

# NUSSBAUM: A UTILITARIAN CRITIQUE

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**Abstract:** This Essay offers a utilitarian perspective on Martha Nussbaum's theory of justice. Nussbaum believes that society should guarantee to every individual a threshold level of central human capabilities. Although Nussbaum's approach has considerable appeal, it is implausible and unappealing when it diverges greatly from utilitarianism. Nussbaum's theory requires that enormous sums of money be devoted to people who receive very little benefit from efforts to raise them toward a capability threshold. Moreover, Nussbaum refuses to take a principled position on how conflicts among below-threshold interests should be resolved, even when one alternative would produce enormously more good than another alternative. Nussbaum mitigates these problems through an implicit incorporation of utilitarianism to address conflicts among below-threshold interests, but this partial adoption of utilitarianism cannot completely cure her theory. In addition to critiquing Nussbaum's theory, this Essay responds to some of Nussbaum's criticisms of utilitarianism. It rejects Nussbaum's claim that utilitarianism is wrong to give weight to adaptive preferences. It also demonstrates that Nussbaum misstates the relationship between her theory and the doctrine of incommensurability: features of her theory that she attributes to a denial of commensurability actually reflect a commitment to commensurability across the capability threshold.

## INTRODUCTION

In this Essay, I offer a utilitarian perspective on Professor Martha Nussbaum's theory of justice.<sup>1</sup> Nussbaum holds that society should

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<sup>1</sup> The works of Nussbaum that I consider here are MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter NUSSBAUM, *FRONTIERS OF JUSTICE*]; MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) [hereinafter NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*]; Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005 (2000) [hereinafter Nussbaum, *Costs of Tragedy*]; and Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities*:

guarantee to every individual a threshold level of central human capabilities. In addition, rich nations have an obligation to contribute a substantial portion of their national income to poor nations, and humans have an obligation to promote the capabilities of nonhuman animals. Nussbaum believes that her capabilities approach should guide the interpretation of the U.S. Constitution.<sup>2</sup> She hopes that her approach will eventually be supported by a political consensus in all nations.<sup>3</sup>

Nussbaum's theory has considerable appeal. It is, however, implausible and unappealing when it diverges greatly from utilitarianism.<sup>4</sup> I explore some of the major differences between utilitarianism and her theory, and I also respond to some of Nussbaum's criticisms of utilitarianism.<sup>5</sup>

Utilitarianism is a benefit-maximizing theory. In the distribution of scarce resources, utilitarianism tells us to help those who will most benefit—those who will gain the most additional welfare. The greatest divergence between utilitarianism and Nussbaum's capabilities approach occurs when the capabilities approach requires that enormous sums be devoted to people (or animals) who receive very little benefit from efforts to raise them toward a capability threshold.<sup>6</sup>

In Part I of this Essay, I describe Nussbaum's theory and compare it to utilitarianism and other theories of distributive justice.<sup>7</sup> Most contemporary theories of justice can usefully be described across two di-

"Perception" Against Lofty Formalism, 121 HARV. L. REV. 4 (2007) [hereinafter Nussbaum, *Constitutions and Capabilities*].

In *Constitutions and Capabilities*, Nussbaum references FRONTIERS OF JUSTICE and WOMEN AND HUMAN DEVELOPMENT as illustrating her capabilities approach. See Nussbaum, *Constitutions and Capabilities*, *supra*, at 10 n.7.

<sup>2</sup> Nussbaum, *Constitutions and Capabilities*, *supra* note 1, at 58.

<sup>3</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 163.

<sup>4</sup> The utilitarian perspective I offer here differs from that of commentators in the legal academy who have reviewed Nussbaum's book FRONTIERS OF JUSTICE, *supra* note 1. For a Rawlsian perspective, see Samuel Freeman, *Frontiers of Justice: The Capabilities Approach vs. Contractarianism*, 85 TEX. L. REV. 385 (2006) (book review). For a disability rights perspective, see Anita Silvers & Michael Ashley Stein, *Disability and the Social Contract*, 74 U. CHI. L. REV. 1615 (2007) (book review). For a review focusing on the problems of cosmopolitanism, see Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022 (2007) (reviewing KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006)); KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005); MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1).

<sup>5</sup> I present a general defense of utilitarianism against egalitarian theories in MARK S. STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY: UTILITARIANISM AGAINST EGALITARIANISM* (2006) [hereinafter STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*]. See also Mark S. Stein, *Utilitarianism and Conflation*, 35 POLITY 479 (2003), for a defense of utilitarianism against the charge that it fails to respect the separateness of persons.

<sup>6</sup> See *infra* notes 64–91 and accompanying text.

<sup>7</sup> See *infra* notes 12–61 and accompanying text.

mensions, according to the metric they use and the principle or function they apply to the chosen metric.<sup>8</sup> Nussbaum uses a different metric than utilitarianism, and she also applies different distributive principles.

In Part II, I critique Nussbaum's distributive principles.<sup>9</sup> Nussbaum gives absolute priority to raising people toward a capabilities threshold. This approach is unacceptably extreme, as indicated by the problem of individuals for whom more can always be done, but for whom all the resources of society will not suffice to raise them all the way to the threshold. Nussbaum has never confronted this problem.

In another respect, Nussbaum's distributive principles are too poorly defined rather than too extreme. Nussbaum refuses to take a principled position on how to resolve below-threshold conflicts, even when one alternative would produce enormously more good than another alternative. This gap in Nussbaum's theory is mitigated because in practice, Nussbaum applies a more-or-less utilitarian standard for resolving below-threshold conflicts. Nussbaum's implicit incorporation of utilitarianism for below-threshold conflicts lends her theory considerable plausibility, but the lack of an explicit principle remains troublesome.

In Part III, I discuss differences between Nussbaum's theory and utilitarianism that arise from Nussbaum's use of the capabilities metric rather than the metric of welfare.<sup>10</sup> In the course of this discussion, I reject Nussbaum's claim that it is wrong to respect adaptive preferences. I also demonstrate that Nussbaum misstates the place of incommensurability in her theory. Features of her theory that she attributes to a denial of commensurability actually reflect a commitment to commensurability across the capability threshold. In conclusion, I consider how Nussbaum might revise her theory to make it more plausible.<sup>11</sup>

## I. NUSSBAUM'S THEORY AND WELFARIST ALTERNATIVES

In this Part, I set forth the basics of Nussbaum's capabilities approach and describe its relationship to other theories of justice. Nussbaum's theory is complicated, so it may be helpful to consider first the class of welfarist theories to which utilitarianism belongs.

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<sup>8</sup> See IAN SHAPIRO, *DEMOCRACY'S PLACE* 112 (1996). A theory's metric can also be described as the space in which it operates. See AMARTYA SEN, *INEQUALITY REEXAMINED* 2 (1992).

<sup>9</sup> See *infra* notes 62–190 and accompanying text.

<sup>10</sup> See *infra* notes 191–232 and accompanying text.

<sup>11</sup> See *infra* notes 233–236 and accompanying text.

### A. *Welfarism*

Welfarist theories of justice use the metric of welfare or well-being.<sup>12</sup> Welfarist theories apply different distributive principles, sometimes leading to widely different results.

Utilitarianism is the most prominent welfarist theory. The utilitarian principle of distribution is unweighted maximization; utilitarianism tells us to maximize welfare, giving equal weight to the welfare of everyone.<sup>13</sup> As between two claimants for a resource, utilitarianism tells us to prefer the one who would benefit more from the resource, “benefit” being understood as an increase in welfare.<sup>14</sup> I therefore refer to the distributive principle of utilitarianism—unweighted maximization—as the “benefit-maximizing” principle.

There are also egalitarian welfarist theories. By “egalitarian” I mean a theory that gives absolute priority, within some range, to improving the welfare of someone who is worse off, as opposed to improving the welfare of someone who is better off.<sup>15</sup> One kind of egalitarian welfarist theory is maximin welfare egalitarianism, which tells us to maximize the welfare of those who have the least welfare.<sup>16</sup> Another kind of egalitarian welfarist theory is welfare sufficientarianism, which tells us to raise everyone’s welfare above a certain level.<sup>17</sup> As between two claimants for a resource, the egalitarian principle (in the range it operates) tells us to prefer the one who is worse off.<sup>18</sup>

Utilitarianism, then, tells us to help those who can most benefit, while welfare egalitarianism tells us to help those who are worse off.<sup>19</sup>

<sup>12</sup> The terms “welfare” and “well-being” are generally used interchangeably.

<sup>13</sup> See JOHN C. HARSANYI, *Nonlinear Social Welfare Functions: Do Welfare Economics Have a Special Exemption from Bayesian Relationality?*, in *ESSAYS ON ETHICS, SOCIAL BEHAVIOR, AND SCIENTIFIC EXPLANATION* 72 (1976); PETER SINGER, *PRACTICAL ETHICS* 21 (2d ed. 1993); STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 33–35.

<sup>14</sup> I assume no effects on anyone other than the two claimants. Any such effects would also be evaluated under a greater-benefit criterion.

<sup>15</sup> Philosophers do not all use the term “egalitarian” in the same way. In recent years, some have begun to use the term “egalitarian” to refer only to theories that would “level down,” that would reduce the welfare of the better-off without doing *anything* to benefit the worse-off. See, e.g., LARRY TEMKIN, *INEQUALITY* (1993). I do not adopt this usage, as it would exclude most of the major theorists, such as Rawls, who have been considered egalitarians and have considered themselves to be egalitarians.

<sup>16</sup> See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 75–91.

<sup>17</sup> See Richard J. Arneson, *Why Justice Requires Transfers to Offset Income and Wealth Inequalities*, 19 *SOC. PHIL. & POLICY*, Winter 2002, at 172, 173–74 (describing but not endorsing sufficientarianism). Sufficientarianism is only an egalitarian theory, in my sense of the term, if it gives absolute priority to raising people above a certain level. If it gives less than absolute priority to this goal, it is a prioritarian theory in its lower range.

<sup>18</sup> See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 75–91.

<sup>19</sup> See *id.*

One can effect a compromise between these welfarist theories, mixing the benefit-maximizing principle of utilitarianism with the equalizing principle of welfare egalitarianism.<sup>20</sup> Such a mixed utilitarian-egalitarian theory is often called prioritarianism.<sup>21</sup> Like utilitarianism, prioritarianism seeks to maximize the welfare of everyone.<sup>22</sup> But unlike utilitarianism, prioritarianism does not give equal weight to the welfare of everyone; it gives greater weight to the welfare of those who are worse off.<sup>23</sup> Like egalitarianism, prioritarianism gives priority to improving the welfare of those who have less welfare.<sup>24</sup> But unlike egalitarianism, prioritarianism does not give absolute priority to those who have less welfare.<sup>25</sup>

### B. Nussbaum's Theory

Nussbaum's metric is capabilities rather than welfare.<sup>26</sup> She presents a long list of human capabilities, a list that has evolved over time.<sup>27</sup> There are ten categories of capabilities, and many of the categories contain several different capabilities. Following is a truncated version of Nussbaum's capabilities list, drawn from *Frontiers of Justice*:

1. *Life*. Being able to live to the end of a human life of normal length . . . .
2. *Bodily Health*. Being able to have good health . . . to be adequately nourished . . . .
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

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<sup>20</sup> See *id.* at 181.

<sup>21</sup> See *id.* at 189–206; Derek Parfit, *Equality and Priority*, in IDEALS OF EQUALITY 12, 12–13 (Andrew Mason ed., 1998).

<sup>22</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 189–206.

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 69–81. Nussbaum takes the term “capabilities” from Amartya Sen, but her theory is different in many respects from Sen’s; this essay concerns Nussbaum’s capabilities approach, not Sen’s approach. For Sen’s approach, see SEN, INEQUALITY REEXAMINED, *supra* note 8. For my discussion of Sen, see STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 181–82. For another welfarist critique of Sen, see generally Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?*, 116 PHIL. REV. 603 (2007).

<sup>27</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 76–78.

4. *Sense, Imagination, and Thought.* Being able to use the senses, to imagine, think, and reason . . . . Being able to have pleasurable experiences and to avoid nonbeneficial pain.

5. *Emotions.* Being able to have attachments to things and people outside ourselves . . . to love, to grieve, to experience longing, gratitude, and justified anger.

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 . . . .

