

## *Claims and Capabilities*

One of the most arresting features of Martha Nussbaum's many articles and books is the way they manage to blend and harmonize so great a variety of voices. Her essays and chapters typically open with quotations, their original authors serving as unaccompanied soloists who introduce motifs to be elaborated in the work to come. Before long, other voices are heard – the voices of economists and anthropologists, of historians and academic lawyers, of philosophers ancient, modern and contemporary, of the ancient cosmologists who appear in Nussbaum's commentaries on *de Motu Animalium*, of Socrates and Alcibiades, of the literary characters who figure in *Love's Knowledge*.<sup>1</sup> These voices do not, of course, all intone the same melody. They introduce alternative themes to be explored, refuted or defended. Yet in every movement of the argument, Nussbaum shows herself to be an accomplished conductor of antiphony and counterpoint. Her texts are not just highly original philosophical treatises. They are also tightly disciplined masterworks of choral orchestration.

Quite often, the leading voice heard in those texts is Nussbaum's own, for hers is not the detached or disembodied authorial voice in which so much academic philosophy is presented, and she is very much a presence in her own work. One effect of this stylistic departure is to remind us that when we do philosophy, we reflect on the human world, a world of human embodiment. Another effect – equally powerful -- is to remind us that the human world is a world in which voices, especially the voice of women, are often silenced. It is a great merit of Nussbaum's work that in it, the victims of injustice are given voice.

One of those victims is Jayamma, an impoverished widow from Kerala introduced to us in *Women and Human Development*.<sup>2</sup> She is a woman whose life provides a window into the forms of injustice Nussbaum writes to combat and into the theoretical approach Nussbaum has developed to combat them. In this essay, I want to explore Nussbaum's groundbreaking work on justice. As shall become apparent later, Jayamma has an important role to play in that exploration.

- I -

Beginning with her bold and original essay "Aristotle on Political Distribution"<sup>3</sup>, Nussbaum has been developing what she calls the "capabilities approach". At the heart of that approach is an evolving list of central human capabilities. Roughly, someone's central capabilities are those of her native abilities and dispositions which – "given the provision of suitable training, time and other instrumental necessary conditions"<sup>4</sup> – can be developed so that, should their possessor enjoy favorable circumstances, she can perform valuable human functionings and enjoy valued human states. Examples of valued human functionings are associating freely for religious or political purposes, raising a family, playing, and exercising the imagination. Examples of valued states are states such as the states of being sheltered, being nourished and being free of mosquito-borne disease.<sup>5</sup>

What is Nussbaum's "capabilities approach" an approach *to*?

Nussbaum and Amartya Sen have proposed a capabilities approach to quality of life. According to this approach, a person's quality of life is to be determined by first measuring the extent to which she has various capabilities. The measures are then combined to yield a partial capability index for each person.<sup>6</sup> That index is an index of his or her life-quality. If the capabilities measured are the ones on Nussbaum's list, then her list provides the basis of a capabilities approach to quality of life. Nussbaum and Sen have criticized alternative measures of quality of life, such as those that take quality of life to be a function of resources alone, because resource measures are insufficiently sensitive to differences in individuals' abilities to use resources to function well.<sup>7</sup>

The question of whether or for what purposes quality of life should be measured by a capabilities index – rather than, say, by an index of Rawlsian primary goods -- is a very interesting one that has inspired an enormous literature. Rather than enter into that debate here, I grant for the sake of argument that the capabilities approach to quality of life is correct in some form. I shall concentrate instead on what Nussbaum herself takes to be the much more ambitious use of the list of central capabilities:

to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.<sup>8</sup>

Many people around the world lack the central capabilities on Nussbaum's list because of poverty, ignorance, disease and injustice. Some such lives, Nussbaum thinks, are so lacking in the chance to enjoy valued states and functionings that they are "unworthy of human dignity". According to the account of basic constitutional principles that Nussbaum defends, every society should "guarantee these to all its citizens, at some appropriate threshold level"<sup>9</sup>, where 'these' refers to the capabilities on Nussbaum's list and the threshold is the level at which each citizen can enjoy a life of functionings and states worthy of human dignity.

Note that the "should" of the last sentence is, Nussbaum insists, a "should" of justice. Societies should guarantee threshold capacities to their citizens as a matter of justice. And conversely, each citizen has an entitlement of justice against her society to the threshold capacities. Note further that the "should" is not *merely* a "should" of justice, it is a "should" of what Nussbaum calls "*basic* social justice"<sup>10</sup>, where "basic" means "minimal". The entitlement to threshold capabilities is, Nussbaum thinks, a social minimum that should be guaranteed by a society's constitution.

As we shall see in section IV, the capabilities approach is an approach to "basic social justice" in a different sense of "basic" as well – one having to do with the conceptual

priority of the entitlements Nussbaum defends. For Nussbaum, the capabilities approach is not just an account of minimal entitlements; it is also – and more interestingly -- an account of fundamental entitlements.

Nussbaum's fullest statement of the capabilities view of basic justice is to be found in her 2006 book *Frontiers of Justice*. There, she lays out and develops the view by way of a sustained contrast with Rawls's account of justice. Despite the deep differences she highlights, there are, Nussbaum insists, important similarities between her account and justice as fairness as Rawls presented that view in his later work. Nussbaum maintains that the notion of human dignity which is so critical to her own project, and her thesis that certain capabilities are central to human well-being, can be defended without appeal to religious or metaphysical views of the person. She therefore thinks of her capabilities view of justice as a form of what Rawls has famously called "political liberalism". She thinks her view can gain support of adherents of a variety of religious and philosophical views, and thereby enjoy the support of what Rawls called an "overlapping consensus" among comprehensive doctrines.<sup>11</sup>

Nussbaum argues for the capabilities view with great subtlety and sophistication. The contrast she develops with Rawls forms an elegant and riveting counterpoint that runs through the articles and books in which she lays out her view.<sup>12</sup> I shall largely forego analysis of the counterpoint. Instead, I will explore what I take to be the central argument for Nussbaum's claim about citizens' basic entitlements. My attempt to understand that argument will lead me to question whether Nussbaum's capabilities approach to justice can realize its ambitions, and whether it can indeed be the object of an overlapping consensus.

- II -

As I have already said, the conclusion of Nussbaum's central argument is that as a matter of justice, citizens are entitled to possess the central capabilities at a threshold level. Despite the subtlety with which Nussbaum develops the capabilities view of justice, that argument is admirably clear and straightforward. Though she nowhere lays it out step-by-step, a step-by-step version of the argument can be extracted from *Frontiers of Justice*.

On p. 74 of *Frontiers*, Nussbaum writes

The basic intuitive idea of my version of the capabilities approach is that we begin with a conception of the dignity of the human being, of a life that is worthy of that dignity – a life that has available in it "truly human functioning".

I believe what Nussbaum means here is at least that "truly human functioning" is necessary for "a life that is worthy of the dignity of the human being". And I take the

“truly human functioning” that is necessary for such a life to be the set of what I referred to earlier as valuable functionings and states. So I take the quoted passage to imply that:

- (1) Someone lives a life worthy of human dignity only if her life has available in it valuable human functionings and states.

The central capabilities are capabilities to enjoy truly human functioning. So Nussbaum thinks that:

- (2) A person’s life has available in it valuable human functioning and states if and only if she has the capabilities to an appropriate threshold level.

From (2), it follows that (1) is equivalent to:

- (3) Someone lives a life worthy of human dignity only if she has the capabilities to an appropriate threshold level.

I believe Nussbaum thinks that:

- (4) As a matter of justice, every citizen is entitled to live a life worthy of human dignity.

From (3) and (4), Nussbaum can infer that:

- (5) “all citizens have entitlements based on justice to all the capabilities, up to an appropriate threshold level.”<sup>13</sup>

Nussbaum also says that “the capabilities in question are held to be important for each and every citizen, in each and every nation[.]”<sup>14</sup> This suggests that the entitlements (5) asserts are entitlements Nussbaum thinks all citizens hold against their societies. That is why she moves from (5) to:

- (6) “[a] society that does not guarantee [the capabilities] to all its citizens, at some appropriate threshold level, falls short of being a fully just society.”<sup>15</sup>

From (6) it follows that:

- (7) If a society is to be fully just, then every citizen must be guaranteed the capabilities at some appropriate threshold level.

And (7), conjoined with the claim that such guarantees must be expressed in the constitution, implies Nussbaum’s conclusion:

C: If a society is to be fully just, then its constitution must guarantee every citizen the capabilities at some appropriate threshold level.

