

REVIEW:

FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW

Martha C. Nussbaum

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Introduction

In recent times the discussion on rights for the gay and lesbian community has come to the forefront in legal circles. Contributing to the debate on U.S. Constitutional policies and the place that these rights hold, the Inalienable Right series presents *From Disgust to Humanity*, a book by Martha C. Nussbaum. It is her goal to address legal but also sociological arguments related to the perceptions that the general population in the United States has concerning key issues concerning gender equality/sexual orientation, like same-sex marriage and intimacy. At the core of this book is the idea that many of the ways that the legal framework addresses these issues are rooted in disgust. Nussbaum advocates for a transition to the politics of humanity, pointing out instances of its use and further promoting its application.

Politics of Disgust

In Nussbaum's first chapter she introduces the theory of the 'politics of disgust', something that she attributes to two key individuals, Lord Patrick Devlin and Leon Kass. Both have different arguments as it relates to their similar view that disgust, and thus morality, have a role to play in the legal regulation of a nation. In this chapter the reader is introduced to the multidisciplinary approach that Nussbaum uses throughout the book. In pulling from philosophy, sociology, politics and law she outlines that disgust as argued for by Kass and Devlin does have some serious flaws. Devlin rooted his approach in the idea that societal conventions ought to be upheld for social stability, whereas Kass is motivated by moral arguments, saying that disgust helps to regulate the right and wrong of human interactions. In Nussbaum's mind, the evolution of disgust towards certain groups of the population, for example Jews or the physically disabled, show that Devlin and Kass have faulty argumentation.

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Nussbaum uses the rest of the chapter to build the framework from which she will develop her future legal arguments. Disgust as an idea and its implications on the human psyche are discussed. Especially of focus and important to the issue of disgust in sexual orientation is the 'projective disgust', where groups of people and not actual primary objects are viewed as disgusting. Nussbaum points out the logic of certain laws relating to primary objects of disgust, for example in sanitation. However Nussbaum concludes that 'projective disgust' "provides no good reason for limiting liberties or compromising equalities that are constitutionally protected" (p. 21)

Politics of Humanity

Before Nussbaum addresses many of the constitutional laws that form her arguments against disgust, she proceeds with a chapter to contrast 'politics of disgust' with the 'politics of humanity'. The key legal framework that motivates the 'politics of humanity' can be found in the Declaration of Independence, which establishes that "all citizens are of equal worth and dignity" (p. 32). The most important highlight addressed by Nussbaum is the 'pursuit of happiness', that is so often considered a goal and equated to an ideal American society. In arguing along this line of thought she maintains that limitations for homosexuals is thus inherently unconstitutional to start with.

One fault of the chapter is the choice by Nussbaum to compare sexual orientation to religious choice as well as birth characteristic groups of 'suspect classification', such as women and race. At the same time she does acknowledge that 'suspect classification' based on certain levels of discrimination is hard to determine as it pertains to sexual orientation. Also included in her list of comparisons is the discrimination based on certain disabilities, which is crucial to the argument of equal protection, as a central constitutional argument made throughout the book. Though quite convincing in her arguments, the four different categories of comparison used, only serve to confuse and bring less weight to the overall picture of humanity surrounding sexual orientation.

In the conclusion Nussbaum brings forward her strongest point on humanity, which is the idea of imagination, including respect and empathy. This she argues is to be used for all human beings regardless of sex, race, or religion bringing about this human aspect, courts, law makers and everyday citizens will start to see the value of protection for all.

Sodomy Laws

After outlining the two opposing policies that shape the constitutional framework when it comes to sexual orientation, Nussbaum next examines the legal construct surrounding the intrusion into the public space of intimacy of individuals. In this chapter Nussbaum focuses increasingly closer on the constitutional rights of due process and equal protection. To highlight her

arguments, Nussbaum uses the infamous case of Michael Hardwick, which shows the implementation of sodomy laws and their intersection with the right to privacy.

Hardwick was arrested in his own home and was charged with sodomy. The case eventually made its way to the Supreme Court, which in 1986 upheld the sodomy laws. The arguments made by Attorney General Bowers were all made under a framework of disgust. The defence case was argued on the grounds of due process as a case mostly about liberty. In the decision in this case, it is clear that traditional society norms trumped a Constitutional value.

Other cases are used to show the evolution of the liberation of sexual policies, such as in *Griswold*, which dealt with the use of contraception. In this way Nussbaum is showing that for heterosexual couples what happens behind closed doors as long as it is between consenting adults is not of state interest. This line of argumentation she takes from John Stuart Mills, and in fact much of Nussbaum's key points advocating for a shift from disgust to humanity come directly from Millian philosophy.

