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CAPABILITIES AND HUMAN RIGHTS

Martha C. Nussbaum*

INTRODUCTION

WHEN governments and international agencies talk about people's basic political and economic entitlements, they regularly use the language of rights. When constitutions are written in the modern era, and their framers wish to identify a group of particularly urgent interests that deserve special protection, once again it is the language of rights that is regularly preferred.

The language of rights has a moral resonance that makes it hard to avoid in contemporary political discourse. But it is certainly not on account of its theoretical and conceptual clarity that it has been preferred. There are many different ways of thinking about what a right is, and many different definitions of "human rights."¹ For example, rights are often spoken of as entitlements that belong to all human beings simply because they are human, or as especially urgent interests of human beings *as human beings* that deserve protection regardless of where people are situated.² Within this tradition there are differences. The dominant tradition has typically grounded rights in the possession of rationality and language, thus implying that non-human animals do not have them, and that mentally impaired humans may not have them.³ Some philosophers have maintained that sentience, instead, should be the basis of rights; thus, all animals would be rights-bearers.⁴ In contrast to this entire group of natural-rights theorists, there are also thinkers who treat all rights as artifacts of state action.⁵ The latter position would seem to imply that there are no

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1. For one excellent recent account, with discussions of other views, see Alan Gewirth, *The Community of Rights* (1996).

2. For just one example, this is the view of Thomas Paine. See Thomas Paine, *Rights of Man—Common Sense* 80-85 (Alfred A. Knopf 1994) (quoting and discussing the French Declaration of the Rights of Man and of Citizens); *id.* at 114 (insisting that rights, so conceived, should be the foundation of a nation's prosperity). Such views ultimately derive from ancient Greek and Roman Stoic views of natural law. The Latin word *ius* can be translated either as "right" or as "law;" Grotius already discussed the manifold applications of *ius*. See Hugo Grotius, *De Iure Belli Ac Pacis* (On the Law of War and Peace) (P.C. Molhuysen, A.W. Sijthoff 1919) (1625).

3. The most influential exemplar of such a view, followed by most later theorists, is Cicero. See M. Tulli Ciceronis, *De Officiis* (On Duties), bk. 1, paras. 11-14 (Oxford Univ. Press 1994) (distinguishing humans from beasts by reference to rationality and language); *id.* paras. 20-41 (deriving duties from this).

4. See Peter Singer, *Animal Liberation* (2d ed. 1990).

5. This view is most influentially found in Kant. See Immanuel Kant, *The Metaphysics of Morals*, in Kant: *Political Writings* 132-35 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge Univ. Press 2d enlarged ed. 1991) (1798) (defining right and the theory of right with reference to law and the state).

human rights where there is no state to recognize them. Such an approach appears to the holders of the former view to do away with the very point of rights language, which is to point to the fact that human beings are entitled to certain types of treatment *whether or not* the state in which they happen to live recognizes this fact.

There are many other complex unresolved theoretical questions about rights. One of them is the question whether the individual is the only bearer of rights, or whether rights belong, as well, to other entities, such as families, ethnic, religious, and linguistic groups, and nations. Another is whether rights are to be regarded as side-constraints on goal-seeking action, or as parts of a goal that is to be promoted.⁶ Still another unresolved question is whether rights—thought of as justified entitlements—are correlated with duties. If *A* has a right to *S*, then it would appear there must be someone who has a duty to provide *S* to *A*. But it is not always clear who has these duties—especially when we think of rights in the international context. Again, it is also unclear whether all duties are correlated with rights. One might hold, for example, that we have a duty not to cause pain to animals without holding that animals have rights—if, for example, one accepted one of the classic accounts of the basis of rights that makes reference to the abilities of speech and reason as the foundation, and yet still believed that we have other strong reasons not to cause animals pain.

Finally, there are difficult theoretical questions about what rights are to be understood as rights *to*. When we speak of human rights, do we mean, primarily, a right to be treated in certain ways? A right to a certain level of achieved well-being? A right to certain resources with which one may pursue one's life plan? A right to certain opportunities and capacities with which one may, in turn, make choices regarding one's life plan? Political philosophers who debate the nature of equality standardly tackle a related question head on, asking whether the equality most relevant to political distribution should be understood, primarily, as equality of well-being, or equality of resources, or equality of opportunity, or equality of capabilities.⁷ The language of

6. An influential example of the first approach is in Robert Nozick, *Anarchy, State, and Utopia* 26-53 (1974) (Chapter 3: Moral Constraints and the State), arguing that rights supply moral constraints on state action. *See also* Samuel Scheffler, *The Rejection of Consequentialism* (rev. ed. 1994) (developing a theory of rights as side constraints). For the second approach, see, for example, Amartya Sen, *Rights as Goals*, in *Equality and Discrimination: Essays in Freedom and Justice* (Stephen Guest & Alan Milne eds., 1985) [hereinafter *Rights as Goals*], developing an account of rights as among the goals of public action.

7. *See* Amartya Sen, *Equality of What?*, I The Tanner Lectures on Human Values 195 (Sterling M. McMurrin ed., 1980), *reprinted in* *Choice, Welfare and Measurement* 353 (1982) [hereinafter *Equality of What?*] (arguing that the most relevant type of equality for political purposes is equality of capability); *see also* Amartya Sen, *Inequality Reexamined passim* (1992) [hereinafter *Inequality Reexamined*] (making the same case in more detail); Richard J. Arneson, *Equality and Equal Opportunity for*

rights to some extent cuts across this debate and obscures the issues that have been articulated.

Thus, one might conclude that the language of rights is not especially informative, despite its uplifting character, unless its users link their references to rights to a theory that answers at least some of these questions.⁸ It is for this reason, among others, that a different language has begun to take hold in talk about people's basic entitlements. This is the language of capabilities and human functioning. Since 1993, the *Human Development Reports* of the United Nations Development Programme⁹ ("UNDP") have assessed the quality of life in the nations of the world using the concept of people's capabilities, or their abilities to do and to be certain things deemed valuable.¹⁰ Under the influence of economist/philosopher Amartya Sen, they have chosen that conceptual framework as basic to inter-country comparisons and to the articulation of goals for public policy.

Along with Sen, I have been one of the people who have pioneered what is now called the "capabilities approach," defending its importance in international debates about welfare and quality of life. My own use of this language was originally independent, and reflected the fact that Aristotle used a notion of human capability (Greek *dunamis*) and functioning (Greek *energeia*) in order to articulate some of the goals of good political organization.¹¹ But the projects soon became fused: I increasingly articulated the Aristotelian idea of capability in

Welfare, 56 *Phil. Stud.* 77 (1989) (defending equality of opportunity for welfare); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 *Ethics* 906, 920-21 (1989) (arguing that the right thing to equalize is "access to advantage"); Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 *Phil. & Pub. Aff.* 185 (1981) (discussing distributional equality); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 *Phil. & Pub. Aff.* 283 (1981) (arguing that the right thing to equalize are resources, and defining a suitable conception of equality of resources); John E. Roemer, *Equality of Resources Implies Equality of Welfare*, 101 *Q.J. Econ.* 751 (1986) (arguing that, suitably understood, equality of resources implies equality of welfare).

8. See, e.g., Bernard Williams, *The Standard of Living: Interests and Capabilities*, in *The Standard of Living* 94, 100 (Geoffrey Hawthorn ed., 1987) (arguing for an approach to basic human rights through basic capabilities).

9. See, e.g., United Nations Development Programme, *Human Development Report 1996*; United Nations Development Programme, *Human Development Report 1993* [hereinafter *Human Development Report 1993*].

10. The reports' primary measure of quality of life is the "human development index" ("HDI"). *Human Development Report 1993*, *supra* note 9, at 10. HDI is a composite of three basic components of human development: longevity (measured by life expectancy), knowledge (measured by a combination of adult literacy and mean years of schooling), and standard of living (measured by income relative to the poverty level). *Id.* at 100. For a standard definition of capabilities, see Amartya Sen, *Capability and Well-Being*, in *The Quality of Life* 30-31 (Martha Nussbaum & Amartya Sen eds., 1993), explaining the choice of the term and its relationship to other basic concepts.