Though I have drawn the steps of this argument on *Frontiers of Justice*, C is a conclusion Nussbaum also defends in her earlier work *Women and Human Development* and in her earliest work on the capabilities approach to justice, “Aristotle on Political Distribution”.<sup>16</sup> The argument for that conclusion has undergone a certain amount of refinement since Nussbaum’s earliest defense of it, for the notion of human dignity was not explicitly appealed to in that early work. But, though I shall not try to show it, I believe an essential element of the argument I have reconstructed – a presupposition of the third step of the argument – played a critical role in Nussbaum’s earlier defenses of C as well. Anyone interested in Nussbaum’s capabilities approach to basic justice will need to come to grips with this argument.

- III -

Let me begin by taking a closer look at the conclusion.

It may seem a mistake to say, as C does, that a society’s constitution should guarantee citizens “the capacities to some appropriate threshold level”, for it is hard to see how societies can guarantee that citizens will in fact have the capacities on the list to the appropriate level. For example, it is hard to see how a society could guarantee that its citizens will be “able to have good health” or will be “able to live to the end of a human life of normal length”, since chronic disease and accidental death are at least sometimes beyond a society’s control. Even if there are some kinds of misfortune – such as serious illness – that a society should help its citizens overcome, a society’s efforts to mitigate the effects of such misfortunes may themselves fail because of circumstances beyond anyone’s control. These considerations may seem to tell against the guarantee that C requires.

Moreover, as we have already seen, Nussbaum recognizes that the development of the central capabilities requires the provision of “suitable training, time and other instrumental necessary conditions”.<sup>17</sup> It is these conditions, rather than the capabilities themselves, that a society seems to be able to distribute. So perhaps instead of C, Nussbaum should defend the conclusion:

C': If a society is to be fully just, then its constitution must guarantee every citizen the instrumental conditions she needs to develop the central capabilities to some appropriate threshold level, together with the external conditions suitable for their exercise.

Or

C'': If a society is to be fully just, then its constitution must guarantee every citizen the social bases of central capabilities, possessed at the appropriate threshold level.

And though Nussbaum quite often writes as if societies controlled and distributed capabilities rather than instrumental conditions, she does sometimes note that what they really distribute are the “social bases” of the capabilities.<sup>18</sup> Why, then, when she comes to her central argument, does she defend C rather than C' or C"?

To see the answer, we have to look more closely into what the capabilities are, and – ultimately -- into what Nussbaum means by ‘able’.

In *Women and Human Development*, Nussbaum distinguishes three kinds of capabilities<sup>19</sup>. What she calls “basic capabilities” are “the innate equipment of individuals that is the necessary basis for developing the more advanced capabilities, the ground of moral concern”. Examples are the human capability for seeing and hearing, and the newborn’s capability for speech and language. “Internal capabilities” are “developed states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions”. These are, she says, “mature conditions of readiness” that are developed “with support from the material and social world”. Finally, “combined capabilities” are “internal capabilities combined with suitable external conditions for the exercise of the function” in question.

What Nussbaum calls the “central capabilities”, the capabilities referred to in C, are capabilities of the third kind. They are combined capabilities. Why does C refer to them rather than to basic or internal capabilities?

Recall that, according to the capabilities approach to well-being, well-being is a function of both someone’s resources and conditions, and of her ability to convert resources into valued functionings in those conditions. And so someone’s well-being cannot simply be a function of her internal capabilities (which do not include her resources) or of her resources (which do not include her ability to convert those resources to functionings). More formally, since someone’s capabilities index is an index of her well-being, that index must be an index of both her internal capabilities and her resources and conditions. It is therefore, Nussbaum must think, an index of her combined capabilities.

At one place in *Frontiers*, Nussbaum writes that “what matters for justice is the quality of life of people”<sup>20</sup>; elsewhere in the same book she implies that quality of life is what “matter[s] most for social justice”<sup>21</sup>. Since well-being is what matters most for social justice, and since well-being is a matter of someone’s combined capacities, it is combined capabilities – developed states of the person plus suitable external conditions – that Nussbaum thinks societies must guarantee their citizens. That is why Nussbaum says that “[t]he [capabilities] list,” the list of what societies must guarantee, “is a list of *combined capabilities*.”<sup>22</sup> When a society guarantees combined capabilities, it thereby guarantees its members that they will enjoy suitable external conditions. And so it is not the case that Nussbaum defends C but not C' or C". Rather, C entails C' and C".

But this response just raises further questions. If all that societies control are social bases or external conditions, why defend the stronger conclusion C? Why not simply defend the weaker C' or C''? A deeper set of questions concerns the concept of a combined capability, and asks whether that concept really carves the world at the joints. Why insist that what results from combining internal capabilities with suitable external conditions is itself a capability? And why insist that these conditions are constitutive of the capacities which societies are to guarantee? Why not assert instead that societies should guarantee a threshold of well-being, and that well-being is a matter of someone's internal capabilities plus her external conditions, but maintain that what the measure of well-being measures a mixture rather than a capability, and reword C accordingly?

I believe Nussbaum would answer the deeper questions by reminding us that someone's well-being is a matter of what she is "actually able to do and to be"<sup>23</sup>. The word 'able' is, in the hands of the capability theorist, multivalent. To say that someone is able to perform a valued functioning means that she has the skills to do it, that she has undergone the requisite physical or cognitive development. This is why Nussbaum's preferred notion of capability includes "developed states of the person". But to say that someone is able to do something also means that she is free to do it.<sup>24</sup> Capability is, as Sen says, "a freedom type notion". Freedom requires certain "external conditions", including liberties, rights and opportunities. Liberties, rights and opportunities do not seem merely to be necessary means to the freedom to perform valued functions. They seem to be constitutive of that freedom, and therefore constitutive of the ability – the capability -- to perform it. One reason for introducing the concept of a combined capability and for implying that it does carve the world at the joints, then, is to accommodate the constitutive relation of rights, liberties and opportunities to abilities or capabilities. And once we see that there is such a relation, we can see why Nussbaum defends C.

The question of whether rights, liberties and opportunities are constitutive of capabilities is a very interesting one. It is not, however, a question I shall pursue here.<sup>25</sup> For even if the combinations of internal capacities and external conditions are not capacities properly so called, the capabilities approach to well-being would still provide an interesting and distinctive account of why it is bad for human beings to have to live without the combinations, at least to some threshold level. And this means that even if the concept of combined capabilities does not cut the world at the joints, there would still be considerable interest to Nussbaum's capabilities approach to basic justice. For what is most interesting about Nussbaum's approach to basic justice is that it exploits the account of what is bad about being denied what she calls "combined capabilities" to defend basic entitlements. To see this, it is necessary to look more closely at the argument Nussbaum offers for C.

- IV -

One of the critical steps in the argument for C is the step that precedes it:

(7) If a society is to be fully just, then every citizens must be guaranteed the capabilities at some appropriate threshold level.

(7) follows immediately from:

(6) “[a] society that does not guarantee [the capabilities] to all its citizens, at some appropriate threshold level, falls short of being a fully just society.”

I said that Nussbaum thinks (6) follow from (5), together with the assumption that the entitlements (5) asserts are entitlements citizens hold against their society. I believe she makes that assumption because she thinks, first, that the entitlements (5) asserts are entitlements each person holds against all others<sup>26</sup> and second, that governmental institutions are fully just only if they address the resulting collective action problems by guaranteeing that entitlements each holds against all will be met.

This argument for (6) is very interesting, but reasoning like it is a common feature of cosmopolitan views. Exploring it is, I believe, unlikely to bring to light the distinctiveness of Nussbaum’s view. I shall therefore pass over (6), and take a closer look at (7).

(7) expresses a necessary condition of the full justice of a society, rather than a sufficient condition or a condition that is both necessary and sufficient. Nussbaum does not go on to provide such conditions. Instead, she says in *Frontiers* that “the capabilities approach is an outcome-oriented approach that supplies a *partial* account of basic social justice.”<sup>27</sup> But despite the fact that Nussbaum’s account is partial, it is supposed to be an account of *all* the basic entitlements. Nussbaum makes this clear in a criticism she directs at Rawls:

Rawls’s doctrine aims at completeness and finality. Even if a view (such as my capabilities view) does not aim at completeness, it ought to show that no major and fundamental entitlements of citizens have been ignored. ... it is not open to us to say: we have done one part of that task, but of course other parts, equally basic, based on completely different principles, will come along later.<sup>28</sup>

When Nussbaum implies that “no major and fundamental entitlements of citizens have been ignored” by her view, I take her to mean that the entitlements she asserts in (5), (6), (7) and C are all the “major and fundamental entitlements” citizens have.

