

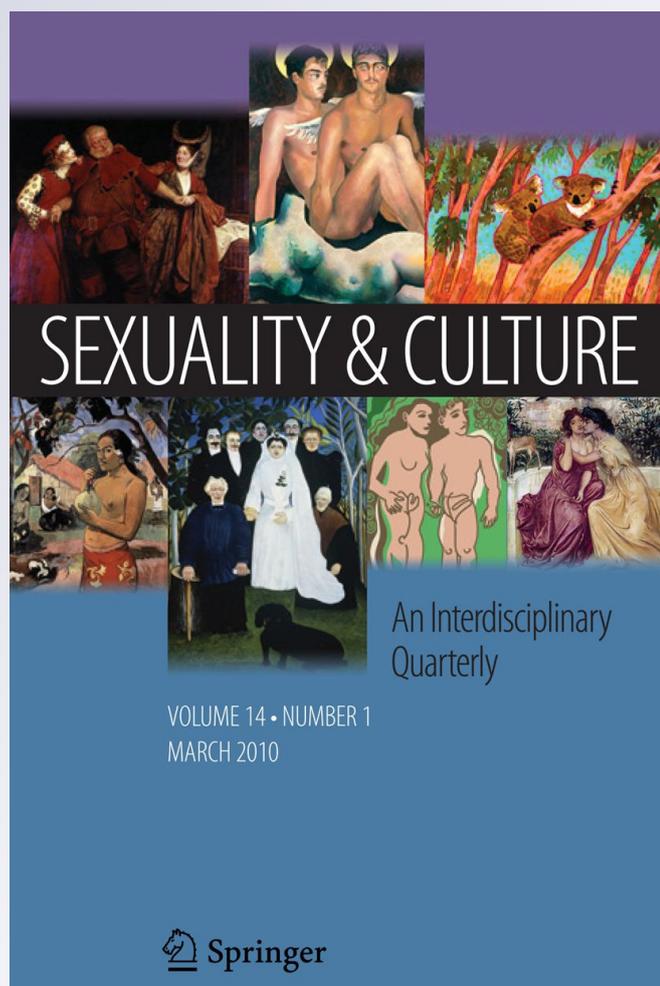
# *Legislating Humanity*

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## Legislating Humanity

**Martha C. Nussbaum: From Disgust to Humanity: Sexual Orientation and Constitutional Law. Oxford University Press, 2010. 256 pp. \$21.95**

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Martha Nussbaum's compelling work on United States (U.S.) Constitutional law and sexual orientation grounds abstract discussions of liberty and freedom in material lived circumstances. In particular, she demonstrates the ways in which "projective disgust" informs legal decision-making, counters such disgust through the conceptualization of a "politics of humanity," shows how legal struggles tied to sexual orientation resemble legal struggles tied to religion, race, and sex, and illustrates relational characteristics of legislation.

Nussbaum begins by demonstrating the ways in which "projective disgust" pervades U. S. constitutional law on sexual orientation. She defines disgust as a "fundamental refusal of another person's full humanity" (p. xiii) and projective disgust as a "fantasy of the dirtiness of the other and a fantasy of one's own purity" (p. 17), a "contamination" that is not "literal and physical, but imaginary" (p. 20). Nussbaum argues that legislating on behalf of projective disgust is insufficient, particularly because disgust "cannot withstand rational scrutiny" (p. 20) and "provides no good reason for limiting liberties or compromising equalities" (p. 21).

Nussbaum's counter to projective disgust is a "politics of humanity," a "political attitude that combines respect with curiosity and imaginative attunement" (p. xviii), and an attitude that "doesn't connote approval of the choices other people make, or even respect for the actions they perform. It just requires seeing them as human beings of equal dignity and equal entitlement" (p. 51). Subsequently, she says, judges must protect "minorities whose fundamental rights have not been given a fair hearing in the majoritarian political process" (p. 160).

Mainstream discussions of sexual orientation sometimes make troublesome comparisons between experiences of sexual orientation and experiences of religion, race, and/or sex—comparisons best noted by phrases like "I know how racism or

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sexism feels because I have experienced homophobia,” or by comparing histories of oppression, with lesbian, gay, bisexual, and transgender populations being framed as one of the last groups to experience socially-accepted prejudice (see Fone 2000). However, Nussbaum shows how and why, from a legal perspective, some of these identity struggles *are* similar.

