Chapter 4

NUSSBAUM’S CAPABILITIES APPROACH: 
POLITICAL CRITICISM AND THE BURDEN OF PROOF

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INTRODUCTION

The capabilities approach, as characterized by Martha Nussbaum, is a normative political theory aimed at securing the social/political environment necessary for a flourishing human life. The underlying claim is that a human life lacking the identified capabilities would be guaranteed less than a fully human life. The list of capabilities offered is held to be intercultural in import and therefore applicable to all social/political organizations.

In this paper I will first give a brief description of the capabilities approach. Then I will argue that if one places the burden of proof on the opponent of the capabilities approach dispositive reasons against affirming its intercultural validity (or something of the like) as a base line for constitutional principles are hard to imagine. After that I will outline some reasons why the burden of proof should be seen as properly placed on the opponent of the capabilities approach. The general conclusion argued for is that in the area of political thought the burden of proof should be placed upon an advocate of a less universalistic intercultural stance. This is because, contrary to prevailing sentiment, the harm present in the danger of mistake lies firmly against adopting a more deferential view towards cultures or political organizations that do not adopt such an approach.

THE CAPABILITIES APPROACH

The capabilities approach, as Martha Nussbaum characterizes it, is premised upon a conception (partial, not comprehensive) of human flourishing. Drawing from Aristotle, the approach aims at identifying and insuring a political environment that allows for a truly
human life.\textsuperscript{1} It is an admittedly normative theory based upon common understandings of what it is to be human. The sources of the common understanding are understood to be myths, legends, common sense, “stories of communal definition and self-clarification”\textsuperscript{2} when subjected to critical appraisal by the “many and the wise.”\textsuperscript{3} From myths that place the human between the completeness of the Gods and the incompleteness of those without culture is distilled a set of attributes that are seen to be important, indeed appear to be essential, for human existence.\textsuperscript{4} The conception also holds that imagination is needed in order to come to a properly sensitive political stance.\textsuperscript{5}

The underlying question to be asked in relation to each capability is whether that function is “so important that a creature which lacked it would not be judged to be properly human at all.”\textsuperscript{6} The basic claim argued for is that a human being lacking the capabilities, as Nussbaum lists them, would be guaranteed a less than fully human life “no matter what else it [the life] has.”\textsuperscript{7} The aim is to create a list that is universal, truly intercultural in import and not subject to the identifiable flaws in the other theories available and, furthermore, is applicable to all political organizations.\textsuperscript{8} Underlying is the hope that constitutional arrangements agreed upon will ensure the capabilities, as enumerated on the following list, are guaranteed “as an enabling core of whatever else human beings choose.”\textsuperscript{9} Or, on the philosophical level, “to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by governments of all nations, as a bare minimum of what respect for human dignity requires.”\textsuperscript{10}

The list, in full, is as follows:

\begin{itemize}
  \item For the Aristotelian basis of the capabilities approach see Martha Nussbaum “Aristotelian Social Democracy,” in R. Bruce Douglass et al. (eds.), \textit{Liberalism and the Good} (New York: Routledge, 1990). Hereafter ASD.
  \item The picture is of a creature that is both exceedingly needy and prone to accidents of environment as well as worthy of dignity and respect. An especially powerful analysis of this picture of human existence is given in Nussbaum, \textit{The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy} (Cambridge: Cambridge University Press, 1986).
  \item An interesting version of this requirement in the area of legal imagination is Nussbaum, \textit{Poetic Justice: The Literary Imagination and Public Life} (Boston: Beacon Press, 1997).
  \item NFC, p. 177.
  \item Nussbaum contrasts the capabilities approach with various other approaches. A particularly clear summary is at p. 285 of “Capabilities and Human Rights”: “This focus on capabilities, unlike the focus on GNP, or on aggregate utility, looks at people one by one, insisting on locating empowerment in \textit{this} life and in \textit{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. 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. 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.” Nussbaum, “Capabilities and Human Rights,” 66 \textit{Fordham Law Review} (1997). Hereafter CHR. In this paper I assume that this analysis is correct. The issue then becomes how to respond to the non-universalist.
  \item Nussbaum, “Adaptive Preferences and Women’s Options,” \textit{Ethics} (forthcoming). Hereafter APWO.
\end{itemize}
1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. **Bodily Health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. **Bodily Integrity.** Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one's own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.