This may seem an odd way to read her, since step (4) also asserts an entitlement – the entitlement to live a life worthy of human dignity – which seems to be more basic than the entitlements asserted at subsequent steps. But the impression of oddness depends upon taking the entitlements asserted at (5), (6), (7) and C to be entitlements citizens have *in addition* to the entitlement asserted in (4). This is the wrong way to take what Nussbaum is saying. She thinks that the entitlements asserted in (5) specify or spell out

the entitlement asserted in (4).<sup>29</sup> Put differently: what we learn by conjoining (4) with (3) is that (4) – which seemed to assert a single entitlement – asserts a set of entitlements the members of which are given by (5).

I take Nussbaum's commitment to providing an account of all fundamental entitlements to impose two strictures on her own account. One is the stricture she accuses Rawls of violating. Specified for Nussbaum's account, that stricture says that there cannot be entitlements which are as fundamental as those asserted in (5), but which can be defended only by presupposing the truth of C. The other stricture, again specified for Nussbaum's account, is that there cannot be any entitlements more fundamental than those asserted in (4) and (5), and on which the argument for C depends.

Earlier, I said that the entitlements Nussbaum identifies are basic in that they are minimal. These strictures imply that they are basic in second sense as well: they are supposed to be conceptually more basic than other entitlements. We must read Nussbaum's claim to provide "a partial account of basic social justice" with this use of 'basic' in mind. We shall see that the second of Nussbaum's two strictures causes problems for her own account. Yet I shall argue at the end of this essay that the conceptual priority of the entitlements Nussbaum identifies is an integral part of her view. The difficulties in her account therefore stem from claims from which she can retreat without altering her view in fundamental ways.

- V -

The critical step in getting to (6), hence to (7) and C, is:

(5) "all citizens have entitlements based on justice to all the capabilities, up to an appropriate threshold level."

(5) is supposed to follow from (3) and (4), which read:

(3) Someone lives a life worthy of human dignity only if she has the capabilities up to an appropriate threshold level.

and

(4) As a matter of justice, every citizen is entitled to live a life worthy of human dignity.

We might think that (4) is too general as stated, and that it needs some more careful examination before we can tell whether or not we should accept it. I am prepared to concede (4) for the sake of argument, though I recognize that the notion of dignity requires some specification. As we have seen, Nussbaum thinks that that specification is to be provided by claims about the central capabilities. But the conjunction of (4) with those claims – in effect, the conjunction of (4) with (3) – has very strong implications for

citizens' basic entitlements, since the conjunction of (3) and (4) implies (5). So if we do grant Nussbaum (4) but think (5) is too strong a claim to be gotten easily, then we may have serious doubts about (3). On the other hand, (3) may also seem plausible enough on its own. If it does, then we may be tempted to rethink the concession of (4). Clearly we need to look more closely into how Nussbaum gets to (5).

Because (3) asserts a necessary condition on someone's living a life worth of human dignity, it is natural to read it as saying

(3') Someone needs her capabilities to an appropriate threshold level if she is to live a life worthy of human dignity.

Suppose that instead of (4), Nussbaum accepts:

(4') As a matter of justice, every citizen is entitled to what she needs to live a life worthy of human dignity.

Then Nussbaum could get to (5).

There is significant textual support for reading Nussbaum as arriving at (5) in this way. For if we read (3) as (3'), and take Nussbaum to accept (4') in place of (4), then the entitlements she asserts in (5) are entitlements Nussbaum thinks people have on the basis of certain of their needs. And this is exactly how Nussbaum seems to defend those entitlements. In her fullest and most developed statement of the capabilities approach to justice, Nussbaum notes that Marx speaks of the human being as a being "in *need* of a totality of human life-activities" and says that her own approach to basic justice "takes its cue" from this remark.<sup>30</sup> In "Aristotle on Political Distribution", her earliest work on that approach, she says:

on this account, B-capabilities are *needs* for functioning: they give rise to a claim because they are there and in a state of incomplete realization. They are conditions that reach towards, and demand fulfillment in, a certain mode of activity.<sup>31</sup>

She then says that these needs generate claims because of "the value of the functionings in which they terminate".<sup>32</sup> This suggests that we read the third step of Nussbaum's argument as a claim about what human beings need if they are to be able to realize certain values in their lives. In Nussbaum's later work, it becomes clear that dignity is the critical value. So even Nussbaum's earliest work suggests that she always intended to get to (5) from (3') and (4'), or premises quite like them.

The difficulty with this reading of the argument is that I do not think casting the third step as (3') is perfectly faithful to Nussbaum's thinking. For Nussbaum clearly thinks that if someone does not have the central capabilities to a threshold level, then she does

not have the option of realizing “the value of the functionings in which [her needs] terminate”. That someone with the basic capability to realize those values should be unable to do so is a bad state of affairs – a state of affairs Nussbaum describes as “a kind of premature death”.<sup>33</sup> Nussbaum has consistently maintained that the badness of this “kind of premature death” had to be averted as a matter of justice. What has become increasingly clear as Nussbaum has developed her view – and what is now explicit in *Frontiers* -- is that suffering this “kind of premature death” means leading a life unworthy of dignity, and that the badness of *that* state of affairs must be averted because everyone is entitled to a life that *is* worthy of dignity.

Let me now say how I take Nussbaum to argue for (5).

Suppose Nussbaum thinks, as seems plausible, that someone lives a life worthy of human dignity if and only if the badness of her living a life unworthy of human dignity is to be averted. Then (3') is equivalent to:

(3'') Someone needs the central capabilities to the appropriate threshold if the badness of her living a life unworthy of human dignity is to be averted.

And if Nussbaum also accepts

(4'') As a matter of justice, every citizen is entitled to what she needs if the badness of her living a life unworthy of human dignity is to be averted.

then she can get to the desired conclusion (5).

I think that reading the third step in Nussbaum’s argument as (3'') *is* faithful to her thinking, for it makes clear – in a way that the wording of (3') did not – just why she takes that step. It also fits with an important remark about the central capabilities. Just after introducing those capabilities in *Frontiers*, Nussbaum says:

The basic idea is that with regard to each of these [entries on the central capabilities list], we can argue, by imagining a life without the capability in question, that such a life is not worthy of human dignity.<sup>34</sup>

Thus Nussbaum thinks our intuitions about dignity are definite enough to establish that for each of the central capabilities, there is some threshold such that someone living below that threshold lacks dignity. The reason for imputing (3'') to Nussbaum is that it can be established by conjoining the conclusions of arguments that Nussbaum suggests can be made about each of the capabilities taken singly.

Is the reformulated argument for (5), and hence for C, a sound argument?

If we are prepared to grant (4), as I was, then we should also grant (4"). I am not sure that the form of argument Nussbaum offers for each of the conjuncts in (3") works for all of the capabilities on her list, but here -- as with (4) and (4") -- I am prepared to grant her claim for the sake of argument. In that case then it seems that -- putting aside the question of whether the "appropriate threshold level" is so high as to make the capabilities approach unaffordable and implausibly demanding<sup>35</sup> -- Nussbaum's argument for (5), (6), (7) and C is successful.

It does not follow, however, that Nussbaum's *capabilities approach to basic justice* is successful. This is not because the concept of combined capabilities is suspect, though I think the question of whether it is is not settled by the arguments I imagined Nussbaum making in section III and so remains open. To see my real concern, it is helpful to return to what is distinctive about the capabilities approach.

I implied at the end of section III that what distinguishes Nussbaum's approach to justice is the way she draws on claims about the badness of lacking the capabilities to argue for C. Having reconstructed Nussbaum's argument, I can now say what I had in mind.

What makes her approach distinctive is Nussbaum's attempt to establish basic entitlements by moving *from* (3"), a claim about the badness or tragedy of living with capabilities ill-being, *to* the "major and fundamental entitlements"<sup>36</sup> asserted in (5), *via* the entitlement to live a life worthy of dignity asserted in (4) -- understood as a life lacking that kind of ill-being. If those entitlements are truly to be *fundamental* -- if they are to be *basic* entitlements in that sense of 'basic' -- then that move must be executed without appeal to entitlements which are prior to the entitlements asserted in (5).

The argument for (5) depends upon the possibility of describing the badness or tragedy of lives lived without dignity by appeal Nussbaum's list of capabilities, for without such descriptions, it would be impossible to establish (3"). Because of the way (6), (7) and C -- which assert citizens' entitlements against their society -- depend upon (5), and hence upon (3"), the argument for constitutional entitlements also depends ultimately upon that possibility as well.<sup>37</sup> I want to question whether Nussbaum can adequately describe the badness or tragedy of lives without dignity while maintaining that the entitlements her account singles out are indeed the conceptually fundamental entitlements she claims they are.<sup>38</sup> If she cannot, then the capabilities approach to "basic social justice" cannot realize its ambitions.