7. *Affiliation.* Being able to . . . engage in various forms of social interaction . . . . This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

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.* [H]aving the right of political participation . . . . Being able to hold property . . . being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.<sup>28</sup>

As Nussbaum recognizes, there is considerable overlap between the metric of capabilities and the metric of welfare.<sup>29</sup> Most of the capabilities are clearly elements of welfare for most or all people. There are also important differences between the metric of capabilities and the metric of welfare; I explore these differences in Part III.<sup>30</sup>

Nussbaum's principle of distribution is egalitarian-sufficientarian. She believes that justice requires every nation to raise every citizen to or above a threshold level of each of the capabilities.<sup>31</sup> If it is not possible to give some people all the capabilities up to the threshold level, a society must give "as many of them, and as fully, as is possible."<sup>32</sup>

The threshold level of each capability should be set "with an eye to the other capabilities" and "should not be set in a utopian or unrealistic

<sup>28</sup> *Id.*

<sup>29</sup> One source of the items on Nussbaum's capabilities list is the informed-preference account of welfare. See *infra* notes 191–200 and accompanying text.

<sup>30</sup> See *infra* notes 191–232 and accompanying text.

<sup>31</sup> Her formulation varies between "to" and "above." Compare NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 182 ("to"), with *id.* at 75 ("above"). In this Essay, I generally use the "to" formulation, though I do not achieve complete consistency either.

<sup>32</sup> *Id.* at 222.

way . . . .”<sup>33</sup> In determining the threshold level, some variability among societies is permitted.<sup>34</sup> However, there are also some absolute requirements.<sup>35</sup> For example, a nation that provides free education only to age twelve fails in its responsibility.<sup>36</sup>

As between above-threshold interests and below-threshold interests, Nussbaum is an egalitarian: below-threshold interests have absolute priority.<sup>37</sup> There may be some doubt about this key aspect of Nussbaum’s theory, so I explore it in brief detail. The absolute priority that Nussbaum gives to below-threshold interests is often merely implicit in her statements of principle.<sup>38</sup> She repeatedly refers to the list of central human capabilities as fundamental “entitlements,” and states that societies have an obligation based in justice to raise every citizen to or above the threshold level.<sup>39</sup> As above-threshold interests are not said to be fundamental entitlements, and are not said to be protected by justice, it follows that they always have lower priority than below-threshold interests.

Sometimes Nussbaum is more explicit, making it clear that no benefit to people who are above the capability threshold can justify withholding any capability enhancement from a person who is below the threshold.<sup>40</sup> Thus, she states that “policies that improve the lot of a group are to be rejected unless they deliver the central capabilities to *each and every person*.”<sup>41</sup> Also, “each and every citizen is entitled to an ample amount of each of these diverse goods, seen as capabilities, and . . . society may not pursue overall advantage in a way that slights any citizen’s claim to them . . . .”<sup>42</sup>

In her article *Costs of Tragedy*, Nussbaum is only slightly less emphatic. There she states:

<sup>33</sup> *Id.* at 402.

<sup>34</sup> *Id.* at 179–80.

<sup>35</sup> *Id.*

<sup>36</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 180.

<sup>37</sup> *Id.*; see *infra* notes 38–44 and accompanying text.

<sup>38</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 180.

<sup>39</sup> *Id.* at 75, 82, 85, 166, 182, 279, 290. “The capabilities approach . . . is an account of minimum core social entitlements . . . .” *Id.* at 75. “It is the whole set of such entitlements, suitably defined, that is held to be required by justice, and no entitlement can substitute for any other.” *Id.* at 85. Capabilities are “fundamental entitlements of citizens.” *Id.* at 166. “The job of a decent society is to give all citizens the (social conditions of the) capabilities, up to an appropriate threshold level.” *Id.* at 182. “[W]e all have entitlements based in justice to a minimum of each of the central goods on the capabilities list.” *Id.* at 279. “[T]he central human capabilities are not simply desirable social goals, but urgent entitlements grounded in justice.” *Id.* at 290.

<sup>40</sup> *Id.* at 216.

<sup>41</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 216.

<sup>42</sup> *Id.* at 178.

[I]f one or more [policy alternatives] involves violation of a fundamental entitlement and the others do not, then there is an extremely strong case for striking the tragedy-bearing alternatives off the list; indeed, it would be hard to know what could make one keep them on the list, other than a suspicion that the list had been badly constructed, or the levels of entitlements set too high.<sup>43</sup>

Perhaps there is some equivocation in *Costs of Tragedy*, but it is very small, and it is not repeated in *Frontiers of Justice*. Thus, the most accurate interpretation of Nussbaum's theory is that of Professor Peter Singer: her priority for below-threshold interests is indeed absolute.<sup>44</sup> While Nussbaum is sensitive to cost in setting the capabilities thresholds, she is insensitive to the cost of meeting entitlements once the thresholds have been set.<sup>45</sup>

Nussbaum has no principle for the resolution of conflicts among above-threshold interests. Somewhat strikingly, she also has no principle for the resolution of below-threshold conflicts. In *Frontiers of Justice*, Nussbaum proclaims:

[A]ll ten of these plural and diverse ends are minimum requirements of justice, at least up to the threshold level. In other words, the theory does *not* countenance intuitionistic balancing or trade-offs among them. The constitutional structure (once they are put into a constitution or some other similar set of basic understandings) demands that they *all* be secured to each and every citizen, up to some appropriate threshold level. In desperate circumstances, it may not be possible for a nation to

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<sup>43</sup> Nussbaum, *Costs of Tragedy*, *supra* note 1, at 1024.

<sup>44</sup> Peter Singer, The Tanner Lectures on Human Values, A Response to Martha Nussbaum (Nov. 13, 2002), *available at* <http://www.utilitarian.net/singer/by/20021113.htm>.

Professor Alexander Kaufman suggests that Nussbaum may assign a less-than-absolute priority to below-threshold interests. Alexander Kaufman, *A Sufficiantarian Approach? A Note, in* CAPABILITIES EQUALITY: BASIC ISSUES AND PROBLEMS 71, 72 (Alexander Kaufman ed., 2006). But this suggestion is based on a misreading of Nussbaum's WOMEN AND HUMAN DEVELOPMENT, *supra* note 1, at 75. Nussbaum there states that "social and political institutions should be chosen, at least in part, with a view to promoting at least a threshold level of these human capabilities." *Id.* The context of this passage clearly indicates that the term "at least in part" is not intended to signify that the priority for below-threshold interests is less than absolute; rather, once everyone has been raised to the threshold level, justice may impose further requirements. *See id.* In the very next sentence, Nussbaum states: "But the provision of a threshold level of capability, exigent though that goal is, may not suffice for justice, as I shall elaborate further later, discussing the relationship between the social minimum and our interest in equality." *Id.*

<sup>45</sup> As noted in Part II, the first kind of cost-sensitivity cannot necessarily substitute for the second. *See infra* notes 90–91 and accompanying text.

secure them all up to the threshold level, but then it becomes a purely practical question what to do next, not a question of justice. The question of justice is already answered: justice has not been fully done here.<sup>46</sup>

In sum, Nussbaum has an egalitarian principle for cross-threshold conflicts, but she has no principle for above-threshold conflicts or below-threshold conflicts.

Nussbaum extends the capabilities approach in *Frontiers of Justice* to address issues of international justice and inter-species justice.<sup>47</sup> While stressing that each nation retains the responsibility to bring all its citizens above the threshold, Nussbaum also concludes that rich nations “have a responsibility to give a substantial portion of their GDP to poorer nations.”<sup>48</sup> She suggests that “the figure of 2 percent of GDP, though arbitrary, is a good sign of what might begin to be morally adequate.”<sup>49</sup> As to animals, Nussbaum concludes that humans have a responsibility to promote the capabilities of non-human animals as well as the capabilities of their fellow humans.<sup>50</sup> She offers a list of animal capabilities, many of which are the same as the capabilities on the human list, or similar to them.<sup>51</sup> On the use of animals for food, Nussbaum states that “[i]t seems wise to focus initially on banning all forms of cruelty to living animals and then moving gradually toward a consensus against killing at least the more complexly sentient animals for food.”<sup>52</sup>

Every distributive theory faces “frontier” problems. Who is to be included as a beneficiary of the theory, and are all to count equally? To its credit, utilitarianism is often associated with a concern to reduce all suffering, including the suffering of foreigners and non-human animals.<sup>53</sup> I welcome Nussbaum’s extension of her own approach to international and inter-species matters. I will for the most part evaluate Nussbaum’s theory in the context of distribution within a single nation, for ease of analysis. All the points that follow, however, can be made

<sup>46</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 175.

<sup>47</sup> *See id.* at 273–405. She also fleshes out her position on disability and health. *Id.* at 96–216. But disability is not an extension in the same sense, because no new principles are offered.

<sup>48</sup> *Id.* at 316.

<sup>49</sup> *Id.* at 317. Currently, even the most generous countries fall short of this standard. *See* ORG. FOR ECON. COOPERATION & DEV., *AID TARGETS SLIPPING OUT OF REACH?* 6 (2008), available at <http://www.oecd.org/dataoecd/47/25/41724314.pdf>.

<sup>50</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 393–401.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 393.

<sup>53</sup> *See, e.g.*, PETER SINGER, *ANIMAL LIBERATION* (2d ed. 1990); PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2d ed. 2004).

also about global redistribution and treatment of animals because those aspects of Nussbaum's theory have similar features, including the obligation to bring people (or animals) to a threshold, and the refusal to specify principles for the resolution of below-threshold conflicts.<sup>54</sup>

### C. *Resourcist Theories*

Welfarist theories are not the only alternative to Nussbaum's capabilities approach. Some theories of distributive justice use the metric of material resources—income and wealth. Resourcist theories are not the focus of this essay; I mention them briefly because of their importance and because they can provide some useful contrasts.<sup>55</sup>

The late John Rawls's theory is a resourcist theory; Rawls applies the egalitarian principle to the metric of resources.<sup>56</sup> A great part of Nussbaum's book *Frontiers of Justice* is given to a critique of Rawls.<sup>57</sup>

It is also possible to apply the benefit-maximizing principle to the metric of resources. The result is the theory of wealth-maximization. Judge Richard Posner advocated this theory for many years,<sup>58</sup> though he eventually drew back from it somewhat.<sup>59</sup> In the development field, wealth-maximization is the only normative theory that can view economic growth as an end in itself, rather than as a means to improve the welfare of people.

A major difference between utilitarianism and wealth-maximization is that utilitarianism is concerned with the distribution of wealth.<sup>60</sup> Because the poor benefit more from additional money than

<sup>54</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 273–405.

<sup>55</sup> Ronald Dworkin refers to his theory as “equality of resources.” RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 65–119 (2000). I do not, however, consider Dworkin either a resourcist or an egalitarian; as I have argued, his hypothetical-choice distributive device is essentially utilitarian. See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 119–57; Mark S. Stein, *Ronald Dworkin on Redistribution to the Disabled*, 51 SYRACUSE L. REV. 987 (2001). A similar argument is made in Marc Fleurbaey, *Equality of Resources Revisited*, 113 ETHICS 82 (2002).

<sup>56</sup> See, e.g., JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*]; JOHN RAWLS, *A THEORY OF JUSTICE* (Erin Kelly ed., 1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*]. I discuss Rawls's theory in STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 102–18.

<sup>57</sup> For a Rawlsian response, see Samuel Freeman, *supra* note 4.

<sup>58</sup> See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

<sup>59</sup> For an overview of the evolution of Posner's views, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 996 n.68 (2001).

