will be affirmed by everyone who is tolerant, who respects the different views of his fellow citizens. There may be others who do not respect different views about some things, and their views are protected, but they do not count in determining which capabilities are fundamental. The fact, however, that the ones who count have chosen to live in a pluralistic democracy cannot get us very far. Imagine a group, for example, that considers homosexuality morally wrong, for themselves and for others. They may have chosen to live in a pluralistic democracy at a time when that democracy did not respect the right of homosexuals to their own sexual orientation; and they may not be able to leave when that society recognizes the right to privacy of homosexuals. Are they then withdrawn from the list of those who count?

But even assuming that we have settled the question of who is to count and which capabilities are basic, we find ourselves running up against a question that is more central to the theory. It may be that not everyone can be provided with all the central capabilities; and it may be that some who can be provided with all of them would require an extraordinary amount of resources to bring them to that point. It is no longer about mutual advantage, so the mere fact that providing someone with a certain capability requires an expenditure that might not be returned is not a problem. The fact that it might be impossible to provide that capability is a problem though, and so is the fact that in some cases providing the capability might be so expensive that attempting to do it might reduce the standard of living so far that considerations of justice would no longer be among the most important considerations. How are we to treat these cases without abandoning the project? There are two possibilities: We might treat those who cannot reach the minimal level of a given capability as belonging to a different species, and thus not entitled to all the capabilities that go along with human dignity; we might create a different list, or a different threshold. Or we might regard the list as aspirational, something to be achieved when reasonably possible.

Nussbaum rejects the first, and the reason she gives is that it would be too easy to categorize many cases of disability that way, too easy to let ourselves off the hook.

[U]sing a different list of capabilities or even a different threshold of capability as the appropriate social goal for people with impairments is practically dangerous, because it is an easy way of getting off the hook, by assuming from the start that we cannot or should not meet a goal that would be difficult or expensive to meet. Strategically, the right course seems to be to harp on the single list as a set of nonnegotiable social entitlements and to work tirelessly to bring all children with disabilities up to the same threshold of capability that we set for other citizens. (FJ 190)

But we all know that will sometimes be impossible, no matter how many resources we are willing to use up. What then? Then, apparently, we must acknowledge failure and concede that the case is “unfortunate.” (FJ 192) This move, it seems to me, marks the list as--at least in part--merely hortatory or aspirational, just as a list of rights and entitlements might be aspirational when there is no forum for enforcing them. The Italian Constitutional Court has distinguished between programmatic rights and preceptive rights; the latter requiring enforcement, the former--largely
entitlements--not requiring enforcement. But what, then, is the cash value of calling them rights? It lies in the fact that they are meant to guide state action when possible. Is the list of capabilities no more than that? Though I’m sure she would not like the way I have characterized it, Nussbaum seems to favor that option:

The main role of the list in thinking about public policy toward [someone so severely mentally disabled] will be to pose the question: Has the public political arrangement in which she lives extended to her the social basis of all the capabilities on the list? (FJ 193)

But what is the “social basis” of a capability, and how is it distinguished from the capability itself? This is a question that Nussbaum does not answer.

I will grant that the cases in which capability-achievement is impossible will be rare, but it is a factual judgment that will have to be made. And why is it not as susceptible of abuse as the “other list, other threshold” judgment?

IV. Capabilities in the World.

Chapters 4 and 5 extend the capabilities approach to the problem of global justice. The problem here is not just international justice, which suggests questions of justice between nations. In fact in Chapter 4, continuing her critique of Rawls, she objects to the Rawlsian approach to this matter precisely because it tends to see it as a problem of relations between nations, and not as a problem of justice for the citizens of foreign nations. Her own view is, with Grotius, that the problem of world justice is a problem of justice to individuals, not justice to nations.

For Grotius, all entitlements in the international community, including national sovereignty itself, derive ultimately from the dignity and the sociability of human beings. . . . The social contract tradition, by contrast, understands the situation that exists between states as a state of nature, and imagined principles of justice being contracted as if between virtual persons. (FJ 230 - 231)

She criticizes both the “two contract” approach of Rawls (one contract between individuals within the state, a second contract between states), and the “one contract” approach of Pogge and Beitz. The two contract approach to international justice is insensitive to inequalities of power between nations (or else must exclude weaker nations from the contract), just as the basic contract between individuals assumed equality of power; it ignores the global economic order and its depredations; it prevents serious consideration of redistribution across borders; and it is insufficiently respectful of disadvantaged groups within each nation. The one contract approach, on the other hand, is simply too vague, and lacks a theory of motivation, since it cannot seriously be argued that negotiating with the citizens of the world, most of whom live in a state of deprivation, could be for mutual advantage, as the contract tradition requires.