- VI -

Let's return to Jayamma, whom I mentioned in my opening remarks and who was introduced to us in *Women and Human Development*. Jayamma is a widow who recently retired from physically taxing work at a brick kiln, which she is no longer able to perform. I want to vary her situation somewhat, so that she is still working but at wages that are not enough to lift her out of destitution.

There are several capabilities on Nussbaum's list that Jayamma seems not have to an adequate threshold. Let's suppose that Jayamma cannot afford adequate nutrition and shelter. Because she has no husband and no savings, and because her sons refuse to help support her, Jayamma needs support from her society if she is to be adequately nourished and housed. Let's grant, then, that Jayamma has a claim of justice to that support. The question is what exactly the grounds of Jayamma's claim are.

Jayamma's claim against her society is just an instance of the entitlement asserted in (7) and in C. As I have reconstructed Nussbaum's argument, (7) and C are supposed to follow from (5). (5), in turn, is supposed to follow from (4"), (3") and the presupposition of (3") – that a life of capabilities ill-being is a life unworthy of human dignity. So if I have reconstructed Nussbaum's argument correctly, she thinks the grounds of Jayamma's claims to nutrition- and shelter-support consist in her need for that support if she is to be able to attain states and functionings of value, and so avoid the tragedy or waste or badness of a life without dignity.

This seems to me to omit something important from the grounds of Jayamma's entitlement. For it seems clear to me that the effort Jayamma has willingly expended in productive work – at the brick kiln and at home, raising her children and keeping house - - is relevant to her claim to nutrition-support and shelter-support. Her grounds of her claim to nutrition- and shelter-support consist in the fact that she cannot attain states and functionings of value *despite her demonstrated willingness to work*.

I shall assume that Nussbaum agrees. That she would agree that effort is morally relevant is at least suggested by the fact that she introduces Jayamma to us in a section of *Women and Human Development* entitled "Two Women *Trying* to Flourish"<sup>39</sup>. The question I want to press is whether Nussbaum can accommodate the relevance of Jayamma's effort within the capabilities approach to basic justice.

I shall press this question by contrasting Jayamma with *Lazy*, who lives in a similar state of destitution but who is poor because he chooses not to work, and with *Frivolous*, who is poor because he willingly puts a great deal of effort every day into trivial activities. Intuitively, Jayamma's claims to nutrition- and shelter-support seem much stronger than the claims of *Lazy* and *Frivolous*, and they seem stronger precisely because Jayamma works hard at productive activities while they do not. So we can see how Nussbaum would try to account for the relevance of Jayamma's work to her claim for support by looking at how she would try to account for the intuition that Jayamma has a stronger claim to support than *Lazy* and *Frivolous*. To see whether Nussbaum can account for that intuition in a way that is consistent with her capabilities approach, I want to look at three strategies Nussbaum could employ to handle *Lazy* and *Frivolous*.

#### *i. The Idealization Strategy*

A society can make good on the guarantees mentioned in (7) and C only if it has considerable resources at its disposal.<sup>40</sup> Those resources will have to be produced, but

this is a matter Nussbaum largely ignores. Nussbaum's account of basic justice – like Aristotle's account of household management – seems simply to presuppose that “a supply of property [is] ready to hand”.<sup>41</sup> We have already seen that Nussbaum's is a partial account of justice; this is another way in which it is so.

If Nussbaum is going to abstract away from the production of those resources by assuming that the resources are available, it might also seem natural for her to abstract away from the fact that citizens make differential contributions to the cooperative scheme by which those resources become available. The natural way to abstract away from that fact is to idealize by supposing that there are no citizens like *Lazy* and *Frivolous*. This *Idealization Strategy* acknowledges, in effect, that there is difference between Jayamma on the one hand, and *Lazy* and *Frivolous* on the other, by idealizing away the latter but not the former. But if Nussbaum did idealize away citizens like *Lazy* and *Frivolous* then her account of basic entitlements would be conditional. She would have identified the basic entitlements citizens have if the idealizing assumption holds. How, then, to defend the interest of the account?

Nussbaum could defend the interest of a conditional account by maintaining that such an account still addresses the most fundamental or interesting questions about social justice. For the most interesting questions about “basic social justice”, she might say, just are those that arise when there are no citizens like *Lazy* and *Frivolous*. And so for purposes of identifying the demands of “basic social justice”, she will simply assume that everyone does his part in social cooperation. But this way of handling *Lazy* and *Frivolous* is not open to Nussbaum for two related reasons.

First, Nussbaum criticizes Rawls for assuming that all citizens are fully cooperating members of society, arguing that that assumption makes it impossible for his theory adequately to handle the claims of the disabled.<sup>42</sup> If Nussbaum were to handle *Lazy* and *Frivolous* by idealizing them away in the way I have suggested, she would then be making the very assumption that she criticizes Rawls for making.

Second, Nussbaum would have to argue for the claim about when the most fundamental questions about basic entitlements arise. The question is how that argument would go. Rawls makes the assertion I have imagined Nussbaum making, saying that “[t]he fundamental problem of social justice arises between those who are full and active and morally conscientious participants in society”.<sup>43</sup> He treats this as a simplifying assumption, one for which he offers a highly compressed argument. That argument is worth reviewing to show why Nussbaum could not use it. Unfortunately, Rawls's argument is not stated as clearly as it might be. I believe it goes roughly as follows.

Problems of justice arise, Rawls thinks, when agents make conflicting claims on goods that cannot be generated in a supply sufficient to satisfy them all. The fundamental case of such conflicts is one in which all the agents involved have equal claims to the goods. This is the fundamental case because it poses the first test a theory of justice must pass;

as Rawls implies, a theory of justice which cannot even adjudicate among equally strong claims “is of no use at all”.<sup>44</sup> A sufficient condition of agents’ having equal claims to goods is that all of them cooperate fully in the scheme by which those goods are generated and distributed. A society in which everyone fully cooperates is therefore a society that poses “the fundamental problem of social justice” – the problem of what to do when claims to the social product are equal.<sup>45</sup>

According to the Rawlsian argument, a society from which citizens like *Lazy* and *Frivolous* have been idealized away is a society in which all citizens have equally strong claims because they contribute fully to the generation of the social product. Someone who accepts the Rawlsian argument might still be able to use the list of central capabilities to say what citizens with equal claims have claims *to*. She would presumably conclude that they have the claims asserted in (5). But those claims would then be specifications of the entitlements citizens have in virtue of being fully cooperating members. According to Nussbaum’s capabilities view, however, the entitlements asserted in (5) specify the entitlements citizens have in virtue of the entitlement specified in (4”), the entitlement to live lives worthy of human dignity. So from Nussbaum’s point of view, the Rawlsian argument is premised upon an incorrect account of the basis of claims.

Thus Nussbaum could not avail herself of the Rawlsian argument without accepting a premise that she rejects. The only way for her to avoid this difficulty, and to accept the Rawlsian argument, would be for her to claim that someone is entitled to a life worthy of human dignity if and only if she is a fully cooperating member of society. But that is precisely what Nussbaum wants to deny. Since it is hard to see how Nussbaum could justify handling *Lazy* and *Frivolous* by idealizing them away without relying on the Rawlsian argument, it seems she cannot use the *Idealization Strategy* to cope with their cases.

It is not surprising that the *Idealization Strategy* is incompatible with the capabilities view, since the strategy is deeply at odds with the spirit of that view. In Rawls’s hands, the *Idealization Strategy* idealizes in order to get “a clear and uncluttered view” the fundamental question of political justice<sup>46</sup>. It assumes that for purposes of addressing that question, citizens are best thought of as fully cooperating participants in their society. And it conceives of their society as a scheme of cooperation that is “productive and fruitful”<sup>47</sup>. For purposes of framing a theory of basic justice, then, it takes citizenship to entail full participation in a productive scheme. It is just this way of conceiving of citizenship that Nussbaum wants to undermine. She is expressly critical of “the idea of the citizen as a productive augments of social well-being”<sup>48</sup> and wants to derive the basic entitlements of citizens from a different basis altogether.

*ii. Distinguishing the External Conditions*

If Nussbaum cannot idealize away *Lazy* and *Frivolous*, then she needs to distinguish their cases from Jayamma's. To see what distinctions she would draw, it helps to look at the situations of the three in more detail.