<sup>60</sup> Utilitarianism is not concerned with the distribution of welfare, however. Critics of utilitarianism often consider this indifference to the distribution of welfare to be a defect. For my response, see STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 203–06.

do the rich, utilitarians almost always support some measure of redistribution from rich to poor.<sup>61</sup>

## II. NUSSBAUM'S DISTRIBUTIVE PRINCIPLES (OR LACK THEREOF)

Nussbaum uses a different metric than utilitarianism and also different principles of distribution. In Part III below, I focus on Nussbaum's metric.<sup>62</sup> In this Part, I focus on her principles (or lack thereof). The two key features here are Nussbaum's absolute priority for below-threshold interests and her failure to supply principles for the resolution of conflicts among below-threshold interests.<sup>63</sup>

### A. *Cross-Threshold Egalitarianism and the Problem of Insatiable Entitlements*

It is impossible to raise everyone to the threshold of all of the capabilities. Some people will not have the capability to "live to the end of a human life of normal length,"<sup>64</sup> even if all the world's resources are devoted to prolonging their lives.<sup>65</sup> Similarly, all the world's resources will not suffice to enable some people to rise to the threshold of other capabilities: to "have good health," to be "able to use the senses," to be "able to form a conception of the good," and so forth.<sup>66</sup>

The impossibility of raising every person to the threshold of all capabilities is not, in itself, a problem for Nussbaum's theory. The problem is that even when it is impossible to raise people to the threshold, it is often possible to spend an unlimited amount of resources raising them *toward* the threshold. Often enormous investments—another doctor, another hospital, another medical research project—can make some improvement, however small, or can increase, however slightly, the likelihood of achieving a large improvement. This is the problem of insatiable entitlements, also known as the problem of voracious needs<sup>67</sup> or the bottomless-pit problem.<sup>68</sup>

<sup>61</sup> See *id.* at 33–35.

<sup>62</sup> See *infra* notes 191–232 and accompanying text.

<sup>63</sup> See *supra* notes 37–46 and accompanying text.

<sup>64</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 76.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 77.

<sup>67</sup> CHARLES FRIED, *RIGHT AND WRONG* 121–22 (1978).

<sup>68</sup> Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. 146, 172 (1981). While evocative, the term "bottomless pit" may be somewhat misleading. If you were trying to fill in a truly bottomless pit, you would not make any progress at all. But a key feature of the problem of insatiable entitlements is that it is possible to improve without limit, however slightly, the condition or expected condition of those who are worse off, through additional expenditures.

The problem has been memorably described, in somewhat different contexts, by Professor Kenneth Arrow and also by Professor Charles Fried. Arrow states: “[T]here can easily exist medical procedures which serve to keep people barely alive but with little satisfaction and which are yet so expensive as to reduce the rest of the population to poverty.”<sup>69</sup> Fried adds: “[T]here is literally no end to the drain on resources that medicine might represent . . . [T]here is always the possibility of devoting endless research funds to the development of relief measures which do not now exist.”<sup>70</sup>

The problem of insatiable entitlements involves diminishing returns to social spending; however, the phrase “diminishing returns” does not adequately describe the problem. Often it is reasonable to pursue a spending program that has diminishing returns—say, a program to reduce infant mortality. The second million dollars spent on the program will save fewer lives than the first million, let us assume, but the second million should still be spent on the program if the money would do less good otherwise. An insatiable entitlement is one in which a (non-utilitarian) theory of justice requires spending for the benefit of an individual long past the point where additional spending will do much good, and under circumstances where the individual’s claim cannot ever be fully satisfied.

The problem of insatiable entitlements is one that commonly afflicts egalitarian theories.<sup>71</sup> Unfortunately, Nussbaum fails to confront the problem; she appears not to be aware of it. Indeed, she often seems not even to be aware that it is impossible for any nation to raise all its citizens to the capabilities thresholds. Consider her statement that “[i]n desperate circumstances, it may not be possible for a nation to secure them [the capabilities] all up to the threshold level, but then it becomes a purely practical question what to do next, not a question of justice.”<sup>72</sup> The reference to “desperate circumstances” suggests that it is an unusual situation, perhaps characteristic of a very poor nation, in which the nation cannot secure all the capabilities up to the threshold level. In fact, this situation is universal; it holds always in every country, even the very richest. In every country, there will be people who do not live to a normal lifespan, and so on. Another example of Nussbaum’s

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<sup>69</sup> Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls’s Theory of Justice*, 70 J. PHIL. 245, 251 (1973). This comment is made in a review of Rawls, but it actually pertains more to welfare egalitarianism than to Rawls’s theory. *See id.*

<sup>70</sup> FRIED, *supra* note 67, at 122.

<sup>71</sup> Though not resource-egalitarian theories; they have other problems. *See* STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 63–75.

<sup>72</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 175.

failure to grasp the problem is her insistence that her theory is only a partial account of justice, one that is “compatible with different views about how to handle issues of justice and distribution that would arise once all citizens are above the threshold level.”<sup>73</sup> But all citizens will never be above the threshold level.

When referring to health-related capabilities, Nussbaum sometimes observes that government need provide only the “social basis” of these capabilities.<sup>74</sup> This observation does not appear to be an attempt to deal with the insatiable-entitlements problem, and in fact it does not deal with the problem. The social basis of the capabilities includes money, and society could spend an unlimited amount of money attempting to satisfy insatiable entitlements.<sup>75</sup>

Nussbaum also cannot avoid the problem of insatiable entitlements by adjusting the capability thresholds. While Nussbaum observes that “the level of education that should be provided free of charge by the state may vary somewhat in accordance with the type of economy and employment in a state,” her theory does not permit major health-related capabilities to be keyed to expenditure levels in this way.<sup>76</sup> If it did, her theory would be a resourcist theory, not a capabilities-based theory. The capability “Life” is a capability to “live to the end of a human life of normal length,” not a capability to receive a certain level of health care or health insurance coverage.<sup>77</sup>

Nussbaum comes closest to confronting the insatiable-entitlements problem when she discusses whether the capabilities list and threshold levels should be adjusted for those with severe mental disability. In her discussion of mental disability, Nussbaum continually refers to three actual individuals: Sessa, a person with severe mental retardation who is the daughter of Professor Eva Feder Kittay, and who is featured in Kittay’s book *Love’s Labor*;<sup>78</sup> Jamie, a person with Down syndrome who is the son of Professor Michael Berube, and who is featured in Berube’s

<sup>73</sup> *Id.* at 75.

<sup>74</sup> *Id.* at 193; NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 1, at 81–82, 89.

<sup>75</sup> Cf. Michael L. Corrado, *Disability and Nationality: Martha Nussbaum on Justice* 17 (Univ. of N.C. Legal Studies Research Paper Series, Paper No. 1,117,633, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1117633](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117633) (“[W]hat is the ‘social basis’ of a capability, and how is it distinguished from the capability itself? This is a question that Nussbaum does not answer.”).

<sup>76</sup> See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 180.

<sup>77</sup> See *id.* at 76.

<sup>78</sup> EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999).

book *Life As We Know It*; <sup>79</sup> and Arthur, a person with Asperger syndrome who is Nussbaum's nephew. <sup>80</sup> Reflecting on Sesha's case, Nussbaum concludes that it is impossible to give her all the capabilities up to the threshold level. <sup>81</sup> She then considers and rejects the idea of "norming" the capabilities list or threshold level:

[U]sing a different list of capabilities or even a different threshold of capability as the appropriate social goal for people with impairments is practically dangerous, because it is an easy way of getting off the hook, by assuming from the start that we cannot or should not meet a goal that would be difficult and expensive to meet. Strategically, the right course seems to be to harp on the single list as a set of nonnegotiable social entitlements, and to work tirelessly to bring all children with disabilities up to the same threshold of capability that we set for other citizens . . . . [F]or political purposes it is generally reasonable to insist that the central capabilities are very important for all citizens, and thus worth the expenditures that may have to be made on those with unusual impairments. <sup>82</sup>

As to Sesha, "[s]ociety should strive to give her as many of the capabilities as possible directly; and where direct empowerment is not possible, society ought to give her the capabilities through a suitable arrangement of guardianship." <sup>83</sup>

These passages make clear Nussbaum's view that when it is impossible for people to attain the threshold level, society has an obligation to bring them as close as possible to the threshold. <sup>84</sup> This should perhaps be an obvious implication of Nussbaum's theory, but Nussbaum rarely acknowledges that it is impossible for all people to attain the threshold. Accordingly, she almost always phrases the social obligation as one to raise people to or above the threshold, without specifying what is to be done for those who cannot rise that far.

In her discussion of mental disability, Nussbaum does confront the impossibility of raising everyone to the capability thresholds—at least, those thresholds that relate to mental disability. <sup>85</sup> However, Nussbaum

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<sup>79</sup> MICHAEL BÉRUBÉ, *LIFE AS WE KNOW IT: A FATHER, A FAMILY, AND AN EXCEPTIONAL CHILD* (1996).

<sup>80</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 96-97.

<sup>81</sup> *Id.* at 188.

<sup>82</sup> *Id.* at 190.

<sup>83</sup> *Id.* at 193.

<sup>84</sup> *Id.* at 190, 193; *see also id.* at 222 ("as many of them, and as fully, as is possible").

<sup>85</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 188.

does not take the next step and confront the insatiable-entitlements problem.<sup>86</sup> She seems to assume that though bringing the mentally disabled as close as possible to the threshold may be “difficult and expensive,” it does have a finite cost; we quickly reach a point where nothing *whatsoever* can be done through further expenditures.<sup>87</sup> She does not acknowledge that for some disabilities, at least, it is always possible to make further small improvements, or to increase slightly the probability of making large improvements, by spending ever greater amounts of money.<sup>88</sup>

It is also unclear whether Nussbaum realizes that her theory faces the same or worse problems with physical disability as with mental disability. As noted, there are some people who will never be able to live to the end of a human life of normal length, who will never be able to have good physical health, and so on. If Nussbaum were to “norm” the capabilities approach for those with severe mental disabilities—a course she rejects—she presumably would have to do the same for those with severe physical disabilities.<sup>89</sup>

In setting the capability thresholds, Nussbaum tries to be sensitive to cost; she would like to avoid setting the thresholds “in a utopian or unrealistic way.”<sup>90</sup> She tries not to take account of cost in cross-threshold conflicts; below-threshold interests have absolute priority. But because of differences among people, and in particular the problem of insatiable entitlements, this bifurcated approach does not work. If there is going to be the same threshold for everyone (a position to which Nussbaum is committed), it would have to be set at a ridiculously low level to avoid the problem of insatiable entitlements.

Suppose Nussbaum were to adopt the adjustment that she rejects in *Frontiers of Justice*: lowering the threshold level for some people.<sup>91</sup> For whom would the threshold be lowered, and by how much? One approach would be to say that if the expense of moving toward the threshold is too great in relation to the capability increase, the threshold must be lowered until the expense is not too great in relation to the capability increase. That would of course be an improvement; it would

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<sup>86</sup> See *id.*

<sup>87</sup> *Id.* at 190.

<sup>88</sup> A similar point is made by Professor David Wasserman near the end of his essay on Nussbaum. David Wasserman, *Disability, Capability, and Thresholds for Distributive Justice*, in CAPABILITIES EQUALITY, *supra* note 44, at 214, 230.

<sup>89</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 190.

<sup>90</sup> *Id.* at 402.

<sup>91</sup> See *id.* at 193.

be a roundabout way of limiting capability claims through the benefit-maximizing principle of utilitarianism.

In any event, Nussbaum has not adjusted her theory to deal with the insatiable-entitlements problem. Insatiable entitlements have absolute priority over all above-threshold interests. The capability "Life" alone imposes unlimited demands that exceed the resources of every country. Despite Nussbaum's caution that the capability thresholds should not be set in a utopian or unrealistic way, her cross-threshold egalitarianism makes her theory utopian and unrealistic.

### B. *Below-Threshold Conflicts*

Although Nussbaum has a clear—and wrong—priority rule for cross-threshold conflicts, she has no explicit principle to resolve conflicts among below-threshold interests. In *Costs of Tragedy*, she observes that "[w]henever the capabilities approach is presented to an audience containing economists and policy makers, the first question that is typically posed is, How do we make trade-offs when we cannot provide people with all the capabilities on the list?"<sup>92</sup> It seems almost to be a point of pride for Nussbaum that she has never answered this question. As noted, she proclaims in *Frontiers of Justice* that

*all ten of these plural and diverse ends are minimum requirements of justice, at least up to the threshold level. In other words, the theory does not countenance intuitionistic balancing or trade-offs among them. The constitutional structure (once they are put into a constitution or some other similar set of basic understandings) demands that they all be secured to each and every citizen, up to some appropriate threshold level.*<sup>93</sup>

Commentators, including myself, have observed that Nussbaum's failure to specify any principles for the resolution of below-threshold conflicts is a major gap in her theory.<sup>94</sup> The insatiable-entitlements problem shows that this gap is even wider than may initially appear. Due to insatiable entitlements, below-threshold conflict will always exist.<sup>95</sup> In every society, there will always be people below the thresholds for whom more could be done, but for whom all the resources of society will not suffice to raise them to all the thresholds. Insatiable enti-

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<sup>92</sup> Nussbaum, *Costs of Tragedy*, *supra* note 1, at 1028.