11. See Martha C. Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, in [Supplementary Volume] *Oxford Studies in Ancient Philosophy* 145 (Julia Annas & Robert H. Grimm eds., 1988) [hereinafter *Nature, Function, and Capability*].

terms pertinent to the contemporary debate,¹² while Sen increasingly emphasized the ancient roots of his idea.¹³ In a variety of contexts, we argued that the capabilities approach was a valuable theoretical framework for public policy, especially in the international development context.¹⁴ We commended it to both theoreticians and practitioners as offering certain advantages over approaches that focus on opulence—GNP per capita, or welfare—construed in terms of utility or desire-satisfaction, or even the distribution of basic resources.¹⁵

Both Sen and I stated from the start that the capabilities approach needs to be combined with a focus on rights. Sen wrote about rights as central goals of public policy throughout the period during which he developed the approach.¹⁶ I stressed from the start that Aristotle's theory was grossly defective because it lacked a theory of the basic human rights, especially rights to be free from government interference in certain areas of choice.¹⁷ More recently, responding to com-

12. See Martha Nussbaum, *Aristotelian Social Democracy*, in *Liberalism and the Good* 203 (R. Bruce Douglass et al. eds., 1990) [hereinafter *Aristotelian Social Democracy*]; Martha C. Nussbaum, *Aristotle on Human Nature and the Foundations of Ethics*, in *World, Mind, and Ethics: Essays on the Ethical Philosophy of Bernard Williams* 86 (J.E.J. Altham & Ross Harrison eds., 1995) [hereinafter *Human Nature*]; Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, in *Women, Culture, and Development* 61 (M. Nussbaum & J. Glover eds., 1995) [hereinafter *Human Capabilities*]; Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *The Quality of Life*, *supra* note 10, at 242; Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 *Pol. Theory* 202 (1992) [hereinafter *Human Functioning*]; Martha C. Nussbaum, *The Good as Discipline, The Good as Freedom*, in *The Ethics of Consumption and Global Stewardship* 312 (D. Crocker & T. Linden eds., forthcoming 1998) (manuscript on file with the *Fordham Law Review*) [hereinafter *The Good as Discipline, The Good as Freedom*]; Martha C. Nussbaum, *Sex and Social Justice* (forthcoming 1998) (Chapter 1: *Women and Cultural Universals*) (manuscript on file with the *Fordham Law Review*) [hereinafter *Women and Cultural Universals*].

13. See, for example, *Inequality Reexamined*, *supra* note 7, which also contains his most recent formulation of the approach.

14. A good summary of our approaches, and the similarities and differences between Sen's and my views, is in David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic*, 20 *Pol. Theory* 584 (1992) [hereinafter *Functioning and Capability: Part I*], and David A. Crocker, *Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic, Part 2*, in *Women, Culture, and Development*, *supra* note 12, at 153 [hereinafter *Functioning and Capability: Part 2*].

15. See Amartya Sen, *Capability and Well-Being*, in *The Quality of Life*, *supra* note 10, at 30; Amartya Sen, *Commodities and Capabilities* (1985); *Equality of What?*, *supra* note 7; Amartya Sen, *Gender Inequality and Theories of Justice*, in *Women, Culture, and Development*, *supra* note 12, at 259 [hereinafter *Gender Inequality*]; Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 *J. Phil.* 169 (1985) [hereinafter *Well-Being*].

16. See Amartya Sen, *Rights and Capabilities*, in *Morality and Objectivity: A Tribute to J.L. Mackie* 130 (T. Honderich ed., 1985), reprinted in Amartya Sen, *Resources, Values and Development* 307-24 (1984) [hereinafter *Rights and Capabilities*]; *Rights as Goals*, *supra* note 6; Amartya Sen, *Rights and Agency*, 11 *Phil. & Pub. Aff.* 3 (1982) [hereinafter *Rights and Agency*].

17. See *Aristotelian Social Democracy*, *supra* note 12, at 239.

munitarian critics of rights-based reasoning and to international discussions that denigrate rights in favor of material well-being, both Sen and I have even more strongly emphasized the importance of rights to our own capabilities approach. We stressed the various roles liberty plays within our respective theories and emphasized the closeness of our approach to liberal theories such as that of John Rawls.¹⁸

Moreover, rights play an increasingly large role inside the account of what the most important capabilities are. Unlike Sen, who prefers to allow the account of the basic capabilities to remain largely implicit in his statements, I have produced an explicit account of the most central capabilities that should be the goal of public policy. The list is continually being revised and adjusted, in accordance with my methodological commitment to cross-cultural deliberation and criticism. But another source of change has been an increasing determination to bring the list down to earth, so to speak, making the “thick vague conception of the good”¹⁹ a little less vague, so that it can do real work guiding public policy. At this point, the aim is to come up with the type of specification of a basic capability that could figure in a constitution,²⁰ or perform, apart from that, the role of a constitutional guarantee.

In the process, I have increasingly used the language of rights, or the related language of liberty and freedom, in fleshing out the account of the basic capabilities. Thus, in *Human Capabilities*, I speak of “legal guarantees of freedom of expression . . . and of freedom of religious exercise”²¹ as aspects of the general capability to use one’s mind and one’s senses in a way directed by one’s own practical reason. I also speak of “guarantees of non-interference with certain choices that are especially personal and definitive of selfhood,” and of “the freedoms of assembly and political speech.”²² In a forthcoming paper, I actually use the language of rights itself in articulating the capability to seek employment outside the home, and several of the other important capabilities.²³ In part, this is a rhetorical choice, bringing the list

18. See John Rawls, *Political Liberalism* (1993) [hereinafter *Political Liberalism*]; John Rawls, *A Theory of Justice* (1971) [hereinafter *A Theory of Justice*]. Sen discusses, and supports, the Rawlsian notion of the priority of liberty in *Freedoms and Needs*, *New Republic*, Jan. 10 & 17, 1994, at 31-38 [hereinafter *Freedoms and Needs*]. I discuss the relationship between my own version of the capabilities view and Rawls’s theory in *Aristotelian Social Democracy*, *supra* note 12, and *The Good as Discipline, The Good as Freedom*, *supra* note 12. In *The Good as Discipline, The Good as Freedom*, I emphasize the liberal roots of my own Aristotelianism, contrasting my view with two non-liberal forms of Aristotelianism.

19. This is my term from *Aristotelian Social Democracy*, *supra* note 12, at 217, contrasting with Rawls’s “thin theory of the good.” *A Theory of Justice*, *supra* note 18, at 395-99.

20. See *Human Capabilities*, *supra* note 12, at 85.

21. *Id.* at 84.

22. *Id.* at 84-85.

23. *Women and Cultural Universals*, *supra* note 12, at 25-26.

of capabilities into relation with international human rights instruments that have a related content. But in part it also reflects a theoretical decision to emphasize the affiliations of the approach with liberal rights-based theories, in an era of widespread reaction against the Enlightenment and its heritage.²⁴

But there are still some large questions to be answered. The relationship between the two concepts remains as yet underexplored. 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? On the other hand, 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?²⁵ Does the capabilities view help us to answer any of the difficult questions that I sketched above, which have preoccupied theorists of rights? 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?²⁶ 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?

In short, the conceptual relationship needs further scrutiny.²⁷ Commenting on Sen's Tanner Lectures in 1987, Bernard Williams expressed sympathy with the capabilities approach, but called for a conceptual investigation:

I am not very happy myself with taking rights as the starting point. The notion of a basic human right seems to me obscure enough, and I would rather come at it from the perspective of basic human capabilities. I would prefer capabilities to do the work, and if we are going to have a language or rhetoric of rights, to have it delivered from them, rather than the other way around. But I think that there

24. For the close relationship between the capabilities approach and Enlightenment liberalism, see *Freedoms and Needs*, *supra* note 18, and *The Good as Discipline, The Good as Freedom*, *supra* note 12.

25. I put things this way because the most prominent anti-liberal natural law theorists do not explicitly reject rights language, see John Finnis, *Natural Law and Natural Rights* (1980), and Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (1993), and the most prominent Catholic opponent of rights language does not endorse the capabilities approach, see Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991), but the combination is easy enough to imagine.

26. See *Rights and Capabilities*, *supra* note 16, at 310-12.

27. A valuable beginning, bringing together all that Sen and I have said on the topic, is in *Functioning and Capabilities: Part 2*, *supra* note 14, at 186-91.

remains an unsolved problem: how we should see the relations between these concepts.²⁸

This paper is a contribution to that project. I shall not be able to answer all the outstanding questions, and I shall certainly not be able to offer a theory of rights that solves all the problems I outlined. But I hope to illuminate some of the issues that must be faced when one does attempt to connect the two ideas, some of the options one has, some of the problems that arise, and some of the positive dividends one may reap.