Though Jayamma is very poor, it is not her level of immiseration – as measured, say, in disutility -- that gives her a claim to support. Nor is it her poverty, as measured simply by her command of resources. What gives her a claim to support, according to Nussbaum, is that she lacks some of the central capabilities to an appropriate threshold level. She suffers a critical level of what I have referred to as “capabilities ill-being”. As we have seen, the central capabilities are combined capabilities. They are “internal capabilities combined with suitable external conditions for the exercise of the function” in question. For reasons I shall spell out below, I shall assume that Jayamma's capability ill-being is not due to any deficit in her internal capabilities. It is due, rather, to the conditions in which she lives. For it is because of those conditions – including gender discrimination, the lack of opportunity and the low wages attached to her job at the brick kiln -- that Jayamma cannot nourish and house herself without society's assistance. Thus Jayamma's low capability index, and hence her claim, are due to her “external conditions”.

I have supposed that *Lazy* and *Frivolous* are as poor as Jayamma. But because the capabilities approach says that claims depend upon deficits in combined capabilities rather than in resources, the fact that they are as poor as she does not itself imply, Nussbaum would insist, that they have the same claims as Jayamma. To see what claims they have, we need to ask what capabilities they have.

Suppose the circumstances of *Lazy* and *Frivolous* are such that it would be relatively easy for them to find jobs that would pay enough for them to secure adequate nourishment and shelter. This, we might think, makes their situation significantly different from Jayamma's and accounts for the difference in their claims. The significance of the difference is one Nussbaum seems to be able to accommodate within the capabilities approach. Because the conditions of *Lazy* and *Frivolous* allow them to afford food and housing if they work, and because living in conditions suitable for the exercise of a valued function counts toward possession of the combined capability, it is open to Nussbaum to say that, unlike Jayamma, *Lazy* and *Frivolous* do have the capabilities to be adequately nourished and housed. Their capability indices, unlike Jayamma's, are above the threshold. And so, unlike Jayamma, they do not have claims to their society's assistance. Thus, it may seem, Nussbaum's reliance on combined capabilities enables her to capture just what we think distinguishes Jayamma's case from the other two.

But the reply I have attributed to Nussbaum begs an important question. It assumes that circumstances like those of *Lazy* and *Frivolous*, in which one can afford food if one works, are more favorable than circumstances like Jayamma's, in which even hard work

does not secure enough money for adequate nourishment and shelter. And it is because the circumstances of *Lazy* and *Frivolous* are assumed to be more favorable that *Lazy* and *Frivolous* will be said to have higher capability indices than Jayamma. But how is this assumption to be justified from within the capabilities approach? What is it about work – more specifically, about the willing expenditure of productive effort -- that makes conditions in which one can afford food if one works count as more favorable than the circumstances Jayamma faces?

It may be tempting to argue that the differences in circumstance make Jayamma less free than *Lazy* and *Frivolous*. For Jayamma's circumstances seem to pose obstacles to her feeding herself that *Lazy* and *Frivolous* do not face. Because they do not face them, they are free to feed themselves while she is not. This difference in what the three are free to do is morally significant, and might be thought to be what makes Jayamma's circumstances less favorable than those of *Lazy* and *Frivolous*. Moreover, the claim that Jayamma's circumstances are less favorable can be justified from within the capabilities approach. For the difference in what Jayamma, *Lazy* and *Frivolous* are *free* to do is a difference in what they *can* do. It is therefore a difference in capability, reflected in different capability indices. Once we have seen how this difference in capability arises, Nussbaum may say, we can see why Jayamma, *Lazy* and *Frivolous* have different claims.

This argument exploits the appealing claim, introduced in section III, that capability is a “freedom-type notion”. But it will not do. For all of three of Jayamma, *Lazy* and *Frivolous* face a similar obstacle to feeding themselves: all have to work in order to do it. Why isn't this similarity of condition, rather than the difference in their condition, what is most significant in assessing the freedom of Jayamma, *Lazy* and *Frivolous*? Why aren't all three equally unfree, and therefore all equally badly off? The answer must be that there is something significant about being free to or being able to support oneself by working. But what that is remains to be explained.

So far, then, the strategy of *Distinguishing the External Conditions* has not explained the difference between Jayamma's claims and those of *Lazy* and *Frivolous*, and so has not explained the relevance of Jayamma's willing expenditure of productive effort. But a difference in external conditions is not the only difference in the cases. Perhaps we can see what distinguishes Jayamma from *Lazy* and *Frivolous* by looking at the differences in their internal capabilities as well as the difference in their external conditions.

### *iii. Distinguishing the Internal Capabilities*

As we saw, internal capabilities are “developed states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions”. Jayamma, I am supposing, wants to feed and house herself by working, and would be able to so if her external conditions permitted it. Her initiative – her readiness to work – is one of the “developed states” that constitute her internal capabilities. I shall suppose that she has developed states that are sufficient, and that she has the relevant internal capability. The fact that she has that capability seems to be a

good thing. The fact that she has this good, that she has an estimable internal capability but is not able to support herself, seems to be part of what makes her circumstances unfavorable. It therefore seems to be part of what is bad about her life, hence part of what grounds her claim to support.

Jayamma's possession of the internal capability seems to distinguish her from *Lazy* and *Frivolous*, and it is open to Nussbaum to maintain that that difference will be reflected in different capability indices. But of course Nussbaum does not want to maintain that Jayamma is better off. And so it must be that, while someone's capability index is a function of her internal capabilities and her external conditions, the function is complex. Perhaps the function combines internal and external conditions so that someone who has internal capabilities that would be sufficient for the exercise of the requisite function in circumstances  $C_1$ , but who is prevented from functioning by her actual circumstances  $C_2$  will score lower than someone who is actually in  $C_1$  but lacks the internal capabilities. If so, then Jayamma's capability index could be lower than those of *Lazy* and *Frivolous*, despite the fact that she has a valuable internal capability that they lack. Her capability index will then be below the threshold, thus giving her a claim, while theirs are not.

This strategy for distinguishing Jayamma from *Lazy* and *Frivolous* depends upon the claim that there is something good or valuable about Jayamma's internal capability, understood as including her willingness to work. The strategy of *Distinguishing the Internal Capabilities* seems to raise a question similar to the one raised by the strategy of *Distinguishing the External Conditions*: what is it about work that makes the willingness to do it a good thing? To answer this question, it will help to ask what would be bad about the life of someone in Jayamma's circumstances who lacks that capability. What is it that someone in her circumstances, who lacks that capability, is unable to do? What would Jayamma be unable to do if she lacked it?

Jayamma is, we are told, a member of a lower Hindu caste. She "[lack[s] good social standing" and belongs to a class in which women "rarely get opportunities for formal education". She is subject to sex discrimination at work, where "women are never considered for ... promotions and are never permitted to learn the skills involved." Nor is there much prospect for improving her situation. Jayamma "could never hope to get a bank loan", as some women do who are slightly better off, and "the idea of two savings accounts is beyond her". "She feels she has had a bad deal, but she doesn't see any way of changing it".<sup>49</sup> "Despite all these reversals," we are told, "Jayamma is tough, defiant, and healthy." Indeed, Nussbaum's description of Jayamma makes her sound like a woman of extraordinary psychological resources. It is for this reason that I have supposed Jayamma's capabilities ill-being is not due to any deficit in her internal capabilities.

But now consider *Hopeless*, a childless woman who faces exactly the reversals and prospects Jayamma did but who is of a less combative and resilient disposition. Uneducated, subject to pervasive social, economic and gender discrimination, knowing

that she will never be given the opportunity to acquire job-skills and seeing no “way of changing her situation”, she simply gives up. Instead of taking an unskilled job at the brick kilns as Jayamma did, she subsists entirely by begging.

Nussbaum writes “One cannot understand Jayamma’s choices ... without understanding, at many different levels of specificity and generality, how she is socially placed”.<sup>50</sup> I think the same is true of *Hopeless*. Her prospects for a good life seem dim to her. She is much more vulnerable to the effects of bad luck, such as illness, than is someone with more resources. Because of the pervasive discrimination and dim prospects that she faces, she suffers another aspect of capabilities ill-being: she lacks what Nussbaum, following Rawls, calls “the social bases of self-respect”. That is, *Hopeless* does not enjoy the social conditions that normally conduce to the sense that her plans are can be carried out.<sup>51</sup> Small wonder, then, that she makes such limited plans.