The issue of sodomy returned to discussions of constitutional politics starting in 1998, in the case of *Lawrence*, which bears many similarities to *Bowers*. Many states had repealed their sodomy laws by this point, but Texas still had a ban against anal sex between same-sex couples. The issue was once again brought to the Supreme Court that found in 2003 that under the clause of Equal Protection sodomy laws could not discriminate against only one group. The Court's ruling henceforth negated all American sodomy laws. In regards to relations kept in the privacy of the home, humanity prevails and is a triumph of the "moral imagination", one that Nussbaum closely links to the achievement of law.

One aspect that is lacking in Nussbaum's argument in this chapter is the difficulty of US Constitutional politics, with the divisions between state and federal laws. In tackling constitutional issues, Nussbaum is not as critical of the power of the Supreme Court, and its' position to shape the development of politics of 'disgust' or 'humanity' on a national level.

Discrimination and Anti-Discrimination

In this chapter, Nussbaum discusses the delicate balance between antidiscrimination laws and religious freedom. Religious institutions, the author points out, are given the right to favour coreligionists, such as matters of hiring, in spite of federal antidiscrimination laws. Yet how far should this freedom go when the issue at stake is based on race or marital status rather than on religion itself?

She traces this quandary with an analysis surrounding Amendment 2, proposed on 20 March 1992, by the conservative organization Colorado for Family Values (CVF) which aimed at banning local gay-rights laws. This meant that gays and lesbians would be prevented from bringing legal action against any form of

discrimination that they may suffer in the 'public sphere' and in places of 'public accommodation.' (p. 99) CVF argued that they were not in favour of denying equal rights to gays and lesbians, but they were against giving them 'special rights'.

The measure passed, and the battle for rights begun. Nussbaum analyses the arguments given at different courts, finding that most of them are presented in a legal vocabulary. Yet at the most basic level they are concerned with morality, the idea of protecting the State, on the one hand, versus the idea of enforcing protection for a group of people that otherwise would be at a disadvantage.

The Supreme Court ruled, and Nussbaum agrees, that most of the evidence presented did very little to help the State's case, which was based mostly on a very narrow idea of 'public morality' and what this entailed. "The indignation and disgust of the average person enabled the law, and a vulnerable minority was deprived,..., of privileges and entitlements that are the ordinary stuff of democratic politics"(p. 123) says Nussbaum bluntly. On appeal to the U.S. Supreme Court, Amendment 2 was deemed unconstitutional, based on a reasoning of illicit intent of the measures established by it. And so, the politics of humanity won a limited and incomplete, but important victory.

The victory was limited because the Supreme Court still defined the idea of 'animus' or intent in a narrow sense, leaving interpretation to local courts. Nussbaum thus argues that judges have a central role to play in the development of a wider and more comprehensive jurisprudence in this regard. However, those who supported and put Amendment 2 on the ballot were certainly not convinced by a juridical argument, and the measure had enough popular support to merit a vote. They would probably not be convinced by this argument, and would most likely not support this jurisprudential change.

A Right to Marry

In the following chapter she zooms into the issue of marriage, what it is, and whether current interpretations also depend, as she suggests, on the idea of disgust. For the author, the main question is not whether gays and lesbians actually have a right to marry or not. Nussbaum clearly advocates that people have a right to form households, regardless of whether they are two persons of the same sex or of opposite ones. And she makes a convincing point that 'marriage' as it is understood today has two different meanings, the one adjudicated in religious spaces on the one hand, and the set of civil benefits that the government gives to people who decide to form a household on the other.

With this separation in mind, then the pertinent question is whether the restriction on same-sex marriage is justifiable legally—as pertains to the state—or if it is a reflection of the moral and religious disapproval of some—as established by their religious belief. She comes to the conclusion that arguments such as same-sex marriage being immoral, anti-natural (insofar as

there is no procreation), that it would be forcing approval of something upon those who do not want to accept it, or that it damages family life, are all based on anxieties brought about by disgust, rather than by solid evidence.

Nussbaum then goes on to analyse the idea of a right to marry and what it means to the society of the United States. Here she re-introduces the idea that marriage as an institution has its roots in traditional religious values. Therefore the state is under no obligation to offer “any particular package of civil benefits” (p. 152) to people who marry.

However, the right to marry is classified as a fundamental personal liberty, so the issue goes beyond mere recognition of a religious ceremony in a legal context and is protected by the Due Process Clause of the Fourteenth Amendment. If this lens is applied then, the state cannot forbid a specific class of marriage, as it would be considered interference. Further, there is an issue of equality at stake: groups of people cannot be denied this fundamental right without a very strong counter-argument from the state (as are regulations on polygamy and incestuous unions). While some local courts have taken this matter in their hands, Nussbaum is of the opinion that this issue is better left to federalism.