<sup>93</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 175.

<sup>94</sup> STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 187; Silvers & Stein, *supra* note 4, at 1638.

<sup>95</sup> See *supra* notes 69–71 and accompanying text.

lements pertaining to various capabilities will always clamor for additional resources, along with entitlements that can more efficiently be met.<sup>96</sup> There must be some way of adjudicating these claims.

As Nussbaum does not recognize the insatiable-entitlements problem, she also does not recognize the ubiquity of below-threshold conflict.<sup>97</sup> Thus, she states that “if the capabilities list and its threshold are suitably designed, we ought to say that the presence of conflict between one capability and another is a sign that society has gone wrong somewhere.”<sup>98</sup> But since the insatiable-entitlements problem guarantees that below-threshold conflict will be ubiquitous, the mere presence of below-threshold conflict is not necessarily a sign that “society has gone wrong somewhere.”<sup>99</sup>

Nussbaum’s refusal to endorse principles for the resolution of below-threshold conflicts is doubtless related to her insistence that the capabilities are incommensurable, meaning that they are not reducible to a single scale of value.<sup>100</sup> Nussbaum’s silence on below-threshold conflicts, however, goes far beyond a refusal to reduce all capabilities to a single scale of value. Nussbaum does not even provide any distributive principles for resolving conflicts *within* a single capability.<sup>101</sup> She does not indicate that she would resolve below-threshold conflicts, even

<sup>96</sup> See FRIED, *supra* note 67, at 122 (“The fact is that if we were to recognize a right to the satisfaction of our most unfortunate fellow citizens’ medical needs, the drain on resources available to satisfy other kinds of needs (education, defense, housing) and also to satisfy all the residual wants of healthy, secure, educated persons would be staggering.”).

<sup>97</sup> Conversely, Nussbaum’s failure to recognize the ubiquity of below-threshold conflict is yet another indication that she fails to recognize that her theory has an insatiable-entitlements problem.

<sup>98</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 401.

<sup>99</sup> See *id.* Certain kinds of conflicts may signify bad social policy, though.

<sup>100</sup> *Id.* at 165–67. For a discussion of the issue of incommensurability, see *infra* notes 214–224 and accompanying text.

<sup>101</sup> In *Costs of Tragedy*, Nussbaum offers a grudging acceptance of cost-benefit analysis, after subjecting it to much criticism. But she explicitly rejects utilitarianism and wealth maximization as theories that might guide cost-benefit analysis. Nussbaum, *Costs of Tragedy*, *supra* note 1, at 1028–29. She even argues that cost-benefit analysis does not presuppose commensurability, an argument that is hard to credit: what is cost-benefit analysis if not a reduction of competing options to a single scale of value? See *id.* at 1030–31. In context, Nussbaum appears to say only that it is important to know the consequences of policies, but without offering a way of evaluating the consequences:

[O]ne thing we certainly need to know, before we act, is how the costs and benefits balance out, looking at the totality of the factors. Cost-benefit analysis provides a handy model, or group of models, for representing our practical thinking on complex questions of choice, where we must choose among plural and diverse goods and where our choices have complex consequences as well as involve complex issues of intrinsic value.

*Id.* at 1030.

within one capability, by favoring those who could gain the greatest increase in capability, by favoring those who have the lowest level of capability, or by maximizing the number of people who can rise to the threshold.<sup>102</sup>

Suppose we had to choose to help either person A, person B, or persons C and D, all of whom would fall below the threshold of the capability “Life” without our help.<sup>103</sup> Person A, without our help, would live to T-40 (that is, forty years less than the normal lifespan); we can give her another twenty years, increasing her lifespan to T-20. Person B, without our help, would live to T-50; we can give him another five years, increasing his lifespan to T-45. Persons C and D, without our help, would both live to T-2; we can give them both an additional two years, bringing them up to the threshold of the capability “Life.” A benefit-maximizing principle applied to the metric of life years would tell us to help person A, as she can gain the greatest number of life years.<sup>104</sup> An equalizing principle would tell us to help person B, as he is farthest below the capability threshold.<sup>105</sup> And a principle of maximizing the number of people who are above the threshold would tell us to help persons C and D. Nussbaum’s theory does not give us any guidance here.<sup>106</sup>

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<sup>102</sup> *Id.* at 1028–31.

<sup>103</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 76 (defining the “Life” capability as being able to live to the end of a human life of normal length).

<sup>104</sup> This is the principle of life-year maximization, which is similar though not identical to utilitarianism. See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 222–65.

<sup>105</sup> See *id.* at 244–45.

<sup>106</sup> On below-threshold priorities, the book *CAPABILITIES EQUALITY*, *supra* note 44, edited by Alexander Kaufman, may be a source of confusion. In his entry, Professor Richard Arneson discusses a sufficientarian theory of the same kind as Nussbaum’s, except that he supplies a principle for below-threshold conflicts. Richard Arneson, *Distributive Justice and Basic Capability Equality: “Good Enough” Is Not Good Enough*, in *CAPABILITIES EQUALITY*, *supra* note 44, at 17, 27. He writes:

Consider this version of sufficiency: As many as possible of those who shall ever live should be brought to the good enough threshold level of lifetime well-being. This principle is understood to have strict lexical priority over other justice values, including gains to those above and below the . . . threshold that do not alter the numbers of people who are sustained at sufficiency.

*Id.* Arneson does not actually attribute to Nussbaum this principle of maximizing the number of people who can be raised to the threshold. See *id.* But in his own entry, Professor David Wasserman goes further and does seem to attribute to Nussbaum the principle that Arneson supplies: “Arneson finds deficient priority for the worse off in Nussbaum’s emphasis on bringing as many people as possible up to her minima.” Wasserman, *supra* note 88, at 214, 229. In fact, Nussbaum nowhere adopts the principle of raising as many people to the threshold as possible as a way of resolving below-threshold conflicts.

The only suggestion Nussbaum has offered of an explicit priority rule to resolve below-threshold conflicts is that “we should attach more importance to the large items on the list than to their more specific subsections.”<sup>107</sup> Nussbaum gives this directive in discussing potential political participation by those with severe intellectual disability, such as Sesha.<sup>108</sup> Nussbaum remarks: “[E]ven if Sesha cannot become a potential voter, we should ask what other ways there might be to give her political membership and the possibility of some political activity (although we also would allow her a vote through a guardian, as a sign of her full political equality).”<sup>109</sup> This limited priority rule, of course, does not resolve the contending claims of the many people who fall below one or more thresholds on the large items of “Life,” “Health,” and so on, including all those with insatiable entitlements.

### 1. Intuitionistic Balancing

Given the ubiquity of below-threshold conflict, Nussbaum’s statement that her theory “does *not* countenance intuitionistic balancing or trade-offs” of below-threshold capabilities is actually incorrect.<sup>110</sup> This statement signifies Nussbaum’s refusal to say *how* tradeoffs should be made. But ubiquitous below-threshold conflict means that there must be tradeoffs. And since Nussbaum refuses to say how tradeoffs should be made, the only thing left is intuitionistic balancing.

The term “intuitionism” has more than one usage in philosophy.<sup>111</sup> Nussbaum’s mistaken insistence that her theory does not countenance intuitionistic balancing comes in the context of an imagined critique of her theory by Rawls.<sup>112</sup> She uses the term “intuitionism” in the same way Rawls did: to denote a pluralist ethics, an ethics that has more than one principle or goal, but no rule for resolving conflicts.<sup>113</sup>

Prioritarianism, the theory that mixes elements of utilitarianism and welfare egalitarianism, is in effect such a pluralist ethics.<sup>114</sup> Prioritarians rarely if ever specify how much additional weight they would give to those who are worse off.<sup>115</sup> Rather, they apply the benefit-

<sup>107</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 194.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 175.

<sup>111</sup> See, e.g., RAWLS, *A THEORY OF JUSTICE*, *supra* note 56, at 34–40; STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 10–22.

<sup>112</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 173–76.

<sup>113</sup> See RAWLS, *A THEORY OF JUSTICE*, *supra* note 56, at 34–40.

<sup>114</sup> See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 180–206, for a discussion of the contest between utilitarianism and prioritarianism.

<sup>115</sup> See *id.*

maximizing principle of utilitarianism and the egalitarian principle of welfare egalitarianism in an ad hoc, intuitionistic way, sometimes favoring those who are worse off and sometimes favoring those who can most benefit.<sup>116</sup> Indeed, some theorists explicitly advocate a pluralist ethics that respects both aggregate welfare and equality, rather than attempting to integrate these goals into a single theory.<sup>117</sup>

As the example of prioritarianism should make clear, Nussbaum is even *less* forthcoming about the resolution of conflicts than the ethical pluralist “intuitionism” Rawls had in mind. Ethical pluralists at least tell you what their principles are, even if they cannot say in advance how they would resolve conflicts among those principles.<sup>118</sup> But with Nussbaum, no principles are even specified.

## 2. Justice and Below-Threshold Conflicts

Nussbaum is also wrong to say that the resolution of below-threshold conflicts is “a purely practical question what to do next, not a question of justice.”<sup>119</sup> A major part of the field of bioethics concerns the distribution of scarce medical resources, for example.<sup>120</sup> Typically, claimants for medical resources are below any reasonably defined threshold of health, life, and/or practical reason.<sup>121</sup> Is it not an issue of justice who is to receive a scarce organ transplant? Which medical research programs should be funded?

Given the ubiquity of below-threshold conflict, Nussbaum’s claim that the resolution of below-threshold conflict is not a “question of justice” sweeps very broadly.<sup>122</sup> Every time the government spends money on any below-threshold interest, it could instead spend money on other below-threshold interests; certainly, it could instead spend money on any of a number of insatiable entitlements. If below-threshold conflicts are not a matter of justice, no one can ever claim that justice requires any particular government program (the only exception would be pro-

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<sup>116</sup> Cf. *id.* at 190 (arguing that the only plausible prioritarian theory must approximate unweighted utilitarian values).

<sup>117</sup> See *id.* at 180–89.

<sup>118</sup> RAWLS, A THEORY OF JUSTICE, *supra* note 56, at 34–40.

<sup>119</sup> See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 175.

<sup>120</sup> See, e.g., ROBERT M. VEATCH, TRANSPLANTATION ETHICS 277–79 (2000); Mark S. Stein, *The Distribution of Life-Saving Medical Resources: Equality, Life Expectancy, and Choice Behind the Veil*, SOC. PHIL. & POL’Y, Summer 2002, at 212, 221.

<sup>121</sup> See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 76–77.

<sup>122</sup> See *id.* at 175.

grams that pay for themselves, by generating revenue even as they help those below the capabilities thresholds).<sup>123</sup>

Ironically, Nussbaum criticizes Rawls for having an artificially narrow conception of justice.<sup>124</sup> Nussbaum's specific complaint is that Rawls fails to address the interests of people with disabilities as a matter of basic justice.<sup>125</sup> I generally concur with this criticism of Rawls, having previously offered a version of it myself.<sup>126</sup> But with her refusal to speak to below-threshold conflicts, Nussbaum is at least as much subject to this kind of criticism as is Rawls. Indeed, some of Nussbaum's language echoes that of Rawls.<sup>127</sup> Nussbaum quotes with evident disapproval Rawls's claim that care for those with expensive medical requirements, while a "pressing practical question," is not part of the "fundamental problem of social justice."<sup>128</sup> She herself, however, uses a similar locution ("purely practical . . . not a question of justice") in her attempt to avoid addressing below-threshold conflicts.<sup>129</sup>

### C. *Can a Below-Threshold Application of Utilitarianism Save the Capabilities Approach?*

Insatiable entitlements, I have observed, make Nussbaum's lack of below-threshold principles a more serious problem than may first appear. But fortunately for Nussbaum, her lack of below-threshold principles may make insatiable entitlements a *less* serious problem than may first appear. Nussbaum's theory does require nations to spend billions of dollars to prolong, however slightly, the lives of those who die prematurely of incurable illness, and it requires further billions to address other insatiable entitlements.<sup>130</sup> But her theory also requires a great many sensible expenditures to prolong life and improve health.<sup>131</sup> Her theory gives absolute priority, as against above-threshold interests, to very welfare-inefficient uses of funds, but it also gives absolute priority,

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<sup>123</sup> As noted in Section C, Nussbaum herself does not really believe that the resolution of below-threshold conflict is not a "question of justice," as she does advocate specific programs. See *infra* notes 141–149 and accompanying text.

