

**FEMINISM EMBRACES THE SEWING MACHINE:<sup>1</sup>**  
 MARTHA NUSSBAUM'S ETHICAL UNIVERSALISM IN A PLURALIST WORLD

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**Abstract:** This paper examines the adequacy of Martha Nussbaum's approach to social justice; in particular, her political-moral insistence that the governments of all nations should secure a minimum threshold of "central human functionable capabilities" among their citizenry. Nussbaum presents her project as unashamedly universal and essentialist, yet at the same time sensitive to local particularity as well as flexible in its application to different contexts. This paper takes the position that Nussbaum's feminist internationalism is workable, despite some problems her proposal encounters with regard to justification, institutional conservatism, and claim that the discourse on capabilities both interprets and improves upon the language of human rights.

When thinking about matters of human dignity, women's equality, public policy or economic development, Martha Nussbaum argues that the best starting point for reflection is one which begins with a conception of the human being. Her aptly named *capabilities approach*, an approach which implores the nations of the world to look after their citizen's "human capabilities" or "what people are actually able to do and to be," is both neo-Aristotelian in the substantive account of human flourishing upon which it depends, and Rawlsian/neo-Kantian in its reliance upon a political, not metaphysical justification, as well as in the respect it shows for persons to pursue their own comprehensive doctrines of the good.<sup>2</sup> Though the essentialism of her project is obvious, Nussbaum insists that her form of universalism does not require *sameness* in the following three ways – the list of central capabilities requires no particular account of human nature for support, the ten central capabilities remain revisable and realizable in multiple ways given local beliefs and circumstance, and the proper political goal for adults is and will

remain *capability* development and not actual or requisite *functioning*. This nod to pluralism notwithstanding, Nussbaum's use of a single set of norms coupled with her demand for institutions such as religions or the family to reform whenever their practices harm the exercise of the central capabilities, reveal that she is unwilling to permit any and all conceptions of the good to flourish for the sake of multicultural toleration or political compromise. Moreover, given the international focus of the approach and its stipulation of a singular account of norms which all nations of the world must respect, the capabilities approach should be read as interpreting, and in some ideal sense even replacing, the language of international human rights (WHD 5).

The aim of this paper is to explore Martha Nussbaum's approach to social justice, especially as it relates to the more difficult question of how human rights in particular or *any* set of universal norms regarding human treatment can be given an adequate philosophical justification. This paper will be organized in five sections. The first will provide an overview of Nussbaum's capabilities approach — its intended normative and comparative aims, its actual content, and its implications given anti-essentialist, cultural relativist, and post-colonial criticisms of ethical universalism. In the second section, I will critically examine the two-part justificatory scheme that Nussbaum offers, the *substantive* account based on a purportedly “intuitive” idea of human dignity, and the *procedural* one based on the Rawlsian idea of “reflective equilibrium” which itself has multiple parts. In that section I hope to show that while Nussbaum shares Rawls' propensity to bracket “comprehensive doctrines”<sup>3</sup> and specifically religious beliefs for political purposes,<sup>4</sup> she does not endorse fully Rawls' penchant for pure proceduralism since she fully, and I think correctly, acknowledges we can never exhaust our need for ethical evaluation or judgment.<sup>5</sup> No doubt much of the success of Nussbaum's

approach will depend upon how conflicts between different central capabilities will be resolved, and to that end, the third section will assess Nussbaum's method of adjudication between religious capabilities and other types when they conflict. To be sure, religion will not be treated simply as a test-case for the capabilities approach, but the aim of this section will be to consider the adequacy of her proposal to honor religion's central place of importance in the lives of many while at the same time appropriately limit the amount of religious "special pleading" which may sometimes come at the expense of women and/or minorities. As in the case of religion, the feasibility of the capabilities approach on an international scale will depend in large part on its conceptual relationship to human rights, given that the language of rights, however contested, remains the primary moral concept when discussing cross-cultural norms. My fourth section, then, will specifically address the reasons why Nussbaum believes that the language of capabilities *adds* to rather than obscures the language of rights. In my concluding section, I hope to critically assess the capabilities approach in light of both the afore-mentioned and other issues, as well as provide my endorsement of several of its features.

## **I. THE CAPABILITIES APPROACH**

### **A. The ten central human capabilities**

The central aim of the capabilities approach is to ensure that each and every individual has the capability to function in a "truly human way" as measured by an Aristotelian-inspired account of human flourishing. It should be noted from the outset that Nussbaum originally developed her ideas in independence from Amartya Sen, though their projects became fused while the two were working together in 1986 at the World Institute for Development Economics Research (WIDER) after they noticed that her ideas in the context of Aristotelian scholarship

bore a striking resemblance to his approach in development economics.<sup>6</sup> This note about links to Sen's work notwithstanding, the first point to make about Nussbaum's capabilities approach is that it is highly normative and evaluative, with its central idea being a *moral* claim that only certain human abilities should be developed. In other words, the approach does not simply "read off norms from the facts of human personality," but distinguishes between those capabilities worthy of promotion and those which should not be encouraged (*e.g.*, our capabilities for cruelty or aggression (WHD 83, 156)). Her most recent formulation of the list of the ten items deemed worthy of inclusion, a list which may suggest a parallel set of Ten Commandments to honor them,<sup>7</sup> is produced below in its entirety:

#### CENTRAL HUMAN FUNCTIONAL CAPABILITIES

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. **Bodily Health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. **Bodily Integrity.** Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, *i.e.*, being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason – and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one's own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.
5. **Emotions.** Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's

emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. **Practical Reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience.)
7. **Affiliation. A.** Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capacity for both justice and friendship. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)  
**B.** Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason an entering into meaningful relationships of mutual recognition with other workers.
8. **Other Species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.
9. **Play.** Being able to laugh, to play, to enjoy recreational activities.
10. **Control over One's Environment. A. Political.** Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.  
**B. Material.** Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure (WHD 79-80, APHC, 6-7)

The above list is composed of "separate and indispensable components" according to Nussbaum, and as such reflects Aristotle's insistence on the incommensurable and plural goods. By this, Nussbaum means to imply that no one item on the list can be substituted for a larger portion of another, for all items are to be regarded as equally valuable in themselves even as they additionally are instrumental to further pursuits (C&HR 286). Seen in this light, the list can be compared further to Rawls's account of primary goods, the analogy being that both items make

any choice of life possible and thereby merit a “special claim” to be supported for political purposes in a pluralistic society (WHD 75).<sup>8</sup> In fact, Nussbaum’s egalitarian and non-elitist commitments can be further evidenced by her rejection of the perfectionist view that the capabilities of a hypothetical farmer, mother, or “sweeper of the streets” are in anyway less valuable or “lower” than those of any prominent scientist whose abilities are believed to be especially needed by society (APHC, 129). While this anti-utilitarian desire to preserve the plurality and distinctiveness of goods is to be commended, it seems right that nations should be allowed to set priorities regarding the capabilities given the dual recognition that her approach is supposed to be oriented towards public policy and that all governments called upon to implement it have finite, and in some cases extremely limited, resources. In the words of Susan Wolf: “where people are starving it seems absurd to occupy oneself with the quality of their relationship to nature.”<sup>9</sup>

While still clinging to this idea of the good as plural, even Nussbaum flags “practical reason” (rubric #6) and “affiliation” (rubric #7) as especially important, since the two purportedly “organize and suffuse all the other capabilities, making their pursuit *truly human*” (emphasis added, C&HR 288, WHD 82, 244). That the neo-Aristotelian Nussbaum should highlight practical reason among the other capabilities should not be surprising, given Aristotle’s famous discussion of the primary role of reason in his “human function” argument of *NE* I.7 (1097b33-1098a6). Likewise, the special attention Nussbaum draws to affiliation mirrors Aristotle’s contention that the human being is by nature a political being, that friendship is important to *eudaimonia*, and that the *polis* is natural. Even so, it remains to be shown what Nussbaum means by her claim that practical reason and affiliation make life “truly human.” The answer, surprisingly, is found in her reading of what she believes Marx found in Aristotle – that

there is something about doing things in a *human* way, not in a mere herd or animal manner.<sup>10</sup>

She writes:

In Marx's example, a starving person doesn't just use food in a fully human way – by which I think he means a way infused by practical reasoning and sociability. He or she just grabs at the food in order to survive, and the many social and rational ingredients of human feeding can't make their appearance. Similarly, he argues that the sense of a human being can operate at a merely animal level – if they are not cultivated by appropriate education, by leisure for play and self-expression, by valuable associations with others; and we should add to the list some items that Marx probably would not endorse, such as expression and associational liberty, and the freedom of worship... (WHD 72)

As we shall examine more closely in the following section on justification, Nussbaum's point is *not* that practical reason and affiliation are the two ends to which all others should be reduced, but that all items should be available in a form that involves reason and affiliation so that it is “worthy of the dignity of the human being” (WHD 72).

The second point to make about Nussbaum's capabilities list is that realization of any of its items will require both the development of innate abilities as well as an environment that is favorable to their cultivation and exercise (WHD 85, C&HR 290). This is why the list for Nussbaum is one of *combined capabilities*, by which she means the appropriate combination of “internal fitness” and “external conditions” (WHD 85, C&HR 290). More specifically, in order for an individual to demonstrate internal fitness, (s)he must have both *basic capabilities*, or the “innate equipment” that is the necessary basis for developing more advanced capabilities,<sup>11</sup> as well as *internal capabilities*, or “mature conditions of readiness” to function provided that there are no outside impediments.<sup>12</sup> To use her example, a woman who has not undergone female genital mutilation (fgm) most likely has the *internal capability* for sexual pleasure, yet that same woman would lack the *combined capability* for sexual expression if, for example, she is prevented for cultural reasons from re-marrying as some widows in India are (WHD 85). To be

sure, the distinction between *internal* and *combined* capabilities is not very sharp, as even Nussbaum concedes that proper development of an internal capability usually requires favorable conditions, most likely even actual functioning (*ibid.*). As we shall see later, this is the principal reason why Nussbaum will require actual *functioning* in children in areas such as health and education.

Before we proceed to a discussion of the intended aims of the capabilities approach, the final point we should make regarding the list is that it is admittedly provisional in nature.<sup>13</sup> As she puts it, “the list remains open-ended and humble; it can always be contested and remade... Indeed, part of the idea of the list is its *multiple realizability*: its members can be more concretely specified in accordance with local beliefs and customs” (WHD 76, C&HR 286). According to Nussbaum, some rubrics on the list will seem to be more fixed than others, *e.g.* the right to bodily integrity, while others such as the capability to be in relation to other species and to the world of nature (rubric #8), might find more heated debate in some corners of the world (WHD 77). Thus, given her “methodological commitment to cross-cultural deliberation and criticism,”<sup>14</sup> as well as her efforts to “emphasize the affiliations of the approach with liberal rights-based theories,” the list must oppose rigidity and remain adjustable at all times (C&HR 277-278). To be sure, one major advantage of flexibility is that the approach can accommodate changing needs of a changing world without having to invent reasons why the stated demands are “timeless,” as many human rights defenders and traditional natural law theorists have been pushed to demonstrate regarding their respective theories (WHD 78-79 at note 81).<sup>15</sup>

Nussbaum’s capabilities approach, however, does not require any concoction of elaborate myths about the *a priori*, pre-political nature of the capabilities (*pace* the Lockean and Hobbesian “state of nature” which serves this very task),<sup>16</sup> but can argue that certain requests, such as literacy in

the rubric on *senses, imagination, and thought*, should be understood as nothing more than a “concrete specification for the modern world of a more general capability that may have been realized without [it] in other times and places” (*ibid.*) On the other hand, one serious drawback of this degree of flexibility is that a list which is subject to endless historical or cultural revisions may slide very quickly into a form of communitarianism or relativism to which her theory is conceptually and principally opposed.

### **B. The aims of the capabilities approach**

Having spent some time enumerating the contents of Nussbaum’s list of ten central human capabilities, we should now discuss its two major aims. In the first case, Nussbaum intends to provide a philosophical underpinning for the constitutional law of every state, so that the capabilities are established in every nation as a bare social minimum of what “respect for human dignity requires” (APHC, 124). Though it is clear that actual functionings, and not simply capabilities are what render a life fully human “in the sense that if there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained,” Nussbaum takes great pains to emphasize that it is *capability*, and not requisite *functioning*, which should be the appropriate public policy goal (with exceptions noted below, (WHD 87)). The secondary aim for the approach is to replace other common ways in which the quality of life is compared across nations, such as GNP per capita, utility or subjective-welfare, and distribution of resources. I shall now consider these two aims in turn.