For instance, early legal decisions about religion were made by people who did not value certain non-Christian religious practices, but who had respect for the people engaging in these practices; “observant Jews abhor the eating of pork, but few if any would think that this religiously ground abhorrence is a reason to make the eating of pork illegal” (p. 141). Early acceptance of religions and religious traditions was thus never about respect for the religious conduct of others, but rather about a respect for the people practicing these traditions; persons with non-Christian beliefs were perceived as “bearers of human dignity and conscience” and thereby deserving of “equal respect” (p. 38).

Nussbaum proposes a similar legal attitude toward sexual orientation by suggesting that just because a person finds intimate same-sex affairs immoral does not mean that legislation (e.g., sodomy laws, the Defense of Marriage Act) should target or limit rights of people who engage in these affairs. Rulings on sexual orientation should not be about (projected-as-disgusting) sexual acts, but rather about our integrity as people with choice. Furthermore, she suggests that legal settings must find a way to understand sexual orientation as something irrelevant to much of social life *and* as something “deep and central in people’s lives” whereby “asking people to give up acting on their orientation is a kind of cruelty” (p. 122).

Nussbaum also has a keen ability to illustrate relational characteristics of legislation. In particular, she suggests, with few exceptions (e.g., national security), that conduct should only be open to regulation when it is “other-regarding,” that is, when it impacts people beyond oneself; it is not okay to regulate private, consensual, self-regarding affairs. For instance, it is okay to regulate public uses of pornography, especially when unsuspecting, non-consenting others are exposed to it (e.g., showing pornography in an elementary classroom), but it is not okay to regulate private uses of pornography (e.g., watching a video in the privacy of one’s home). (Granted, the self-other-regarding act of porn-viewing is complicated by child pornography: even though viewing may occur within the privacy of one’s home, the content may still be regulated.) This self-other distinction matters for sexual orientation in that early sodomy laws aimed a “policing nonprocreative sexual relations” (p. 63)—acts that should not be open to regulation at all, especially if they occur in private.

Furthermore, the self-other-regarding distinction extends beyond sexual orientation. For instance, while Nussbaum does not discuss abortion explicitly, I see the distinction at the core of abortion regulation and debate: Is abortion a private, consensual, self-regarding affair that has nothing to do with others (e.g., “keep your laws off my body!”), or is abortion other-regarding in that it harms an unsuspecting, non-consenting person (fetus)? Nussbaum’s argument suggests that if abortion is agreed upon as self-regarding, then it should not be regulated; if abortion is agreed upon as other-regarding, then it may be conducive to regulation.

What complicates the self-other-regarding distinction is the supposed “harmful secondary effects” of self-regarding acts. Nussbaum uses the example of arguments against allowing an exotic dancing venue in a community particularly because it is perceived that the venue will promote prostitution and sexual violence. Consequently, not allowing the venue is *not* a violation of personal freedom, and, consequently, is open to regulation; allowing a person to open an exotic dancing venue might have consequences for others in the community. However, as Nussbaum suggests, such correlations are only imaginary, slippery, and unfounded, and they show how “projective disgust” looks in practice (p. 190).

As a gay/queer man who researches and teaches about sexual orientation, I support most everything Nussbaum says. I am for same-sex marriage and cannot wait for the day when I can marry my partner. But as a person who dwells within the communication discipline, a discipline whose core premise is that most everything we do impacts others, I do not easily dismiss “harmful secondary effects”; (unknown) effects exist with most any action we take. From this perspective, I find it difficult to say that there are no perceived, unfounded “harmful secondary effects” of legislation tied to sexual orientation, specifically same-sex marriage as there will be secondary effects on contexts in which marriage matters or is discussed (e.g., religious services, elementary education classrooms).

For instance, in contexts in which same-sex marriage is legal, same-sex couples are, by default, implicated when marriage is mentioned. However, what if a mother, because of religious reasons, doesn't want to discuss same-sex relations (or, homosexuality) with her son, but the son's elementary school classroom has a favorable discussion of marriage—a discussion that includes not just husbands and wives, but wives and wives, husbands and husbands? Are the religious freedoms of the mother (and son) violated, especially if same-sex relations are framed, in the discussion, as natural and normal? Of course, I do not see any problem with discussions about same-sex relations, but there are others who would. And this isn't a critique of the book, but rather an observation about the importance of Nussbaum's work: she encourages me to think about the next possible obstacles—the “harmful secondary effects”—of pro-LGBT legislation, obstacles for which future legal work must contend.

Nussbaum puts forth a passionate and informed read, one appropriate for anyone interested in law and ethics, gender and sexuality studies, rhetoric and communication. In arguing that liberty is not “given only to nice people” or “rich people” but rather to all, Nussbaum gives us a book about humanity and imagination, regulation and empathy, oppression and social justice—a book that should encourage us all to live, think, and legislate differently.

## Reference

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