<sup>124</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 108–27.

<sup>125</sup> *Id.*

<sup>126</sup> See Mark S. Stein, *Rawls on Redistribution to the Disabled*, 6 *GEO. MASON L. REV.* 997, 1004–05 (1998).

<sup>127</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 110.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 175.

<sup>130</sup> See *supra* notes 23–25 and accompanying text (discussing Nussbaum's absolute priority for below-threshold interests).

<sup>131</sup> See *supra* notes 68–71 and accompanying text. For some examples of sensible investments, see Gareth Jones et al., *How Many Child Deaths Can We Prevent This Year?*, 362 *LANCET* 65 (2003).

as against above-threshold interests, to welfare-efficient uses of funds.<sup>132</sup> Among below-threshold interests, Nussbaum's theory does not explicitly give priority to uses of funds that will benefit people the most, but at least it does not give priority to uses of funds that will benefit people the *least*.<sup>133</sup> Nussbaum's theory, therefore, appears more plausible than some other egalitarian theories one might conceive.

Maximin welfare egalitarianism, for example, would likely fasten on some smaller set of insatiable entitlements, and would give absolute priority to those entitlements.<sup>134</sup> Suppose that infants who will die within one month of birth are considered to have the least welfare of all people, because their lives have been shortest. Then maximin welfare egalitarianism will give absolute priority to prolonging the lives of these neonates. Of course, there are a great many welfare-efficient measures that could be taken to reduce neonatal mortality, especially in developing countries.<sup>135</sup> Utilitarianism, along with various egalitarian theories, would support such measures (and would support funding them from the resources of rich countries).<sup>136</sup> But even after all the welfare-efficient measures are undertaken, maximin welfare egalitarianism would require countries to continue reducing neonatal mortality if any reduction at all could be achieved.<sup>137</sup> Even if it would cost a million dollars to prolong the life of a neonate one extra minute, maximin welfare egalitarianism would require that expense.<sup>138</sup>

Nussbaum, of course, is not necessarily committed to spending a million dollars to buy an extra minute of life for a neonate, as long as other below-threshold improvements can be made instead.<sup>139</sup> Nussbaum's theory is more vague than maximin welfare egalitarianism in addressing below-threshold conflict, and so is less objectionable.

Still, it is objectionable. To have no principle for below-threshold conflict is better than having the wrong principle, but it is worse than having the right principle. A theory of justice should be able to tell us that the welfare-egalitarian theory sketched above is wrong, that it is

<sup>132</sup> See *supra* notes 23–25 and accompanying text.

<sup>133</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 189–206.

<sup>134</sup> *Id.* at 75–91.

<sup>135</sup> See Joy E. Lawn et al., *4 Million Neonatal Deaths: When? Where? Why?*, 365 LANCET 891 (2005).

<sup>136</sup> Utilitarianism would support such measures because they would increase welfare, egalitarian theories because they would help the worse off. For a utilitarian perspective on international redistribution, see SINGER, *supra* note 53.

<sup>137</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 75–91.

<sup>138</sup> The same fixation on a class of insatiable entitlements would occur if some other class, such as young people with terminal cancer, were identified as those having the least welfare. See *id.*

<sup>139</sup> See *supra* notes 23–25 and accompanying text.

wrong to purchase a minute of neonatal life at the cost of a million dollars (which could save many lives of people who are older than one month). True, this example is extreme, and the right decision is obvious. But that only makes Nussbaum's failure to supply a principle that can reach the right decision an even greater defect.

In imagining the operation of Nussbaum's theory, we do likely give her the benefit of the doubt. We likely assume that Nussbaum's theory would not waste public funds on insatiable entitlements at the expense of highly beneficial programs. In other words, we assume that in resolving below-threshold conflicts, Nussbaum's theory would give considerable weight to the benefit-maximizing principle of utilitarianism. Her theory need not apply a strict utilitarian standard for below-threshold conflict; it would gain plausibility even by applying a prioritarian approach, which mixes utilitarian and welfare-egalitarian elements (though in my view only a version of prioritarianism that is close to utilitarianism can be truly plausible).<sup>140</sup>

We are right to give Nussbaum the benefit of the doubt, for her policy choices do implicitly reflect a benefit-maximizing principle, even though she refuses to endorse that principle. For example, Nussbaum supports expensive special education programs for children with disabilities and government-funded care for intellectually disabled people who need care.<sup>141</sup> She touts the benefits of such programs for Jamie,<sup>142</sup> Arthur,<sup>143</sup> and Sessa.<sup>144</sup> As to Arthur, she observes:

After some years of failure with the public school system, even with a special monitor, the state agreed to support Arthur's education in a special private school for children with [Asperger syndrome]. He is now making rapid cognitive and behavioral/affective progress. He holds parties and has friends. He simply is no longer stigmatized. His cognitive gifts are progressing rapidly as well.<sup>145</sup>

But all the funds needed for such programs could instead be used for projects that hold out only a very small chance of prolonging the lives of people who are terminally ill and have yet to reach the end of a normal lifespan. By advocating government support for people with intellectual and emotional disabilities, Nussbaum, in view of the scarcity

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<sup>140</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 190.

<sup>141</sup> See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 199–216.

<sup>142</sup> See *id.* at 189–90.

<sup>143</sup> See *id.* at 190, 207.

<sup>144</sup> See *id.* at 219–20.

<sup>145</sup> *Id.* at 207.

of resources, implicitly rejects a whole host of programs that could also be directed at those below the capability thresholds but that would be less beneficial.<sup>146</sup> Indeed, she also implicitly rejects a whole host of less beneficial programs for persons with intellectual disability. Sesha's mother, Professor Eva Feder Kittay, provides one example of a program that ended up providing little marginal benefit:

For a while Sesha was enrolled in one of the pilot projects in early intervention for the developmentally delayed. She made wonderful progress in the first five months of the program. But Sesha's story . . . was not one of continuing development. After several years in that same program the improvements became more and more minimal.<sup>147</sup>

Of the three people with intellectual and emotional disabilities whom Nussbaum discusses, Sesha is farthest from the capability thresholds.<sup>148</sup> All the public resources that are devoted to people with less severe disabilities could instead be lavished on people at Sesha's level. But Nussbaum does not advocate such a course.<sup>149</sup>

Thus, for resolving conflicts among below-threshold interests, both within one capability and across capabilities, Nussbaum implicitly gives a large role to the benefit-maximizing principle of utilitarianism. It might be thought: Of course. To reject programs that bring hardly any benefit is simple common sense. And so it is common sense; the benefit-maximizing principle of utilitarianism is part of common sense, part of practical wisdom.<sup>150</sup>

But Nussbaum's effective embrace of utilitarianism for the resolution of below-threshold conflicts actually goes much farther than an implicit rejection of unlimited funding for claimants with insatiable entitlements who can make only slight improvements. All of Nussbaum's discussion of expensive programs to benefit the disabled concerns the United States or other rich countries. For poor countries, Nussbaum does not advocate such programs.<sup>151</sup>

In the United States, disabled children have rights to educational assistance under the Individuals With Disabilities Education Act.<sup>152</sup>

<sup>146</sup> And she implicitly rejects her own expressed view that the resolution of below-threshold conflicts is not a matter of justice.

<sup>147</sup> KITTAY, *supra* note 78, at 155.

<sup>148</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 128.

<sup>149</sup> *Id.* at 129 (advocating helping all three individuals).

<sup>150</sup> See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 2.

<sup>151</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 401–02.

<sup>152</sup> See 20 U.S.C. § 1400(d)(1)(A) (2006).

Sometimes this assistance is given on a one-to-one basis. There may be need for a sign language interpreter who interprets for only one child in a class. Or an educational assistant may be assigned to an intellectually disabled child—once again, on a one-to-one basis.<sup>153</sup>

In rich countries such as the United States, the provision of an educational assistant to one disabled child may be justified on utilitarian grounds, as the use to which the funds would otherwise be put may not bring greater benefit. I do not believe that the United States devotes too many resources to special education.<sup>154</sup> This impressionistic judgment could be challenged; some other utilitarian observer might think that if fewer resources were devoted to special education, those resources could and would do more good elsewhere. The opposing view, however, certainly could not claim to be an obvious conclusion.

In many poor countries, by contrast, it is obvious that special education services of the type described—one-to-one assistance—can rarely be justified on utilitarian grounds. Of course, some resources of poor countries should be allocated to the benefit of the disabled in those countries (and some resources of rich countries should be allocated to the benefit of the disabled in poor countries). Nevertheless, many poor countries do not provide a primary education to all children. If the choice is between providing an educational assistant to one disabled child and providing a teacher to thirty nondisabled children, the teacher should be provided.<sup>155</sup> Nussbaum evidently agrees.<sup>156</sup> For poor countries, she does not advocate expensive programs of educational assistance for children with disabilities; she advocates universal primary education.<sup>157</sup>

As previously indicated, Nussbaum cannot reach this differential result by adjusting the threshold for poor countries: severely disabled children are below capability thresholds in poor countries, just as they are in rich countries.<sup>158</sup> The only way Nussbaum can advocate expensive special education programs for rich countries, but not for poor countries, is through an implicit determination that the funds needed for such programs would provide greater benefits in poor countries if used in other ways (such as by achieving universal primary education).

<sup>153</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 205–11; STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 51–52.

<sup>154</sup> Perhaps the resources devoted to special education could be better allocated, though.

<sup>155</sup> See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 48–54.

<sup>156</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 401–02.

<sup>157</sup> See *id.*

<sup>158</sup> See *supra* notes 76–77 and accompanying text.

It might be wondered: as long as Nussbaum is prepared, in practice, to apply a benefit-maximizing principle to below-threshold conflicts, what does it matter that she refuses to endorse such a principle explicitly? Under a Nussbaumian system, public funds will be limited, they will be distributed in a more-or-less utilitarian manner, and they will run out before they have to be wasted on insatiable entitlements. So even though Nussbaum's theory requires governments to fund insatiable entitlements, such requirements can effectively be a dead letter.

That is not quite good enough, however. First, it would be nice if non-utilitarian philosophers, especially those who attack utilitarianism, could acknowledge the extent to which they must accept the benefit-maximizing principle of utilitarianism in order to avoid absurd results. Second, even though Nussbaum's theory is implicitly sensitive to relative benefit in resolving below-threshold conflicts, it is still an egalitarian theory in dealing with cross-threshold conflicts.<sup>159</sup> As between the insatiable entitlements of any individual and all the above-threshold interests of every person in a society, Nussbaum gives priority to the insatiable entitlements.<sup>160</sup> If any society (or the entire world) ever reaches the point where the only people remaining below the capability thresholds are those with insatiable entitlements, the truly implausible nature of Nussbaum's cross-threshold egalitarianism becomes apparent. As Peter Singer observes, Nussbaum's absolute priority for below-threshold interests

appears to require that if a society has only one member below the minimum entitlement level, it should spend all its resources on bringing that member above the entitlement level before it spends anything at all on raising the welfare level of anyone else, no matter how big a difference the resources could make to everyone else in society. That, surely, is an absurdity.<sup>161</sup>

#### D. *Nussbaumian Tax Policy*

But the biggest reason why the implicit application of utilitarianism to below-threshold conflicts cannot cure Nussbaum's theory is that Nussbaum's cross-threshold egalitarianism bears on the supply of public funds as well as on spending priorities. The fiscal demands posed by insatiable entitlements are, of course, unlimited.<sup>162</sup> For Nussbaum, these

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<sup>159</sup> See *supra* notes 39–44 and accompanying text.

<sup>160</sup> See *supra* notes 39–44 and accompanying text.

<sup>161</sup> Singer, *supra* note 44.

<sup>162</sup> See FRIED, *supra* note 67, at 122.

demands, along with the demands posed by all other below-threshold interests, have priority over all above-threshold interests. Therefore, the government must raise as much revenue as possible from above-threshold interests and must use that revenue, to the maximum extent, to satisfy below-threshold interests. If individuals have property, the loss of which would not cause anyone to fall below a capability threshold (or fall farther below a capability threshold), that property must if possible be taxed away and used to augment, however slightly, the capabilities of those who are below a threshold.