I shall begin by describing the capabilities approach and the motivations for its introduction: what it was trying to do in political philosophy, how it commended itself by contrast to other standard ways of thinking about entitlements. Then I shall briefly clarify the connection between the capabilities approach and liberal theories of justice. Finally, I shall turn to my central topic, the relationship between rights and capabilities.

I. THE CAPABILITIES APPROACH: MOTIVATION AND ARGUMENT

Why, then, should there be a theory of human capabilities? What questions does it answer, and what is its practical point? Why should an international agency such as the UNDP use a measure of quality of life based on human capability and functioning, rather than other more traditional measures: for example, those based on opulence, utility, or a distribution of resources that satisfies some constraint, whether it be a social minimum, or the Rawlsian Difference Principle, or some more exacting egalitarian condition?

The account of human capabilities has been used as an answer to a number of distinct questions, such as: What is the living standard?²⁹ What is the quality of life?³⁰ What is the relevant type of equality that we should consider in political planning?³¹ It has also been closely linked to discussion of a theory of justice, because such a theory has a need for an account of what it is trying to achieve for people. I believe that the most illuminating way of thinking about the capabilities approach is that it is an account of the space within which we make comparisons between individuals and across nations as to how well they are doing. This idea is closely linked with the idea of a theory of justice, since one crucial aim of a theory of justice typically is to promote some desired state of people; and in *Aristotelian Social Democracy* I linked it very closely to an account of the proper goal of government, to bring all citizens up to a certain basic minimum level

28. Williams, *supra* note 8, at 100.

29. *Id.* at 100-02 (discussing Sen's proposal that the living standard should be defined in terms of capabilities).

30. See *The Quality of Life*, *supra* note 10.

31. See *Inequality Reexamined*, *supra* note 7.

of capability.³² But 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. For example, Robert Nozick could grant that capabilities are the relevant space within which to make comparisons of well-being, while denying that this has anything at all to do with a theory of justice, since he rejects theories of justice based on a "patterned end-state" conception, preferring to define justice solely in terms of procedures and entitlements.³³

The capabilities idea is also closely linked to a concern with equality, in that Sen has always used it to argue that people are entitled to a certain level of rough material and social equality. But, strictly speaking, these two concerns of Sen's are logically independent. One might agree that capabilities are the relevant space within which to compare lives and nations, and yet hold that equality of capability is not the appropriate goal. Capabilities inform us as to what type of equality might be thought pertinent; they do not by themselves tell us whether we should value an equal distribution or some other distribution.

As a theory of the relevant space within which to make comparisons, the capabilities approach is best understood by contrasting it with its rivals in the international development arena. The most common method of measuring the quality of life in a nation and making cross-national comparisons used to be simply to enumerate GNP per capita. This crude method is reminiscent of the economics lesson imagined by Charles Dickens in *Hard Times*, and used by Sen and me to introduce our volume on *The Quality of Life*:

"And he said, Now this schoolroom is a Nation. And in this nation, there are fifty millions of money. Isn't this a prosperous nation? Girl number twenty, isn't this a prosperous nation, and a'n't you in a thriving state?"

"What did you say?" asked Louisa.

"Miss Louisa, I said I didn't know. I thought I couldn't know whether it was a prosperous nation or not, and whether I was in a thriving state or not, unless I knew who had got the money, and whether any of it was mine. But that had nothing to do with it. It was not in the figures at all," said Sissy, wiping her eyes.

"That was a great mistake of yours," observed Louisa.³⁴

In short, the crude approach does not even tell us who has the money, and thus typically gave high marks to nations such as South Africa, which contained enormous inequalities. Still less does it provide any information at all about elements of human life that might be thought very important in defining its quality, but that are not always well cor-

32. *Supra* note 12.

33. Nozick, *supra* note 6, at 150-64 (criticizing patterned end-state conceptions in favor of procedural conceptions).

34. Charles Dickens, *Hard Times* 74-75 (Oxford Univ. Press 1989) (1854).

related with GNP per capita: educational opportunities, health care, life expectancy, infant mortality, the presence or absence of political liberties, the extent of racial or gender inequality.

Somewhat less crude is an economic approach that measures quality of life in terms of utility, understood as the satisfaction of preference or desire.³⁵ This approach at least has the advantage of concerning itself to some degree with distribution, in the sense that it does look at how resources are or are not going to work to make people's lives better. But it has severe shortcomings. First, there is the familiar problem that utilitarianism tends to think of the social total, or average, as an aggregate, neglecting the salience of the boundaries between individual lives.³⁶ As Rawls pointed out, this approach means that utilitarianism can tolerate a result in which the total is good enough, but where some individuals suffer extremely acute levels of deprivation, whether of resources or of liberty.³⁷ In that sense, it does not tell Sissy "who has got the money and whether any of it is mine," any more than does the GNP-based approach. (Indeed, Sissy's teacher was clearly a Benthamite Utilitarian.) Rawls was convinced that the failure of utilitarianism to justify adequately strong protections for the basic political liberties, given this propensity to aggregate, was by itself sufficient reason to reject it.³⁸ Bernard Williams, similarly, has considered utilitarianism's neglect of the "separateness of persons" to be a cardinal failure, and a reason why the theory cannot give an adequate account of social well-being.³⁹

A second problem with utilitarianism is its commitment to the commensurability of value, the concern to measure the good in terms of a single metric and thus to deny that there are irreducibly plural goods that figure in a human life.⁴⁰ Both Sen and I have pursued this ques-

35. For discussion of this approach, see *Equality of What?*, *supra* note 7, at 358-64.

36. See *A Theory of Justice*, *supra* note 18; Amartya Sen & Bernard Williams, *Introduction to Utilitarianism and Beyond* 1, 4-5 (Amartya Sen & Bernard Williams eds., 1982) (arguing that utilitarianism views persons simply as locations of their respective utilities).

37. See *A Theory of Justice*, *supra* note 18, at 179-83 (arguing that utilitarianism treats people as means, rather than as ends).

38. *Id.* at 207 (arguing that it is unacceptable to take chances with basic liberties).

39. Here I am combining arguments from Williams's essay, *A Critique of Utilitarianism*, in *Utilitarianism: For and Against* 77 (1973), arguing that utilitarianism cannot give an adequate account of a person's special connection to his or her own actions, and therefore of personal integrity, with his *Persons, Character and Morality*, in *The Identities of Persons* 197 (Amélie O. Rorty ed., 1969), arguing that the separateness of persons is a central fact of ethical life.

40. See the discussion in Martha C. Nussbaum, *Plato on Commensurability and Desire*, in *Love's Knowledge* 106 (1990) [hereinafter *Commensurability and Desire*], and Martha C. Nussbaum, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, in *Love's Knowledge*, *supra*, at 54 [hereinafter *Discernment of Perception*], arguing that the plurality and distinctness of the valuable things in life make any single metric a damaging distortion.

tion extensively, apart from our work on capabilities.⁴¹ But it has also had importance in justifying the capabilities approach, since the quality of life seems to consist of a plurality of distinct features—features that cannot be simply reduced to quantities of one another. This recognition limits the nature of the tradeoffs it will be feasible to make.⁴²

But a third feature of utilitarianism has been even more central to the capability critique. As Sen has repeatedly pointed out, people's satisfactions are not very reliable indicators of their quality of life. Wealthy and privileged people get used to a high level of luxury, and feel pain when they do not have delicacies that one may think they do not really need. On the other hand, deprived people frequently adjust their sights to the low level they know they can aspire to, and thus actually experience satisfaction in connection with a very reduced living standard. Sen gave a graphic example: In 1944, the year after the Great Bengal Famine, the All-India Institute of Hygiene and Public Health did a survey.⁴³ Included in this survey were a large number of widows and widowers.⁴⁴ The position of widows in India is extremely bad, in all kinds of ways but notoriously in terms of health status.⁴⁵ But in the survey, only 2.5 percent of widows, as against 48.5 percent of widowers, reported that they were either ill or in indifferent health.⁴⁶ And when the question was just about "indifferent health," as opposed to illness—for which we might suppose there are more public and objective criteria—45.6 percent of widowers said their health was "indifferent," as opposed to zero percent of the widows.⁴⁷ The likely explanation for this discrepancy is that people who have regularly been malnourished, who have in addition been told that they are weak and made for suffering, and who, as widows, are told that they are virtually dead and have no rights, will be unlikely to recognize their fatigue and low energy as a sign of bodily disease; but not so for males, who are brought up to have high expectations for their own physical functioning. Sen concludes: "Quiet acceptance of depriva-

41. See *The Discernment of Perception*, *supra* note 40; *Plato on Commensurability and Desire*, *supra* note 40; see also Martha C. Nussbaum, *The Fragility of Goodness* 290-317 (1986) (arguing that Aristotle was right to recognize a type of deliberation that does not rely on a single metric); Amartya Sen, *On Ethics and Economics* 62-63 (1987) [hereinafter *On Ethics and Economics*] (discussing plurality and non-commensurability); Amartya Sen, *Plural Utility*, 81 *Proc. Aristotelian Soc'y* 193 (1981) [hereinafter *Plural Utility*] (arguing that the right way to think of utility is as a plurality of vectors).