5. **Emotions.** Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve in their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect. (Supporting this capacity means supporting forms of human association that can be shown to be crucial in their development.)

6. **Practical Reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience.)

7. **Affiliation.**
   A Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
   B Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

8. **Other Species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. **Play.** Being able to laugh, to play, to enjoy recreational activities.

10. **Control over one's Environment.**
    A **Political.** Being able to participate effectively in choices that govern one's life; having the right of political participation, protections of free speech and association.
B Material. Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.\textsuperscript{11}

A few preliminary points are in order. First, while some of these capabilities are thought by Nussbaum to be more central than others (practical reason and affiliation are seen to underlie the possibility of the others\textsuperscript{12}) all of the capabilities are treated as unique and individual. The possibility of aggregating them is excluded due to the importance and uniqueness of each in itself. Second, it is very important to distinguish actual functioning from capability. The list is not meant to be taken as ensuring that all will make use of the capabilities. Functioning is an individual achievement and certain types of allowable or even desirable functioning might actually entail the loss of other capabilities.\textsuperscript{13} What the capabilities approach is aimed at is creating a base-line set of abilities that are guaranteed in order to create an environment of potential human flourishing.\textsuperscript{14} While the capabilities on the list are to be seen as important, the list is contingent upon current understanding and is meant to leave room for revision (especially if further reflection reveals more that should be ensured). The list is to be thought of as "broad" in the sense that it is to apply to all within the political organization and "deep" in that it is concerned with the "totality of functionings that constitute the good human life."\textsuperscript{15} The list is also to be flexible in order to accommodate different beliefs, values and political organizations. Finally, while equality is in many aspects very important to the capabilities approach, it is not the overriding aim because individuals are seen to have "widely varying needs for resources if they are to achieve the same level of functioning."\textsuperscript{16} More important than equality, at least for an aim in contemporary life, is getting all above a threshold level of minimal capabilities.

PLACING THE BURDEN OF PROOF

One cannot but be amazed at the ambitiousness of the list. In this age of skepticism and professed value relativity the list seems like a huge target ready for the aim of a destructive critic. And it certainly is a huge target from a post-modern stance of ironic distance. It is hard to imagine what type of arguments would be completely convincing as support for the list. This is especially true when some of them are controversial claims even within the liberal democratic cultures that they most nearly mirror in political content. A further problem is that Nussbaum is clear that objectivity as to the capabilities approach entails that "we do not want

\textsuperscript{11} WDH at pp. 78–80.
\textsuperscript{12} See, for example, ASD at p. 226.
\textsuperscript{13} An example Nussbaum uses is the difference between starving and fasting. It very well may be desirable to be able to fast, but this does not entail that starving is just as desirable. What the capabilities approach aims at here is the opportunity to choose. The difference is shown in the absurdity of describing a starving person as living under "conditions of enforced fasting."
\textsuperscript{14} Furthermore, the set of capabilities listed are of aims. Certainly conditions may be such within a society that these aims might be thwarted by physical circumstances or "catastrophic" events. See NFC at p. 147. Not living up to cultural aims, though, is very different than expressly denying such capabilities as aims.
\textsuperscript{15} ASD, at p. 209.
\textsuperscript{16} GDGF at p. 315.
simply to take each culture’s or group’s word for it” when evaluating their beliefs.\textsuperscript{17} Even if an individual within the group states their desire to live their way, the Aristotelian political theorist replies that “[d]esire...is an easily corrupted, unstable, and unreliable guide to genuine human flourishing.”\textsuperscript{18} The capabilities approach does this in order to avoid the two extreme positions of “subjective welfarism” (a position that holds that all existing preferences are on a par for political purposes) and political “platonism” (a view where desire and choice play no role in justifying something as politically good). So not only is there the issue of holding to objective values in the face of an area of political discourse wary of such a position, but, further, the position carries within itself a skepticism as to the weight other conflicting opinions should be given. These are just the kind of claims that are red flags in today’s political arena. To expect a knock-down argument in its favor seems to hope for the impossible. If this is so, then what hope is there for convincing support of the capabilities approach in face of various forms of skepticism?