A Nussbaumian tax policy could be more extreme than one based on John Rawls's theory. Under Rawls's "difference principle", the absolute limit to redistribution is income equality.<sup>163</sup> As Rawls essentially defines disadvantage in terms of income and wealth, the least advantaged can never be given a greater-than-equal income (in that event, they would no longer be least advantaged).<sup>164</sup> Under Nussbaum's system, by contrast, people with insatiable entitlements can have enormous resources devoted to them and still be entitled to further redistribution from people who have quite modest incomes.

One limit to redistribution would be the same or similar under a Nussbaumian system as under a Rawlsian system (or, indeed, most any system): the counterproductivity limit.<sup>165</sup> Tax rates will not be raised past the point where they actually reduce tax receipts (the maximum of the so-called "Laffer Curve"). Although there is great skepticism among mainstream economists that the United States has in recent decades been anywhere near the counterproductivity limit, such a limit presumably exists.<sup>166</sup> Perhaps, then, the counterproductivity limit can save Nussbaum's theory from itself, can stop it short of taxing away all above-threshold wealth. Note, however, that a Nussbaumian tax policy is not limited to current tax instruments, such as the graduated income tax. There might be new and different taxes that would increase overall revenue from above-threshold interests, and if so, those taxes would have to be imposed.

The utilitarian limit on redistribution is that people must only be called upon to give up things for the benefit of others if those others would benefit more; people must never have to give up things to others

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<sup>163</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 56, at 97–98 (describing representative individuals "specified by the levels of income and wealth"). To similar effect, see RAWLS, JUSTICE AS FAIRNESS, *supra* note 56, at 65.

<sup>164</sup> See RAWLS, A THEORY OF JUSTICE, *supra* note 56, at 97–98.

<sup>165</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 79.

<sup>166</sup> For a brief review of the literature, see Jon Gruber & Emmanuel Saez, *The Elasticity of Taxable Income: Evidence and Implications*, 84 J. PUB. ECON. 1 (2002).

if those others would benefit *less*.<sup>167</sup> In principle, Nussbaum's theory does require people to sacrifice so that others can benefit less—a great deal less, in fact.<sup>168</sup> If the counterproductivity limit stops Nussbaum short of taxing away all above-threshold wealth, and therefore makes Nussbaum's theory appear more plausible, it is only because the counterproductivity limit fortuitously leads to a result not so far distant from the utilitarian limit on taxation.<sup>169</sup>

Nussbaum asserts that under the capabilities approach “[n]o creature is being used as a means to the ends of others, or of society as a whole.”<sup>170</sup> This formulation is a little unusual; it departs from the usual Kantian injunction that people must never be used “*merely* as a means.”<sup>171</sup> It is unclear whether Nussbaum intends to claim fidelity to a standard higher than the Kantian one, or whether this is just an error.<sup>172</sup> In any event, Nussbaum suggests that her theory is superior to utilitarianism in this respect because utilitarianism does treat people as means.<sup>173</sup>

But to those who are subject to having all of their above-threshold interests taken away in a Nussbaumian tax system, it must surely seem not only that they are being used as a means, but also that they are being used merely as a means. Any sacrifice of their above-threshold interests, no matter how large, is justified, and indeed mandated, if it can provide any benefit, no matter how small, to someone below a capability threshold. This message seems unlikely to garner the political consensus Nussbaum seeks for her theory.

Nussbaum could of course argue that people who have all their above-threshold interests taken away through taxation are not being treated solely as means; they are also being treated as ends, as their capabilities are also guaranteed, up to the threshold level. Similarly, utilitarianism takes the position that it never treats people merely as means since it values equally the welfare of everyone; unlike other theories, utilitarianism never requires anyone to sacrifice unless others will bene-

<sup>167</sup> STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 33–35.

<sup>168</sup> Even prioritarianism sometimes requires redistribution to those who can benefit less, if they are sufficiently worse off.

<sup>169</sup> See *id.* at 79 (discussing the counter-productivity limit under welfare egalitarianism).

<sup>170</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 351.

<sup>171</sup> IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 97 (H.J. Paton trans., Harper & Row 1964).

<sup>172</sup> At other places, Nussbaum also omits the qualifier “merely.” See, e.g., NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 277. She includes the qualifier “merely” in Martha Nussbaum, *Human Dignity and Political Entitlements*, in HUMAN DIGNITY AND BIOETHICS 351, 354 (2008). There, however, she is describing the Stoic view, not her own view. *Id.*

<sup>173</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 351–52.

fit more.<sup>174</sup> As a matter of moral theory, perhaps neither theory treats people as mere means. But as a matter of political perception, I believe that Nussbaum's theory, if ever actually enacted, would more likely appear to violate the Kantian injunction.

#### E. *A Priority Less Absolute*

Because a significant part of my critique of Nussbaum depends on the conclusion that she gives absolute priority to below-threshold interests, it may be wondered whether I was uncharitable in reaching that conclusion in Part I.<sup>175</sup> In accordance with the principle of charity, should I not assume that the priority Nussbaum gives to below-threshold interests is not absolute? The problem is that while it is indeed uncharitable, from a utilitarian perspective, to interpret Nussbaum as being an uncompromising cross-threshold egalitarian, it is not uncharitable from Nussbaum's own perspective. If Nussbaum did not give absolute priority to below-threshold interests, she could not say that "policies that improve the lot of a group are to be rejected unless they deliver the central capabilities to *each and every person*."<sup>176</sup> Nor could she claim that "each and every citizen is entitled to an ample amount of each of these diverse goods, seen as capabilities, and . . . society may not pursue overall advantage in a way that slights any citizen's claim to them . . ."<sup>177</sup>

As to conflicts *among* below-threshold interests, I do conclude (charitably, from a utilitarian perspective) that Nussbaum's policy choices reflect the influence of a benefit-maximizing principle.<sup>178</sup> But as to conflicts *between* above-threshold interests and below-threshold interests, such a conclusion is precluded by the central place Nussbaum gives to the threshold level in her theory, as well as by the above-quoted statements. It would be well if Nussbaum acknowledged that policies that improve the lot of a group should sometimes be pursued even though they do not deliver the central capabilities to every person, and that society should sometimes pursue overall advantage in a way that slights the claims of some people below the capabilities thresholds.<sup>179</sup>

<sup>174</sup> STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 33–35.

<sup>175</sup> See *supra* notes 39–44.

<sup>176</sup> NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 216.

<sup>177</sup> *Id.* at 178.

<sup>178</sup> See *supra* notes 140–145.

<sup>179</sup> Nussbaum's rhetoric to the contrary appears to be drawn from Rawls. See RAWLS, A THEORY OF JUSTICE, *supra* note 56, at 3–4 ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice . . . does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many."). But as noted *infra* at text accompanying notes 185–

But until she does so acknowledge, the most plausible interpretation of her theory is that she does indeed give absolute priority to below-threshold interests.

How have other egalitarian theorists dealt with the problem of insatiable entitlements; how have they avoided the “bottomless pit”?<sup>180</sup> Those who seek to equalize welfare (or capabilities) have generally compromised their egalitarianism by accepting, more explicitly than Nussbaum, some role for the benefit-maximizing principle of utilitarianism. As suggested above, there are two ways to effect this incorporation of utilitarianism into an egalitarian theory. One way is prioritarianism, which blends the benefit-maximizing principle and the egalitarian principle into one composite principle.<sup>181</sup> Another way, which in practice yields something close to prioritarianism, is an ethical pluralism that respects both the benefit-maximizing principle of utilitarianism and the egalitarian principle.<sup>182</sup> Amartya Sen, the father of the capabilities approach, is an ethical pluralist of this type. He concedes that equality cannot be the sole distributive principle: “[E]quality would typically be one consideration among many, and this could be combined with *aggregative* considerations including *efficiency*.”<sup>183</sup>

For resource egalitarians, such as Rawls, the problem of insatiable entitlements is less troublesome.<sup>184</sup> Though Rawls gives absolute priority to those who are worst off, he uses the metric of material resources (income and wealth) to determine who is worst off.<sup>185</sup> The resourcist metric means that no one can have an entitlement, based on the principle of equality, to more than an equal share of material resources. People who would have insatiable entitlements under a welfare-egalitarian theory very quickly reach the limit of their claims under resource egalitarianism. But while resource egalitarianism is better able to avoid excessive redistribution than is welfare egalitarianism (or capabilities egalitarianism), resource egalitarianism has a problem of inadequate redistribu-

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186, such sentiments are less extreme in the context of Rawls’s theory, as he uses a resourcist metric.

<sup>180</sup> See Daniels, *supra* note 68, at 172.

<sup>181</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 181.

<sup>182</sup> *Id.*

<sup>183</sup> SEN, *supra* note 8, at 92.

<sup>184</sup> See generally RAWLS, JUSTICE AS FAIRNESS, *supra* note 56. As noted, I do not consider Ronald Dworkin to be either a resourcist or an egalitarian; his hypothetical-choice distributive device is essentially utilitarian. See *supra* note 55; see also STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 119–57.

<sup>185</sup> I speak here of Rawls’s theory as set forth in A THEORY OF JUSTICE, *supra* note 56, at 97–98. There is a ginger step away from resourcism in RAWLS, JUSTICE AS FAIRNESS, *supra* note 56, at 65. I discuss Rawls’s theory in STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 102–18.

tion.<sup>186</sup> Resource egalitarianism resists an unequal distribution of resources even when some people would benefit enormously from a greater-than-equal share—even when they need a greater-than-equal share to avoid death or horrible pain.<sup>187</sup>

The welfare-egalitarian problem of excessive redistribution (shared by capabilities egalitarianism) and the resource-egalitarian problem of inadequate redistribution are really two sides of the same coin. Uncompromising egalitarian theories of all types are insensitive to relative benefit, which means that they will either distribute too many resources to people who would benefit hardly at all (welfare egalitarianism), or distribute too few resources to people who would benefit enormously (resource egalitarianism), or both. Only when they compromise their theories in the direction of utilitarianism—only when they are prepared to distribute or withhold resources based on how much a claimant would benefit—can egalitarians achieve a plausible balance.<sup>188</sup> Utilitarianism is the golden mean of distributive justice, and egalitarian theories can achieve plausibility only by moving toward that mean.

Nussbaum incorporates the benefit-maximizing principle of utilitarianism, more or less explicitly, in setting the capabilities thresholds.<sup>189</sup> She incorporates utilitarianism implicitly in resolving below-threshold conflicts.<sup>190</sup> These two assimilations of the utilitarian principle go a long way to lend plausibility to her theory. But she remains an uncompromising egalitarian as to cross-threshold conflicts, and in that respect her theory is deeply implausible.

### III. CAPABILITIES VERSUS WELFARE

I am more troubled by Nussbaum's principles of distribution (or lack thereof) than by her metric. I do, however, think that the welfarist metric is superior to the metric of capabilities. In this Part, I explore some of the differences between a welfare-based theory and a capabilities-based theory. In the course of doing so, I respond to some of Nussbaum's criticisms of utilitarianism, in particular her criticism that utilitarianism is wrong to give effect to adaptive preferences.

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<sup>186</sup> Resource egalitarianism can still require excessive redistribution, from a utilitarian perspective, if it imposes a tax system that reduces average welfare even as it raises the situation of the poorest class.

<sup>187</sup> See STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY, *supra* note 5, at 63–75.

<sup>188</sup> See *id.* at 2.

<sup>189</sup> See NUSSBAUM, FRONTIERS OF JUSTICE, *supra* note 1, at 402.

<sup>190</sup> See *supra* notes 145–150.