42. See *Human Capabilities*, *supra* note 12, at 85-86; *On Ethics and Economics*, *supra* note 41, at 63-64.

43. *Rights and Capabilities*, *supra* note 16, at 309.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

tion and bad fate affects the scale of dissatisfaction generated, and the utilitarian calculus gives sanctity to that distortion."⁴⁸

This phenomenon of "adaptive preferences"—preferences that adjust to the low level of functioning one can actually achieve—has by now been much studied in the economic literature,⁴⁹ and is generally recognized as a central problem, if one wants to use the utilitarian calculus for any kind of normative purpose in guiding public policy.⁵⁰ We are especially likely to encounter adaptive preferences when we are studying groups that have been persistent victims of discrimination, and who may as a result have internalized a conception of their own unequal worth. It is certain to be true when we are concerned with groups who have inadequate information about their situation, their options, and the surrounding society—as is frequently the case, for example, with women in developing countries. For these reasons, then, the utility-based approach seems inadequate as a basis for offering comparisons of quality of life.

Far more promising is an approach that looks at a group of basic resources and then asks about their distribution, asking, in particular, how well even the worst off citizens are doing with respect to the items on the list. Such is the approach of John Rawls, who, in *A Theory of Justice* and subsequent works, advanced a list of the "primary goods" intended to be items that all rational individuals, regardless of their more comprehensive plans of life, would desire as prerequisites for carrying out those plans.⁵¹ These items include liberties, opportunities, and powers, wealth and income, and the social basis of self-respect. More recently, Rawls has added freedom of movement and the free choice of occupation.⁵² The idea is that we measure who is better off and less well off by using such a list of primary resources;

48. *Id.*

49. See Jon Elster, *Sour Grapes—Utilitarianism and the Genesis of Wants*, in *Utilitarianism and Beyond*, *supra* note 36, at 219 (defining adaptive preferences and arguing that their existence poses insuperable problems for utilitarianism); Amartya K. Sen, *Gender and Cooperative Conflicts*, in *Persistent Inequalities* 123 (Irene Tinker ed., 1990) (arguing that women frequently adjust their expectations to the low level of well-being they can achieve, and that on this account a bargaining model of the family is superior to a utilitarian account).

50. See Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, in *The Essence of Becker* 633, 636-37 (Ramón Febrero & Pedro S. Schwartz eds., 1995) (arguing that the beliefs of employers, teachers, and others that minorities are less productive can be self-fulfilling, causing minorities to underinvest in education and work skills, thus becoming less productive than they would otherwise have been).

51. *A Theory of Justice*, *supra* note 18, at 62, 90-95, 396-97. More recently, Rawls has qualified his view by stating that the primary goods are to be seen not as all-purpose means, but as the needs of citizens understood from a political point of view, in connection with the development and expression of their "moral powers." He has stressed that the account of the moral powers—of forming and revising a life plan—is itself an important part of the political theory of the good. See *Political Liberalism*, *supra* note 18, at 178-90.

52. *Political Liberalism*, *supra* note 18, at 181.

that information is used, in turn, by the parties who are choosing principles of justice. Notice that this list is heterogeneous. Some of its items are capacities of persons such as liberties, opportunities, and powers, and the social basis of self-respect is a complex property of society's relation to persons, but income and wealth are pure resources. And income and wealth frequently play a central role in the measurement of who is better and worse off.⁵³ Rawls was at pains, moreover, to state that this list of "primary goods" is not a comprehensive theory of what is good or valuable in life.⁵⁴ For Rawls, the attraction of operating with a list of resources is that it enables the approach to steer clear of prescribing the basic values of human life, which individuals must be able to select for themselves, in accordance with their own more comprehensive religious or ethical conceptions.

Sen's basic argument against Rawls, for the past twenty years, has been that the space of resources is inadequate as a space within which to answer questions about who is better and who is worse off.⁵⁵ The inadequacy derives from the fact that individuals vary greatly in their need for resources and in their ability to convert resources into valuable functionings. Some of these differences are physical. Nutritional needs vary with age, occupation, and sex. A pregnant or lactating woman needs more nutrients than a non-pregnant woman. A child needs more protein than an adult. A person whose limbs work well needs few resources to be mobile, whereas a person with paralyzed limbs needs many more resources to achieve the same level of mobility. Many such variations escape our notice if we live in a prosperous nation that can afford to bring all individuals to a high level of physical attainment; in the developing world we must be highly alert to these variations in need. Some of the variations, again, are social, and have to do with traditional social hierarchies. If we wish to bring all citizens of a nation to the same level of educational attainment, we will need to devote more resources to those who encounter obstacles from traditional hierarchy or prejudice. Thus, women's literacy will prove more expensive than men's literacy in many parts of the world. This means that if we operate only with an index of resources, we will frequently reinforce inequalities that are highly relevant to well-being. An approach focusing on resources does not go deep enough to diagnose obstacles that can be present even when resources seem to be adequately spread around, causing individuals to fail to avail themselves of opportunities that they in some sense have, such as free public education, the the right to vote, or the right to work.

53. A Theory of Justice, *supra* note 18, at 97-98 (discussing different ways of defining the least well off—both favored approaches focus on income and wealth as indicators).

54. Political Liberalism, *supra* note 18, at 187-88.

55. See *Equality of What?*, *supra* note 7, at 364-67; *Gender Inequality*, *supra* note 15, at 263-66.

For this reason, we argue that the most appropriate space for comparisons is the space of capabilities. Instead of asking "How satisfied is person A," or "How much in the way of resources does A command," we ask the question: "What is A actually able to do and to be?" In other words, about a variety of functions that would seem to be of central importance to a human life, we ask: Is the person capable of this, or not? This focus on capabilities, unlike the focus on GNP, or on aggregate utility, looks at people one by one, insisting on locating empowerment in *this* life and in *that* life, rather than in the nation as a whole. Unlike the utilitarian focus on satisfactions, it looks not at what people feel about what they do, but about what they are actually able to do.⁵⁶ Nor does it make any assumptions about the commensurability of the different pursuits. Indeed, this view denies that the most important functions are all commensurable in terms of a single metric and it treats the diverse functions as all important, and all irreducibly plural.⁵⁷ Finally, unlike the focus on resources, it is concerned with what is actually going on in the life in question: not how many resources are sitting around, but how they are actually going to work in enabling people to function in a fully human way.⁵⁸

II. THE CENTRAL HUMAN CAPABILITIES

Sen has focused on the general defense of the capability space, and has not offered any official account of what the most central human capabilities are, although in practice he has to some extent done so, by focusing on some areas of human life and not others in constructing the measures used in the *Human Development Reports*.⁵⁹ Again, his recent book on India gives many concrete examples of the importance and the interrelationships of various concrete human capabilities.⁶⁰ I, by contrast, have focused on the task of producing such a working list, describing a methodology by which we might both generate and justify such a list⁶¹ and defending the whole project of giving such a list

56. Sen has insisted, however, that happiness is "a momentous functioning," in *Well-Being*, *supra* note 15, at 200, and I have insisted that emotional functioning is one of the important types of functioning we should consider. See Martha C. Nussbaum, *Emotions and Women's Capabilities*, in *Women, Culture, and Development*, *supra* note 12, at 360.