The issue takes on a very different character when one runs on the assumption that somebody arguing against this list has the initial burden of proof. If this assumption in granted, as I think it should be, then the person arguing against the list has a very tall order. Why should their stance be given the air of neutrality? So, in this section I start with the assumption that the burden of proof is upon the critic of the list of capabilities above and explore some of the positions that such a person would have to advocate.\textsuperscript{19} In the next section I will address the further issue of why this initial placement of burden of proof on the opponent is fair. In the section that follows I will assume that Nussbaum’s capabilities theory is the best candidate from among the competing universalistic theories for creating a base line set of aims for a government. Therefore the choice will be seen as one between a lesser set of universal protections or some type of non-universal stance.

\textbf{Life, Bodily Health, Bodily Integrity}

What would a person have to argue to prove that human beings within a political organization should not have a right to the capabilities of life, health, and bodily integrity from the above list? What kinds of reasons would work in the hope of proving this claim? What kind of reasons would convince us that a foreign government, say Canada, that decided to expressly disavow the aim of bodily integrity was justified in its decision?\textsuperscript{20} Furthermore,
reproduction and a certain level of existence are necessary for a society to remain in existence. What kind of reasons might a person offer to explain the legitimacy of a government that thought guaranteeing the ability for all its citizens to live a life of “normal length” and not dying “prematurely” were not to be high on its list of priorities? Certainly it is imaginable that somebody or even a group of people might choose a shorter life in service of some purpose they think overrides this capability. But in this case the operative word is “chooses.” What cannot be imagined, in opposition to this, is a government that both looked upon its citizens as human and therefore worthy of dignity and yet told them, at the very same time, that these capabilities were not of any importance to secure for them. To accept such a position, for example, a government would have to adopt a position that effectively stated “This government respects your humanity, but this does not entail that you have legitimate expectation of protection from life shortening events that are preventable.”\(^{21}\) What reasons can be offered for such a stance?

Even more clearly strange and difficult would be formulating an argument purporting to respect the humanity in a person and yet telling them at the same time and with no acknowledgment of logical inconsistency, that they have no right to bodily integrity. Very true, many societies have not accepted the position that all human beings deserve the capability of bodily integrity. Yet the conclusion that it has no legitimate cross-cultural claim seems much more difficult to sustain when reasons must be offered for that conclusion. If, on the other hand, the capability of bodily integrity is accepted as a rebuttable presumption what reasons could actually be mustered for the claim that human beings should not be guaranteed protection against unwanted invasion of their bodies?\(^{22}\)

The guarantees of reproduction and bodily health might, conceivably, be thought of as western values not worthy of universal validity. But this seems a stretch given their necessity for even minimal survival. Anybody actually holding that these are not capabilities that a society must provide, or in extreme situations attempt to provide, all of its citizens must be taking a different stance. What they must be arguing for is what seems like an even more difficult stance to justify—that some people within this society are not entitled to such guarantees while others are. As opposed to the earlier assumption that the society did not provide these protections to all across the board equally this selectivity seems even more difficult to conceive of compelling reasons for.

In argument to those people from within the domain of the government, the statement would have to go something like, “We realize that you are human, but we do not realize any entitlements for your group (or you specifically) as to these basic physical possibilities.” What reasons could be legitimately given for such an exclusion? Even more callous, if that is possible, would be the person looking in from outside the culture (lets say an American) who states “I must not project my values upon their (valuable Canadian) culture” when confronted with this type of social arrangement. This type of stance is usually couched in terms of respect for other cultures and toleration. But what type of respectful position allows one to look upon a society that could say to one of its human inhabitants “Why should I respect your

\(^{21}\) Once again it bears re-emphasis that this is not to create unrealistic expectations as to the type of protection offered. The aim is to reasonably protect citizens and other human beings. Further content has to await embodiment in a concrete political system.