The capabilities approach, in the first instance, is oriented towards public policy in hoping to secure constitutional principles in every nation which in turn will secure the ten central capabilities for all citizens (WHD 171). In essence, Nussbaum’s vision is for each and every person to be treated as “worthy of regard,” and as morally prior to the perceived needs and/or

interests of larger units such as religions, families,<sup>17</sup> or other conglomerations of people (73-74). In fact, respect for persons as ends in themselves entails respecting individual choice with regard to functioning, for in a pluralistic society not all will wish to actualize their entire set of capabilities even if sufficiently equipped to do so. For example, some persons may wish to strenuously fast instead of be well-nourished, just as some women may elect to live a “traditional gender-divided mode of life” even if opportunities for work outside of the home are made available. The point to underscore, however, is that there is a difference between fasting and starving, or electing to stay at home as opposed to having no other options, and Nussbaum’s approach is designed to honor that distinction (WHD 87, APHC 123). Finally, it should be noted that though Nussbaum believes that her approach represents a “necessary condition of justice for a public policy arrangement,” she is well aware that her account does not provide a full theory of justice, and to some extent is logically independent of one (WHD 71).<sup>18</sup> For by her own admission, a full theory of justice would cover a number of other important issues left unsettled by her account: what to do after citizens have reached the threshold, the appropriate role of the public sphere vis-à-vis incentives to private actors, matters relating to private & public property, justice between generations, civil disobedience, and re-distributive justice between nations (WHD 75 at note 75).<sup>19</sup>

Two further caveats about the political role of the capabilities should be mentioned before we proceed to its secondary aim. The first is that meaningful choice in adulthood is made possible only by actual functioning in childhood,<sup>20</sup> which is why Nussbaum believes that governments may legitimately require some areas of functioning in children — *e.g.*, education, health, emotional well-being, bodily integrity, and dignity (WHD 90). Without actual exercise, the danger is that our capabilities would become “fruitless, cut off, in some way but a shadow of

themselves” (C&HR 291-292, WHD 83-90).<sup>21</sup> The second caveat is more controversial, and essentially gets to the heart of the tension between the libertarian desire to be able to form any contract (s)he elects provided that the harm-principle is not violated, and the State’s desire to act paternalistically on the behalf of its citizens even if against their stated preferences. More specifically, Nussbaum’s carefully finessed point is that while *capability* remains the appropriate social goal for adults in most cases, there are certain areas in which the state may require actual *functioning* within limits set by an appropriate concern for liberty. For example, in cases where a person wishes to sign-away one capability or another entirely (*e.g.*, commit suicide, bond herself into slavery to another) or put herself in danger of severely threatening a capability in a particular serious or irreversible way (*e.g.*, use illegal and dangerous drugs, engage in extremely violent sports, drive without safety precautions such as seat-belts and helmets) the government may prohibit or otherwise regulate certain activities as they already do in matters of health in many modernized countries (APHC 130-131, WHD 94-95). In fact, with respect to women’s well-being in particular, Nussbaum is especially concerned about capability-surrender in matters of reproduction, where state concerns about population pressure “frequently lead to policies that actively promote such surrenders as an inexpensive form of contraception” (WHD 94). To be sure, there are many controversial issues involved when assessing the correct balance between individual liberty and a compelling state interest to interfere, and Nussbaum’s approach does not cover them all. But the basic idea behind her argument is correct — the libertarian fantasy of a minimalist state in matters of governmental intervention in matters of personal liberty must be tempered, given the values we place on health and bodily integrity and our recognition that it is not always wise to leave such decisions up to personal choice.

Nussbaum's attempts to negotiate between the competing values of individual liberty and legitimate state interest demonstrate very clearly that there can be no hard and fast rules which determine in advance which capabilities-threatening activities will be deemed acceptable (*e.g.*, professional boxing?) and which may not (*e.g.*, the bar sport of dwarf-tossing?). For the neo-Aristotelian like Nussbaum, this difficulty is not to be bemoaned but expected, since the ability to accurately discern the "salient features of one's particular situation," is the core of what *phronesis* is really about (LK 37). In our next section on justification we shall have much more to say about the role of ethical evaluation and judgment in Nussbaum's capabilities approach. But for now, let us press on to secondary aim of the capabilities approach.

The weaker aim of the capabilities approach for Nussbaum is that it become the relevant space within which to compare the quality of life of individuals, as well as to assess social progress across nations in meeting basic needs and entitlements (C&HR 279). Against three major rivals: GNP per capita model, a utility model which measures subjective welfare, and a resources model which examines their distribution, Nussbaum proposes that we instead compare the degree to which citizens of every nation, taken one by one, are in possession of the ten central capabilities, and the degree to which their surrounding environs are conducive to their potential functioning. A short description of each rival approach together with a brief discussion of the relative merits of hers should prove useful in showing more clearly what the capabilities approach hopes to accomplish and, as we shall see later, actually is required by the form of philosophical justification she adopts – "reflective equilibrium."

The popular *GNP per capita model* fails for two principal reasons according to Nussbaum: it does not answer the question of actual distribution,<sup>22</sup> nor take into account other important elements in life which are not always well correlated with wealth and income, such as

“educational opportunities, health care, life expectancy, infant mortality, the presence or absence of political liberties, the extent of racial or gender inequality (WHD 60-61, C&HR 280-28). Not surprisingly, the *utility model* faces similar problems in neglecting to consider distribution when aggregating pleasure, since its method does not respect the difference between persons nor the incommensurability of plural goods. Of course, while there may be myriad reasons to reject utilitarianism as an ethical model or a way to compare the quality of life across countries, Nussbaum’s main problem with it is that desire is not always morally relevant nor should be treated as such. For Nussbaum together with Sen argue that a person’s perceived well-being is not a very reliable indicator of well-being, given the role of “adaptive preferences,” or the phenomenon which tracks the malleability and manipulation of desire given the laws, institutions, and conditions under which a person lives.<sup>23</sup> More specifically, what “adaptive preferences” show is that people commonly re-adjust their aspirations to what they can realistically achieve, *e.g.*, as children we may have wanted to fly like birds, as adults we no longer yearn to sprout wings (WHD 61-65; C&HR 282-283). Another major problem Nussbaum finds with the utility model is that utilitarianism would value the capabilities only because of subjective approval, yet in her view the capabilities are “intrinsically worthy,” which means that capability-failure in anyone should be regarded as tragic and unjust whether or not the agent expresses actual dissatisfaction about this lack (WHD 144). To be sure, that Nussbaum regards the central capabilities as valuable in themselves does not mean that she completely disregards the role of preferences nor has a quasi-Platonic conception of the good which is defined without any recourse to our subjective appraisal. Rather, the central question for Nussbaum is and will remain the following: “under what conditions are preferences a good guide to such fundamental issues of social choice, and under what conditions might we be justified in departing from or

criticizing some of them in the name of important norms such as justice and human capability? How should such a justification go?" (WHD 115).

Finally, a *resources model* approach such as John Rawls' which looks closely at the distribution of resources and asks in particular how the worst off citizens are doing with respect to them is believed to be initially more promising than the others. Yet her primary concern regarding it mirrors Sen's famous quarrel with Rawls, and that is that individuals vary in their need for resources and in their capacity to convert them into valuable functioning (C&HR 284, SSJ 34, WHD 68).<sup>24</sup> In other words, physical and social variability among individuals will greatly affect the amount of resources each will need to overcome certain impediments to functioning, *e.g.* nutritional needs will vary with age, occupation, and sex; and persons negatively affected by traditional hierarchy or prejudice may need more resources to overcome these inequalities than others not so affected (WHD 69, C&HR 284).<sup>25</sup> Nussbaum, however, does find Rawls' resource-based approach attractive in his intentional avoidance of prescribing the values of human life, since Rawls' theory of justice encourages individuals to select their own course of life in accordance with their own notions of the good. Nonetheless, for all of Rawls' sensitivity to cultural and religious difference, Nussbaum finds especially problematic his insistence that political liberalism has found a consensus only within a particular Western tradition of political philosophy and thus his belief that justification is limited there.<sup>26</sup> In sum, Nussbaum finds her approach superior to Rawls' in two separate ways – in her recognition that individuals will vary in their needs for resources, and in her offering and defense of the protections afforded by political liberalism to all of the world's people – not only Westerners.

To recapitulate, the capabilities approach does not ask how satisfied each person is, nor how much in terms of resources each individual commands, but *what each individual is able to*

*do and to be?*, and then requires the governments of all nations to secure a minimum threshold of capabilities for all under their care (C&HR 285). Certainly the success of Nussbaum's ethical universalism will not stand or fall on the question which model of quality of life comparison is best, for the purpose of presenting the rivals was to better understand, by negative example, her own proposal. Whatever the merits are of her approach against all others, it is at least worth mentioning that the Human Development Reports of the United Nations Development Programme ("UNDP") since 1993 have adopted the Sen-Nussbaum model of assessing quality of life using the concept of people's capabilities (C&HR 275).

### **C. Implications**

Before turning to a discussion of justification for Nussbaum, it would be useful to pause here to reflect on the implications of the approach thus far considered. That Nussbaum hopes the capabilities approach will serve as the philosophical foundation for constitutional principles everywhere, and that she is committed to making judgments regarding the quality of life across cultures, readily demonstrate her thoroughly and unashamedly universalistic aspirations. Nussbaum, in fact, is convinced that "the human personality has a *structure* that is at least to some extent independent of culture, powerfully though cultures shapes it at every stage" (emphasis added, WHD 155). Furthermore, that Nussbaum is seeking to secure the capabilities for each and every person means that larger entities such as cultures, religions, families, and other groups may be forced to revise their institutions or practices should they impede capability development. Thirdly, that Nussbaum offers only *one* list of capabilities which purportedly generalizes to all human beings reveals that her approach contains within it a thoroughly "objective" account of the good, whereby the good is measured in part independently of an agent's subjective desire. Nussbaum, in fact, pushes the highly essentialist character of her

approach when she contends, in the context of a woman electing to stay in an abusive marriage, that “there is something wrong with the preference (if that’s what we should call it) to put up with abuse... that there is something wrong with not seeing oneself in a certain way, as a bearer of rights and a citizens whose dignity and worth are equal to that of others” (WHD 113).

Most assuredly, relativists, anti-essentialists, communitarians, libertarians, post-colonialists who fear another onslaught of Western cultural imperialism, feminists who deny the utility of using the category “woman,” and still many other critics will have numerous objections to or at least worries about Nussbaum’s ethical universalism. Yet however aware Nussbaum is to their concerns, she quite frankly is not very impressed with their arguments. For example, against those who claim that all values are local and thus insist that their group need not subscribe to one set of universal norms, Nussbaum adopts a hermeneutics of suspicion regarding such advocates of radical sectarianism,<sup>27</sup> and further interrogates the conceptual coherence of any plea for toleration or respect for difference given that those concepts themselves require a commitment to universal values (WHD 32). Moreover, against those who accuse her political theory as inextricably Western or denounce women seeking to secure liberal protections as aping the West, Nussbaum retorts that such criticisms represent empirical falsehoods based on ignorance of the histories of non-Western indigenous movements of resistance.<sup>28</sup> What’s more, even if it could be established that feminism and the ideals of political liberalism have “Western” roots, Nussbaum would not concede that matters of origin are even morally salient. That is, given the descriptive fact that “people are resourceful borrowers of ideas” (*e.g.*, “the ideas of Marxism, which originated in the British Library, have influenced conduct in Cuba, China, and Cambodia”) and the prescriptive one that we should uphold the best ideas we can find whether local or foreign, the question of origins should not be treated as a matter of decisive ethical

importance (WHD 48). Finally, against those who argue that appeals to human nature cannot withstand the post-modern attack(s) on essentialist metaphysics, Nussbaum will argue, as we shall see in the next chapter, that an “internalist” account of human nature can be defended even without the belief in metaphysical realism, or the view that there is some determinate way the world is which is independent of the interpretive workings of our cognitive faculties.

