

Global Aspirations versus Local Plumbing:
Comment: on Nussbaum

by
Richard A. Epstein

Martha Nussbaum has long been a champion of the capabilities approach which constantly worries about what state people are in and what they can do. In working within that tradition, she has been relentless in her pursuit of a list of basic rights to which all nations should aspire to provide to their citizens. At the level of aspiration, it is difficult to gainsay the interests that she wishes to advance: no one should come out foursquare for privation of well-being, whether it concerns physical nourishment or psychological peace of mind. But as a lawyer, I think as much like a plumber as I do like a philosopher, and the questions that I ask is whether these interests to which all rightly aspire are well captured in the class of rights enforceable against the state. As a limited-government libertarian, I am deeply suspicious of state involvement in the affairs of ordinary citizens, and think that the British empiricists—Hobbes, Locke, Hume, Smith, and (maybe) Mill—had the right set of institutional instincts when they favored a state that controlled force and fraud, supplied infrastructure, and controlled the dangers of monopoly, including those of state-run and state supported monopolies. The hope here is that the creative powers that can be unleashed by the facilitation of voluntary exchange will generate the material resources needed to satisfy these interests.

The ultimate objective here is not simply to generate a large GNP with a skewed distribution. Rather, it stems from the conviction that decentralized markets are the opposite of caste relationships, in that only the former but not the latter, will be conducive to an equitable distribution of wealth. It is one thing to criticize the United States Constitution for its strong emphasis on negative rights.

It is quite another to recognize the huge social benefits that our Constitution has bestowed on the American populace, even when all of its negative injunctions have not been strictly observed. I would not swap its injunctions for the positive rights of the Indian Constitution.

My concerns here cover both the rich profusion of rights and the sources of their implementation. For one thing, rights that claim too much of the legal terrain simultaneously often are in collision with each other. The source of the problem is clear both as a matter of legal theory and economic logic: all rights have correlative duties; all stipulated benefits come with stipulated costs. The trick in these cases is to arrange the rights and their correlative duties such that the net benefit (taking distribution into account) is the largest. That is not an easy task. But there are real signs here that the list of rights has to be cut back from the list of interests for all this to work.

Here are some examples. The list gives a strong endorsement to the principle of freedom of association and to the enforcement of antidiscrimination laws in the workplace. These are in sharp tension with each other, and someone has to decide which principle will yield when. Do we want to allow affirmative action or brand it as reverse discrimination? Or do we think that the key protection for occupational choice is no employment antidiscrimination law, as I do, because these work as barriers to entry. I take that latter position, and I think that everyone, including Nussbaum, should be concerned about the strong evidence that now suggests that the laws that prevent discrimination against the disabled have exactly that feared effect: they deter initial hiring.

Matters get no easier when we try to establish the floor below which no person can sink. It is a commonplace of the law of tort that no amount of money can restore a woman to the level of satisfaction that she had before she became a quadriplegic. No system of positive rights will change the inescapable fact that

huge sums of money will produce only tiny improvements in overall satisfaction level. But they will draw away money from education and other social services that Nussbaum wants the state to provide. Scaling back the aspiration to meet the needed financial constraints is a huge part of this public enterprise, but the Nussbaum critique does not address any of the hard questions of taxation needed to fund this system. But dangers here are rampant. A Medicare program may look fine in practice, but its revenue consuming features have led to a regrettable systematic overconsumption of medical services, often by the well-to-do.

Last there are key questions of institutional design that must be answered before any set of aspirational interests can be turned into legal rights. All too often the rich and powerful will game for private advantage a system that introduces complex legal structures in order to set up the regime of positive rights that Nussbaum champions. The distributional consequences of dairy supports are, for example, hardly those that Nussbaum or I would like, but the moment we create a positive right to farm, then we have marched a long way down the road to a ruinous system of crop subsidies. The upshot is to divert resources from the state provision of infrastructure of such humdrum items as streets and sewers. The traditional libertarian framework requires fewer state services, and while it is never immune from partisan political behavior, it prevents many abuses that will surely crop up when any extensive view of human capabilities becomes the template for individual rights. Aspirations are necessary to kick-start any serious discussion over the human conditions. But the question of social commitment to any set of enforceable legal rights cannot overlook the resource constraints, incentive effects and institutional arrangements that so preoccupy legal plumbers like myself.

Charles Larmore

Comments on Nussbaum

Martha Nussbaum and Amartya Sen are the primary architects of the "capabilities" approach to social justice. Their guiding idea is the justice of a society is to be primarily measured, not by the rights which individuals are said to possess by the society's constitution or political institutions, not by the wealth which the people individually or collectively have managed to amass, and not by the extent to which people may feel that their desires or interests have been satisfied. Instead, justice is best understood, so they claim, in terms of what people are actually able to do or to be.

Rights, wealth, and welfare all have something to do with justice, of course. But what precisely their role is has to be gauged by reference to the capabilities which a society gives its members. Rights are significant only when they are effectively exercisable. The distribution of wealth ought to be sensitive to the different amounts of the same good which different people may need in order to be able to function similarly. (Women who are pregnant need more food than others in order to be able to do the same things). The preferences by whose satisfaction welfare is measured often follow what people are capable of. People tend to adapt their preferences to their capabilities, and so the first order of business must be, not so much to satisfy preferences, as to ensure that people have the capabilities which they ought to have.