\(^{22}\) Of course as with any such claim there will be borderline cases as, for example, in medical emergencies where such invasions might be justified. But here we are talking of general governmental aims, not exception to the rule due to extreme situations.
bodily integrity? You don’t have any such privilege to be free of bodily intrusion and I therefore can assault you (or your child) sexually at my will. I realize, on the other hand, that you are worthy of respect as a human, it is just that you must realize that sexual autonomy is not one of the bundle of choices that you have been allotted”? This is just denial of respect to this person as a person. In terms of the capabilities approach this is just ensuring a life that is less than fully human. Certainly there are legitimate fears related to the danger of cultural imperialism and intolerance of divergent views. These claims should be allowed their due place. But to let these fears create such a large blind spot to injustice seems ridiculous. Those fears should be given great import given history, but are they enough to change the burden of proof as many have seemed to think?

In the face of a person internal to that society bringing such an argument based on toleration and cultural imperialism, we might just raise accusation of being caught in a performative contradiction. That is, the person is trying to justify a society that subjugates some of its subjects while claiming the outside perspective is bad because it allows subjugation of his or her views. Why should we allow the opponent of a more universalizable approach such inconsistency? The person outside of the society making this argument is, on the other hand, more difficult to accuse of blatant inconsistency. My claim is that at the very least this person is misplacing the burden of proof. The question to ask is “Why should a government that is animated by such an impoverished picture of humanity and human suffering be thought deserving of toleration and respect?”

Practical Reason, Affiliation, Control over One’s Environment

The capabilities of practical reason, affiliation and control over one’s environment seem, on first glance, to be slightly less basic and easier to take aim at than those of the last section. Especially when projected as a universal set of requirements, the opponent might seem to have a much better chance of carrying the weight of justification here. But, once again, if the burden of proof is placed squarely upon the person or society advocating the rightful elimination of such capabilities the picture becomes much the opposite.

The capability of “practical reason” is described as “[b]eing able to form a conception of the good and to engage in critical reflection about the planning of one’s life.” This capability is held by Nussbaum to be central to all the rest. This conclusion seems easy to support when one asks what a person would be like that didn’t have such a capability. Certainly if a person lacked this capability it would be hard to know what a choice of any type might signify. Furthermore, how would one interact with a person that did not have the ability to reason practically? We might picture a society that so humiliated or dehumanized a human being that we would conclude that it didn’t have any remaining ability to think for itself, but would we allow that such a society treated that person as a person? What kind of reasons would carry weight when arguing that a society should be able to ignore the development of such capabilities or to not hold that this ability is in some way something akin to a right.23 It takes

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23 It is important to acknowledge the usefulness of rights talk. But one of the virtues of the capabilities approach is the avoidance of the metaphysical jumble that such talk gets one into. This is especially true in the international context. For a discussion of the virtues and drawbacks of rights-based politics in relationship to the capabilities approach see CHR. Furthermore it might just be the intractable metaphysical problems brought along with the rights approach that has caused the “scorched earth version of rights” that prevails today. What
real imagination, of a most perverse type, to argue for the legitimacy of such a conclusion. Here Aristotelian naturalism that emphasizes the social and worldly goods necessary to ensure the capability of choice is clearly superior to the opposing picture of choice as “pure spontaneity.”

What about the capability of “affiliation”? The capability of affiliation comes with two subcategories: (A) “[b]eing able to live with and toward others”; and (B) “[h]aving the social bases of self-respect and non-humiliation.” Once again the question to be asked is what a society would look like if it didn’t aim at such abilities. Once this is imagined, the difficulty of justifying such a society becomes clear. What would it take to successfully argue for the legitimacy of a society that stated to its citizens “You are human but you are not to expect that this government should worry about your ability to avoid humiliation or ensure the possibility of living with and toward others”? What kinds of reasons could be given internally to the culture? What kinds externally? What reasons, honestly, could be given for allowing, or governmentally endorsing, the humiliation of some of the human beings under its care? The same types of questions may be asked, naturally, of a government that argues for its right to eliminate the individual’s control over their environment.