The myths on which the denial of the right to same-sex marriage rests can be easily debunked by looking at the situation in states where those types of unions exist, and the fact that most of the arguments against same-sex marriage fail the basic rational basis test, as Nussbaum argues convincingly in this chapter, should only strengthen the case for it. The author then addresses certain considerations regarding marriage, what rights it should entail and to whom those rights should be given. She tackles the idea that perhaps there is an issue of semantics at play. Marriage is the term preferred, but not the only term that can be used.

In her conclusion she puts forth a quite controversial idea: that the state should offer civil unions for couples regardless of their sex, and that it should “back out of the expressive domain altogether” (p. 163). As long as this is done on equal grounds, it might be a step in the right direction.

Protecting Intimacy

Finally, the author deals with sex, fear and disgust. Sex in private already causes fear and shame, but when it is (imagined to be) conducted in spaces considered public, such as businesses, the politics of disgust show their ugly face. In these cases disgust appears across the board and is not limited to gay encounters, although in these cases there is a heightened level of disgust and anxiety.

To Nussbaum, this disgust has led to an impingement on “freedoms of association and expression and the equality of citizens”(p. 170), particularly when defining certain places, such as bathhouses, as harming the public or causing ‘public nuisance’. She then goes on to clarify what harm, nuisance and

public should mean to the law and how these views are permeated by politics of disgust.

Nuisance laws protect people from dangerous or offensive things which interfere with their enjoyment of activity or property, and thus are harmful. Further, a public nuisance is such a harm that has an impact on the public at large. Bystanders, according to Nussbaum, are not given a choice to step away from the nuisance. In the case of public sex acts, for example, bystanders have not consented to witness them. However, if a person goes to a club where such acts are taking place, and where onlookers are there for that specific purpose, then non-participating parties who do not experience the act cannot experience disgust.

Live sex businesses have been considered in several occasions public nuisances and thus forced to close down. Arguments have been put forth that they are a danger to public health, because patrons may contract STDs. Nussbaum counters by opening up the idea that STDs are not only, or mainly, to be found in people who frequent these establishments. Also, she raises the point that these people might be even more aware of the risks of STDs than the general population and that in the end, patrons put themselves at risk. How is that, she wonders, different from participating in other risky activities where consent must be given? If a person has contracted an STD such as HIV, in many U.S. jurisdictions there are already laws in place to make it a criminal act not to disclose such information.

Nussbaum retakes her argument against Devlin reasoning, because oftentimes clubs and bathhouses are considered moral nuisances. Yet again she shows that this is a fiction based purely on politics of disgust because attendance to those clubs is voluntary, therefore they cannot be considered a nuisance as “the elements of direct causation and unwilling imposition are lacking” (p. 181).

Amsterdam is mentioned as an example of where the politics of disgust have been overcome with rational arguments. Sexual behaviour in a public park—the Vondelpark—has been permitted as long as it is secluded, does not cause ‘any actual nuisance’ and follows a strict set of rules to, for example, avoid the vicinity of children. This was done in order to protect the community as a whole, including gay people who had become the target of ‘queer-bashers.’ In this manner, the people of Amsterdam at large would enjoy a measure of freedom and protection

She attempts to show that disgust masks stigma and hierarchy and that, when applied without discretion to legal enterprise, civil liberties might be undermined without there being nuisance or harm to begin with. Therefore, once the mask falls, it would be easily seen that there are certain Millian reasons to regulate the sex business industry, but many others are non-Millian and thus grew from the politics of disgust. It is the latter that we should be most careful of when approaching the subject.

Conclusion

Throughout the book, it is seen that legal morality has influenced the development of laws in the United States. Nussbaum's book is a good reflection of the evolution of laws for this particular issue. However, while the focus is on gay rights, she makes use of historical comparisons with other rights movements, in order to show that disgust and humanity have anchored many struggles for basic rights.

The discussion that this book raises could have significant policy implications, but this crucial step is never clearly established. Therefore, the book remains a great exercise in philosophy and encourages change but without many direct applications. This can be explained by the fact that the author is not a lawyer, however she shows a strong understanding of legal arguments, which she uses to counter opposing views.

For the layman or the foreigner without an extensive knowledge of constitutional politics in the United States, the book remains centred around one country and one experience, whereas inalienable rights appeal to universality. It is perhaps because of the nature of the series that the book is limited to the United States, but the move from politics of disgust to politics of humanity requires looking outside the one country's experience.

By showing that most of the opposing arguments are rooted in politics of disgust, Nussbaum makes a strong case for societal change. In the end, she goes beyond the politics of humanity, imploring for a common-sense understanding of these inalienable rights.