57. See *Human Capabilities*, *supra* note 12, at 85-86; *Plural Utility*, *supra* note 41.

58. In this sense, the approach takes its inspiration from Marx's discussion of fully human functioning in several early works in which he was in turn much influenced by Aristotle. For discussion of these links, see *Human Nature*, *supra* note 12, at 119-20.

59. See *supra* notes 9-10 and accompanying text.

60. See, e.g., Jean Drèze & Amartya Sen, *India: Economic Development and Social Opportunity* 13-16, 109-39 (1995) (discussing the relationship between health and education and other capabilities); *id.* at 155-178 (discussing the relationship between gender inequality and women's functioning and capability). For an enumeration of all the examples Sen has given in a variety of different works, see *Functioning and Capability: Part 1*, *supra* note 14, and *Functioning and Capability: Part 2*, *supra* note 14.

61. This is especially evident in *Human Nature*, *supra* note 12, at 90-95.

against the objections of relativists and traditionalists.⁶² The list is supposed to be a focus for political planning, and it is supposed to select those human capabilities that can be convincingly argued to be of central importance in any human life, whatever else the person pursues or chooses. The central capabilities are not just instrumental to further pursuits: They are held to have value in themselves, in making a life fully human. But they are held to have a particularly central importance in everything else we plan and choose. In that sense, central capabilities play a role similar to that played by primary goods in Rawls's more recent account: They support our powers of practical reason and choice, and have a special importance in making any choice of a way of life possible. They thus have a special claim to be supported for political purposes in societies that otherwise contain a great diversity of views about the good. I do not think of the political sphere in exactly the way that Rawls conceives it, since I do not make the assumption that the nation-state should be the basic deliberative unit,⁶³ and the account is meant to have broad applicability to cross-cultural deliberations. Nonetheless, the basic point of the account is the same: to put forward something that people from many different traditions, with many different fuller conceptions of the good, can agree on as the necessary basis for pursuing their good life.⁶⁴

The list is an attempt to summarize the empirical findings of a broad and ongoing cross-cultural inquiry. As such, it is open-ended and humble; it can always be contested and remade. It does not claim to read facts of "human nature" off of biological observation, although it does of course take account of biology as a relatively constant element in human experience. Nor does it deny that the items on the list are to some extent differently constructed by different societies. Indeed, part of the idea of the list is that its members can be more concretely specified in accordance with local beliefs and circumstances. In that sense, the consensus it hopes to evoke has many of the features of the "overlapping consensus" described by Rawls.⁶⁵

Here is the current version of the list, revised as a result of my recent visits to development projects in India.⁶⁶

62. See *Human Capabilities*, *supra* note 12, at 67-72, 93-95; *Human Functioning*, *supra* note 12; *Women and Cultural Universals*, *supra* note 12, at 12-20.

63. For an excellent discussion of this question, and a critique of Rawls with which I largely agree, see Thomas W. Pogge, *Realizing Rawls* 211-280 (1989).

64. See *The Good as Discipline, The Good as Freedom*, *supra* note 12, at 324, where I have stressed this political-liberal role of the capabilities list more than in previous papers.

65. Political Liberalism, *supra* note 18, *passim*.

66. The primary changes are a greater emphasis on bodily integrity, a focus on dignity and non-humiliation, and an emphasis on control over one's environment. Oddly, these features of human "self-sufficiency" are the ones most often criticized by Western feminists as "male" and "Western"—one reason for their more muted role in earlier versions of the list. See Martha C. Nussbaum, *The Feminist Critique of Liber-*

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; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. **SENSES, IMAGINATION, AND THOUGHT.** Being able to use the senses; being able to imagine, to think, and to 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 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 have pleasurable experiences and to avoid non-beneficial 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 fear and anxiety. 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 and religious observance.

7. **AFFILIATION.**

A. **FRIENDSHIP.** Being able to live for and to 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 capability for both justice and friendship. Protecting this capability means, once again, protecting institutions that constitute such forms of affiliation, and also protecting the freedoms of assembly and political speech.

B. **RESPECT.** Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, ethnicity, caste, religion, and national origin.

alism, The Lindley Lecture, Univ. of Kansas (1997), *also in Sex and Social Justice* (Martha C. Nussbaum ed., forthcoming 1998).

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, and 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); having the right to employment; having freedom from unwarranted search and seizure.

The list is, emphatically, a list of separate and indispensable components. We cannot satisfy the need for one of them by giving a larger amount of another. All are of central importance and all are distinct in quality. Practical reason and affiliation, I argue elsewhere, are of special importance because they both organize and suffuse all the other capabilities, making their pursuit truly human.⁶⁷ The individual importance of each component limits the trade-offs that it will be reasonable to make, and thus limits the applicability of quantitative cost-benefit analysis. At the same time, the items on the list are related to one another in many complex ways. One of the most effective ways of promoting women's control over their environment, and their effective right of political participation, is to promote women's literacy. Women who can seek employment outside the home have more resources in protecting their bodily integrity from assaults within it.

III. CAPABILITY OF GOAL

I have spoken of both functioning and capability. How are they related? Understanding this relationship is crucial in defining the relation of the "capabilities approach" to both liberalism and views of human rights. For if we were to take functioning itself as the goal of public policy, the liberal would rightly judge that we were precluding many choices that citizens may make in accordance with their own conceptions of the good, and perhaps violating their rights. A deeply religious person may prefer not to be well-nourished, but instead prefer to engage in strenuous fasting. Whether for religious or for other reasons, a person may prefer a celibate life to one containing sexual expression. A person may prefer to work with an intense dedication that precludes recreation and play. Am I declaring, by my very use of the list, that these are not fully human or flourishing lives? And am I instructing government to nudge or push people into functioning of the requisite sort, no matter what they prefer?

67. See *Aristotelian Social Democracy*, *supra* note 12, at 226-28; *Human Nature*, *supra* note 12, at 102-20.

It is important that the answer to these questions is no. Capability, not functioning, is the political goal. Capability must be the goal because of the great importance the capabilities approach attaches to practical reason, as a good that both suffuses all the other functions, making them human rather than animal,⁶⁸ and figures itself as a central function on the list. It is perfectly true that functionings, not simply capabilities, are what render a life fully human: If there were no functioning of any kind in a life, we could hardly applaud it, no matter what opportunities it contained. Nonetheless, for political purposes it is appropriate for us to strive for capabilities, and those alone. Citizens must be left free to determine their course after they have the capabilities. The person with plenty of food may always choose to fast, but there is a great difference between fasting and starving, and it is this difference that we wish to capture. Again, the person who has normal opportunities for sexual satisfaction can always choose a life of celibacy, and we say nothing against this. What I speak against, for example, is the practice of female genital mutilation, which deprives individuals of the opportunity to choose sexual functioning, and indeed, the opportunity to choose celibacy as well.⁶⁹ A person who has opportunities for play can always choose a workaholic life. Again, there is a great difference between that chosen life and a life constrained by insufficient maximum-hour protections and/or the "double day" that make women unable to play in many parts of the world.

I can make the issue clearer, and also prepare for discussion of the relationship between capabilities and rights, by pointing out that there are three different types of capabilities that figure in my analysis.⁷⁰ First, there are what I call *basic capabilities*: the innate equipment of individuals that is the necessary basis for developing the more advanced capability. Most infants have from birth the *basic capability* for practical reason and imagination, though they cannot exercise such functions without a lot more development and education. Second, there are *internal capabilities*: that is, states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions. A woman who has not suffered genital mutilation has the *internal capability* for sexual pleasure; most adult human beings everywhere have the *internal capability* to use speech and thought in accordance with their own conscience. Finally,

68. See *Human Nature*, *supra* note 12, at 119-20 (discussing Marx).

69. See Martha C. Nussbaum, *Religion and Women's Human Rights*, in *Religion and Contemporary Liberalism* 93, 107-10 (Paul J. Weithman ed., 1997) [hereinafter *Religion and Women's Human Rights*]; Martha Nussbaum, *Double Moral Standards?*, *Boston Rev.*, Oct.-Nov. 1996, at 28, 30 (replying to Yael Tamir's *Hands Off Clitoridectomy*, *Boston Rev.*, Summer 1996, at 21-22).