Whether people can and do put forth effort is itself a consequence of how their society is set up and where they are placed within it. It depends upon whether it elicits productive efforts, what kind of efforts it trains people to put forward, what efforts it rewards, and how much it rewards them. In light of the way *Hopeless*’s society is set up and where she is “socially placed”, I think we should regard her decision to give up as reasonable in this sense: despite not working, she can still invoke the basic entitlements she has by (5), (6), (7) and C, and claim nutrition- and shelter-support. Since the entitlements to which *Hopeless* appeals follow from (4”), (3”) and the presuppositions of (3”), her claims to support depend, in part, upon the badness or tragedy of living with internal capabilities which pull her below an acceptable capabilities threshold. What is it, exactly, that makes a life like *Hopeless*’s bad or tragic?

The proponent of the capabilities approach would cite the valued states and functionings that cannot be enjoyed by someone in *Hopeless*’s position. And to be sure, there is much that *Hopeless* cannot do or be because of her deprivations. Nussbaum’s list of basic capabilities helps us to spell this out. But there is one thing *Hopeless* has great trouble *doing* that is not on Nussbaum’s list: forming and executing a plan of life that includes the expenditure of productive effort. And so one of the things she has great trouble *being* is, in Rawlsian terms, a “fully cooperating member” of her society, where her society is understood as an enterprise that is “productive and fruitful”. These difficulties are part of what makes *Hopeless*’s situation “tragic” and “a waste”.

But because these difficulties are part of the badness of a life like *Hopeless*’s, they are part of the badness of such a life that is presupposed by (3”) and that must be averted as a matter of justice by (4”). They are therefore among the grounds of the entitlements asserted in (5). If this is correct, then the claims to education, nutritional- and shelter-support that are asserted in (5) rest on the fact that citizens need guaranteed education, nutrition and shelter if they are to put forward productive effort and to be fully cooperating members of society.<sup>52</sup> Because nothing like “being a fully cooperating

member of society” appears on the list of basic capabilities, it follows that Nussbaum’s account of the bases of basic entitlements is incomplete.

This line of thought assumes that forming and executing a plan of life which includes the willing expenditure of productive effort is a valuable functioning, and that a fully cooperating member of one’s society is a valuable thing to be. Indeed, it assumes them to be so valuable that a life which is lacking the opportunity to do and to be them is a life lacking in some element of human dignity. Looking at the basis of these critical assumptions shows that Nussbaum cannot remedy the incompleteness of her account by adding a capability for the missing functioning to her list, nor can she account for the badness of *Hopeless*’s plight simply by pointing out that *Hopeless* lacks part of the capability for forming a plan of life. The reason for accepting the critical assumptions lies in the bearing of voluntary productive effort, and of full cooperation, on claims to shares of the social product. How do they bear on claims? And what claims do they bear on?

I have supposed that *Hopeless*, like Jayamma, satisfies sufficient conditions for lodging claims to shelter-and nutrition-support. But there is a significant difference between them. When someone like Jayamma, who does her part by obeying the law, by supporting institutions and by willingly expending productive effort makes claims to shares of the social product – rights, liberties, opportunities, material support – she claims a share of the product *in return for* what is and is acknowledged to be a full contribution to the generation of that product.

This is generally regarded as a privileged basis for lodging claims. One indication that people privilege it is that those who press claims are generally treated with greater respect when they are perceived to have done their parts than when they have not. I take respect to entail acknowledgement of status that is worthy of esteem. Perhaps respect does not always entail such acknowledgement. But there are, I think, clear cases in which it does. Thus if I respect the office of the presidency, it is because that office is a position of elevated or estimable status. If I respect humanity as an end in itself, I believe it is because I regard the status of being human as an estimable one, a status that is elevated above that enjoyed by other creatures. So what I am suggesting is that those who lodge claims to shares of the social product in return for their contributions are treated as having a status that is worthy of esteem relative to those who lodge claims – even valid claims – on different bases.

Pinning down the meaning of ascriptions of dignity with any precision is notoriously difficult. At least part of what is meant by saying that someone has dignity, I think, is that she has a status that is estimable and therefore worthy of respect. If this is correct, then respect is acknowledgement of dignity and those who lodge claims in return for their contributions are generally treated as having a dignity that those who lodge claims on a different basis lack. Being treated as having such dignity is itself a valuable state, for to lack it is – in the absence of circumstances recognized as mitigating -- to be treated

as someone who is free-riding or who is claiming more than is her due. Indeed, being treated as having such dignity or status is, I suggest, itself an element of human dignity, at least when the treatment is based on the right criteria.

Thus one of the reasons that forming and executing a plan of life which includes the willing expenditure of productive effort is a valuable function is this. Someone like Jayamma who executes such a plan satisfies a privileged sufficient condition for making a claim to a share of the social product and will therefore be treated in a valued way. And one of the things that is bad or tragic about *Hopeless's* life is that she has great difficulty satisfying the sufficient condition on claims that Jayamma satisfies. So even if she makes valid claims for support, she will not receive the respect from others that is itself an element of a dignified life.

So far, the strategy of *Distinguishing the Internal Capabilities* seems very promising. The comparison between *Hopeless* and Jayamma enables us to see what Jayamma would be unable to do if she lacked the internal capability I have ascribed to her. The strategy therefore enables us to see why that capability is valuable. With this explanation in hand, we can see a morally significant difference between Jayamma on the one hand, and *Lazy* and *Frivolous* on the other. Jayamma possesses a valuable internal capability that they do not. That capability would, in other circumstances, enable her to satisfy a privileged condition for claiming her share of the social product.

This explanation helps answer the question left open by the strategy of *Distinguishing the External Conditions*. What makes Jayamma's actual circumstances less favorable than those of *Lazy* and *Frivolous* is that her circumstances keep her from claiming her share by actually supporting herself. Indeed, those circumstances are so unfavorable that it would not be unreasonable for someone in them simply to give up – as *Hopeless* does. This difference in circumstances can then be used to explain the difference in claims to social support: Jayamma and *Hopeless* have weightier claims than *Lazy* and *Frivolous* because Jayamma and *Hopeless* are less favorably placed. Of course, the difference in claims must be reflected in difference in capability indices. I have suggested how that difference might arise if the function for computing the combined capability index is sufficiently complex. Finally, thinking about why Jayamma's internal capability is valuable has brought to light why work is important, and why the willing expenditure of productive effort is relevant to claims.

But the strategy of *Distinguishing Internal Capabilities* is not consistent with Nussbaum's capabilities approach. I argued above that *Hopeless* has claims to nutrition- and shelter-support, and to education, in part because she needs them to avoid the badness or tragedy presupposed by the relevant instance of (3"): the badness of not being able to be a fully cooperating member of her society. The assertion that it is bad or tragic not to be a fully cooperating member of one's society depends upon the fact that it is bad or tragic to be unable to satisfy a privileged sufficient condition for lodging claims. That fact obtains only if there is already a set of entitlements in place: the entitlements for

which voluntarily expending productive effort, or being a fully cooperating member of one's society, is a sufficient condition. Nussbaum cannot allow for such entitlements while also maintaining that the entitlements asserted in (5) are basic in the sense that she requires. For as we saw, according to Nussbaum's second stricture, the entitlements asserted in (5) specify the entitlement asserted in the various versions of (4), but they cannot presuppose any prior entitlements.

*iv. The Three Strategies*

I have now considered three strategies that Nussbaum could use to accommodate the relevance of productive effort and address the difficulties posed by *Lazy*, *Frivolous* and *Hopeless*. Those three strategies are the *Idealization Strategy*, the strategy of *Distinguishing External Conditions* and the strategy of *Distinguishing Internal Capabilities*. The first strategy asserts what is, from Nussbaum's point of view, the wrong basis of entitlements. The second strategy leaves crucial questions unanswered, questions that lead us to the third strategy. The third strategy is incompatible with Nussbaum's assertion that the claims she identifies are basic in the sense that she requires. I cannot think of other strategies that do not encounter the same problems. So it is unclear to me how the capabilities approach can handle the relevance of efforts like those Jayamma makes, and how it can distinguish her case from the very different cases of *Lazy*, *Frivolous* and *Hopeless* – at least if the capabilities account is taken as an account of basic entitlements, where 'basic' means fundamental.