A. *Objective Versus Subjective View of the Good: Only a Partial Divergence*

Most theorists who consider themselves welfarists hold to a subjective or experiential view of the good. This is certainly true of utilitarians. Among contemporary utilitarians, the two main conceptions of welfare are the hedonic account and the informed-preference account.<sup>191</sup> Under the hedonic account, positive welfare is a positive mental state or subjective experience, such as happiness or enjoyment; negative welfare is a negative mental state such as unhappiness or suffering.<sup>192</sup> Under the informed-preference account, positive welfare is the satisfaction of informed preferences, while negative welfare is the frustration of informed preferences.<sup>193</sup>

Nussbaum, by contrast, has a partially objective view of the good.<sup>194</sup> Under her theory, the central capabilities are good for people whether or not they are experienced as good. The partially objective character of the capabilities approach, as opposed to what Nussbaum calls “subjective welfarism,”<sup>195</sup> can yield criticisms in both directions. It is important, however, not to overstate this difference between the metric of capabilities and the metric of welfare; the two metrics overlap. As Nussbaum explains, one reason items are included on the list of capabilities is that they contribute to the welfare of people under the informed-preference account of welfare (she refers to it as the “informed desire” account).<sup>196</sup> Nussbaum states that “the very fact that human beings characteristically desire play, and intimacy, and control over their environment provides at least some reason for politics to secure these

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<sup>191</sup> See ROBERT GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 12–16 (1995); JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 10–11 (1986); STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 14–16; L.W. SUMNER, *WELFARE, HAPPINESS, AND ETHICS* 113–47, 171–83 (1996); T.M. Scanlon, *The Moral Basis of Interpersonal Comparisons*, in *INTERPERSONAL COMPARISONS OF WELL-BEING* 17–44 (Jon Elster & John Roehner eds., 1991).

<sup>192</sup> See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 14.

<sup>193</sup> I have not yet taken a firm position on what account of welfare is best. I have not yet had to do so, as I am generally interested in issues which pit all forms of utilitarianism against opposing theories. Nevertheless, I do have considerable sympathy for the good old-fashioned hedonic account of welfare, at least insofar as issues of distributive justice are concerned. See STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 15.

<sup>194</sup> Nussbaum uses the term “substantive” rather than “objective.” See NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 1, at 151–52. I believe that the term “objective” more accurately conveys the distinction between Nussbaum’s approach and the two main accounts of welfare. The hedonic account of welfare might be considered substantive, but it is not objective.

<sup>195</sup> *Id.* at 8.

<sup>196</sup> *Id.* at 152.

things to people, a reason that is not fully reducible to the other reasons we have for saying that these things are good."<sup>197</sup>

By the same token, welfarism is advanced by systematic thinking about the things that promote welfare. Nussbaum's list of central human capabilities seems to embody considerable wisdom. Although I would not take it as the last word, it could be useful to welfarists.

Yet another way in which Nussbaum's capabilities approach converges with welfarism is that the concept of a capability includes an element of choice or preference at its core. Following Sen, Nussbaum emphasizes the distinction between functionings and capabilities.<sup>198</sup> Her theory strives to guarantee people the capabilities to exercise various functionings (for example, the capability to play, or to commune with nature), but she would not require people to exercise those functionings.<sup>199</sup> As Nussbaum observes, the emphasis on capabilities rather than functionings reduces the paternalism that might otherwise characterize an objective theory of the good.<sup>200</sup>

### B. Adaptive Preferences

Nussbaum's partially objective view of the good allows her to level a serious criticism against welfarism, and against utilitarianism in particular: that utilitarianism wrongly gives effect to adaptive preferences.<sup>201</sup> This criticism is stressed by Sen;<sup>202</sup> Nussbaum gives it even more emphasis.<sup>203</sup> Like Sen, Nussbaum is mainly concerned with adaptation to oppression.<sup>204</sup>

People may adapt to unjust oppression, so that the effect on their welfare is not as severe as might be expected. From a utilitarian perspective, adaptation to oppression seems to lessen the moral urgency of alleviating oppression. Under Nussbaum's capabilities approach, by contrast, the urgency of alleviating oppression may be unaffected by adaptation: oppressed people who are adapted and those who are unadapted both may lack basic capabilities, such as the right to vote, to

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<sup>197</sup> *Id.* at 148; *see also id.* at 152 ("Informed desire plays a large role in finding a good substantive list, for epistemic reasons."). I believe that Nussbaum actually understates the extent to which welfarism is the source of her capabilities list.

<sup>198</sup> NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 1, at 153; SEN, *supra* note 8, at 4–5.

<sup>199</sup> NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 1, at 160.

<sup>200</sup> *Id.* at 160–61.

<sup>201</sup> *Id.* at 139–42.

<sup>202</sup> SEN, *supra* note 8, at 6–7.

<sup>203</sup> NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 1, at 140.

<sup>204</sup> *Id.* at 117–18.

the same extent.<sup>205</sup> In *Women and Human Development*, Nussbaum states that a “habituated preference not to have any one of the items on the list (political liberties, literacy, equal political rights, or whatever) will not count in the social choice function . . . .”<sup>206</sup>

The criticism of utilitarianism based on adaptive preferences can be taken to ridiculous extremes if one postulates “happy slaves,” oppressed people who are actually happier under oppression than they would be if treated fairly. Nussbaum has a generally keen sense of social reality, so in her hands the argument does not go to this extreme. Indeed, in *Frontiers of Justice*, she suggests that it is “extremely likely that there is no tradition anywhere, nor ever has been, in which its subordinated or minority members simply endorse the lower lot in life they are offered.”<sup>207</sup> Nevertheless, there can be greater and lesser adaptation, and utilitarianism seems to hold that it is less morally urgent to help those who are more fully adapted. Is this wrong?

An informed-preference utilitarian might argue that adaptive preferences are not fully informed, and that utilitarianism should therefore not give effect to them. I would not make this move, however, as I believe it is right to respect adaptive preferences; adaptation to oppression does indeed make it less morally urgent to alleviate oppression.

Suppose there are two societies in which women are oppressed in familiar ways: They cannot vote, they are excluded from desirable professions, they lose legal personhood when they marry, and they suffer discrimination in divorce law, inheritance law, and so on. There is, however, a large difference between the two sexist societies in the extent to which women have adapted to oppression. In one society, there is a great deal of subjective misery among women. This misery is evidenced by past protests that were violently suppressed and are unlikely to recur.<sup>208</sup> It is further evidenced by strenuous attempts to emigrate (suppose both societies are closed to emigration), and by social science surveys taken by outsiders. In the other sexist society, women have adapted to a much greater extent. There is far less opposition to oppression and far less discontent.

Suppose now that the international community can force only one of these societies to eliminate its sexist laws, or can exert pressure on

<sup>205</sup> *Id.* at 149.

<sup>206</sup> *Id.*

<sup>207</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 254; *see also* NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 1, at 155.

<sup>208</sup> I stipulate that the protests are unlikely to recur because I do not want to tilt the hypothetical example by saying that it is necessary to help the unadapted group in order to prevent violence and death.

only one society at a time. Should the international community help the truly miserable, unadapted group first, as utilitarianism recommends? Or should the international community help the group that is largely adapted to its situation?

Nussbaum's principles do not tell us to help first the unadapted group that is suffering more. As the women of both societies are below the capabilities thresholds, Nussbaum's theory does not straightforwardly give priority to one group or another. Indeed, if faced with a decision between helping the two groups, someone applying Nussbaum's theory might decide that it is morally more urgent to help the group that is suffering *less* rather than the group that is suffering more. The more-adapted and less-suffering group has a kind of "false consciousness," which ranks it *lower* on some capabilities than the group that is suffering more. For example, one element in the capability "Emotions" is to be able to experience "justified anger."<sup>209</sup>

But while Nussbaum's theory does not tell us to help first the group that is less adapted and thus more miserable, it is clear to me (and, I hope, to the reader) that we should indeed help that group first.<sup>210</sup> It is morally more urgent to help a group that is suffering, that is groaning under the yoke of oppression, than to help a group that is relatively content. Utilitarianism, then, is not morally deficient in giving weight to adaptive preferences. On the contrary, the moral deficiency lies with theories that refuse to take adaptive preferences into account. We should help first the people who are suffering the most, and a theory that does not tell us to do so is wrong.<sup>211</sup>

Of course, this is not the kind of example that critics of utilitarianism have in mind when they speak of adaptive preferences. Instead, critics envision a scenario in which utilitarianism actually endorses oppression because of adaptive preferences. Because adaptive preferences cause the oppressed to be relatively satisfied, the argument goes, an end to oppression could hurt the favored group (the oppressors) more than it benefits the oppressed.

But the preference to oppress is far more adaptable than the preference not to be oppressed. Are the British any less happy now that they do not persecute Catholics? Are the French any less happy now that they do not persecute Protestants? I do not think so. Since the favored group can be just as happy in a tolerant regime as in an oppres-

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<sup>209</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 76–77. Pointing in the other direction, one element in the capability "Senses, Imagination, and Thought" is being able to "avoid nonbeneficial pain." *Id.* at 76.

<sup>210</sup> Absent some unusual circumstances not stipulated here.

<sup>211</sup> For a similar view, see Kaplow, *supra* note 26, 627–29.

sive regime, the “joy of oppression” has no weight at all in a long-term utilitarian analysis, and the suffering of an oppressed group is a total net loss.

Critics of utilitarianism argue that even if unjust systems of oppression really do result in lower aggregate welfare, that is too shaky a basis on which to oppose such injustice.<sup>212</sup> Surely, the benefits that a favored group gains from oppression should not be counted at all, even in the short term. But in fact, we are unlikely to think that a system or institution is “oppressive” in the first place unless it involves unnecessary suffering. Consider military conscription in time of war. If we only took account of the burden placed on conscripted soldiers, the loss of liberty and the danger, we might say that military conscription is horribly oppressive and unjust, a system akin to slavery. Yet military conscription is a good deal more widely accepted than slavery. Why? Because the benefits to society as a whole are thought to outweigh the burden placed on conscripted soldiers.<sup>213</sup> Of course, it is easily possible for military conscription to reduce the overall welfare of the nation in which it exists, to say nothing of the welfare of foreigners who may be affected by that nation’s military policies. But the general point is that we do count benefits in determining whether a practice constitutes immoral oppression. It is only after we have counted the benefits and made an intuitive finding of unnecessary suffering that we come to believe that the benefits to those we consider oppressors do not count at all.

### C. *Incommensurability?*

Another difference that Nussbaum stresses between her own approach and welfarism is that she holds goods to be incommensurable, meaning that they cannot be reduced to a single scale of value.<sup>214</sup> She states that “[i]t is of the essence of the focus on capabilities to insist that the primary goods to be distributed by society are plural and not single, and that they are not commensurable in terms of any single quantitative standard.”<sup>215</sup> Welfarists, by contrast, believe that goods are commensurable in terms of welfare.

It is usual to distinguish incommensurability from incomparability. Incomparability means that goods cannot be compared.<sup>216</sup> Nussbaum’s

<sup>212</sup> Nussbaum, *Constitutions and Capabilities*, *supra* note 1, at 19.

<sup>213</sup> The Supreme Court held, in a World War I-era case, that conscription does not violate the Thirteenth Amendment. *The Selective Draft Law Cases*, 245 U.S. 366, 390 (1918).

<sup>214</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 165–66.

<sup>215</sup> *Id.*

<sup>216</sup> Ruth Chang, *Introduction to INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 1, 2 (Ruth Chang ed., 1997).

view is that incommensurability does not entail incomparability: it is or may be possible to choose well among different goods, even if it is impossible to reduce those goods to a single scale of value.<sup>217</sup>

It may also be useful to distinguish a variety of positions on a spectrum from complete commensurability to complete incommensurability. Complete commensurability means that all goods can be reduced to a single scale of value; complete incommensurability means that no two goods can be so reduced. In between are various degrees of partial commensurability. I do not think that a welfarist need be committed to complete commensurability; pockets of incommensurability may exist.

There has been considerable discussion of incommensurability and the law, in areas such as surrogacy.<sup>218</sup> I will not address such issues; I am concerned here with the relationship between Nussbaum's theory and the doctrine of incommensurability. The chief elements of Nussbaum's theory that might be thought to reflect a denial of commensurability are its lack of principles to resolve conflicts among below-threshold interests and its absolute priority for below-threshold interests as against above-threshold interests. As argued above, these are the least plausible elements of Nussbaum's theory. If a commitment to the doctrine of incommensurability has motivated these elements, it has had a truly baleful effect on her theory. In any event, while the lack of principles for below-threshold conflict does reflect a partial rejection of commensurability, the absolute priority for below-threshold interests does not. Indeed, the latter feature of Nussbaum's theory establishes a kind of commensurability.