70. See *Human Capabilities*, *supra* note 12, at 88 (discussing the basic capabilities); *Nature, Function, and Capability*, *supra* note 11, at 160-64 (referring to Aristotle's similar distinctions). Sen does not use these three levels explicitly, although many things he says assume some such distinctions.

there are *combined capabilities*,⁷¹ which I define as internal capabilities *combined with* suitable external conditions for the exercise of the function. A woman who is not mutilated but is secluded and forbidden to leave the house has internal but not combined capabilities for sexual expression—and work, and political participation. Citizens of repressive non-democratic regimes have the internal but not the combined capability to exercise thought and speech in accordance with their conscience. The aim of public policy is the production of *combined capabilities*. This idea means promoting the states of the person by providing the necessary education and care, as well as preparing the environment so that it is favorable for the exercise of practical reason and the other major functions.⁷²

This explanation of the types of capability clarifies my position. I am not saying that public policy should rest content with *internal capabilities*, but remain indifferent to the struggles of individuals who have to try to exercise these capabilities in a hostile environment. In that sense, my approach is highly attentive to the goal of functioning, and instructs governments to keep functioning always in view. On the other hand, I am not pushing individuals into the function: once the stage is fully set, the choice is up to them.

The approach is therefore very close to Rawls's approach using the notion of primary goods.⁷³ We can see the list of capabilities as like a long list of opportunities for life-functioning, such that it is always rational to want them whatever else one wants. If one ends up having a plan of life that does not make use of all of them, one has hardly been harmed by having the chance to choose a life that does. Indeed, in the cases of fasting and celibacy it is the very availability of the alternative course that gives the choice its moral value. The primary difference between this capabilities list and Rawls's list of primary goods is its length and definiteness, 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."⁷⁴ Since Rawls has been willing to put the social basis of self-respect on his list, it is not at all clear why he has not made the same move with imagination and health.⁷⁵ Rawls's evident concern is that no society can guar-

71. In earlier papers I called these "external capabilities," see, for example, *Nature, Function, and Capability*, *supra* note 11, at 164, but Crocker has suggested to me that this suggests a misleading contrast with "internal."

72. This distinction is related to Rawls's distinction between social and natural primary goods. *A Theory of Justice*, *supra* note 18, at 62. Whereas he holds that only the social primary goods should be on the list, and not the natural (such as health and imagination), we say that *the social basis of the natural primary goods* should most emphatically be on the list.

73. *Id.* at 62, 90-95.

74. *Id.* at 62.

75. Rawls comments that "although their possession is influenced by the basic structure, they are not so directly under its control." *Id.* This is of course true if we are thinking of health, but if we think of the social basis of health, it is not true. It

antee health to its individuals—in that sense, saying that the goal is full external capability may appear unreasonably idealistic. Some of the capabilities, for example, some of the political liberties, can be fully guaranteed by society, but many others involve an element of chance and cannot be so guaranteed. My response to this concern is that the list is a list of political *goals* that should be useful as a benchmark for aspiration and comparison. Even though individuals with adequate health support often fall ill, it still makes sense to compare societies by asking about actual health-capabilities, since we assume that the comparison will reflect the different inputs of human planning, and can be adjusted to take account of more and less favorable natural situations. Sometimes, however, it is easier to get information on health achievements than on health capabilities; to some extent we must work with the information we have, while not forgetting the importance of the distinction.

In saying these things about the political goal, we focus on adults who have full mental and moral powers—what Rawls calls “normal cooperating member[s] of society.”⁷⁶ Children are different, since we are trying to promote the development of adult capabilities. We may in some cases be justified in requiring functioning of an immature child, as with compulsory primary and secondary education, but we must always justify coercive treatment of children with reference to the adult-capability goal.

Earlier versions of the list appeared to diverge from the approach of Rawlsian liberalism by not giving as large a place to the traditional political rights and liberties—although the need to incorporate them was stressed from the start.⁷⁷ This version of the list corrects that defect of emphasis. These political liberties have a central importance in rendering well-being human. A society that aims at well-being while overriding these liberties has delivered to its members a merely animal level of satisfaction.⁷⁸ As Sen has recently written: “Political rights are important not only for the fulfillment of needs, they are crucial also for the formulation of needs. And this idea relates, in the end, to the respect that we owe each other as fellow human beings.”⁷⁹ This idea of freedoms as need has recently been echoed by Rawls: primary goods specify what citizens’ needs are from the point of view of political justice.⁸⁰

seems to me that the case for putting these items on the political list is just as strong as the case for the social basis of self-respect. In *The Priority of Right and Ideas of the Good*, 17 Phil. & Pub. Aff. 251, 257 (1988), Rawls suggests adding leisure time and the absence of pain to the list. He makes the same suggestion in *Political Liberalism*, *supra* note 18, at 181-82. For Rawls’s current treatment of health, see *id.* at 184.

76. *Political Liberalism*, *supra* note 18, at 183.

77. See *Aristotelian Social Democracy*, *supra* note 12, at 239-40.

78. See *Human Nature*, *supra* note 12, at 110-120.

79. *Freedoms and Needs*, *supra* note 18, at 38.

80. *Political Liberalism*, *supra* note 18, at 187-88.

The capability view justifies its elaborate list by pointing out that choice is not pure spontaneity, flourishing independently of material and social conditions. If one cares about people's powers to choose a conception of the good, then one must care about the rest of the form of life that supports those powers, including its material conditions. Thus, the approach claims that its more comprehensive concern with flourishing is perfectly consistent with the impetus behind the Rawlsian project. Rawls has always insisted that we are not to rest content with merely formal equal liberty and opportunity, but that we must pursue their fully equal worth by ensuring that unfavorable economic and social circumstances do not prevent people from availing themselves of liberties and opportunities that are formally open to them.⁸¹

The guiding thought behind this form of Aristotelianism is, at its heart, a profoundly liberal idea,⁸² and one that lies at the heart of Rawls's project as well: the idea of the citizen as a free and dignified human being, a maker of choices.⁸³ Politics here has an urgent role to play, providing citizens with the tools that they need, both in order to choose at all and in order to have a realistic option of exercising the most valuable functions. The choice of whether and how to use the tools, however, is left up to the citizens, in the conviction that this choice is an essential aspect of respect for their freedom. They are seen not as passive recipients of social patterning, but as dignified free beings who shape their own lives.⁸⁴

IV. RIGHTS AND CAPABILITIES: TWO DIFFERENT RELATIONSHIPS

How, then, are capabilities related to human rights? We can see, by this time, that there are two rather different relations that capabilities have to the human rights traditionally recognized by international human rights instruments. In what follows, I shall understand a human right 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.

First, there are some areas in which the best way of thinking about rights is to see them as, what I have called, *combined capabilities* to function in various ways. The right to political participation, the right to religious free exercise, the freedom of speech, the freedom to seek

81. A Theory of Justice, *supra* note 18, at 83-90, 224-27.

82. Though in one form Aristotle had it too. See *Human Nature*, *supra* note 12, at 110-120.

83. See A Theory of Justice, *supra* note 18, at 251-57; *Freedoms and Needs*, *supra* note 18, at 38.

84. Cf. *Freedoms and Needs*, *supra* note 18, at 38 ("The importance of political rights for the understanding of economic needs turns ultimately on seeing human beings as people with rights to exercise, not as parts of a 'stock' or a 'population' that passively exists and must be looked after. What matters, finally, is how we see each other.").

employment outside the home, and the freedom from unwarranted search and seizure are all best thought of as human capacities to function in ways that we then go on to specify. The further specification will usually involve both an internal component and an external component: a citizen who is systematically deprived of information about religion does not really have religious liberty, even if the state imposes no barrier to religious choice. On the other hand, internal conditions are not enough: women who can think about work outside the home, but who are going to be systematically denied employment on account of sex, or beaten if they try to go outside, do not have the right to seek employment. In short, to secure a right to a citizen in these areas is to put them in a position of capability to go ahead with choosing that function if they should so desire.

Of course, there is another way in which we use the term "right" in which it could not be identified with a capability. We say that *A* has "a right to" seek employment outside the home, even when her circumstances obviously do not secure such a right to her. When we use the term "human right" this way, we are saying that just by virtue of being human, a person has a justified claim to have the capability secured to her: so a right in that sense would be prior to capability, and a ground for the securing of a capability. "Human rights" used in this sense lie very close to what I have called "basic capabilities," since typically human rights are thought to derive from some actual feature of human persons, some untrained power in them that demands or calls for support from the world. Rights theories differ about which basic capabilities of the person are relevant to rights, but the ones most commonly chosen are the power of reasoning, generally understood to be moral reasoning, and the power of moral choice.⁸⁵

On the other hand, when we say, as we frequently do, that citizens in country *C* "have the right of free religious exercise," what we typically mean is that this urgent and justified claim is being answered, that the state responds to the claim that they have just by virtue of being human. It is in this sense that capabilities and rights should be seen to be equivalent: For I have said, combined capabilities are the *goals* of public planning.