For all of Nussbaum’s dismissive remarks about the various oppositions to universalism, the truth is that her account even at the outset is defensively presented as highly attuned to cultural and religious pluralism, feminist fears regarding essentialism claims, and the pernicious effects of Western cultural imperialism. In fact, the larger claim of her approach is that she can be committed to liberal feminist goals without trampling on difference:

I shall argue that it is possible to describe a framework for such a feminist practice of philosophy that is strongly universalist, committed to cross-cultural norms of justice, equality, and rights, and at the same time sensitive to local particularity, and to the many ways in which circumstances shape not only options but also beliefs and preferences (WHD 7)

In sum, Nussbaum’s contention is that a recognition of the good of diversity does not necessarily undermine the search for universal values, but actually invites us to inquire into them because we will need to know whether any given value in question will be worth preserving. In her own words, “...to ask this entails a very general universal framework of assessment, one that will tell us what is and is not beyond the pale...” (WHD 50). Nussbaum concludes her response to the critics of universalism by providing a five-point outline designed to assuage these and other fears: 1) the list will be specified at high level of generality, leaving room for nations to specify the items in accordance with their history and problems, 2) capability and not functioning will be the appropriate public policy goal for adults in most cases, 3) various liberties, and choice itself will be put in a place of prominence on the list, 4) the whole list of capabilities will be promoted

for political purposes only (*e.g.*, not because of an Aristotelian account of the virtuous life or other comprehensive doctrine), so that its core can be the object of overlapping consensus, and 5) implementation will be left to the internal political processes of each state (WHD 105, APHC 132).<sup>29</sup> Whether this manner of negotiating between universalism and particularity is satisfactory will be the subject of our next section.

## II. JUSTIFICATION

*“We need, that is, to be able to assert two things: first, that we are essentially beings of a certain kind, and second, that there are modes of treatment that are appropriate, and others that are inappropriate, for beings of this kind. If we have no essential nature as human beings, how are we to understand the complaint that certain kinds of treatment are ‘dehumanizing’?”*

--Louise M. Anthony, “Natures and Norms” *Ethics* 111 (2000): 11

The above quotation reveals a need for an underlying conception of human nature in order for us to recognize the suffering of others or even make sense of the claim that certain forms of conduct are harmful or bad. Nussbaum readily acknowledges the need for justification of this sort, and offers two kinds of grounding in support of her claim that the ten central capabilities should be made available to each and every person. The first is based on an “intuitive” idea of human dignity and is inspired by what she claims is the “Aristotelian” approach in ethics – one which draws ethical conclusions from ethical premises alone – as well as the Aristotelian account of human flourishing which takes practical reason and affiliation as central to a truly human life. Though the above justificatory scheme is based on a (partial) conception of the good life, since 1994 she has endorsed a form of Rawlsian political liberalism and accordingly has argued in her second account of justification that we should seek to establish “reflective equilibrium” between our considered judgments or intuitive ideas on the one hand, and the conception of justice being considered on the other, in this case her proposed approach to

focus on human capabilities (WHD 72). By moving from the intuitive idea which she believes has homes in many traditions, to this politically liberal conception of human capabilities which can be the object of an “over-lapping consensus,” Nussbaum intends to show convergence between her substantive and procedural accounts of the capabilities approach (APHC, 118, WHD 151). Thus, in order to understand the types of justification that Nussbaum offers, we must get clear on both what Nussbaum means by the internalist-Aristotelian approach in ethics as well as a host of Rawlsian concepts upon which her political theory depends. It is to these discussions which I now turn.

### A. The Substantive Account

Nussbaum’s substantive account shows influence from Aristotle’s writings in two ways<sup>30</sup> – in the approach it takes to settle ethical disputes, and in its use of his conception of *eudaimonia* or human flourishing, specifically his notions of human capability (Greek *dunamis*) and functioning (Greek *energeia*). Nussbaum finds that Aristotle’s general approach to ethics sheds light on the larger question involved in any ethical enterprise, namely “is there any coherent way of establishing a foundation for our attempts to answer the question, ‘How should one live?’” (AHN 86, LK 25)<sup>31</sup> She believes, along with many others, that Aristotle’s point of departure for ethical deliberation is also good for us because of its inclusiveness. In her own words:

[the question] presupposes no specific demarcation of the terrain of human life, and so, *a fortiori*, not its demarcation into separate moral and non-moral realms. It does not, that is, assume that there is, among the many ends and activities that human beings cherish and pursue, some one domain, the domain of moral value, that is of special importance and dignity, apart from the rest of life. Nor does it assume, as do utility theorists, that there is a more or less unitary something that a good agent can be seen as maximizing in every act of choice. It does not assume the denial of these claims either; it holds them open for inquiry within the procedure – with the result that, so far, we are surveying everything that

Aristotle surveys, that we do actually survey – humor alongside justice, grace in addition to courage” (LK 25)

Of course, the Aristotelian procedure in ethics is desired not only for its inclusiveness, but for containing both empirical and practical elements: *empirical* because concerned with our experience of life, and *practical* in its aim to “find a conception by which human beings can live, and live together” (LK 25).

To be sure, it is not only Aristotle’s general approach to ethics that Nussbaum finds attractive, but it is the specific manner in which he goes about obtaining the answer to what is truly human which is most influential to her own work. More specifically, Nussbaum believes that for Aristotle, inquiry into what constitutes the nature of a human being is not settled by an appeal to non-moral facts, but is ascertained by means of a series of narrative thought-experiments designed to evoke within the inquirer what (s)he ultimately values in life.<sup>32</sup> Contrary to some readers of Aristotle, she finds nothing in his entire corpus which corresponds precisely to a modern distinction between fact and value, and does not even interpret Aristotle’s famous “human function” argument of *EN* I.7 as an appeal to biology or natural teleology but as an invitation to engage in dialogue about what is most essential (AHN 102).<sup>33</sup> That Aristotle did not consider the “phusis” or nature of a being in abstraction can be further demonstrated by his appeal to his interlocutors’ beliefs about beasts and gods, an appeal which Nussbaum believes was made in order to get them to judge “which are the features whose presence or absence makes the difference between humanness and its absence” (AHN 95).<sup>34</sup> She writes:

It matters a great deal what we ourselves think about our selfhood and our possibilities; what a being who stands apart from our experiences and ways of life think seems to matter little, if at all. Human nature cannot, and need not, be validated from the outside, because human nature just is an inside perspective, not a thing at all, but rather the most fundamental and broadly shared experiences of human beings living and reasoning together (AHN 121)

As Nussbaum reads Aristotle then, to respond to questions of species-membership, personal continuity, or human nature turns out to be “one and the same thing” as discovering what we deeply believe to be “most important and indispensable” (AHN 106).<sup>35</sup> In other words, we need to ask ourselves about the forms of activity, of “doing and being,” that constitute what we consider to be the human form of life, one which is distinguished from all other actual or imaginable forms such as animal and plant or immortal (HCFHB 72-73). What Nussbaum finds in Aristotle then is the belief that the lines which demarcate what is and is not central to human nature *cannot* be settled by value-neutral or external facts, *pace* any desire, such as Bernard Williams’s, to find an extra-human, extra-ethical “absolute conception of the world” which will serve as a foundation for our myriad ethical puzzles.

This then, is what is meant by an “internalist” conception of human nature. It is one which takes its point of departure from human beliefs and practices, and then makes evaluative and indeed ethical judgments absolutely central to the task.<sup>36</sup> This way of answering the question about our essence most likely will appear odd to those who think that the answer will be unavoidably metaphysical. Yet her response to the metaphysically-inclined is the same as above, for even within the branch of philosophy known as metaphysics, the “best and deepest of the metaphysical arguments” to her seem to “contain an evaluative component: that is, they ask us (implicitly or explicitly) to consider which functions of an alleged human being are so important, so central, that their absence will mean the absence of a human being or human life” (AHN 94).

Nussbaum may or may not be right on this score, and yet whether or not she is correct, it remains to be seen what role metaphysics, if any, plays in her account if essentialism can be

defended without it. To answer this question, we must return to a point established earlier, that the ten capabilities considered central for human flourishing do not represent the whole of what we may have the capacity, or biological tendency, to do. Undoubtedly connections are often drawn between what we *can* and *should* do, yet the point here is that nothing follows about inevitability or rightness — *e.g.*, we correct for near-sightedness and teach the control of aggression however “natural” corneal curvature or violent instincts may be. Having reaffirmed the relative independence of nature and norms, Nussbaum nevertheless concedes that metaphysical biology does factor into her account in two areas. In the first involving her normative account of the person, the capabilities approach is designed to honor the whole of our animality and not just our rationality. In fact, in an earlier article entitled “Human Capabilities, Female Human Beings,” Nussbaum stresses that her choice to focus on “human” capabilities and not those of *persons* was intentional in order to evoke a more organic and biological model. In the second instance, Nussbaum believes that in order for one to be the object of normative ethical concern, it is a necessary and sufficient condition that one has the “innate equipment” that makes it possible to attain the central capabilities in question. More specifically, the point that Nussbaum is hoping to convey is that there would be “no sense of waste and tragedy” if a turtle were given a life that did not develop powers of practical reason and sociability because it is not so designed to do so, yet there is and should be grief and anger when Marx’s worker is “forced to live a life that reduces his senses to a less than fully human level of functioning” (APHC 123). On top of these two reasons, I would offer a third role for metaphysical biology – the power of scientific discovery about our physical make-up to inform our ethical views. To illustrate, when biological reasons for mental illness and learning disorders were discovered, when “race” as a category was debunked scientifically, when the “end” of life was measured by first the loss of

breath, then heart-failure, and currently the cessation of all brain activity, our corresponding judgments about responsibility, blame, and treatment had to and did indeed change.

Certainly Nussbaum's form of essentialism-without-metaphysical-realism has the advantages of steering clear of contentious metaphysical debates about who or what we really are, and this is no insignificant matter if one agrees with Alasdair MacIntyre that we are living in a world of many fractured viewpoints and moralities. Yet one potential danger of Nussbaum's internalism is that the line between the questions "is this life human?" and "is this life *worthwhile*?" may become lost. In an earlier paper, Nussbaum draws attention to the fact that she is really offering *two* thresholds – a threshold of capability to function "beneath which a life will be so impoverished that it will not be human at all," and a somewhat higher threshold beneath which those characteristic functions are available but in such a reduced way that we may judge that while the form of life is human, it is not *good* (HCFHB 81). Though it is this second threshold with which she asserts public policy should be concerned, her account seems to leave vulnerable the question of how the first will be answered. Recall that Nussbaum herself does not endorse any simple or conventional form of the fact-value distinction as well as repeatedly insists that we will never be able to settle difficult ethical disputes or controversies without engaging in ethical judgment (APHC 118, at note 32, Cf. WHD 73). Though Nussbaum is admittedly less interested in questions of boundary than in those of threshold level for a good human life (important as the first question is, by her own admission, for medical ethics), she does recognize that at one extreme, we may come to judge that the absence of capability for a central function is so acute "that the person is not really a human being at all, or any longer," as in the case of certain very severe forms of mental disability, or senile dementia (WHD 73). This same point

about our need to *evaluate* whether someone is still human any longer is reaffirmed in the following passages:

Any concept of the human being (or person) that is useful in settling ethical questions must be evaluative and, in the broad sense, ethical: for among the many things we do and are, it will have to single out some as particularly central, as so important that without those we don't think that a human life exists any longer...*when we make tough judgments about whether this senile-demented individual is really a human life any longer: we just have to ask ourselves: How important are the capacities for reasoning and sociability?* And I argued that there is rather broad consensus that *they are very, very, important: without those, whatever sort of life it is, it is not a human life* (emphasis added, APHC 119)

The fact that a person who has lost her arms cannot play a piano does not make us judge that she no longer lives a human life; *had she lost the capacity to think and to remember, or to form affectionate relationships, it would have been a different matter* (emphasis added, HCFHB 82)

Of course, the worry is that in the absence of a more robust externalist account, we may not have sufficient action-guiding criteria to actually make the right judgments about these difficult matters; in fact, the criteria we use may turn out to be morally arbitrary. To illustrate, many persons whether for religious reasons or not subscribe to the view that human life is to be treated reverently, however inconsequential or minimally functioning it may appear to others to be. We should mention that Nussbaum herself is not worried about our likelihood of moral error given this lack of an extra-ethical account of human nature, stating that if we will avoid atrocities, it will be because we will have recognized them as such and “not because some wall of scientific fact has blocked us” nor because “a biologist has discovered something” (AHN 123). In sum, Nussbaum remains untroubled - I do not.

## **B. Political Justification by means of “Reflective Equilibrium”**

Having considered Nussbaum's substantive account of human nature, let us now turn to her account of political justification. Yet before we consider this procedural defense of the capabilities approach, we should first respond to the question why this secondary move is even necessary. That is, given the purported intrinsic worth of the capabilities, one wonders why any justificatory scheme would have to take subjective preferences into account at all. In response, Nussbaum believes that a *political* justification is necessary for three two reasons: to show respect for persons for their stated preferences and beliefs, and to demonstrate that our intuitions actually accord with the movements we make in the political arena. This two-part justificatory scheme then cleverly navigates between subjective welfarism, where the good is determined by simply canvassing opinions, and a form of Platonism, where preferences are not at all relevant given the knowledge of how unsuitable desires and preferences are as a guide to what is really good or just.