As we saw earlier, Nussbaum hopes "to provide the philosophical underpinning for an account of basic constitutional principles that should be respected and implemented by the governments of all nations".<sup>53</sup> It is unclear that Nussbaum's account provides a principled basis on which such a constitution could distinguish Jayamma's claims from the claims of the other three. If it does not, then it cannot provide the right account of the grounds of Jayamma's entitlement.<sup>54</sup>

- VII -

It should not be surprising that Nussbaum's capabilities approach has difficulty accommodating the relevance of productive effort to the strength of claims. One of the most surprising things about the capabilities approach to basic justice is its treatment of work. Work appears on the capabilities list under "Having Control Over One's Environment". There, it is said that the central capabilities include being able to seek employment on an equal basis with others, being able to have relations of mutual recognition and being able to work as a human being. This last requirement is one that Nussbaum spells out especially powerfully.<sup>55</sup>

It is, of course, important to be able to work and to be able to work in ways that realize distinctively human powers, just as it is important to be able to play and to eat, and to do so in human ways. But the activities of eating, playing and working differ in ways that are morally significant. I worry that the capabilities approach to basic justice gives too little attention to these differences. I worry that the capabilities approach neglects these

differences because it abstracts away from the fact that resources needed to satisfy entitlements have to be produced, and assumes instead that they are – as I put it earlier -- “ready to hand”.<sup>56</sup>

Part of what distinguishes work from other necessary human activities is the way it bears on fundamental claims. A correct account of what distinguishes it, of what makes productive work a valuable human functioning, and of what is bad about being unable to work, all will appeal to the basis of the claims people can make in virtue doing their part in productive schemes. A correct account of these matters will therefore presuppose an account of fundamental claims and their bases. Yet according to Nussbaum, the most basic entitlements are supposed to *follow from* what is bad about being unable to engage in necessary human activities.

This is not a difficulty that can be fixed without altering fundamental structural features of Nussbaum’s capabilities approach to basic justice. I remarked at the end of section V that the distinctiveness and originality of that approach lies in the way Nussbaum argues for step (5). As we have seen, Nussbaum’s assertion of entitlements at (5) depends upon her drawing on the badness presupposed by her step (3’), the badness of living without the capabilities, to specify the entitlement asserted at step (4’). This way of drawing on the badness presupposed by (3’) to specify an abstract entitlement means that, for Nussbaum, “the right and the good seem thoroughly intertwined”.<sup>57</sup>

This intertwining is part of the theoretical structure of the capabilities approach, a structure that made it plausible to suppose that the capabilities approach can yield an account of entitlements which are fundamental as well as minimal. For, Nussbaum implies, a feature of the approach that enables it to describe the badness of lives lacking in dignity in the way that defense of (3’’) would require. Thus she writes at one point:

without an account of the good, however vague ... we have no adequate basis for saying what is *missing* from the lives of the poor or marginalized or excluded[.]<sup>58</sup>

As my discussion of *Hopeless* is meant to show, however, we need some account of the connection between work and entitlements to “say[] what is missing from lives of the poor or the marginalized or excluded” whose circumstances lead them to give up. More specifically, to say what is missing from *Hopeless*’s life, we need to appeal to the privileged condition for claiming entitlements that her marginalization keeps her from satisfying. Since we are to appeal to what is missing from the lives of the marginalized to specify the requirements of human dignity, these entitlements must be in place prior to our attempts to specify the entitlement asserted in (4’). An account that denies the priority of the right in the way that Nussbaum’s does, and that instead insists that “the right and the good [are] intertwined”, will not have conceptual space for those prior entitlements.

My treatment of Jayamma, *Lazy*, *Frivolous* and *Hopeless* depended at critical points on appeals to intuitions about the relative strength of their claims to social support. My discussion of *Hopeless*, in particular, depended upon what I took to be intuitively plausible claims about the respect accorded people when they lodge claims to social support on various bases. Nussbaum may protest that my appeal to these intuitions ignores the extent to which the capabilities account of justice is supposed to be revisionary. Nussbaum hopes, she may say, to leverage our intuitions about human dignity in order to revise just the sort of intuitions to which I appealed. This is suggested by an important remark in *Frontiers* where – as if in response to my treatment of *Hopeless* -- Nussbaum writes “We do not *have* to win the respect of others by being productive. *We have a claim to support in the dignity of our human need itself.*”<sup>59</sup>

As I mentioned early on, Nussbaum thinks that the capabilities view of basic justice can be the object of an overlapping consensus. What has to be shown about a conception of justice to show that it can be the object of such a consensus?

It is commonly thought that one condition a conception must satisfy is that it be a political liberalism. Nussbaum argues that her view satisfies this condition for she argues, in effect, that none of (1), (2), and the various versions of (3) and (4) depends upon comprehensive doctrines. But this condition, while arguably necessary, is not sufficient. Some political liberalisms may be able to serve as the basis of an overlapping consensus, while others may not.

It is tempting to think that only conceptions of justice that accord with prevalent moral intuitions can be the object of such a consensus. But Rawls points out that there can be overlapping consensus on revisionary conceptions of justice, as his own conception would presumably be.<sup>60</sup> It would therefore be no objection to Nussbaum’s view that it, too, is revisionary. On the other hand, it seems to me that the intuitions on which I have tried to draw – intuitions about the moral relevance of willing, productive effort – are very widely held and very deeply rooted. I worry that the intuitions on dignity on which Nussbaum tries to draw will not provide her enough leverage to pull them up. These also strike me as reasonable intuitions, which should be left in place at least in some form. For I have not said that the voluntary expenditure of productive effort is a necessary condition of having basic entitlements. I have merely discussed cases in which I believe it *relevant* to basic entitlements; and I would argue – on Rawlsian grounds – that *Hopeless* has such entitlements.<sup>61</sup> It is hard for me to see how its relevance to claims in those cases could reasonably be denied. I worry that capabilities approach to basic justice – which seems unable to account for its relevance – is too revisionary to be the object of an overlapping consensus.

- VIII -

I said at the outset that those who enter into Martha Nussbaum’s work will hear a remarkably conducted chorus of voices. The lead voice, as I remarked then, is that of Nussbaum herself. Hers is a voice of astonishing clarity, passion and range. She follows

scores of her own composition, incorporating themes and motifs from throughout the history of philosophy to achieve surprising harmonies – such as the harmony of Marx and Aristotle that she thinks is achieved by the capabilities approach.

It is an honor to pay tribute to one of the most distinctive and powerful philosophical voices of our time in a volume such as this. I hope my contribution to this well-deserved tribute does not sound too dissonant a note or too graceless a chord. It is a happy consequence of publishing this critique in a volume of *The Library of Living Philosophers* that Nussbaum will have the chance to restore euphony, for she herself will write the coda.<sup>62</sup>

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*Notes*

- <sup>1</sup> Martha Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford University Press, 1990).
- <sup>2</sup> Martha Nussbaum, *Women and Human Development* (Cambridge University Press, 2000)
- <sup>3</sup> Martha Nussbaum, "Aristotle on Political Distribution", *Proceedings of the Aristotelian Society* (Supplementary Volume, 1988): 145-84.
- <sup>4</sup> Nussbaum, "Aristotle on Political Distribution", p. 166.
- <sup>5</sup> Gerald Cohen has argued that the capabilities approach must privilege states as well functionings; see his "Equality of What?: On Welfare, Goods and Capabilities" in *The Quality of Life* (Oxford University Press, 1993), ed. Nussbaum and Sen. Here I shall assume that Nussbaum treats this as a friendly amendment.
- <sup>6</sup> 'Partial' because while trade-offs among the capabilities are forbidden, no weights are assigned to the various capabilities on the list; see Amartya Sen "Capability and Well-Being", *Quality of Life*, p. 48.
- <sup>7</sup> See Martha Nussbaum, *Frontiers of Justice* (Harvard University Press, 2006), pp. 114ff.
- <sup>8</sup> Nussbaum, *Women and Human Development*, p. 5.
- <sup>9</sup> Nussbaum, *Frontiers*, p. 75
- <sup>10</sup> Nussbaum, *Frontiers*, p. 274.
- <sup>11</sup> See, for example, Nussbaum, *Women and Human Development*, p. 5.
- <sup>12</sup> It receives sustained attention in Samuel Freeman, "Contractarianism vs. the Capabilities Approach", *Texas Law Review*, 85 (no. 2, December 2006): 385-430.
- <sup>13</sup> Nussbaum, *Frontiers*, p. 167.
- <sup>14</sup> Nussbaum, *Frontiers*, p. 78.
- <sup>15</sup> Nussbaum, *Frontiers*, p. 75

<sup>16</sup> Nussbaum, “Aristotle on Political Distribution”, p. 183: “the things that it is the primary responsibility of the lawgiver to put in place ... are the capabilities of persons out of which excellent functioning, doing well and living well, can be selected.”

<sup>17</sup> Nussbaum, “Aristotle on Political Distribution”, p. 166.

<sup>18</sup> Nussbaum, *Women and Human Development*, p. 89.