Why is it a good idea to understand rights, so understood, in terms of capabilities? I think this approach is a good idea because we then understand that what is involved in securing a right to people is usually a lot more than simply putting it down on paper. We see this very

85. This way of thinking derives from the ancient Stoic tradition, continued through Cicero and on into Grotius and Kant. See Martha C. Nussbaum, *Kant and Stoic Cosmopolitanism*, 5 *J. Pol. Phil.* 1 (1997) [hereinafter *Kant and Stoic Cosmopolitanism*]; Martha C. Nussbaum, *The Incomplete Feminism of Musonius Rufus: Platonist, Stoic, and Roman*, Paper presented at the Conference on Gender and Sexual Experience in Ancient Greece and Rome, Finnish Academy in Rome (June 22-25, 1997) (on file with the *Fordham Law Review*).

clearly in India, for example, where the Constitution is full of guarantees of Fundamental Rights that are not backed up by effective state action. Thus, since ratification women have had rights of sex equality—but in real life they are unequal not only *de facto*, but also *de jure*. This inequality results from the fact that most of the religious legal systems that constitute the entire Indian system of civil law have unequal provisions for the sexes, very few of which have been declared unconstitutional.⁸⁶ So we should not say that women have equal rights, since they do not have the capabilities to function as equals. Again, women in many nations have a 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 the 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.

There is another set of rights, largely those in the area of property and economic advantage, which seem to me analytically different in their relationship to capabilities. Take, for example, the right to a certain level of income, or the right to shelter and housing. These are rights that can be analyzed in a number of distinct ways, in terms of resources, or utility, or capabilities. We could think of the right to a decent level of living as a right to a certain level of resources; or, less plausibly, as a right to a certain level of satisfaction; or as a right to attain a certain level of capability to function.

Once again, we must distinguish the use of the term “right” in the sentence “A has a right to X,” from its use in the sentence “Country C gives citizens the right to X.” All human beings may arguably have a right to something in the first sense, without being in countries that secure these rights. If a decent living standard is a human right, then American citizens have that right although their state does not give them, or secure to them, such a right. So far, then, we have the same distinctions on our hands that we did in the case of the political liberties. But the point I am making is that at the second level, the analysis of “Country C secures to its citizens the right to a decent living standard” may plausibly take a wider range of forms than it does for the political and religious liberties, where it seems evident that the best way to think of the secured right is as a capability. The material rights may, by contrast, plausibly be analyzed in terms of resources, or possibly in terms of utility.

86. See *Religion and Women's Human Rights*, *supra* note 69, at 121-26 (reviewing this situation). Typically, only small and unpopular religions get their laws thrown out. Thus, the Christian inheritance law—or one of them, since Christians in India are governed by a bewildering variety of different systems of Christian law—was declared unconstitutional on grounds of sex equality, but the attempt to set aside a part of the Hindu marriage act on these grounds was reversed at the Supreme Court level. *Id.* at 108.

Here again, however, I think it is valuable to understand these rights, insofar as we decide we want to recognize them, in terms of capabilities. That is, if we think of a right to a decent level of living as a right to a certain quantity of resources, then we get into the very problems I have pointed to: that is, giving the resources to people does not always bring differently situated people up to the same level of functioning. If you have a group of people who are traditionally marginalized, you are probably going to have to expend more resources on them to get them up to the same living standard—in capability terms—than you would for a group of people who are in a favorable social situation.

Analyzing economic and material rights in terms of capabilities would thus enable us to understand, as we might not otherwise, a rationale we might have for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capability. The Indian government has long done this. Indeed, affirmative action in this sense for formerly despised caste and tribal groups was written into the Constitution itself, and it has played a crucial role in creating the situation we have today, in which lower-caste parties form part of the ruling government coalition. Indeed, one could also argue that even to secure political rights effectively to the lower castes required this type of affirmative action. If we think of these economic rights asking the question—“What are people actually able to do and to be?”—then I think we have a better way of understanding what it is really to put people securely in possession of those rights, to make them able really to function in those ways, not just to have the right on paper.

If we have the language of capabilities, do we still need, as well, the language of rights? The language of rights still plays, I believe, four important roles in public discourse, despite its unsatisfactory features. When used in the first way, as in the sentence “*A* has a right to have the basic political liberties secured to her by her government,” rights language reminds us that people have justified and urgent claims to certain types of urgent treatment, no matter what the world around them has done about that. I have suggested that this role of rights language lies very close to what I have called “basic capabilities,” in the sense that the justification for saying that people have such natural rights usually proceeds by pointing to some capability-like feature of persons that they actually have, on at least a rudimentary level, no matter what the world around them has done about that. And I actually think that without such a justification the appeal to rights is quite mysterious. On the other hand, there is no doubt that one might recognize the basic capabilities of people and yet still deny that this entails that they have rights, in the sense of justified claims, to certain types of treatment. We know that this inference has not been made through a great deal of the world’s history, though it is false to sup-

pose that it only was made in the West, or that it only began in the Enlightenment.⁸⁷ So, appealing to rights communicates more than appealing to basic capabilities: it says what normative conclusions we draw from the fact of the basic capabilities.

Even at the second level, when we are talking about rights guaranteed by the state, the language of rights places great emphasis on the importance and the basic role of these things. To say, "Here's a list of things that people ought to be able to do and to be" has only a vague normative resonance. To say, "Here is a list of fundamental rights," means considerably more. It tells people right away that we are dealing with an especially urgent set of functions, backed up by a sense of the justified claim that all humans have to such things, by virtue of being human.

Third, rights language has value because of the emphasis it places on people's choice and autonomy. The language of capabilities, as I have said, was designed to leave room for choice, and to communicate the idea that there is a big difference between pushing people into functioning in ways you consider valuable and leaving the choice up to them. At the same time, if we have the language of rights in play as well, I think it helps us to lay extra emphasis on this very important fact: that what one ought to think of as the benchmark are people's autonomous choices to avail themselves of certain opportunities, and not simply their actual functionings.

Finally, in the areas where there is disagreement about the proper analysis of right talk—where the claims of utility, resources, and capabilities are still being worked out—the language of rights preserves a sense of the terrain of agreement, while we continue to deliberate about the proper type of analysis at the more specific level.

One further point should be made. I have discussed one particular view about human capabilities and functioning, my own, and I have indicated its relationship to Sen's very similar view. But of course there are many other ways in which one might construct a view based on the idea of human functioning and capability without bringing capabilities nearly so close to rights. As I have suggested, the view Sen and I share is a liberal view of human capabilities, which gives a strong priority to traditional political and religious liberties, and which fo-

87. On Indian discussions of religious pluralism and liberty, see Amartya Sen, *Human Rights and Asian Values*, *New Republic*, July 14 & 21, 1997, at 33-40. For related discussion of Indian conceptions of pluralism, see Amartya Sen, *Tagore and His India*, N.Y. Rev. Books, June 26, 1997, at 55-56. On the Greek and Roman origins of ideas of human rights, see Fred D. Miller, Jr., *Nature, Justice, and Rights*, in Aristotle's *Politics* (1995), arguing that Aristotle's political theory contains the basic ingredients of a theory of rights; *Nature, Function, and Capability*, *supra* note 11, arguing that Aristotle's political theory contains the view that the job of politics is to distribute to citizens the things that they need for a flourishing life; *Kant and Stoic Cosmopolitanism*, *supra* note 86, arguing that Kant's view of basic human rights is in many ways indebted to the views of the Greek and Roman Stoics.

cuses on capability as the goal precisely in order to leave room for choice. In addition, as I have more recently stressed, the items on my list of basic capabilities are to be regarded as the objects of a specifically political consensus, rather like a Rawlsian list of primary goods, and not as a comprehensive conception of the good.