The method of political justification that Nussbaum offers by her own description "lies close to the Rawlsian account of argument proceeding toward reflective equilibrium" (WHD 101, AHPC 116-117). By "reflective equilibrium," Nussbaum means what Rawls does – we must lay out the arguments for a given theoretical position (in this case the capabilities approach), and then hold it up against "fixed points" in our moral intuitions to see how those intuitions both test and are tested by the conceptions we examine. These intuitions or "provisionally fixed points" need not be timeless nor self-evident, but may arise from judgments (whether emotively based or not) that have won the test of time, *e.g.* slavery is wrong, rape and domestic violence are damaging to human dignity (AHPC 116). The procedure of reflective equilibrium will require us to additionally take into consideration other competing conceptions such as the rivals discussed in the first section, as well as the opinions of our fellow deliberators

(WHD 102). In some cases, we will see that our intuitions will lead us to adopt one theoretical model over another, *e.g.*, the capabilities model over a strict libertarian one if we believe the former but not the latter will better honor our intuitions. In other cases, the conception we favor on other grounds may call into question one of our intuitive judgments, as in the case where Nussbaum did not at first see the value of private property but was later convinced of it and thus modified her list accordingly (APHC 117). The ultimate aim, of course, is to achieve “consistency and fit” within our judgments as a whole. Reflective equilibrium, in short, is the “stuff” of philosophy — we present our best arguments, interrogate our intuitive judgments, and treat sympathetically and then critically all rival positions.

For Nussbaum, the final ingredient to a form of justification suitable for political purposes is that justification cannot depend upon any particular (read: contentious) tenet of faith so that the account can be the object of an “over-lapping consensus” among citizens who otherwise have disparate but reasonable “comprehensive doctrines.” By explicitly using the term “over-lapping consensus,” Nussbaum is signaling that she means what John Rawls means by the term, “that people may sign on to this conception as the freestanding moral core of a political conception, without accepting any particular metaphysical view of the world...” (WHD 76). Though her conceptual debt to Rawls in political matters is obvious, Nussbaum actually credits Jacques Maritain for having invented this concept when introducing into neo-Aristotelianism the idea of an overlapping consensus without explicitly using the term (see the section of his *The Rights of Man and Natural Law* and *Man and the State*, entitled “Men Mutually Opposed in their Theoretical Conceptions Can Come to a Merely Practical Agreement Regarding a list of Human Rights” (AHPC 105)). As alluded to earlier, she herself interprets Aristotle’s account of human functioning to be a freestanding moral conception as well — one that is not based on any

complex metaphysics — yet whether she is right about Aristotle is a cursory matter, at best (WHD 76).

While a more direct and extensive comparison between Rawls and Nussbaum should be left for another occasion, we should pause for a moment here to flag some important distinctions in their methods of justification for the purpose of clarifying Nussbaum's position. The first is that Nussbaum's account is far more normative than Rawls' is, since she explicitly takes up the question what is crucial and good for a *human* form of life, while the post-*Theory of Justice* Rawls has moved away completely from offering comprehensive theories of the self or the good, and now relies on both the values of our public political culture and a purportedly fair procedure to justify his principles of justice. More specifically, Nussbaum's answer to the above question is one which involves a certain picture of our most important functions and capabilities, and is not justified primarily because we can see glimpses of it in our background culture (however important convergence may be for political purposes), but because such arguments are made on essentialist grounds concerning who and what we really are. The second comparative point to make is that Nussbaum's approach is stylistically different from Rawls', and more concretely, that this noted difference in form matters.<sup>37</sup> Through all of her works on narrative fiction, the capabilities approach, and even her latest on the cognitive-moral importance of the emotions, Nussbaum weaves together the life-experiences of particular persons, whether they be of herself grieving the loss of her mother, or of Vasanti & Jayamma trying to flourish in India. As I read Nussbaum, the move to narrative is strategically employed to reveal the universal in the particular,<sup>38</sup> to model her commitment to the ideal that the capabilities of each and every person matter, and to emotionally draw in the reader to plight of the dispossessed. Rawls' approach, in contrast, is far more detached than hers, as he prefers instead to cite facts of world

history (*e.g.*, the religious wars of Europe) or to quote other theorists to make similar points (WHD 23).

For all of its comparative advantages to other theories, I submit that Nussbaum's account of justification remains incomplete. In fact, much more empirical work must be done before Nussbaum can claim that the capabilities approach *is* the "systematization and theorization of thoughts that women are pursuing all over the world" (APHC 139). Certainly we know that the approach was developed in considerable consultation with women in both the local and international levels, and that the UN is now assessing quality of life across countries through a focus on capabilities, but the question still remains whether the capabilities approach has really achieved the over-lapping consensus that she contends it has. Even more worrisome than the concern about consensus is whether her account of our intuitions is correct — do we in fact intuitively lift up human life as demanding certain kinds of care? According to Nussbaum, intuition can be likened to correct perception or discernment, and can spring us into action. She writes:

We react to the spectacle of humanity so assailed in a way very different from the way we react to a storm blowing grains of sand in the wind. For we see a human being as having worth as an end, a kind of awe-inspiring something that makes it horrible to see this person beaten down by the current of chance – and wonderful, at the same time, to witness the way in which chance has not completely eclipsed the humanity of the person. As Aristotle put it, 'the noble shines through.' Such responses provide us with strong incentives for protecting that in persons that fill us with awe. We see the person as having activity, goals, and projects – as somehow awe-inspiringly above the mechanical workings of nature, and yet in need of support from the fulfillment of many central projects. This idea has many forms, some religious and some secular. Insofar as we are able to respond to tragic tales from other cultures, we show that this idea of human worth and agency cross cultural boundaries (WHD 73)

No doubt the preambulatory language of the *Universal Declaration of Human Rights* echoes some of these thoughts, with its mention of the "conscience of mankind" having been shocked

and outraged into action after having witnessed the atrocities of war. These hopes of creating a better world aside, it is doubtful whether the afore-mentioned passage about the (humanitarian) intuitions we purportedly have is even descriptively true. Richard Rorty, for example, does not see evidence of people treating each other humanely given an acknowledgement that the Other are fellow “featherless bipeds” as well; rather, the history of racism and sexism seem to suggest to him that humans do *not* recognize their perceived enemies as human at all.<sup>39</sup> In short, Nussbaum’s account is one of generous and optimistic love which “affirms the world and our lives within it,” but one which seems rather quaint given its lack of recognition resembling anything like sin or evil.<sup>40</sup> This question of whether Nussbaum has overstated her case in assuming common humanitarian intuitions or an over-lapping consensus will be taken up again in our final section.

### III. RELIGION

Any adequate account of political liberalism must address the tensions which invariably arise between the right of religious free-exercise and that of other liberties, so as to protect the central importance that religions play in the lives of its adherents but also curtail the amount of religious “special pleading” that comes, in many cases, at the expense of minorities and women. On the one hand, interfering into religious matters will be read as intervening into the “intimate self-definition and basic liberty” of religious adherents, yet on the other hand there may be other serious “abridgements” if free-exercise is allowed to run an unchecked course (WHD 168). In fact, a religiously plural context will not only strain a theory’s commitment to autonomy given these tensions, but will also pose challenges to the manner in which *any* political theory can be justified given the lack of one unified worldview or set of beliefs.

Nussbaum's general approach to religion is fourfold: respect the "fact of pluralism" in the justification she provides for her approach, honor the "intrinsic value of religious capabilities and of religious women and men as choosers of a way of life," enact provisions designed especially to protect unpopular religions which otherwise meet her principle of "moral constraint," but in all cases refuse to defer to religion or culture "when its practices harm people in the areas covered by the major capabilities" (WHD 78-80, 188, 192). Put in other words, Nussbaum's account is sensitive to religion in three ways – in its "political not metaphysical" grounding, provision of religious free-exercise in the list of central capabilities, and balancing of the claims of religious freedom to those of particular concern to women. In what follows, I will examine the role of religion in Nussbaum's account, emphasizing this latter tension in particular.

With respect to issues of grounding, we have already discussed that her form of Rawlsian political liberalism precludes a justificatory scheme which is premised upon any particular religious, metaphysical, or otherwise comprehensive doctrine. For example, her politically liberal commitments preclude a political appeal to the Jewish-Christian idea that our worth stems from the fact that we have been created in the image of God, or to liberal-perfectionist ideals of the value of autonomy. That Nussbaum believes a focus on the individual can be defended as "free-standing moral idea" can be seen in the following passage:

There is a type of focus on the individual person as such that requires no particular metaphysical tradition, and no bias against love and care. It arises naturally from the recognition that each person has just one life to live, not more than one; that the food on A's plate does not magically nourish the stomach of B; that the pleasure felt in C's body does not make the pain experienced by D less painful; that the income generated by E's economic activity does not help to feed and shelter F; in general, that one person's exceeding happiness and liberty does not magically make another person happy or free... we must conclude that we should look not just to the total or the average, but to the functioning of each and every person (WHD 56)

The fact that individuals are separate, and that their needs and pains are felt apart from others is fairly straightforward. Yet there are two difficulties that Nussbaum encounters with her metaphysical “thinness;” the first does not deliver a decisive blow, though the second leaves much to be desired.

In the first wrinkle, even Nussbaum acknowledges that this purportedly “free-standing moral conception” will appear prejudicial against certain views. Using her own example, some persons, *e.g.*, Buddhists, might believe that persons are not really separate individuals at the ultimate or most real level and thus may hold that the whole idea of any distinction between people and objects is illusory (WHD 58). Nussbaum responds to this complication by first noting that there is no reason to think that the Buddhist case generalizes for others (*i.e.*, not all non-Westerners believe as Buddhists do). Secondly, she argues that since Buddhism “self-consciously portrays itself as a radical critique of ordinary practices, and as making demands that take people, in meditation, far away from the world of physical objects they must continue to inhabit in their daily lives,” it is fair to assume that a “*political* focus on the individual is not insulting or unfair even to Buddhists, since it is meant to supply a basis for politics in the daily world, not in the world of enlightened meditation and reflection” (emphasis added WHD 58). In other words, Nussbaum believes that the Buddhist can accept the appropriateness of any approach which is aimed at relieving the suffering of bodies one by one, even if they believe that at some level individual bodies do not exist as separate. Charles Taylor’s example of a sect of Buddhists who champion human rights seem to confirm this, for despite their metaphysical beliefs about ultimate reality these Buddhists are able to affirm human rights out of a conviction that each is responsible nonetheless for her own enlightenment.<sup>41</sup>

The second worry about Nussbaum's minimalist strategy is that her free-standing moral conception may be able to establish the idea of a minimum threshold for all humans, but may not get her to the vision of equality she so desperately seeks to establish, most especially between the sexes; after all, she presents *one* norm of human functioning rather than two gendered ones. Doubtless I share Nussbaum's egalitarian and feminist commitments, but it is not clear to me that her arguments necessarily lead to a liberal cosmopolitan conclusion. The fact that we all have nutritional needs or seek companionship does not logically lead to the conclusion that we are *equally* entitled to having our needs met; in fact as we have already discussed, Nussbaum's insistence on internalism in ethics prohibits the immediate conflation of nature and norms. In short, Nussbaum seems to be in a bit of a quandary – if she insists on the equality of all persons or the equality between the sexes she will have to rely on some comprehensive doctrine or other to which her commitment to political liberalism, with its concomitant idea of “free-standing moral conceptions,” is principally opposed. But if it is the strategy of minimalism and a metaphysically-free conception she seeks to defend in the end, her assumptions about the equality of persons or that of the sexes will be indefensible. Susan Wolf presses the point even further with respect to feminism, arguing that if Nussbaum is truly open to continual reflection, she will have to leave room for the possibility that human capabilities are, in way, gendered. In her words: “we may uncover some form of functioning capability that is basic for one sex but not for the other. Or perhaps one form of functioning, while relevant to the quality of life for both sexes, will turn out to be more important, and its lack more crippling, to one sex than to the other”<sup>42</sup> In short, Michael Perry's question returns again – can human dignity or the sanctity of human life be protected or even justified without appeal to the ultimately real?<sup>43</sup>