Senses, Imagination, and Thought, Emotions, Play, Other Species

This last group of capabilities must, beyond a doubt, be the most open to effective challenge. Even with the burden of proof squarely upon the challenger it seems that there must be some type of legitimate and reasonable challenge to the capabilities advocate here. For instance, under “senses, imagination, and thought” it is held that a government should insure that each human can think and imagine in a way “informed and cultivated by an adequate education.” This is seen as a way in which to enable the person “to use imagination and thought in connection with experiencing and producing self-expressive works and events of one’s mind.” This stance has got to be open to challenge. Furthermore, to see this capability as connected directly with “guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise” goes against the expressed standards of many societies existing today. And, even more clearly, allowing all citizens to “search for the ultimate meaning of life in one’s own way” goes against many features associated with a traditional society. Many societies have one official religion, the acceptance of which is required. Given this set of professedly universal capabilities, and, in addition, given the opposing set of empirical evidence against the current adoption of such capabilities in the world the opponent must be on strong ground here.

Even if this is so, what does placing the burden of proof on the opposition do here? First, it helps force such a person to produce reasons that will reach out beyond a general stance of “a society deserves respect because it exists.” This very well may be true of Canada, but it hardly carries the day for all forms of social organization. Even if the existence and survival

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24 ASD at p. 238.
25 Affiliation is the other capability held to be essential or central to all the others.
26 This is not to ignore certain areas where many societies that otherwise recognize rights are drawn back at certain times, for example with criminal punishment.
of a society gives it some kind of legitimacy, say of social darwinist grounds or the like, that doesn’t imply that whatever type of legitimacy this entails shouldn’t be overridden by other countervailing reasons. Do we really want to respect or defer to the choices made within a society that holds as one of its basic beliefs that an individual’s search for life meaning is not to be respected? And what of the category of “other species?” Is “being able to live in concern for and in relation to animals, plants, and the world of nature” really just idiosyncratic to a certain wealthy industrial middle class perspective? What would non-acknowledgment of this as an option entail in a society? Once again the question is would a society that told its human inhabitants that these were not options to be guaranteed each of them would be truly human? When phrased in this way, the conclusion that these capabilities are not essential will take a lot of justification.

**WHY PLACE THE BURDEN OF PROOF ON THE OPPONENT OF THE CAPABILITIES APPROACH?**

It should be clear from the foregoing that where the burden of proof is placed in the debate at hand makes a huge difference. In contemporary debate any universalistic stance, no matter how well thought out, is very often placed in the position of bearing the burden. The reason may be a fear of cultural imperialism, or a belief that respect of other cultures dictates this placement of the burden. Or it might be a form of conceptual noblesse oblige. Either way, this puts the capabilities position (or any other substantial position) in a place of severe handicap. In this section my aim is to diagnose and discuss a few reasons why the burden has been placed on the universalistic side of the dialogue. I also will argue that these reasons are not strong enough to support such a position. This should show that the burden of proof is misplaced and more properly should be placed upon the person holding to a less universalistic and/or substantive stance. If this is accepted, then the opponent of the capabilities approach should be placed in the admittedly handicapped position.

**Definitional Issues**

One problem in any dialogue between cultures is definitional. What class of creatures is to be defined into the realm of human? A further and related question is, Are all humans to be considered as at least potential citizens. These questions are pivotal. The reason they are not explored very often is because of the seemingly obvious answer, “human beings are humans” as well as “all humans are to be potential citizens.” But these answers are really much too easy, one just needs to revisit *Dred Scott v. Sandford*, for instance. To illustrate this let me use the pre-Adamite controversy that arose in what is now the state of California. When European explorers “discovered” the New World there were certain inhabitants that exhibited an amazing similarity to human beings. We call these creatures Native Americans, and now