Nussbaum's absolute priority for below-threshold interests prohibits tradeoffs that place people below the threshold of one capability in order to give them (or others) a super-threshold amount of some other capability. Nussbaum evidently has this sort of tradeoff in mind when she writes that "the capabilities are radically nonfungible: lacks in one area cannot be made up simply by giving people a larger amount of another capability."<sup>219</sup> Similarly, she states that "we should not give up on emotional health to achieve a great deal of employment opportunity, or on self-respect in order to achieve a great deal of health."<sup>220</sup>

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<sup>217</sup> Nussbaum, *Costs of Tragedy*, *supra* note 1, at 1030–31.

<sup>218</sup> See, e.g., Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PA. L. REV. 1419 (1998); Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

<sup>219</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 166–67.

<sup>220</sup> *Id.* at 73.

Such statements suggest that there is some general bar to tradeoffs among capabilities, and that the bar to tradeoffs derives from Nussbaum's rejection of commensurability.<sup>221</sup> In fact, the opposite is true. Nussbaum's theory actually *insists* on tradeoffs if it is possible to make them in the opposite direction, if it is possible to give people a below-threshold increase in one capability by taking away from them (or others) an above-threshold amount of some other capability. Although we cannot "give up on emotional health [below the threshold] to achieve a great deal of employment opportunity [above the threshold],"<sup>222</sup> we *must* give up emotional health *above* the threshold in order to increase employment opportunity *below* the threshold.

The reason tradeoffs in the wrong direction are barred is not because Nussbaum's theory treats the capabilities as incommensurable; rather, tradeoffs in the wrong direction are barred, and reverse tradeoffs are mandated, because she treats the capabilities as *commensurable* in cross-threshold conflicts. Nussbaum's cross-threshold egalitarianism establishes a single scale of value as between above-threshold interests and below-threshold interests: all below-threshold interests have absolute priority over all above-threshold interests. This single scale of value then determines the permissibility of tradeoffs, prohibiting some and mandating others. It is not a correct scale of value, either as a normative prescription or as a description of people's preferences—but it is a scale. Moreover, the permissibility of cross-threshold tradeoffs does not depend on whether they are between capabilities or within capabilities. A tradeoff within capabilities is prohibited if it is in the wrong direction and a tradeoff between capabilities is mandated if it is in the right direction.<sup>223</sup>

While there is commensurability across the threshold in Nussbaum's theory, there is incommensurability below the threshold. The lack of any principles to resolve below-threshold conflict means that one must choose among below-threshold interests as if they were not reducible to a single scale of value. One must engage in intuitionistic balancing, which is how one chooses among incommensurable goods. Here, too, however, it does not matter whether competing below-threshold interests pertain to the same capability or different capabilities. Nussbaum offers no explicit principles to resolve conflicts within one capability (for example, between those who can gain the greatest increase in capability and those who have the least capability), any

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<sup>221</sup> See also Nussbaum, *Constitutions and Capabilities*, *supra* note 1, at 19.

<sup>222</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 73.

<sup>223</sup> Unless there is another cross-threshold tradeoff in the right direction available, in which case each is permissible.

more than she offers principles to resolve conflicts among different capabilities.

So if two interests are on opposite sides of the threshold, there is full commensurability: one has either infinitely more value or infinitely less. If two interests are on the same side of the threshold, there is incommensurability. And in neither case does it matter whether the two interests pertain to the same capability or different capabilities.<sup>224</sup> In sum, Nussbaum's theory does not have the relationship to incommensurability that her statements suggest.

#### D. *Paternalism and Diktat*

Although Nussbaum's emphasis on capabilities as opposed to functionings reduces the paternalism of her theory, and aligns it more closely with welfarism, there is still a potential for paternalism in Nussbaum's theory, and even for what might be called dictatorship. There is also a potential for paternalism in utilitarianism.

Under Nussbaum's theory, society must devote resources to developing certain capabilities of people up to a threshold level.<sup>225</sup> This might not be the use of resources that people would most prefer, or that would make them happiest. Indeed, following the work of Professors Louis Kaplow and Steven Shavell,<sup>226</sup> we can see that it is possible for everyone to be worse off, in terms of subjective welfare, under Nussbaum's capabilities approach than under a welfarist system that devotes the same amount of resources to satisfying below-threshold interests. Suppose that everyone would like to have a super-threshold amount of one capability (not the same one for all), and in exchange everyone would be willing to fall below the threshold of another capability (not the same one for all). Nussbaum's approach would not permit such variable capability allotments, and so could make everyone worse off.

Fleshing out this idea, we may suppose that the government guarantees to each person a certain level of material resources (income or wealth), and that each person decides which capabilities to pursue. The guaranteed resource level is not the same for everyone; rather, we ap-

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<sup>224</sup> This is not to say that the classification of interests as pertaining to one or another capability is completely irrelevant. Given that an interest is above or below the threshold, classification is basically irrelevant. But the classification of an interest might bear on whether it is considered an above-threshold interest or a below-threshold interest.

<sup>225</sup> See NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 182.

<sup>226</sup> See generally Kaplow & Shavell, *supra* note 59. Even more relevant here is Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?*, *supra* note 26 (focusing on the work of Sen rather than Nussbaum).

proximate the amount of resources that would be devoted to people under Nussbaum's system, allocating more resources to people who would need more resources to reach the various thresholds. But once the cash is distributed to people, they can spend it on anything. They can buy health insurance, join nature clubs, take adult education classes, and so on. If all choose to spend their resource allotments so as to rise above the threshold of some capabilities and fall below the threshold of others, it is possible that everyone will be better off, in terms of welfare, than they would be under Nussbaum's system.

This example points to a possible ambiguity in Nussbaum's conception of capability. If a person is given enough money to rise to the threshold of capability X, but decides to spend the money on other things, does that mean that she really did have capability X, up to the requisite threshold, all along? If a person is given enough money to purchase health insurance, does that satisfy her capability to have good health, even if she decides not to purchase insurance? If so, it is hard to generate the Kaplow/Shavell critique.

Let us assume, however, that unrestricted cash would not satisfy the requirements of Nussbaum's capabilities approach. Rather, to bring someone to the threshold of the health capability, the government must provide universal health coverage, or perhaps distribute vouchers that can be used only to purchase health insurance. Even so, I confess that I do not think Nussbaum's theory is much damaged by the mere possibility that everyone could be worse off under her theory than if they received unrestricted cash. While I support cash assistance to the poor, I seriously doubt that the best way to promote the welfare of people (at least, those living in a rich country) is to give them unrestricted cash as a substitute for traditional welfare-state programs such as universal health coverage.<sup>227</sup>

My skepticism about replacing all welfare-state programs with grants of unrestricted cash reflects paternalism.<sup>228</sup> A welfarist can be a paternalist, whether he holds to the informed-preference account of welfare or the hedonic account. An informed-preference welfarist can frustrate the actual preferences of people in order to satisfy the preferences people would have if they were fully informed; a hedonic welfa-

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<sup>227</sup> I am far more sympathetic to cash assistance in the context of foreign aid. See The Pushpin Pundit, *Africa Needs a BIG Experiment* (May 21, 2006), <http://www.pushpinpundit.com/v1n8052106.htm> (discussing proposed basic income grant programs in South Africa); The Pushpin Pundit, *The International Food Stamp*, (Mar. 28, 2006), <http://www.pushpinpundit.com/v1n1032806.htm> (arguing in favor of an international food stamp program).

<sup>228</sup> A defense of this paternalism is beyond the scope of this Essay.

rist can frustrate the actual preferences of people (and even their informed preferences) to make them happier.

Indeed, a welfarist can be more paternalistic, in some respects, than a follower of Nussbaum's capabilities approach, as that approach aims at capabilities rather than functionings. A welfarist might, for example, promote the health of people in disregard of their current preferences, while a follower of the capabilities approach might say that it is enough for government to provide people with the capability to be healthy; government need not go further and prevent people from ruining their own health.

Nussbaum's own thinking on government promotion of health seems to have evolved in a libertarian direction. In *Women and Human Development*, she wrote: "We may . . . feel that health is a human good that has value in itself, independent of choice, and that it is not unreasonable for government to take a stand on its importance in a way that to some extent (though not totally) bypasses choice."<sup>229</sup> In *Frontiers of Justice*, however, she expresses disagreement with the view, which she attributes to Professor Richard Arneson, that "it is appropriate for political planning to promote actual health as a social goal rather than merely to promote the capability to choose a healthy life."<sup>230</sup>

Both utilitarians and capabilities theorists can be accused of unjustified paternalism. The difference between the two theories may not be so great on this score, but it still favors utilitarianism. It is one thing to disregard the actual preferences of people in the course of raising their welfare; it is quite another thing to disregard the actual preferences of people if you are going to *lower* their welfare.

Nussbaum's advocacy of the metric of capabilities is not convincing. However, the metric of capabilities is sufficiently close to the metric of welfare so that the difference in distributive principles, as between utilitarianism and Nussbaum's capabilities approach, is in my view far more important than the difference in metric.<sup>231</sup> I would vastly prefer a theory that used the same principle as utilitarianism (benefit maximization), but Nussbaum's metric (capabilities), to a theory that used the same metric as utilitarianism (welfare), but Nussbaum's principle (suf-

<sup>229</sup> NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 1, at 91.

<sup>230</sup> NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 171. Nussbaum does endorse "education about risk." *Id.*

<sup>231</sup> In STEIN, *DISTRIBUTIVE JUSTICE AND DISABILITY*, *supra* note 5, at 181–82, 187–89, I actually treat the capabilities metric as a kind of welfarism. To some extent, Ronald Dworkin does likewise. See DWORKIN, *supra* note 55, at 285–303.

ficientarianism). In other words, I would vastly prefer capabilities maximization to welfare sufficientarianism.<sup>232</sup>

### CONCLUSION

Nussbaum's theory is least plausible where it departs the farthest from utilitarianism. She could regain plausibility by moving in the direction of utilitarianism: relaxing the absolute priority for below-threshold interests and explicitly announcing that at least one important principle governing conflicts among below-threshold interests is that resources should go to those who can most benefit.<sup>233</sup> How easy would it be for Nussbaum to make these adjustments?

On relaxing the absolute priority for below-threshold interests, Nussbaum's past failure to confront the problem of insatiable entitlements actually represents an opportunity. She can determine that in view of insatiable entitlements, it is no longer "hard to know" what could make one abandon cross-threshold egalitarianism.<sup>234</sup> Nussbaum's willingness to consider relative benefit in initially setting the thresholds also could support a decision to consider relative benefit in cross-threshold conflicts.<sup>235</sup> On below-threshold conflicts, Nussbaum's readers probably assume, based on her policy choices, that the benefit-maximizing principle would have a role in resolving such conflicts, so making that role explicit may not be so big a step.

The biggest impediment to these salutary changes in Nussbaum's principles may be her commitment to the capabilities metric. If Nussbaum were to use a benefit-maximizing principle to resolve below-threshold conflicts *within* one capability, the next logical step would be to use a benefit-maximizing principle to resolve below-threshold conflicts *across* capabilities.<sup>236</sup> But once Nussbaum explicitly endorsed such principled tradeoffs across capabilities, the capabilities metric might

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<sup>232</sup> Though under a capabilities maximization theory, there would still have to be some way to make tradeoffs across capabilities.

<sup>233</sup> As suggested above, Nussbaum would not have to move all the way to the benefit-maximizing principle of utilitarianism; a prioritarian principle, which mixes benefit-maximizing and egalitarian elements, would do the trick almost as well.

<sup>234</sup> See Nussbaum, *Costs of Tragedy*, *supra* note 1, at 1024.

<sup>235</sup> Though Nussbaum's willingness to consider relative benefit in initially setting the thresholds may not be as prominent a part of her theory as my presentation suggests. In *Frontiers of Justice*, it is not until near the end of the book that she abjures setting the thresholds "in a utopian or unrealistic way." NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 1, at 402.

<sup>236</sup> As suggested above, Nussbaum has already done so implicitly. By urging the allocation of public resources to certain programs, such as special education, she implicitly rejects other programs, serving other below-threshold interests, that could consume all the available funds.

begin to seem superfluous; she might be drawn to the metric of welfare. Similarly, once Nussbaum abandoned her implausible single scale of value for cross-threshold tradeoffs (below-threshold interests having infinitely more value than above-threshold interests), she might be drawn to the more plausible welfarist scale. While the capabilities metric is not, in itself, one of the most objectionable features of Nussbaum's theory, it may prevent her from altering those features.