Pressing further now, the second point to make about religion in Nussbaum's account is that it is mentioned and thereby protected in the actual capabilities list, though does not stand on its own in a separate rubric. This is because Nussbaum believes that religious capabilities have "multiple aspects," which is why she has included them among the capabilities of the "senses, imagination, and thought," as well as in those of "affiliation" (WHD 179). Nussbaum's inclusion of religion in multiple areas demonstrates her recognition that religion is for many people tied to their "search for an understanding of the ultimate meaning of life in one's own way," their artistic, ethical and intellectual expression, as well as bound up with the moral education of many of the young (*ibid.*). Certainly this effort made by a Western liberal to respect the role of religion is to be commended, and yet one wonders whether she is inadvertently marginalized religion's role by specifically placing it within two rubrics, instead of describing the *entire* list of capabilities as religiously functionable (*i.e.*, one could eat in a religious-infused way, socialize religiously, order her sexual activity in a religious-infused manner, etc.), although it must be added that her approach in no way precludes this possibility. However, that the list is not so described, and that religion is not given its own rubric suggests that Nussbaum does *not* believe that religion is uniquely deserving of protection as a way of pursuing these goals, as we shall see below.<sup>44</sup>

We now turn to the most difficult part of our examination, the procedure Nussbaum proposes to adjudicate between claims of religious free-exercise and those of other important rights, liberties and/or social goals whenever the two are mutually opposed. We should note here that much of the success of Nussbaum's capabilities approach will hang on her ability to negotiate these tensions, since religious free-exercise does and will continue to clash with her larger goal of non-discrimination on the basis of sex, and especially given her earlier claim that

all of her capabilities are equally valuable and non-substitutable for a larger measure of another. Nussbaum's general approach to this difficulty is to situate herself between two feminist positions which see the matter as basically a non-dilemma for opposing reasons: "secular humanist" feminism popular in American philosophy which tends to identify religion only in terms of patriarchy and thus privilege other liberties over religious ones whenever they conflict,<sup>45</sup> and "traditionalist feminism"<sup>46</sup> which commits a similar fallacy through its neglect of its own internally dissenting voices and thus religious trumping of all other concerns. She then begins her reflections within the religiously pluralistic context of India,<sup>47</sup> and takes as her point of departure three (in)famous cases involving conflicts between the claims of religious free-exercise and that of women's fundamental rights as accorded to them under the Indian Constitution.<sup>48</sup> After consulting with women from all over the world and reviewing these cases in light of India's religious pluralism and U.S. constitutional law, Nussbaum concludes that religion ought to be given a rather large range of latitude, even if provided with exceptions to rules generalizable to all others, provided that it does not compromise important areas of human flourishing.

More specifically, Nussbaum's procedure begins with a neo-Kantian orienting principle that *each* person must be treated "as end," the implication being that any solution which appears to be "organically" good for a religious group must be indeed promote (religious and other) capabilities for its members, taken one by one (WHD 188). This is not to suggest that religious functioning needs to be individualistic, but only that it is unacceptable for a religion to prioritize its desire to present a unified front if such a showing comes at the expense of its individual constituents.<sup>49</sup> Secondly, Nussbaum introduces a second principle of "moral constraint" which finds two political applications: 1) all "so-called cults or religions" which diverge "too far from

the shared moral understanding” of the broader political culture will not merit state protection,<sup>50</sup> and 2) the state can legitimately refuse to defer to religion when its practices harm people, whether nonmembers or “co-religionists,”<sup>51</sup> in the areas of major capabilities. The logic of these orienting principles work something like this: “you say that your religion is dedicated to the good...but this is so patently bad that it seems dubious that it can really be a part of the religion, as we understand its central purposes” (WHD 195). In support of her view, Nussbaum interprets Lincoln’s Second Inaugural as endorsing the principle of moral constraint, specifically, the part that the patently unjust nature of slavery leads him to be skeptical about the religious justifications offered in its favor (WHD 195-196). Pushing aside the question whether Lincoln can be linked to Nussbaum’s project, she then models her proposal after the U.S. Religious Freedom Restoration Act of 1993 (RFRA) in her recommendation that the state should not be able to impose a “substantial burden” on religion, even if the burden results from a rule of general applicability, unless it can show that a “compelling government interest” would be furthered, and that the law or rule in question would be the least restrictive means of furthering that interest. Not surprisingly, Nussbaum’s specific take on RFRA is that the otherwise vague principle of moral constraint or of compelling government interest should be interpreted in the language of capabilities, so that the attempt to secure the central capabilities for the citizenry should *always* be understood as sufficient to meet this requirement of compelling state interest. To illustrate, laws against *sati* and *untouchability* in India should be understood as consonant with these principles, just as the U.S. Supreme Court ruling to eliminate the tax-free status of Bob Jones’s University given its policy of racial segregation.

Nussbaum’s proposal regarding the extent to which religious practices will be tolerated seems sound enough. We should pause here to note that her procedure is far more lenient

towards religion than is John Locke's, the philosopher-theologian-political theorist who is largely credited in the West for preaching the gospel of political toleration of religious difference. Recall that Locke taught, in his famous *Letters Concerning Toleration*, that whatever is illegal in all other spheres should be rendered likewise illegal in matters pertaining to religious practice (*e.g.*, killing a person is illegal, so sacrificing persons in religious rituals should be similarly prohibited; however, since the killing of animals for consumption or other reasons is permissible, so should religious sacrifice of them be, as well). In pointed contrast to the Lockean principle of maintaining laws of general applicability, however, Nussbaum has no qualms with granting specifically religious exemptions to certain practices, *e.g.* permitting Hindus to use marijuana without penalty during *Holi*, the Hindu spring festival (WHD 203).<sup>52</sup> In fact, Nussbaum specifically favors RFRA to the laws-of-general-applicability regime inaugurated by the U.S. Supreme Court's *Employment Division v. Smith* decision because she believes the latter specifically does a disservice to minority religions (in that case a native American tribe in Oregon seeking to use peyote for religious purposes) while the latter purportedly better protects them. Here, I see no problem in principle with granting exemptions to certain religious adherents from having to follow certain rules to which all others must comply (*e.g.*, military service is a good example) but in here as in everything else, everything depends upon the manner in which such cases will be handled.

As I see it then, there are two potential problems with Nussbaum's procedure of adjudicating between the afore-mentioned rival claims. The first is that Nussbaum's discussion of the essence of religion, one designed to ascertain which are legitimate claims for exemption to laws of general applicability, leaves much to be desired. In her own words:

One of our greatest problems, in talking about the prerogatives of religious actors and groups, is to decide when there is a legitimate religious issue on

the table, and when the issue is, instead, cultural or political. Religions are intertwined in complex ways with politics and culture. Even when a religion is based on a set of authoritative texts, culture and politics enter into the interpretation of texts and the institutionalized form of traditional practice (WHD 193)

To any scholar of religion or student of 19<sup>th</sup> century continental philosophy, the concerns that this passage raises are obvious – why think there is any “pure” core of religion apart from culture and/or politics? Further, one is led to wonder whether it should be the business of government to determine what is and is not “authentically” religious. Nussbaum does not appear to be troubled by this burden, since she does just that in her assessment of the first of three cases alluded to earlier involving the Christian church in India and its unequal inheritance laws based on sex. Already suspicious of those who claim their free-exercise rights are being violated, Nussbaum first insinuates that the Church’s opposition to abolishing their sex-discriminatory law was based on the financial loss they would incur under the new arrangement, and then concludes: “however difficult it is to say what the core of Christianity is, we ought to be able to agree that the ability of the institutionalized church to enrich itself does not lie within that core. No citizen’s Christian worship is being burdened by the drop in church revenue that would be occasioned by the new inheritance structure” (WHD 170, 218 ). Of course, what does or does not stand at the “core” of Christianity can be debated *ad infinitum*, but my point is that Nussbaum could have maintained that the practice fails her principle of moral constraint *without* assuming to be an expert or an authority on matters pertaining to the essentials of Christian faith. A second problem I see with Nussbaum’s procedure is that her principle of moral constraint suggests that religion may not challenge the status quo, since under her proposal it is religion which must be subject to local mores, and not the other way around. The concern here, of course, is that many religions and religious movements define themselves as prophetically opposed to or otherwise highly critical

of current realities – think of the various religiously-inspired social movements in American history, for example. To be sure, I do not mean to imply that the state should have no right in deciding which religious practices it will find acceptable or not, but only to raise the concern, as Schleiermacher in the *Reden* and Gutierrez in his *Theology of Liberation* have in their separate ways, of the disservice that can be done to religion when it is harnessed for governmental ends or else required to stifle its visionary voices.

#### **IV. CAPABILITIES AND HUMAN RIGHTS**

Though undoubtedly with much debate, since World War II the world community primarily has relied upon the language of human rights to discussing cross-cultural standards of how human beings ought and ought not to be treated. What remains to be seen then, is how Nussbaum's language of capabilities squares with that of rights. For she has, in fact, stated repeatedly that her capabilities share a "close relationship" to human rights as understood in contemporary international discussions, covering the terrain of so-called "first-generation" or civil and political rights as well as "second-generation" or economic and social ones (WHD 96-97).<sup>53</sup> Moreover, we know that Nussbaum has acknowledged that however much inspiration she has drawn from Aristotle's work, his theory nevertheless remains "grossly defective" because of its lack of a theory of basic human rights, "especially rights to be free from government interference in certain areas of choice" (C&HR 276). To be sure, a "human right" for Nussbaum should be understood to "involve an especially urgent and morally justified claim that a person has, simply by virtue of being a human adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group" (C&HR 292). In short, the relationship between capabilities and human rights needs to be examined further, and Nussbaum

herself conveniently provides the following questions to guide us in our reflections upon the relationship between them:

Does the capabilities view supplement a theory of rights, or is it intended to be a particular way of capturing what a theory of rights captures? Is there any tension between a focus on capabilities and a focus on rights? Are the two approaches competitors...is there any reason why a capabilities theorist should welcome the language of rights – that is, is there anything in the view itself that leads naturally in the direction of recognizing rights? Would a natural-law Catholic theorist who used an Aristotelian language of capability and functioning, but rejected liberal rights-based language, be making a conceptual error? Does the capabilities view incline us to opt for any particular set of answers to the various questions about rights, or any particular conception of rights? For example, is Sen justified in thinking that the capabilities view supports a conception of rights as goals, rather than as side-constraints? Finally, is there any reason, other than a merely rhetorical one, why we should continue to use the language of rights in addition to the language of capabilities (C&HR 278)

Nussbaum's over-arching answer to this extensive set of questions is that the capabilities should be understood as *interpreting*, and in some cases, even *replacing* the language of rights. More specifically, she prefers to use the language of capabilities over that of rights for two major reasons: 1) thinking about rights in terms of "combined capabilities" provides a concrete way of conceiving what it is or means to secure a right to someone, 2) rights-based language carries cultural and historical baggage in the way that the language of capabilities purportedly does not. Despite this preference for capabilities talk, Nussbaum provides four additional reasons why the language of capabilities must be supplemented by the vocabulary of rights. In what follows, I shall examine whether the addition of the language of capabilities to that of human rights truly is complementary, or if it obfuscates more than it clarifies.

Nussbaum begins by acknowledging that the language of rights is preferred when talking about people's basic political and economic entitlements though not because of its "theoretical and conceptual clarity" (CHR 273) By this, she means that there is much confusion or flat-out

disagreement about what is meant by rights: what is their *basis*? (*e.g.*, rationality, sentience, mere life?); their *origin*? (*e.g.*, are they pre-political as Hobbes and Locke taught, or artifacts of laws and institutions as Kant as well as Richard Rorty believe?); their proper *subject*? (*e.g.*, do they belong to individual persons only or also groups, as Will Kymlicka *et. al* allow?); their *function*? (*e.g.*, are they Nozickian side-constraints on goal-promoting action, or one part of the social goal to be promoted as Sen claims?); their *aim*? (*e.g.*, are they rights to certain types of treatment, to a certain level of achieved well-being, to resources, to certain opportunities, etc.?) and their *relation to duties*? (*e.g.*, if subjects have rights, who or what is the duty-bearer – other individuals or the government alone?) (WHD 97, C&HR 273-274). The benefit of the language of capabilities, or so Nussbaum maintains, is that it takes a clear position on these and other disputed issues. The argument is that when rights are understood as “combined capabilities” or the “capability to function,” we can then understand that securing a right to someone will mean putting that citizen in a position of actually function in that area if (s)he elects to do so (WHD 98).<sup>54</sup> Furthermore, bringing differently situated people up to the threshold level of capability to function may involve a greater expenditure of resources on those who need to overcome physical differences or traditional prejudices. Thus, thinking about rights in terms of capability will provide us with strong rationales for spending more money, resources, or time on the disadvantaged than on others (WHD 99).