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27 Of course every government puts some types of restrictions upon immigrants, etc. The operative question here is whether there is a wholesale exclusion of a certain group of humans (for example, are women or blacks offered an equal opportunity to be citizens).

are pretty sure they are human. 29 This conclusion which seems beyond doubt to be correct to us was anything but certain at the time. There was a theory available that would clearly distinguish the Native Americans from the truly human—it was possible that they were “pre-Adamites.” What this theory entailed was that there were some creatures very similar to the human but because these human-like creatures were not descendants from Adam they did not have a soul. As having a soul was thought to be the defining attribute of the human the lack of such a soul would exclude the Native Americans from the category of truly human. It is intriguing to imagine what could count one way or the other as evidence for having a soul. Possibly because of this problem of evidence the ultimate decision (from the authority of the Catholic Church) was that Native Americans did have souls. Because they were held to have souls they were included in the class of humans by definition. Once the Catholic Church concluded that they were human, the logical conclusion was that they were entitled to the respect and dignity that the Catholic worldview dictated. 30

The controversy would seem absurd beyond comprehension if it were not the case that it is true. So the question of what the set of creatures we classify as human includes is not as ridiculous as might first appear. Today we might look at such a potential strategy for defining out certain human-like beings from political society as beyond consideration. Anybody or any government which took the stance that a political body of any type had the authority to define who was going to count as human within its borders would be undeserving of a reasoned response. At the very least if such a stance were seriously forwarded, in a nation's Constitution for example, such a political entity should bear an extremely heavy burden of proof. Admittedly, there are many societies today that exclude women or castes from full protection of their laws. The conclusion as to what such an admission logically entails, on the other hand, is not so clear. But the harms these excluded people face are real and certainly should not be ignored in the equation. This observation in itself should be enough to push the burden of proof onto the advocate of such an exclusionary position.

Commonality and Difference

The problem of defining in or out certain classes of people shows the extreme danger of an overemphasis of difference at the exclusion of human commonality. As the capabilities list shows, much of it is aimed at encouraging the maximum amount of difference as long as that difference is not coerced. If difference is to be thought of as something that relates to choice at the individual level defining out certain beliefs, lifestyles, etc., at a societal level insures less difference by definition. In this case it is questionable why a person who feels the existence of difference is so important would accept a position that requires of so many people within such a society less access to difference. Surely people within such a society will only be able to experience and create less diversity. If difference is to be thought of at the level of a society, not the individual, there are at least two further problems with this perspective. First, there are the issues as to why individual choice shouldn’t override group dynamics when they are so intrusive upon the individual (especially in the face of powerfully

29 Many are Canadians as well—an issue that seems to be important in the context of this paper.
30 This is not to pass judgment on the value of the Catholic worldview, just to use the controversy as an example of how definitional issues arise in the face of any position as to what the label “human” entails.
entrenched caste systems or the like). Secondly, there are the problems as to metaphysical or ontological priorities. Certainly not all diversity is “Good” in some absolute sense. Would one really use the diversity argument in the face of a neighboring society of cannibals?

Aesthetic Distance

Much criticism of universalistic values is based upon a sense of loss. What is acknowledged, and rightly so, is the exclusionary and eliminative aspect of political choices. Given adherence to the values as determined by the capabilities approach, certain cultural practices will be intolerable. This is especially tragic when the culture might very well not survive in its other aspects once the intolerable practices are eliminated. The admission that some cultures will not survive the capabilities approach seems to mitigate against its universal acceptance. It may be that many cultures of a “traditional” vein may not survive a wholesale devotion to the list of capabilities as Nussbaum provides. Even if it is held that most societies would be able to adapt, it is a great possibility that some will not be able to survive in any altered state. But there are problems with respecting other cultures that do not hold these values to be essential. And these reasons outweigh the loss that the elimination of such cultures would entail.