<sup>19</sup> Nussbaum, *Women and Human Development*, pp. 84-85.

<sup>20</sup> Nussbaum, *Frontiers*, p. 82.

<sup>21</sup> Nussbaum, *Frontiers*, p. 75.

<sup>22</sup> Nussbaum, *Women and Human Development*, p. 85 (emphasis original).

<sup>23</sup> Nussbaum, *Frontiers*, p. 74.

<sup>24</sup> Amartya Sen, *Commodities and Capabilities* (Oxford University Press, 1999), p. 9.

<sup>25</sup> See Henry Richardson’s contribution to this volume.

<sup>26</sup> See Nussbaum, *Frontiers*, pp. 279-80, where she writes “then we are all under a collective obligation to provide the people of the world with what they need.”

<sup>27</sup> Nussbaum, *Frontiers*, p. 274 (emphasis added).

<sup>28</sup> Nussbaum, *Frontiers*, p. 139.

<sup>29</sup> Nussbaum, *Frontiers*, pp. 7, 161-62.

<sup>30</sup> Nussbaum, *Frontiers*, p. 159 (emphasis added).

<sup>31</sup> Nussbaum, “Aristotle on Political Distribution”, p. 169 (emphasis original).

<sup>32</sup> Nussbaum, “Aristotle on Political Distribution”, p. 169.

<sup>33</sup> Nussbaum, *Frontiers*, pp. 346-47.

<sup>34</sup> Nussbaum, *Frontiers*, p. 78.

<sup>35</sup> Until Nussbaum specifies the “appropriate threshold level” at which the central capabilities are to be guaranteed, it is hard to know just how demanding the capabilities

view is – hence how expensive it would be to implement. But Nussbaum herself acknowledges that implementing a scheme of rights and liberties would be very expensive and that developing the capabilities would be costly; see Martha Nussbaum, “Duties of Justice, Duties of Material Aid: Cicero’s Problematic Legacy” *Journal of Political Philosophy* 8 (2000): 176-206, pp. 192ff. and Nussbaum, *Frontiers*, pp. 365 and 372, for example.

Just how costly it would be is suggested by how far Nussbaum thinks societies should go to develop the capabilities of their citizens. At one point she writes “to those who have the B-capability, *give as much of the relevant goods as would be required* to bring that person along from a B-capability to an E-capability”. See Nussbaum, “Aristotle on Political Distribution”, pp. 167-68, (emphasis added); the capabilities referred to here are defined at pp. 160-62. Later, addressing the question of whether there are any limits at all to this requirement, she says:

Therefore we should, I think, proceed as if every offspring of two human parents has the same basic capabilities, unless and until long experience with the individual has convinced us that damage to that individual's condition is so great that it could never in any way, *through however great an expenditure of resources*, arrive at the higher capability level.

See Nussbaum, “Defending Aristotelian Essentialism”, p. 228 (emphasis added).

Whether this is a plausible limit depends, of course, upon just how high the “higher capability level” is. The obvious worry is that if it is high enough to entail that those who now live in poverty are not at a high enough level of functioning, then it is so high that it requires exorbitant expenditures on the disabled to bring *them* up to the threshold. That Nussbaum’s account entails such exorbitant expenditures might be thought to tell powerfully against it.

<sup>36</sup> Nussbaum, *Frontiers*, p. 139.

<sup>37</sup> As if to confirm this, Nussbaum writes at “Defending Aristotelian Essentialism”, pp. 228-29:

The very being of the[] basic capabilities makes forward reference to functioning; thus if functioning never arrives on the scene, they are hardly even what they are. This basic intuition underlies the recommendations that the Aristotelian view will make for public action: certain basic and central human powers have a claim to be developed and will exert that claim on others – and especially, as Aristotle held, on government.

<sup>38</sup> See note 28 above and accompanying text.

<sup>39</sup> Nussbaum, *Women and Human Development*, p. 15 (emphasis added).

<sup>40</sup> See note 35 above.

<sup>41</sup> Aristotle, *Politics* 1258a34

<sup>42</sup> Nussbaum, *Frontiers*, p. 141.

<sup>43</sup> John Rawls, “Kantian Constructivism in Moral Theory”, *The Journal of Philosophy* 77 (1980): 515-72, p. 546. Nussbaum criticizes him for making the claim at *Frontiers*, chapter 2, §4.

<sup>44</sup> Rawls, “Kantian Constructivism”, p. 546.

<sup>45</sup> For this interpretation of Rawls, I am indebted to T.M. Scanlon’s splendid essay “The Diversity of Objections to Inequality”, reprinted in his *The Difficulty of Toleration: Essays in Political Philosophy* (Cambridge University Press, 2003), 202-218, especially pp. 207-8. Nussbaum reads Rawls as offering a very different argument for the assumption of full cooperation; see *Frontiers*, p. 117.

As Scanlon makes clear, that citizens have equal claims does not entail they are entitled to equal shares. Even the conclusion that they have prima facie claims to equal shares requires some argument, as is clear from Scanlon’s discussion.

<sup>46</sup> Rawls, *Political Liberalism*, p. 20.

<sup>47</sup> Rawls, “Kantian Constructivism”, p. 536.

<sup>48</sup> Nussbaum, *Frontiers*, p. 128.

<sup>49</sup> Nussbaum, *Women and Human Development*, pp. 17-20.

<sup>50</sup> Nussbaum, *Women and Human Development*, p. 21.

<sup>51</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1999), p. 386.

<sup>52</sup> See John Rawls, *Justice as Fairness: A Briefer Restatement* (Harvard University Press, 2001) ed. Kelly, p. 140.

institutions must, from the outset, put in the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality. Among these

means is human as well as real capital, that is, knowledge and an understanding of institutions, educated abilities and trained skills. Only in this way can the basic structure realize pure background procedural justice[.]

Nussbaum argues that Rawls's theory is unable to accommodate the claims of the specially abled. I grant, at least for purposes of argument, that if those who are specially abled need various forms of accommodation to be fully cooperating members of society, then they are entitled to those accommodations. Granting this may require granting truth of the capabilities approach to quality of life, which I have already done. It does not require granting the truth of the capabilities approach to basic justice.

<sup>53</sup> Nussbaum, *Women and Human Development*, p. 5.

<sup>54</sup> A comparison with a document that actually does set out "basic ... principles that should be respected and implemented by the governments of all nations" illustrates the worry. Article 25, clause 1 of the *Universal Declaration of Human Rights* says

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood *in circumstances beyond his control*. (emphasis added)

The "philosophical underpinning" of this clause would have to provide a principled basis for the inclusion of the last, italicized portion. It is not clear that Nussbaum's capabilities approach provides such a basis. If it does not, then I worry that she is committed to guaranteeing entitlements to those who suffer capabilities ill-being, even if – by choosing not to work -- they are responsible for their own condition.

<sup>55</sup> Nussbaum, *Frontiers*, p. 277.

<sup>56</sup> Thomas Pogge, "Can the Capabilities Approach Be Justified?", p. 58 writes of capability theorists:

In thinking about the just design of ... institutional schemes, we must ask not merely whether we approve of the relative gains they bring to the "naturally disfavored," but also whether we can accept the relative losses they bring to others. And we must ask whether the proposed compensation rules achieve equity among their beneficiaries with their diverse special needs, and equity also among their contributors.....Capability theorists usually leave such questions aside. You can read thousands of pages of their writings without finding any hint about how compensation is to be financed.

I am not aware of other commentators who have made these points so clearly and forcefully. I have tried to argue that the capabilities approach to justice suffers from its having left aside just the questions Pogge raises here. Pogge's paper is available on-line at:

<http://mora.rente.nhh.no/projects/EqualityExchange/Manuscripts/tabid/57/Default.aspx>

<sup>57</sup> Nussbaum, *Frontiers*, p. 162.

<sup>58</sup> Nussbaum, "Defending Aristotelian Essentialism", p. 229 (italics original, underlining added).

<sup>59</sup> Nussbaum, *Frontiers*, p. 160 (emphasis added).

<sup>60</sup> See Rawls, *Political Liberalism*, p. 246: "[a] reasonable and effective political conception may bend comprehensive doctrines toward itself[.]"

<sup>61</sup> Because, through no fault or choice of her own, she lacks "sufficient productive means ... to be [a] fully cooperating member[] of society on a footing of equality"; see above, note 58.

<sup>62</sup> I have presented shorter versions of this paper to audiences at Calvin College and the University of Notre Dame. I am grateful to members of both audiences for their comments and questions. I am especially grateful to Henry Richardson and Peter Wicks for their written commentary.