Put still in other terms, Nussbaum’s point is that it is a good idea to talk about rights in terms of capabilities when people have *de jure* protections but not *de facto* ones. For example, even though sex-discrimination is technically illegal in India, since many Indian women do not have combined capabilities to function as men’s equals, we should regard the women as not

really having those rights and concomitantly fault India for failing to secure them (WHD 54). In her own words:

... women in many nations have the nominal right of political participation without really having this right in the sense of capability: for they are secluded and threatened with violence should they leave this home. This is not what it is to have a right. In short, thinking in terms of capability gives us a benchmark in thinking about what it is really to secure a right to someone (C&HR 293-294)

This phenomenon of theoretically having rights but not having them in practice captures what Jack Donnelly has called the “possession paradox of rights,” which is the irony involved in the fact that people recognize their rights and seek to secure them only when they are in fact absent or consistently violated.<sup>55</sup> In sum, the first advantage that Nussbaum finds in the language of capabilities is that it both concretizes and sets more specific criteria regarding what securing a right really means.

Moving on, the second reason why Nussbaum prefers the language of capabilities over that of rights is that she believes that the former is not strongly linked to one particular cultural and historical tradition, as talk of rights is often characterized as being (WHD 99). That is, while rights talk is continually accused of being Western in origin or sensibility, capabilities “do not even give the appearance of privileging a Western idea,” since “ideas of activity and ability are everywhere, and there is no culture in which people do not ask themselves what they are able to do, what opportunities they have for functioning” (WHD 100). In my assessment, however, the apparent advantage of capabilities-talk over that of rights might be smaller than Nussbaum thinks, for those who object to the idea of universal norms probably would be just as offended by the essentialism involved in the capabilities approach as they already are at appeals to human nature in human rights advocacy. Of course, it is not clear whether critics of human rights principally object to the concept of universal values or to the actual list of rights demanded and

assumed to be universally applicable. And, if it is the latter and not the former which most offends, Nussbaum's capabilities approach will give rise to even further objection, since her approach carries prescriptions not only for the way we treat other humans, but potentially other animals and the world of nature, as well.

Given these two advantages of using capabilities instead of rights when assessing human needs, Nussbaum nevertheless recognizes four reasons why capabilities should complement, and not replace entirely, the language of rights. The first is that rights language succinctly captures the ethical judgment that people have justified and urgent claims to certain types of urgent treatment. To illustrate, when we say "A has the *right* to have the basic political liberties secured to her by her government," we have made a normative pronouncement in the language of rights that the relevant capabilities should be secured (WHD 100). The second involves the comparative rhetorical power of rights talk, given that this language places great emphasis on the importance and basic role of the things that rights protect. Nussbaum's point is that it is stylistically more powerful to say "here's a list of fundamental rights" that we need to protect, than "here's a list of things that people ought to be able to do and to be" (C&HR 296, WHD 100). The third reason why rights language should be kept involves the value it places on people's choice and autonomy. This observation comes from her recognition that the Aristotelian language of functions and capability does not emphasize liberty the way her capabilities do, and that Marxist Aristotelianism and some forms of both Catholic Thomist Aristotelianism are "illiberal in this sense" (WHD 101). The language of rights, then, lays extra emphasis on the fact that people are to retain the ability to choose to function in certain ways. Finally, the last reason why the language of rights is valued by Nussbaum is because such language "preserves a sense of the terrain of agreement" even where we disagree about the

proper analysis of rights talk and continue to deliberate about these conceptual matters at the more specific level (WHD 101).

## V. ASSESSMENT AND CRITIQUE

What should be said about the capabilities approach that Nussbaum offers? The account does balance the claims of both universalism and particularism, for there is one political justification but potentially multiple comprehensive ones, and one set of norms although nations retain the right to realize the list in context-sensitive ways as determined by the needs of their growing and changing populace. Nussbaum's account additionally avoids extreme paternalism by preserving the sphere of choice in its push for capabilities but not mandatory functioning in adults, and further provides a convincing account of "adaptive preferences" to account for why persons continue to engage in practices, lifestyles, roles or institutions which may not further their best interests. What's more, that the capabilities are presented as intrinsically valuable, and that Nussbaum is willing universalize this conception of human dignity, means that we will not only be protected against others when they provide alternative accounts of the minimum that is owed to us, but from ourselves whenever we may be tempted to gamble away our capabilities to function in truly human ways. Finally, the point which most earns my praise is Nussbaum's clever interweaving of neo-Kantian and neo-Aristotelian elements within her partial theory of justice at a time when many philosophers subscribe to one style while rejecting almost in entirety the other. More specifically, it is not surprising that Nussbaum privileges the narrative approach in ethics over the "abstract theoretical style" and "moralities based exclusively on general rules" she finds so distasteful in much of Anglo-American philosophy, given that she studied literature and the classics before turning to contemporary analytic philosophy in her academic training (LK 5).<sup>56</sup> Stylistically then, the adoption of rule-based reasoning in her political theory, such as "each

person as end,” “the principle of each person’s capability,” “the principle of moral constraint,” is a divergence from these earlier forms of argumentation. Yet the point to underscore is that even after her turn to political liberalism, Nussbaum’s narrative approach to ethics is retained in two principal ways – in her use of stories of life-struggles of real people, and in the universalistic hermeneutic principle she adopts, *i.e.*, that our response to the suffering of others as well as our ability to share in their joys already betrays the fact that there is an underlying layer of commonality among us.

These positive points aside, there are concerns which linger regarding her approach, and these can be divided into three types: the appropriateness of her reading of Aristotle, her institutional conservatism, and the possible over-stating of her case. Considering these in turn, the first issue is whether Aristotle can be properly licensed to her project in the manner Nussbaum claims he can be. Richard Mulgan, for example, argues that it amounts to “descriptive chauvinism,” or erroneously interpreting thinkers from another time or culture in terms of one’s own categories, to assume that Aristotle can be likened to a social democrat, *pace* Nussbaum, or otherwise assume that Aristotle’s philosophy contains within it the seeds of democracy or liberalism (Mulgan, *Ethics* 111 (2000): 80).<sup>57</sup> Likewise, Bernard Williams contests Nussbaum’s interpretation of Aristotle’s famous “human function” passage, arguing instead that the passage shows support for an *externalist*, not *internalist*, account of human nature. What are we to make of these criticisms? To the first charge, it must be recalled that Nussbaum does wish to distance herself from the “stupidity and unacceptability of [Aristotle’s] arguments on slaves and women,” additionally finds that his comments on leisure lead to unacceptable consequences, and further instructs “the Aristotelian [to] depart from Aristotle” regarding his total lack of a concept of political liberty (APHC 108, ASD, 239).<sup>58</sup> To the second, it must be remembered that

whatever the proper exegesis of the famous “human function” argument is, it is specifically *Marx’s* Aristotle which Nussbaum finds most inspiring. In truth, however, this paper should not stand or fall on which interpretation of Aristotle is correct, for my interest in Aristotle simply stems from the fact that Nussbaum draws much inspiration from his ideas, and it is her feminist internationalism – not Aristotle’s corpus – that I believe is worth examining in considerable detail.

Proceeding now to our second concern, one wonders whether Nussbaum’s approach falls into institutional conservatism, and thereby cannot be as creative or liberating as it can be if it were more sufficiently cosmopolitan. To understand this charge, recall first that a “fundamental role remains for the nation state,” as the capabilities are to provide the philosophical underpinning of the constitutional principles in any given state. However, if the aim is only to influence the constitutional principles of every country while leaving the actual nation-state system intact, the interests of non-citizens may not be suitably protected even though the approach is designed to secure “a threshold level of capability available *to all the world’s people*” (emphasis added, WHD 105). Secondly, when responding to the question of how to set the threshold in a non-arbitrary way, Nussbaum insists that we should let the internal processes of each liberal democracy interpret and implement the list according to its particular circumstances.<sup>59</sup> Nussbaum, in fact, believes that our collective experiences are on the side of this type of concession, as she writes that “history shows that this is not only possible but it is also quite a reasonable way to balance concerns for history and culture against the demands of a universal norm” (APHC 126).<sup>60</sup> She uses the example of hate-speech to illustrate this point, that it “seems reasonable” that Germany currently bans anti-Semitic speech and literature given its harrowing experience of the Holocaust, while such speech remains protected in the United

States, however despised or lauded (APHC 126). In another case, she argues that the given the history of intolerance to minority religions in the U.S., it is wise that the U.S. does not have an established religion, but continues to balance matters of religion with the dual non-establishment and free-exercise constitutional clauses. The point is, of course, that the U.S. model need not be that of others, for she thinks it is possible for Lutheranism in certain Scandinavian countries to protect religious liberties even for minority religions, and would not encourage dis-establishment in India particularly because the interests of its Muslim minorities would lose out (WHD 210).

Apart from the problem of determining what is and is not a legitimate interpretation of the capabilities list, Nussbaum's flexible let-each-nation-decide approach does not seem to improve upon the current system of human rights ratification. In the current system, the problem is generally *not* motivating nations to officially subscribe to various documents, but it is that they do so only by first registering enough reservations so that such treaties lose their teeth, since the point of reservations is to temper a nation's obligation to fulfill the treaty's demands. For example, the work of comparative legal theorist, Ann Elizabeth Mayer, shows that several "Islamic" countries are formal parties to various UN conventions, but have ratified the documents only under the proviso that Sharia's law will be the ultimate source of authority in matters of interpretation, with the consequence being that sex-discrimination will be left unpunished.<sup>61</sup> Likewise, the work of Amnesty International has consistently sought to shame the United States for continuing to reserve the right to sentence even juveniles to death even as most of the modernized world has abolished capital punishment, believing it to be a "cruel and unusual punishment." Still, many more examples can be found.

In short, Nussbaum's framework does not allow for the possibility (or reality) that the nation-state itself is a contestable identity, and this may have disastrous consequences for non-

citizens of the world, as well as the approach's ability to transcend current realities. In this sense, Nussbaum's failure ironically mirrors Rawls' in his most recent work on internationalism, *The Law of Peoples* (2001). The lack of critical thinking into the idea of the nation-state itself seems to me an odd oversight, especially because Nussbaum is at great pains to dismantle the view that other institutions, e.g. the family, exist "by nature," and to demonstrate that it is actually the state which constitutes the family structure through its laws (WHD 262).<sup>62</sup> Yet in her defense, Nussbaum's use of the nation-state as the basic political unit appears to be purposive, for her argument is that however faulty, inefficient, or even corrupt a government may be (as she believe India is), its representatives are and will remain accountable to their citizenry in a way that NGOs and other international agencies simply are not nor will ever be. In her own words, "it would be inconsistent if a defender of the capabilities approach, with its strong role for democratic politics and political liberty, were to seek an implementation strategy that bypassed the deliberations of a democratically elected parliament" (WHD 104). Finally, we should make mention of the fact that the nation-state is not in fact the final seat of sovereignty even under her account, and this can be seen by her arguments that nations may use "economic and other strategies" to secure compliance from other nations whenever "particularly egregious violations of human dignity and person-hood are at issue" (WHD 103). In her own words:

Military intervention to stop genocide, ethnic violence, rapes of women, and other crimes against humanity seem not only permissible but in many cases required, as does intervention to save lives in an area hit by famine or natural disaster, when local institutions prove unable to handle the problems. Perpetrators of crimes against humanity should be accountable before a world court. In other cases, economic sanctions may be appropriate responses to domestic rights violations, as in the case of South African apartheid. And yet, once again, there is a limit beyond which we should not go in compromising sovereignty. In many instances, we are justified in using persuasion only. In all these cases, the goal should

always be the restoration of just and entitlement-protective domestic institutions in each nation (APHC 133)

In contrast to my earlier characterization or intimation then, Nussbaum's account does not call for a return to a Westphalian world, but seeks to leave our domestic deliberative structures intact without rendering them immune to outside interference.