A major problem with any argument to the effect that these cultures should be respected is the aesthetic standpoint from which such a claim is being made. Most often such a comment is made from outside the culture being evaluated. The standpoint is one of intellectual distance. The standpoint, therefore, is very similar to that from which a work of art is contemplated. And just as it would create a sense of loss to one who enjoys a work of art to know that it is to be destroyed, so also it is distressing to a viewer of a beautiful and diverse society to know that that experience is to be lost as well. Even the loss of ugly or inconsequential works can create a true aesthetic loss.

But acknowledging this aesthetic loss is not enough to justify the elimination of criticism or change when we move into the social/political world. First of all, most distant evaluations of such traditional societies rest upon assumptions of purity and harmony that are unrealistic. Aesthetic distance, that is, can lead us to postulate harmony and consistency where there is strife and dissent. Secondly, the perspective of outsider as to the beauty and import of the culture as an object ignores the absolute difference between the understanding of an artwork and the understanding of a culture. Aesthetic distance is of the essence in understanding most works of art. But works of art don’t feel pain or choose their own organization. To judge a society from the point of view of aesthetic distance is to ignore the uniqueness and individuality of the human component in what is being contemplated. Any stance that argues for a society of non-liberal values must be forced to acknowledge the individuals within such a society and at least give great weight to their potential life experiences (and not ignore their real life experiences).

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31 Even in the face of an expressed choice to stay within such a society we might worry about the problem of adaptive preferences.
Metaphysical Issues

Very similar to the problem of aestheticization of cultural critiques is the problem of metaphysical or ontological priorities. It is very interesting how people who talk about the absolute priority of the individual and hold themselves out to be pragmatists become very metaphysical (at least in underlying beliefs) when confronted with the question of other cultures and proper treatment of human beings. While many would argue for great deference to the individual within a liberal society once a border gets in the way the “culture” becomes metaphysically primary. Why should this be the proper stance to take? Why should a patently metaphysical construct—the “society”—take precedence over the obvious and inescapable flesh and blood existence of the individual? Why should the ability to identify and appreciate group mechanisms be used to ignore the individual? Even if the “society” is given a type of ontological existence there is still the question as to how much weight its interests are to be given in contrast to, and separate from, the individuals within such a society.

Furthermore, within such a discourse of “society’s interests” many of the stances are patently essentialistic. Many hold onto a static and purified picture of what it is to be society “X” or a member of society “X.” Where does this epistemological confidence all of a sudden come from? On one side is an assumed skepticism of ideals like minimum social conditions for a truly human life. On the other hand is certainty as to what it means to be a member of “X” and the continuing value of “X-ness.” If this disparity in confidence reflects the placement of the burden of proof then the question is why such a placement isn’t questioned given the strange metaphysical assumptions needed to talk of social entitlements without a focus upon the individuals that constitute any given society. If the placement, on the other hand, comes from some type of argument as to why the truth of one side’s stance is easier to prove—then once again the burden of proof might as well be on the side that has easier access to such proof. In either case the burden of proof, once again, should be on the person advocating something less than the universalistic stance of the capabilities approach.

Identity Politics

Both aesthetic distance and metaphysical reification of social roles and cultures are related to a further mistaken stance sometimes labeled “identity politics.” Identity politics rightly sees identity as in large part a social construct. But people holding to this stance draw the wrong implications from it. Instead of seeing the society as therefore in service of the individual, and as a vehicle for self-fulfillment, most advocates of this stance look at it as an issue more related to purity. Much of identity politics is endorsed from outside of the cultures the advocates idealize. The society is seen as an object of respect, beauty, and wonder. This is just to fall prey to the fallacy of judging a society as an aesthetic object with a distinctive metaphysical existence discussed above. The argument characterizes any change as moving away from a social, ethnic, or racial essence, an essence that is made lesser and impure if any

\[32\] And this evaluation of other societies as worthy of respect, beauty and wonder is correct when properly cabined.