In the first section of Chapter 5 Nussbaum outlines the argument I thought she would make:
1. The capabilities on her list are required for a decent human life.
2. Human beings are entitled to a decent human life.
3. Therefore we are under a collective obligation to provide the capabilities.

The second premise is very powerful, and the missing premise is also very powerful. The missing premise, of course, is

--If everyone is entitled to X, then we are under a collective obligation to provide X.

Given those two premises, I believe, the conclusion does follow. But those two premises require argument to support them, and none appears to be forthcoming. I accept them, and so I accept the conclusion; and it may be that the argument is only aimed at those who do accept them. Still, it would have been helpful to have seen some argument in that direction. There are those within the Western tradition who question whether we are fundamentally entitled to anything but the right to be left alone, and of course there is strand of the egalitarian tradition that argues that we are not under any obligation to provide for those who are responsible for their own undoing. Nussbaum does not seem to recognize any such limitation.

Given her theory of entitlements, it is not surprising to see a defense of rights that go beyond negative rights, as most modern constitutions do. She argues that what is required in any acceptable bill of rights is not only a list of social and economic rights in addition to the purely negative freedoms, but also a list of ways in which the state is required to make it possible to enjoy the negative freedoms: to provide the resources to make it possible for citizens to enjoy freedom of religion and freedom of association, and to block private action that will interfere with freedom of thought and speech. The capabilities approach, she argues, provides for these resources and safeguards.

But we confront now, for the first time, the question of the level of each capability to be provided. We have learned so far that a certain minimum, the same for all, must be guaranteed. But now the question arises, must the minimum be the maximum as well? That is, is everyone to have precisely the same level of each capability, or may there be variation beyond the minimum?

Nussbaum distinguishes the capabilities: For some capabilities, adequate provision is equal provision. Voting rights and religious freedom, for example, must be equally provided: “To give some groups of people unequal voting rights, or unequal religious liberty, is to set them up in a position of subordination and indignity . . . .” (FJ 293) On the other hand, there are capabilities, such as capabilities that depend on the ownership of property, “when what seems appropriate is enough.” Not everyone must have a house of the same value; but all must have shelter. Still, not everything that can be purchased with property is in this category. Education and health care are so fundamental that grossly unequal shares would undermine
the dignity of the recipients. Given that the differences are not too great, just how much inequality in education and health care will be allowed will be reserved for future deliberation--much as Rawls reserved the question of disability for the legislative stage. The overriding concern, in judging all these issues, is the concern for equal human dignity.

To what nations should the capabilities approach extend? Nussbaum takes the notion of overlapping consensus from Rawls; more precisely, she takes the idea of a “hoped-for” overlapping consensus. It should certainly not apply only to Western democracies, where there are common grounds for liberal thinking; it must also include newer democracies like India, which have their own tradition of toleration. Beyond constitutional democracies, it may be extended even to nations like China, where “there are also long-standing seeds of such ideas, and the modern debate has drawn on them, moving liberal ideas into the forefront of political thinking.” (FJ 304) In such nations we cannot assume that the various comprehensive notions of the good will all have room for a common list of central capabilities; but there is enough there that we may “hope for” eventual consensus, and that is enough, Nussbaum believes, to allow us to assert that we are justified in applying the capabilities test to those countries.

[I]t seems to me that in the modern world the ideas of human rights are by now so deeply rooted and so widespread that it is not possible to say of any nation that it cannot achieve such a consensus over time. . . . I conclude that there is no barrier of principle or argument against pursuing the central human capabilities as goals for every nations, and also for international society. (FJ 305)

The partial theory of justice based upon capabilities then may govern not only our domestic decisions, but also our decisions as citizens of the world. (To say that we may judge such nations is not to say that aggression against them is justified on the grounds of their noncompliance with the list, however.)

But how should it govern our decisions as citizens of the world? Are we required to plan our individual lives in such a way as to further, as much as possible, the goal of justice for all in the world? Clearly not; it would require too much of us, and would not, as Nussbaum says, leave each of us with a life. Instead, this is a role for institutions to play, both domestically and globally. It is through institutions of various sorts that justice can be done, institutions which, after all, are designed to solve collective action problems; institutions which can act fairly, where relying on individuals might result in disproportionate shouldering of the burden; institutions which have the capacity to understand and deal with problems of such magnitude. The domestic institutions that serve this purpose start at the most general level with the departments of government, structured according to separation of powers and some form of decentralization like federalism, and limited by judicial review, and work their way down through the various agencies of government, down to the police and the educational system. Together with all this there must be policies, enforceable in the courts and through the agencies, to
prevent corruption and discrimination.