A capabilities theorist might construct a view that departed from our view in all of these ways. First, the content of the list might be different: it might not give the same importance to the traditional liberal freedoms. Second, government might be given much more latitude to shoot directly for functioning as a goal, and to penalize people who do not exhibit the desired mode of functioning. Such, indeed, is the strategy of some natural-law thinkers in the Catholic tradition, and in this regard they are closer to Aristotle himself than I am.⁸⁸ In that sense, as I have written, they construe the account of the human good as a source of public *discipline* on the choices of citizens, whereas we construe the good as an account of *freedoms* citizens have to pursue a variety of different plans of life. Finally, one might think of the account of human functioning as a comprehensive conception of human flourishing for both public and private purposes, rather than as the object of a specifically political consensus. Again, natural law theorists sometimes understand the view this way, as does Aristotle himself—although some Catholic thinkers have themselves adopted a political-liberal interpretation of their tradition.⁸⁹ Insofar as any of these alternatives are pursued, the relationship between capabilities and rights will shift accordingly.

V. RIGHTS AS GOALS AND SIDE-CONSTRAINTS

One final question remains to be discussed. Sen has argued that thinking of rights in terms of capabilities should lead us to opt for a particular way of thinking about rights and to reject another way. Specifically, it should encourage us to think of rights as goals, and thus as part of a more general account of social goals that it is reasonable to promote, rather than to think of them as “side-constraints,” or as justified claims of individuals that should be respected no matter what, and that thus constrain the ways in which we may promote our social goals.⁹⁰ Since Sen’s target here is the libertarian theory of Robert Nozick, and since I believe his critique has force primarily *ad hominem* against Nozick, and not against all versions of a side-constraints view, I must describe Nozick’s position.

88. See Finnis, *supra* note 25; George, *supra* note 25. For a detailed discussion of differences between the Sen/Nussbaum view and those views in a range of areas of public policy, see *The Good as Discipline, The Good as Freedom*, *supra* note 12.

89. For an eloquent example, see Jacques Maritain, *Truth and Human Fellowship*, in *On the Use of Philosophy: Three Essays* 16, 24-29 (1961).

90. *Rights and Capabilities*, *supra* note 16; *Rights as Goals*, *supra* note 6; *Rights and Agency*, *supra* note 16.

Nozick's basic argument, in *Anarchy, State, and Utopia*,⁹¹ is that people have rights, in the sense—apparently, since no account of rights is presented—that these rights should not be overridden for the sake of the greater good. The rights people have are a function of their initial *entitlements*, together with a theory of *just transfer*. One of the notoriously frustrating aspects of Nozick's theory is that he refuses to present his own account of initial entitlements, although he alludes to a controversial interpretation of Locke, in order to illustrate the type of thing he has in mind. Through this process, he derives the view—which must be advanced tentatively, since the account of initial entitlement has not been given—that people have a right to the property they hold, just in case they acquired it by a series of just transfers from the original owners. It is wrong of the state to take any of this property away from them for redistributive purposes. Nozick focuses on property throughout the book, and says little about political, religious, and artistic liberty.

Nozick's theory has been criticized in a number of ways. First of all, in the absence of a theory of initial entitlement, it is very difficult to see what the upshot will be, and thus impossible to know whether a procedural conception of justice like Nozick's will produce results that are acceptable or quite bizarre and unacceptable. And of course one might answer questions about entitlement very differently from the way in which Nozick seems inclined to answer them, saying, for example, that individuals are never entitled to any property they do not need for their own use, or that they are never entitled to accumulate a surplus. Such, for example, was Aristotle's view of entitlement, and this meant that for Aristotle the very existence of private ownership of land was a highly dubious business.⁹² In Aristotle's ideal city, fully half of the land is publicly owned, and the rest is "common in use," meaning its produce can be taken by anyone who is in need.⁹³ So Aristotle's view of entitlement, combined with his strong moral distaste for hoarding and accumulation, would certainly not yield the Nozickian conclusion that: "Capitalist acts between consenting adults are no crime."

Second, it has been pointed out that even if individuals do have entitlements to what they have acquired in a just transfer, it does not follow that they are entitled to the surplus value of these goods, when for contingent reasons they rise in value during the time they hold them. In fact, even the Lockean tradition is much divided on this question.⁹⁴

91. *Supra* note 6.

92. See *Aristotelian Social Democracy*, *supra* note 12, at 203-06, 231-32.

93. See *id.* at 205.

94. Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, 24 *Phil. & Pub. Aff.* 226 (1995).

Third, one might point out that the economic inequalities apparently tolerated in Nozick's minimal state would erode the meaningful possession of other rights that Nozick apparently thinks people have, such as the right to political participation. Nozick nowhere confronted possible tensions between two parts of his libertarian view, so we do not even know whether he would be willing to tax people in order to get the money to support the institutions that make meaningful political and religious liberties for all a social reality. In these ways, his attitude toward rights remained obscure.

Fourth, the view of self-ownership on which much of Nozick's argument rested was both rather obscure and somewhat questionable.⁹⁵ What does it mean to say of people that they own themselves, and how, precisely, does and should this affect arguments on a variety of topics, from the morality of slavery to the legality of prostitution?

These are only some of the ways in which one might criticize Nozick's view. Let me now describe Sen's critique. Sen argues that if we allow rights to function the way Nozick says they should, as "side-constraints" that can almost never be overridden for the sake of the general good, then we will be led to tolerate an unacceptable level of misery.

The question I am asking is this: if results such as starvation and famines were to occur, would the distribution of holdings still be morally acceptable despite their disastrous consequences? There is something deeply implausible in the affirmative answer. Why should it be the case that rules of ownership, etc., should have such absolute priority over life-and-death questions?

. . . But once it is admitted that consequences can be important in judging what rights we do or do not morally have, surely the door is quite open for taking a less narrow view of rights, rejecting assessment by procedures only.⁹⁶

Sen seems to be saying two things not easily made compatible. First, that Nozick has given the wrong account of *what rights people have*: they do not have the right to keep their surplus when others are dying. Second, that the consideration of consequences shows that *the type of view of rights Nozick advances* must be wrong: a side-constraints view is implausible, and we should think of rights as parts of a total system of social goals. But if the first point is correct, as I believe it certainly is, then we have had as yet no reason to accept the second claim. If we question the whole way Nozick thinks about what people's rights and entitlements are, as we most certainly should, then we have no reason to think that a correct list of rights should not be used as side-constraints.

95. G.A. Cohen, *Self-Ownership, Freedom, and Equality* 1-115 (1995).

96. *Rights and Capabilities*, *supra* note 16, at 312.

This realization is important, since a list of human rights typically functions as a system of side-constraints in international deliberation and in internal policy debates. That is, we typically say to and of governments, let them pursue the social good as they conceive it, so long as they do not violate the items on this list. I think this is a very good way of thinking about the way a list of basic human rights should function in a pluralistic society, and I have already said that I regard my list of basic capabilities this way, as a list of very urgent items that should be secured to people no matter what else we pursue. In this way, we are both conceiving of capabilities as a set of goals—a subset of total social goals—and saying that they have an urgent claim to be promoted, whatever else we also promote. Indeed, the point made by Sen, in endorsing the Rawlsian notion of the priority of liberty, was precisely this.⁹⁷ We are doing wrong to people when we do not secure to them the capabilities on this list. The traditional function of a notion of rights as side-constraints is to make this sort of anti-utilitarian point, and I see no reason why rights construed as capabilities—or analyzed in terms of capabilities—should not continue to play this role.

Of course there will be circumstances in which we cannot secure to all the citizens the capabilities on my list. Sen and I have argued that the political liberties and liberties of conscience should get a high degree of priority within the general capability set.⁹⁸ But we also conceive of the capabilities as a total system of liberty, whose parts support one another. Thus we also hold that there is something very bad about not securing any of the items. The precise threshold level for many of them remains to be hammered out in public debate; but there are surely levels easy to specify, beneath which people will have been violated in unacceptable ways if the capabilities are not secured. Viewing capabilities as rather like side-constraints also helps here: for it helps us to understand what is tragic and unacceptable in such situations, and why individuals so treated have an urgent claim to be treated better, even when governments are in other ways pursuing the good with great efficiency.

97. See *Freedoms and Needs*, *supra* note 18, at 32 (defending the Rawlsian priority of liberty).

98. See *Religion and Women's Human Rights*, *supra* note 69, at 113-14 (religious liberty); *Freedoms and Needs*, *supra* note 18, at 32-38; *The Good as Discipline, The Good as Freedom*, *supra* note 12, at 314-21 (defending the general liberal approach); *id.* at 332-33 (political liberty).