As Professor Nussbaum points out in her paper, however, this approach to social justice must undertake to say what are, in fact, the basic capabilities which the just society secures its members. This is the point at which she has carried the project beyond where Sen has left it. To say simply that the just society is one which aims at securing its citizens freedom understood as capability is too vague to be of any use. The basic capabilities which ought to be its focus need to be specified.

I believe that Professor Nussbaum is absolutely right about this point. But I have two fundamental questions about the list of basic capabilities which she proposes. Let me begin by reminding you of her list by repeating the names of the ten capabilities she thinks essential:

-- life

- bodily health
- bodily integrity
- senses, imagination, and thought
- emotions
- practical reason
- affiliation
- play

- control over one's environment

1. Here then is my first question. Appearing a number of times in Professor Nussbaum's paper are expressions of allegiance to egalitarianism, attributed to Sen but also, it seems, put forward in her own voice. A just society is one that secures for its citizens equal freedom, understood as equality of capabilities. Or more exactly, that is the way in which Sen states his general view of social justice in, for example, his book Inequality Reexamined. Nussbaum goes beyond Sen, as I have said, by presenting a list of the basic capabilities. And so my question concerns what is supposed to be the relation between equality and the different capabilities that she lists. Is a just society in her view one that guarantees its citizens equality in all of these ten capabilities?

I doubt that this can be her view, or rather, I hope that it is not. But to make more explicit the worry I have, let me refer to the well-known distinction to which she herself refers between "first-generation" rights (political and civil liberties) and the "second-generation" rights, which concern economic and social matters.

I think that we can take it as settled that political and civil rights must be equally distributed in a just society. Nothing less than equality will do. And given that our concern in this case is not simply with the nominal distribution of these rights, but with the real ability of citizens to exercise them, we can say that the corresponding capabilities on Professor Nussbaum's list are ones which a just society ought to secure equally to its members. Or more exactly (and I will come back to the point involved here in my second question), those capabilities -- to the extent that they are politically relevant, that is, bound up with the ability to exercise political and civil rights -- are capabilities which ought to be secured equally.

But now turn to the so-called "second-generation rights", such as the right to health care, or the right to work, or the right, not simply to acquire property, but actually to own property or wealth. In these

cases, equality seems less of an intrinsic desideratum. Inequalities in distribution would seem to be permissible, even desirable, I would think, so long as those who get less still get enough or those who get least still get more than they would have gotten under a more egalitarian distribution. The important thing is that everyone have access, not so much to equal, but to adequate health care; that everyone possess a certain amount of property or wealth, not necessarily equal amounts or even approximately so. Such is the point of view expressed, of course, by social minimum principles or by John Rawls' difference-principle.

How do we determine what counts as a social minimum? (I will focus just on this case). I would think that we appeal to two sorts of considerations. First, we will determine how much is necessary for the effective exercise of the equally distributed political and civil liberties. And second, we will also rely on a conception of what constitutes a human life lived with dignity. Needless to say, both of these standards require elaboration. But I return to my first question for Professor Nussbaum, which in fact is twofold:

(a) Does she agree that in a just society some basic capabilities (or more precisely, some aspects of them) are to be secured equally for all citizens, while others are to be secured adequately, though not necessarily equally?

(b) And if she agrees, how does the capabilities approach, as such, tell us which capabilities fall into the first group, and which into the second?

2. This brings me to my second question. It will not have escaped you, as you heard Professor Nussbaum describe the ten basic capabilities on her list, that each of them is very broad in scope. Take for example No. 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, etc." Or No. 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".

My worry is not that, despite the level of generality at which she has chosen to describe them, these capabilities may not really be universal, but reflect instead certain cultural preconceptions. I will grant (at

least for argument's sake) that they embody human universals. My worry is instead whether, described as generally as they are, they designate the proper objects of political concern, or in other words, the sorts of things that a just society -- as opposed to a good society -- ought to be concerned with. A worry only aggravated, mind you, by Nussbaum's own claim that her list represents a "partial moral conception, introduced for political purposes only".

Take for example "Bodily Integrity". Within this same capability there figures both "being secure against violent assault", which certainly must be a concern of the just society, and "having opportunities for sexual satisfaction", which, desirable as that no doubt is, seems not to be a matter of justice. So too with "Emotions": being able to love those who love us is certainly a part of the good life, but is it the business of a just society to ensure this capability for all?

My second question, briefly put, is thus: Does Professor Nussbaum really suppose that these basic capabilities, in all their generality, are proper objects of political concern? And if not, what are the sorts of considerations to which she thinks we ought to appeal, in order to determine what specific aspects of these capabilities belong on the agenda of a just society?

Or to put my question another way, now more in the form of an objection: What I find absent in the "capabilities approach" is any specific vision of the political, any specific conception of what are the fundamental concerns of political life, as opposed to the interests which certainly figure in lives lived well, but which have nothing intrinsic to do with the political relations between citizens and which, though part of the good, do not fall within the purview of social justice.