For instance I find the Ancient Greeks worthy of admiration. But at the same time if I argued that their society as it actually was should be preserved today I would be wrong. All the various inequalities and inhumanities it tolerated would not be acceptable today.
change is allowed. This is absurd. Intercultural critique is essential in an international environment, but it shouldn’t be too essentialistic. Comparative cultural study is important and can be an essential tool in “removing the false air of naturalness and inevitability that surrounds our practices.”\footnote{Nussbaum, \textit{Cultivating Humanity: A Classical Defense of Reform in Liberal Education} (Cambridge, Mass: Harvard University Press, 1997), p. 55.} All cultures should be open to critiques internally and externally.\footnote{As Nussbaum writes in \textit{WHD} at p. 46, it may be the uncritical veneration of the past that is more “foreign,” the voice of the protest that is more “indigenous” or “authentic.”} All the capabilities approach ensures is that those inside a given culture are given the tools to make actual choices in as undistorted a position as possible. Certainly as acknowledged before, this is a threat to many forms of social organization (historical, existing, and possible). Insuring the capability of choice, for instance, is admittedly a process that is “unidirectional and irreversible” and can involve, in itself, “taking a stand on the good and tilting the process in one direction rather than another.”\footnote{GDGF at p. 327–328.} But it is not nearly so certain as is sometimes supposed that this minimal threat is not justified in response to the alternatives.

**Harm of Error**

Most importantly, and most simply, any comparisons of the potential harms arising from the error of adopting one of these opposing stances should quickly balance in favor of the capabilities approach. The error of adopting the capabilities approach would be that of possibly eliminating some valuable alternative social arrangements. On the other hand, the positive side of this elimination would be the ensuring of greater opportunities (of an admittedly different character) for the individuals that were otherwise left with lesser protections and therefore a greater probability of a life that could be characterized as less than fully human. The error of adapting the other stance, that of the cultural relativist or a lesser form of universalism, would be that of abandoning many human beings to lesser choices, opportunities and protection than they could otherwise have. While there are costs to erring on the side of the capabilities list, the costs are less substantial and less speculative.

**CONCLUSION**

This paper first attempts to change the focus of the burden of proof in intercultural or international political debate. The basic argument is that many arguments for toleration of other cultures suffer from a lack of concrete imagination of the harms imposed by not ensuring such minimal standards of social existence. The capabilities approach, as characterized by Martha Nussbaum, is seemingly extreme in its large claims for an international basis for basic human guarantees in the political arena. Such a clearly normative political theory aimed at securing the social/political environment necessary for a flourishing human life seems especially vulnerable to popular types of cultural relativism and skepticism of intercultural values. The underlying claim that a human life lacking the identified capabilities would be guaranteed less than a truly human life is clearly ambitious. The list is
held to be intercultural in import and therefore applicable to all social/political organizations. This stance is not consistent with the prevailing post-modern ideologies.

In this paper I argued that if one places the burden of proof on the opponent of the capabilities approach reasons against affirming its intercultural validity as a base line are hard to imagine. One is left to wonder why the burden of proof has been lately placed so squarely on those arguing for basic social standards across cultures. While fears of colonialism and other “obtuse” ways of thinking across cultural boundaries are legitimate, they are far from determinant as to where the debate should start. As Nussbaum correctly states, a universalism need not have any of the defects most feared. I then outlined some reasons why the burden of proof should properly be seen as placed on the opponent of something like the capabilities approach. The general conclusion should be that in the area of political thought the burden of proof should be rightly placed upon an advocate of a less protective universalism or relativist intercultural stance. This is because, contrary to prevailing sentiment, the danger of mistakes lies firmly against adopting a more deferential view towards other cultures beliefs or political organizations.36

My main claim is that those who would place the burden of proof otherwise suffer from a lack of sensitivity to what human existence would be like (or more insistently is) in societies that don’t see the capabilities listed as necessary to truly human existence. In this situation, the question as to what purposes deference to pictures of happy, harmonious, and fulfilled humans in a pure unadulterated culture serve seems important to emphasize. Furthermore, the question of “whose resistance and misery are being effaced”37 should be placed prior in order and importance.38

36 Indeed the argument doesn’t need to be made again that expecting a public reasoning process is actually more respectful of both a culture and a person.
37 WHY at p. 38.
38 I would like to thank David Graver and Martha Nussbaum for comments on earlier drafts of this paper.