Turning now to the most serious of concerns, one is left wondering whether the account that Nussbaum provides is sufficiently justified by the reasons she gives. Certainly we applaud her for recognizing both the dangers of metaphysical foundationalism, but not falling into the trap of thinking that consent or broad popularity of a view (*i.e.*, overlapping consensus) is adequate. The weakest part of her political justification remains her use of overlapping consensus, not because I do not think it is valid nor necessary for political purposes, but because I have yet to see sufficient evidence that we have achieved it. For example, though RFRA was declared unconstitutional in 1997, she believes that it still enjoys the support of "the vast majority of the American people" without providing an empirical evidence to support this assertion (WHD 201-202). Likewise as alluded to earlier, Nussbaum claims to be able to speak for all women, though many feminists would question even her use of the category "woman." Finally, even Nussbaum acknowledges that the ability to live in fruitful relationship with animals and the world of nature has not yet reached a political consensus, and her multiple works on the emotions suggests that she is constantly on the defensive to explain their central import to moral reasoning in particular and human flourishing in general (WHD 157, see EWC and *Upheavals of Thought*). Despite whether an over-lapping consensus has been achieved, Nussbaum's overall procedure of providing both a substantive and procedural account of justification seems to be what is needed. Her theory, in short, is one of both right and (partial) good – it has elements of

both political and comprehensive liberalism, although is not itself fully cognizant of its own implicit endorsement of the latter.

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<sup>1</sup> This title draws its inspiration from Martha Nussbaum's observation that "Western feminist philosophy has not typically focused on getting loans, learning to read, and buying a sewing machine" as well as her concomitant desire to do just that (WHD 23, 7). See Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (2000) for further elaboration of her project.

<sup>2</sup> Nussbaum reveals that she has experienced a significant shift in thought beginning in 1994 to an explicitly Rawlsian type of political liberalism, and that such a shift has altered her understanding of the relationship between politics and metaphysics as well as the political role of the capabilities. See *WHD* and *APHC* for more about John Rawls' influence on Nussbaum's political theory.

<sup>3</sup> Rawls introduces the distinction between "comprehensive" and "political" doctrines in *Political Liberalism* (hereinafter *PL*) when he writes: "[A moral conception] is comprehensive when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole" (*PL* 13). Political ideas or doctrines, on the other hand, purportedly do not require any particular background metaphysics or "thick" notion of the good for support, and as such, can be the object of an "over-lapping consensus" among persons with otherwise disagree about the good.

<sup>4</sup> Care should be taken to note that Rawls' own position regarding the need to bracket or otherwise translate "comprehensive doctrines" into terms of "public reason" has undergone a considerable revision, as noted in his new introduction to the paperback edition of *PL* (lii).

<sup>5</sup> Cf. "Like any balancing test, mine requires the use of judgment in its application to the particular... an irreducible element of judgment remains. To those who follow Rawls in wishing to have pure procedural solutions that involve no element of 'intuitionism', the approach will therefore perhaps seem defective..." (WHD 212). See also Paul Ricoeur (2000) for a critique of Rawlsian proceduralism and a defense of a hermeneutical approach to justice.

<sup>6</sup> For Amartya Sen's argument that the most relevant type of equality for political purposes is equality of capability, see especially *Equality of What?*, The Tanner Lectures on Human Values 195 (Sterling M. McMurrin ed., 1980); *Capability and Well-Being* in *The Quality of Life* *supra* note 10, 30 (Martha Nussbaum and Amartya Sen eds., 1993) for a standard definition of capabilities; *Inequality Re-examined*, *supra* note 7 for Sen's emphasis on the ancient roots of his idea; and C&HR 276 *supra* notes 15 and 16 for further bibliography of Sen's work on capabilities. Briefly, the differences between their two approaches can be stated in the following manner: Sen's capability approach is more comparative (capabilities is the space where comparisons on quality of life can best be made) yet she primarily wants to show how capabilities can provide the "basis for central constitutional principles that citizens have the right to demand from their governments" (WHD 12); the central capability for Sen is liberty though Nussbaum does not order them (WHD 12); Sen hasn't attempted to ground capabilities approach in Marxian/Aristotelian idea of truly human functioning, does not provide a list of capabilities, has not stated which view of liberalism (political or comprehensive) he supports, and does not have anything corresponding to the idea of a threshold; Sen uses well-being/agency distinction, while Nussbaum believes that her capability vs. functioning distinction does similar work (WHD 14). See Nussbaum (WHD 11-15, 70 at note 65 & 68) for a more detailed description of these comparative points of contrast. Also, for a good summary of their approaches, consult David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethics*, 20 *Pol. Theory* 584 (1992) and David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethics*, Part 2 in *Women, Culture, and Development*, *supra* note 12, at 153.

<sup>7</sup> See, for example, Elizabeth Spelman's review article entitled "How do they see you?" *LRB* 22:22 (2000) covering Nussbaum's *Sex and Social Justice* (1999) and *Women and Human Development: The Capabilities Approach* (2000) for more about this suggestion.

<sup>8</sup> Nussbaum adds that her account of capabilities can be contrasted to Rawls' account of primary goods by "its length and definitiveness, and in particular its determination to include the social basis of several goods that Rawls has called 'natural goods,' such as 'health and vigor, intelligence and imagination'" (C&HR 290, Cf. WHD 89). This difference aside, Nussbaum contends that her account is offered in a "similar political-liberal spirit," in that it is a list which can be "endorsed for political purposes, as the moral basis of central constitutional guarantees, by people

who otherwise have very different views of what a complete good life for a human being would be” (WHD 74). Much more will be said about justification in the next section.

<sup>9</sup> Susan Wolf, “Martha C. Nussbaum: Human Capabilities, Female Human Beings: Commentary by Susan Wolf.” *Women, Culture and Development: Women, Culture and Development: A Study of Human Capabilities*, eds. Martha Nussbaum and Jonathan Glover, Oxford: Oxford University Press, 1995 (101-115) at 111.

<sup>10</sup> Nussbaum’s exact appraisal of the status of animals remains ambiguous. In *Women and Human Development*, animal behavior is contrasted heavily with “truly human” behavior as we can see here. Yet in her most recent *Upheavals of Thought*, Nussbaum wavers between an evaluation of (at least some) animals as similar to us in eudaimonistically having “goals and projects,” and a view of animals as perhaps emotive like us, but nonetheless not reflexively self-conscious. For further reference on human and animal emotion, consult *Upheavals of Thought* (2002).

<sup>11</sup> Nussbaum adds that some basic capabilities are more or less ready to function, *e.g.* seeing & hearing, yet in other cases they are “rudimentary” and cannot be directly converted into functioning. In her words, “A newborn child has, in this sense, the capability for speech and language, the capability for love and gratitude, the capability for practical reason, the capacity for work” (WHD 84, C&HR 289).

<sup>12</sup> Here, Nussbaum adds that sometimes these develop just by growing (*e.g.*, sexual capabilities), though in other cases they will need support from the surrounding environment to grow, “as when one learns to play with others, to love, to exercise political choice” (WHD 84).

<sup>13</sup> Hilary Charlesworth, for example, notes that though universalism is term loaded with baggage in its association with Western traditions, Nussbaum uses universalism in a broader way than most international lawyers, because of her emphasis on the revisability (*Ethics*, 70- 74).

<sup>14</sup> For example, Nussbaum notes that the current version of the list reflects changes made as a result of her conversations with people in India. The primary changes include a greater emphasis on bodily integrity and control over one’s environment, *e.g.* property rights and opportunities for employment, and a new emphasis on dignity and non-humiliation. Ironically, Nussbaum notes that “these features of human ‘self-sufficiency’ and the dignity of the person are the ones most often criticized by Western feminists as ‘male and ‘Western’ (WHD 78 at note 82).

<sup>15</sup> For example, that the “right of social security” is included in Article 22 of the *Universal Declaration of Human Rights* is taken by many critics to suggest that human rights are mere artifacts of convention, and the constructedness of the language of rights is thereby understood to count against its universal grounding.

<sup>16</sup> Cf. “The procedure through which this account of the human is derived is neither ahistorical nor *a priori*. It is an attempt to set down a very general record of broadly shared experiences of human beings within history. A related point can be made about the points of inquiry: they do not claim to be ahistorical or *a priori* truth, but, rather, an especially deep and continuous sort of experiential and historical truth” (HCFHB 74).

<sup>17</sup> More specifically, Nussbaum’s problem with viewing individuals and especially women in terms of their families, as per Gary Becker’s influential model, is that seeing them as organically tied to the “largesse of a beneficent altruist” is not the same thing as seeing them as “agents, each with a life to live, deserving of both respect and resources” (WHD 65).

<sup>18</sup> Cf. “Up to a point, *the approach is logically independent of a theory of justice*, since a theory of justice may acknowledge many constraints with regard to how far it is entitled to promote people’s well-being” (C&HR 280).

<sup>19</sup> Concerning this last point, Nussbaum acknowledges that the “effective pursuit of many of the items on the list” will require “some transfers of wealth from richer nations to poorer nations” and it is her hope that the capabilities list will “steer the process of globalization, giving it a rich set of human goals and a vivid sense of human waste and tragedy, when choices are pondered that would otherwise be made with only narrow economic considerations in view” (WHD 104-105).

<sup>20</sup> Cf. “Choice is not pure spontaneity, flourishing independently of material and social conditions” ((C&HR 291-292, WHD 90).

<sup>21</sup> This passage bears some analogy to the classical Confucian concept of moral self-cultivation as told in the Ox-Mountain passage in Mencius – the teaching being that though we have four moral sprouts or incipient moral tendencies, they will wither away if not properly nurtured. See D.C. Lau, *Mencius* (Baltimore, Penguin Books: 1970) for an excellent translation of this parable.

<sup>22</sup> Reflecting her belief that literature can be a rich source for philosophical inquiry, Nussbaum refers us to circus girl character Sissy Jupe in Charles Dicken’s *Hard Times* to illustrate that the question “who has got the money, and whether any of it is mine?” is more pressing and urgent than that of how much total any given nation may have (WHD 60).

<sup>23</sup> In a study designed to determine how widowers and widows assess their health and well-being, Sen found that women significantly under-reported their ill conditions as compared to men, even though they were empirically much worse off. He hypothesizes that women do so because they have long been habituated to the absence of good health, and thus do not report dissatisfaction with it nor realistically expect that it will change (WHD 139-143, Cf. *Sex & Social Justice* 31). Cf. Nussbaum: “If someone who has no property rights under the law, who has had no formal education, who has no legal right of divorce, who will very likely be beaten if she seeks employment outside the home, says that she endorses traditions of modesty, purity, and self-abnegation, it is not clear that we should consider this the last word on the matter” (WHD 43).

<sup>24</sup> For a concise summary of Rawls’ primary goods approach, see C&HR 283.

<sup>25</sup> Cf. “Women who begin from a position of traditional deprivation and powerlessness will frequently require special attention and aid to arrive at a level of capability than the more powerful can more easily attain” (WHD 69).

<sup>26</sup> In contrast to Rawls as we shall discuss in more detail later, Nussbaum does not require the traditions of the West to support her ethical theory, but believes that “the idea of being able to plan and to execute a plan arises without any philosophical backing, out of the struggle of human beings to live in a hostile environment” (WHD 67-69).

<sup>27</sup> Here, Nussbaum wants to know “whose interests are served by this nostalgic image of a happy harmonious culture, and whose resistance and misery are being effaced” (WHD 38).

<sup>28</sup> Against the claim that the suggestions that Nussbaum offers to improve the lot of women are “alien colonial ideas,” Nussbaum retorts that “they are ignoring tremendous chunks of reality, including indigenous movements for women’s education, for the end of *purdah*, for women’s political participation, that gained strength straight through the nineteenth and early twentieth centuries in both Hindu and Muslim traditions, in some ways running ahead of British and U.S. feminist movements” (WHD 38).

<sup>29</sup> Nussbaum goes on to specify, however, that “international agencies and other governments are justified in using persuasion – and in especially grave cases economic sanctions – to promote such developments” (WHD 105). Here we already see a major contrast with Rawlsian global justice, for while Rawls does not allow persuasion of any kind to “decent” societies to internally reform even though they do not guarantee typical liberal freedoms, Nussbaum’s approach, while retaining the nation-state structure, nevertheless puts stricter limits on national sovereignty.

<sup>30</sup> At this point, one might rightfully ask why Nussbaum begins with Aristotle at all. Biographically, we know that Nussbaum entered the formal discipline of philosophy through the classics department, having learned philosophy largely through grappling with the texts of Plato and Aristotle. We also know that Nussbaum consistently reports that she continues to find these texts to be rich sources for her philosophical thinking, as they contain a range of distinctive positions, some which have contemporary analogues (APHC, 103). Of course, that a thinker concerned with social ethics has found inspiration from Aristotle should not be surprising, given the fact that Aristotle has influenced the work of a wide range of thinkers from humanists, Catholic natural law theorists, communitarians, liberal-perfectionists, etc. In fact, however disparate these thinkers are in theoretical commitments and basic

methodology, Nussbaum believes that they all share in common these core ideas from Aristotle: a dislike for ideas that wealth is an end itself, the idea that the proper goal of politics is to support a rich “plurality of human life-activities” using the Marxian phrase, that these activities are distinct and each is valuable, that the separateness of persons is a basic fact and that the goal of politics does not lie in some glorious total or average (APHC 104-105).