And on the international level? Nussbaum is not interested in the establishment of a world-state, which would not be sufficiently accountable, whose crimes would not be subject to review by other states, which would not allow sufficient diversity. Instead she is in favor a thin and decentralized international structure, one not too different except in motivation (or so it seems to me) from the structure in existence now. It would depend on the internal domestic structures of the individual states, motivated by a concern for redistribution of wealth among nations; multinational corporations, motivated by a concern for promoting capabilities in the places where they do business; global agencies like the International Monetary Fund and the World Bank; international bodies like the United Nations and the International Criminal Court; and finally NGOs of various kinds concerned with problems of human development in the world. But the international order is not coercive:

[T]he allocation [of responsibilities to these various entities] is an ethical allocation, and political only in the sense that it is aspirational and we should try to bring it about, since there is not coercive structure over the whole that would enforce on any given part a definite set of tasks. (FJ 315)

Nussbaum ends her consideration of global justice with ten “Principles for the Global Structure.” These are, I think, worth repeating here. We must first require of each nation that it do what it can to maintain the capabilities of its citizens; we recognize, though, that the poorer nations can do only so much and will require help. Second we must respect the sovereignty of nations; though persuasion and coercion through treaties and international law are permitted, forceful intervention is permissible only in rare circumstances. Third, the richer nations must give a substantial portion of their surplus to poorer nations. (She mentions 2% of GDP as a desirable target; the U.S. currently spends .01% of its GDP on foreign aid.) Fourth, multinational corporations must be required, by domestic legal systems but also by the good consciences of their managers and shareholders, to attend to questions of human development. Fifth, the international economic order must be fair to poor and developing countries. Sixth, there must be a thin international structure that is concerned with international criminal law and crimes against humanity; with environmental and health issues; with trade and labor relations; and with redistributive taxation. Seventh and eighth, the focus must be on the disadvantaged and on care for the disabled, the ill, children and the elderly. Ninth, questions of justice should extend to the family; there should be no distinction between the private and public spheres such as exists now. And tenth, a special responsibility for education:

All institutions and individuals have a responsibility to support education, as key to the empowerment of currently disadvantaged people. Education is a key to all the human capabilities. And, as we have seen, it is among the resources most unequally distributed around
the world. (FJ 322)

V. Conclusion.

It seems odd that Nussbaum does not mention the relationship of the capabilities approach to traditional egalitarianism; it seems odd, for example, that she does not mention Roemer. See, for example, John Roemer, *Theories of Distributive Justice* (Harvard, 1996). The book takes Rawls as its foil, of course; but is Rawls contractualism and not his egalitarianism that is the focus of her critique. For all her discussion of utilitarianism, the theory of capabilities is at base an egalitarian theory. It seeks equality in the distribution of capabilities, at least to the level of adequacy; it does not countenance trade-offs; and it is open to many of the objections that egalitarianism is open to. For one thing, it does not have a place for individual responsibility, and the capabilities approach may require society to provide for the capabilities of those who refuse to provide for themselves.

Still, in the world we live in that last point is merely a theoretical quibble. A great number of the world’s people are drowning in poverty. Great numbers of women around the world are deprived of any sort of basic human freedom. Children die early; men and women work in conditions of slavery. Women and men turn to prostitution to support their families and themselves. Before we get to the point where we are entitled to blame whole societies for their refusal to work, we ourselves have a great deal of work to do.

The book has very little to do with what made the capability approach important, i.e., its criticism of utility and resources as measures of social progress. It has, on the other hand, a great deal in common with an approach based upon rights, and it seems to me that the book would not be much different if it were predicated upon a list of basic rights rather than central capabilities. It is, in fact, a theory of rights to certain capabilities, and in an obvious sense it is much fuller than the theories of rights we are accustomed to. It not only includes positive entitlements, which many theories of rights and many constitutional lists of rights also include. It also gives a meaning to the negative rights, to freedom to associate, freedom of speech, freedom of religion, and to participatory rights like the right to vote, that makes clear that the state has a role in enabling citizens to make use of those rights.

*Frontiers of Justice* has faults. It could have been organized better. It is repetitive. (In some places the same sentences are inexplicably repeated several times within a paragraph.) It takes a great deal for granted. But the problems it deals with are pressing problems, and they cannot be ignored.

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Note

1. In this review I will concentrate mainly on the first two categories, people with
disabilities and underdeveloped nations. The same defects that taint the contract approach with respect to the mentally and physically disabled will taint its approach to animals.