<sup>31</sup> “Aristotle and Human Nature and the Foundations of Ethics” was written on the occasion of reflecting on the ethical philosophy of Bernard Williams. In that article, Nussbaum’s basic task is to 1) refute Bernard Williams’ account of Aristotle in his *Ethics and the Limits of Philosophy*, and to 2) show that no “external point” or “absolute conception of nature” is necessary or even sufficient to serve as a foundation for ethics. Consult this article in *World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams* (1995) for more detail.

<sup>32</sup> This thought-experiment approach in examining questions of personal identity is still popular today, with philosophers such as Derek Parfit concocting fantastic hypothetical scenarios designed to spark our thoughts concerning what changes we could undergo in our personhood and still be “the same” as before, just as it was during Descartes’ time, where the activity of thought was deemed all-important to his self-definition as recorded in his *Meditations on First Philosophy*.

<sup>33</sup> Nussbaum acknowledges that this reading is “controversial” but insists, nevertheless, that it is correct.

<sup>34</sup> Here she refers the reader to the countless stories of Homeric gods, the reflections about divinity present in *Xenophanes* and continued in Plato’s *Republic* which criticize the gods of mythology for being more like us in their ways of life. With respect to beasts, Nussbaum notes that stories about them usually characterize them as lacking reason and language or sociability (e.g. Odysseus encounter with the Cyclopes – anthropomorphic creatures who live in isolation from community, and have no problem consuming their “guests”). Nussbaum’s comments about the passage in the *Phaedro* discussing Socrates’ impending fate (115C-E) essentially relate the same message. She notes that to resolve the question whether the post-mortem Socrates will still be him, we will need an account of what it is to be a human being. Her point here, of course, is the following: “...what we require from such an account, if it is really to speak to what troubles us, is an *evaluation* of elements of lives, one that will tell us what among the properties and doings of Socrates are the most important, the truly essential ones, the ones without which he could not continue. But it would seem that there is no answer to this question from a totally external perspective” (AHN 93-94).

<sup>35</sup> Cf. “This idea of an ongoing journeying and an ever deeper searching into ourselves is appropriate as an image of the Aristotelian search for human nature. For what is proposed here is a scrutiny that seeks out, among our evaluative judgments, the ones that are the deepest and the most indispensable, the ones that lie at the heart of the ways in which human beings over time have defined themselves to themselves, through the play of the story-making imagination and in countless other activities of self-expression and self-perpetuation” (AHN 123)

<sup>36</sup> In this sense, Nussbaum insists that her “use of an idea of the human being always was... closer to the Rawlsian idea of a concept of the person than to what Rawls identifies as the Aristotelian reliance on a concept of human nature” (APHC 119).

<sup>37</sup> The argument, of course, is Nussbaum’s: “Style itself makes its claims, expresses its own sense of what matter”; even “abstract theoretical style” makes a statement about what is or is not important, “certain truths about human life can only be fittingly and accurately stated in the language and forms characteristic of the narrative artists” (LK 3-7).

<sup>38</sup> Cf. “the body that gets beaten is in a sense the same all over the world” (WHD 23).

<sup>39</sup> See Richard Rorty, “Human Rights, Rationality, and Sentimentality,” from Stephen Shute and Susan Hurley, eds. *On Human Rights: The Oxford Amnesty Lectures*, 1993, 111-134, for more information about his arguments against the failure of rationality to move us into ethical action.

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<sup>40</sup> Cf. “In theology such grace is the counterpart of God’s creative goodness, and the central problem is how to understand evil.” Jesse Kalin, *Knowing Novels: Nussbaum on Fiction & Moral Theory, Ethics* 103.1 (1992): 135-151.

<sup>41</sup> See Charles Taylor “Conditions of an Unforced Consensus on Human Rights” in Joanne R. Bauer and Daniel A. Bell, eds. *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press: 1999).

<sup>42</sup> See Susan Wolf in “Martha C. Nussbaum: Human Capabilities, Female Human Beings: Commentary” in *Women, Culture and Development: A Study of Human Capabilities*, eds. Martha Nussbaum and Jonathan Glover, Oxford: Oxford University Press, 1995 (101-115) at 114.

<sup>43</sup> See Michael Perry, *The Idea of Human Rights: Four Inquiries* (Oxford: Oxford University Press, 1998), especially chapter 1, for further elaboration of his central contention that the sanctity of human life can only be defended religiously.

<sup>44</sup> Nussbaum acknowledges that while political liberalism is committed to treating secular comprehensive doctrines in the same way as religious ones are, practically there is enormous difficulties in treating religious & non-religious conceptions equally (WHD 208). For example, persons with private religions may be sincere in their conscientious claims for exemption (e.g. a person may sincerely believe that his good can only be achieved by getting stoned and listening to Mahler), yet “ascertaining the centrality of this practice to his search for meaning will be virtually impossible, and granting exemptions in this way would quickly make a mockery of the drug laws, of mandatory military service, and many other laws of general applicability” (WHD 208).

<sup>45</sup> Nussbaum cites various problems she has with this “secular humanist” approach. To begin with, she believes that it is rash and counter-productive (let alone illiberal and disrespectful) to tell religious people that a set of apparently external moral demands need to be followed in lieu of their own traditions (WHD 178-180). Second, she believes they insult many who may otherwise be her allies, since religion has not only stood on the side of patriarchy and oppression against women, but for the protection of human rights justice and commitment to social change (WHD 181). In short, she faults secular humanist feminists for ignoring the internal diversity and voices of contestation within each religion in their identification of religion with patriarchy, as well as their total neglect of the value of the religious capabilities themselves. See in particular Susan Moller Okin’s and Nussbaum’s essays in *Is Multiculturalism Bad for Women?* (1999) for a fuller discussion of these and other ideas.

<sup>46</sup> Nussbaum notes that “traditional feminists” of this sort generally believe that religion and traditional understandings of community are the only guides for charting women’s course of future. Some are cultural relativists, while others simply think that local sources of value are more likely to be good for people than international human rights norms. The view suffers, however, from the same problem as secular feminism, i.e., in neglecting the dissenting and critical voices which may (and in many cases do) exist in their own traditions. However, while Nussbaum does believe that while secular feminists do usually have a goal of liberating women or improving their lot in life, she is much more suspicious of traditional religious appeals. In her own words: “I don’t think there is anything so positive to be said about the motives lying behind traditionalism, where women are concerned. It is rare to find a serious argument to the effect that a certain type of harm or inequality toward women is required, as such, by the spiritual or moral values inherent in a religious tradition. It was not argued that unequal inheritance rights for May Roy were a noble goal, essential to Christian worship; that polygamy and child marriage were of the essence of Hindu spiritual values; or that the failure to pay a monthly maintenance to Shah Ban was a high moment in Islam” (WHD 187).

<sup>47</sup> I should add that I think Nussbaum pushes the point too far when she thinks that as an outsider, she may be able to maintain a “helpful type of neutrality” with respect to her observations in India (WHD 10)

<sup>48</sup> Specifically, these are: 1) a 1983 case involving Christian inheritance law, *Mrs. Mary Roy v. State of Kara and Others* AIR 1986 SC 1011; 2) attempts to reform the Hindu system of personal law (e.g., the 1947 Hindu Code Bill); and 3) a case involving Muslim divorce law, *Mohammed Ahmed v. Shah Ban Begun & Others* SCR 1985.

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<sup>49</sup> Here, Nussbaum offers as an example of a violator – Israel – which denies the existence of other types of Jews, and ironically grants stronger protections for certain classes of non-Jews, for the sake of a strong Judaism.

<sup>50</sup> Here, Nussbaum notes that there are obvious definitional controversies, but offers as an example the U.S. practice of persistently refusing to grant religious status to Satanic cults and other related groups. Moreover, it should be noted that according to contemporary U.S. Law, something can be deemed a “religious” belief or practice even if there is no belief in a supreme deity.

<sup>51</sup> Nussbaum cites as an example the refusal by Hindus of a certain caste to allow women to go outside because their own caste norms prohibit free-movement of that kind.

<sup>52</sup> But see note 45, above, about the special problems posed when secular persons claim similar exemptions based on their own non-religious comprehensive doctrines.

<sup>53</sup> Hilary Charlesworth, for example, notes that some of the items on Nussbaum’s list of capabilities have counterparts in the international conventions on human rights. For example, Nussbaum’s first capability, that of life, is closely tied to the Art. 6 of the ICCPR which states that “everyone has the inherent right to life...no one shall be arbitrarily deprive of his life.” In other cases, Nussbaum’s capabilities approach can be understood as extending the rights enumerated in those same treaties. To illustrate, the fourth capability of “senses, imagination, and thought” has its analogs in the right to education which is recognized in Art. 13 of the ICESCR and the rights to freedom of expression/religion in Art. 18 of the ICCPR, but additionally “covers abilities that have no international legal protection such as that to have pleasurable experiences and to avoid non-beneficial pain” (Charlesworth, *Ethics* 68). Still others, for example the eighth “other species” capability (*i.e.*, of living with concern for and in relation to animals, plants and the world of nature) do not have counterparts in contemporary international law. In other example, Charlesworth notes that while the Committee on the Economic, Social and Cultural Rights, which monitors the ICESCR has developed the idea of a “minimum core entitlements” Nussbaum’s account strives for each and every person to be able to experience full human functioning and flourishing (*ibid.*) See also United Nations, Committee on Economic, Social and Cultural Rights, *The Nature of States Parties Obligations*, General Comment no.3, 1990, E/C.12/1990/8 for further elaboration of this concept of “minimum core entitlements”.

<sup>54</sup> According to Nussbaum, the following rights - political participation, religious free exercise, freedom of speech, freedom to seek employment outside the home, freedom from unwarranted search and seizure, *etc.* are all best understood as human capacities to function in ways (C&HR 293).

<sup>55</sup> See Jack Donnelly, *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, 1989.

<sup>56</sup> Cf. “Aristotle, Plato, Spinoza, Kant – these were still unknown to me. Dickens, Jane Austen, Aristophanes, Ben Johnson, Euripides, Shakespeare, Dostoyevsky – there were my friends, my spheres of reflection” (LK 11)

<sup>57</sup> Here, Mulgan is referring to the following articles: “Nature, Function, Capability: Aristotle on Political Distribution” (1988); and “Aristotelian Social Democracy” in *Liberalism and the Good* (1990).

<sup>58</sup> Nussbaum, however, is quick to point out that Aristotle’s comments on slavery rendered much of the institution as it was practiced unjust, given that the enslaved populations of other Greek cities were treated as such not because they lacked the deliberative faculty, but because they had been captured in war. Nussbaum furthermore wishes to portray Aristotle as not as illiberal as he is often credited with being. For instance, Aristotle rejected the almost universal tendency in his time to assign offices on the basis of wealth, property or honor – preferring claims of virtue and service instead. Additionally, Aristotle offered no prescriptions regarding the religious identity of the ideal city - a notable omission in 4<sup>th</sup> century; argued that the state should directly subsidize the participation of even the poorest citizens in necessary civic functions; and mandated large-scale land reform where half the property would be held in common and the rest would become common in use (APHC 109).

<sup>59</sup> She also offers two other ways to guide threshold setting: 2) give some consideration to current possibilities – *e.g.*, India can not now guarantee college education for everyone, but perhaps primary and secondary education; however not too much, because if the bar is too low we will be merely reifying current realities for what they must be; 3) give

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attention to potential clashes between one capability and another, and her response to clashes is that any situation where we have to push someone below the capability should be considered tragic.

<sup>60</sup> Cf. “It will always be difficult to say what is a legitimate local interpretation of a capability and what is not; that is why it is a good idea for this specifying to take place in connection with a cross-cultural dialogue and attention to international human rights documents...But the history of constitutional interpretation in many nations shows, I suggested, that the incremental specification of a threshold level of capability is possible and gives real guidance” (N. *Ethics* 126)

<sup>61</sup> See Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics*; 3<sup>rd</sup> edition. Boulder, CO: Westview Press, 1999 for specific examples of “Islamic human rights schemes.”

<sup>62</sup> Cf. “People associate in many different ways, live together, love each other, have children. Which of these will be given the name ‘family’ is a legal and political matter, never one to be decided simply by the parties themselves. The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth” (WHD 262).