

**FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW** by Martha C. Nussbaum, New York: Oxford University Press, 2010. 256 pp. \$21.95 paperback.

**“It is possible to view another human being as a slimy slug or a piece of revolting trash only if one has never made a serious good-faith attempt to see the world through that person’s eyes or to experience that person’s feelings.” (p. xvii)**

Since *From Disgust to Humanity* was published, Judge Vaughn Walker in the Northern District of California has ruled that California’s Proposition 8, a 2008 voter initiative that outlawed same-sex marriage in the state of California, violates the U.S. Constitution.<sup>1</sup> *From Disgust to Humanity* attempts to explain some of the very forces that likely led to California voters’ approval of Proposition 8 and its subsequent overruling in federal court.

While I am sure Martha Nussbaum would have appreciated the chance to include another victory for the politics of humanity in this compilation, her work is neither undermined nor irrelevant in the changing world. Rather, Judge Walker’s opinion—and the current academic buzz around sexual orientation and constitutional law—simply provide further support for the importance of Nussbaum’s book.<sup>2</sup> Not only does Nussbaum offer a powerful way for thinking about gay rights, likely the biggest civil rights issue of our time, but she also gives her readers a sense of America’s legal and civil rights past, both recognizing how far we have come and illuminating how far we have to go.

*From Disgust to Humanity* tells the story of our era’s transition from the politics of disgust to the politics of humanity in our social and legal discourse on sexual orientation. Nussbaum defines the politics of disgust as a rhetorical or political perspective that associates same-sex practices with bodily functions, and thus, with disgust—a potent emotion during a political campaign (p. xiv). The politics of humanity, on the other hand, respects individuals’ personal choices—even if contrary to one’s own personal beliefs—so long as those choices do not trample others’ rights (p. xviii). While our era is transitioning from the politics of disgust to the politics of humanity, the politics of disgust are alive and well, both in the foreground and background of our national conversation (p. xix).

Nussbaum explains the transition from disgust to humanity by patiently

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1. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D.Cal. 2010) (decided on August 4, 2010).

2. See *id.*

unwinding the history and manner of courts' reasoning in relevant areas of constitutional law including sodomy laws, discrimination, marriage, and public sex. In the constitutional context, the politics of disgust is even more powerful than it might at first seem. Its sentiment is not just expressed by people on the street—though it is there—or in newspapers' opinion columns—though it is certainly there as well. The politics of disgust has made its way into rights-determining courts of law.

But if anybody is equipped to take on these emotional and hateful politics, it is Nussbaum. She carefully and clearly dismantles the politics of disgust, leaving it in an irrational and emotional heap on the floor, while simultaneously buttressing the politics of humanity with rationality, which ends up stronger for having withstood Nussbaum's analysis and shining with hope for the future.

Nussbaum begins with a human story to anchor the reader before she moves to theoretical, rhetorical, and legal analysis. She tells a story of a gay teen recognizing his "gayness" and reacting to his own inclinations with emotions of horror and disgust (p. xii). Nussbaum addresses the divide that this teen faced in his community between people who could, on the one hand, empathize with his feelings, and, on the other hand, people who recoiled in disgust at his sexual orientation. People can be so disgusted they even feel defiled—maybe even penetrated—by just looking at the gay teen (p. xiii).

Academics have used the disgust reaction as a way to justify the regulation or banning of what they consider to be disgust-inducing behavior (p. xiv). Policymakers and theorists have argued—and continue to argue—that disgust serves a purpose (p. xiv). It is there, they assert, to steer us away from terrible choices. For subscribers to the politics of disgust, being disgusted by something is sufficient reason to ban that practice, even if the practice is not harmful to others (p. xiv).

The theme of disgust runs through each of Nussbaum's six chapters but rears its head differently in each. She begins with the theories of disgust and humanity throughout history: disturbing stories of the politics of disgust in the first chapter followed by beautiful stories of the politics of humanity in the second. Then she moves into the legal issues: sodomy, discrimination, marriage, and finally, sex clubs and public sex.

**Disgust: "Projective disgust rarely has any reliable connection with genuine danger. It feeds on fantasy, and engineers subordination." (p. 16)**

In her first chapter, Nussbaum delves into this disgust reaction theoretically and historically. She first discusses the theorists Devlin and Kass. Lord Patrick Devlin, a 1950s British lawyer who became a "Law Lord," "viewed immorality as like an infection, weakening the body politic," and as a result, he was "unable to adopt John Stuart Mill's principle that only the imminent prospect of harm to others licenses restrictive laws." (p. 9) Consequently, he needed another test to determine when conduct reached regulability—and disgust proved to be a help-

ful measure (p. 10). Average man on the street feeling a sense of disgust? Fair ground for regulation.<sup>3</sup> Leon Kass, on the other hand, does not focus on disgust as an expression of social convention, as Devlin does, but rather as a warning resulting from the public's internal, human-natured, religious reactions.

As she does with so many other pro-disgust arguments presented in the book, Nussbaum dismantles the arguments piece by piece, harshly examining the examples Devlin and Kass used to defend their theories. For example, rape and drugs are regulated because they cause other individuals harm (p. 11). Thus, Nussbaum argues that, as examples, they do not demonstrate that disgust is a more logical test for regulability (p. 11). Nussbaum acknowledges that "Devlin and Kass do not argue well. That does not prove, however that they are wrong." (p. 13)

To prove them wrong, Nussbaum turns to history and reveals the disgust narrative's role in the subordination of various historically oppressed groups, from the untouchables in India to Jews during the Holocaust (p. 21). For many readers, her discussion of these groups will be familiar, but the side-by-side comparison in the context of the politics of disgust spins a new common thread. The fact that this history is so familiar and yet fits so remarkably well into this disgust frame illuminates the grave consequences of the politics of disgust in a way that is more striking and powerful than mere quotations of disgust rhetoric ever could be.

**Humanity: "In general, the Constitution recognizes that equal respect for individuals requires the protection of extensive spheres of liberty, so that they may engage in conduct that is meaningful and significant, forming a key part, for them, of the pursuit of happiness (speech, religious belief and practice, etc). This liberty is not given only to nice people, just as it is not given only to rich people. It is given equally to all." (p. 35)**

The second chapter is as lofty and beautiful as the first chapter was stuck in the annals of hatred and filth. While the first chapter contained quotations comparing people to maggots, in the second chapter, Susan B. Anthony claims the ballot as the way to secure the "blessings of liberty." (p. 33)

It is here that Nussbaum examines the politics of humanity through the lens of U.S. constitutional tradition and the promise of equal liberty in which it is inherent (p. 35). She specifically compares sexual orientation to religious freedom during our nation's beginning and to other forms of systemic disadvantage, like race, gender, and disability. Ending the chapter, Nussbaum concludes that imagination is a necessary component of the politics of humanity (p. 49).

These comparisons are surprising, and they are effective. While it is very

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3. Devlin calls this person "the man on the Clapham omnibus," and determines that when he is disgusted by something that does not directly affect him, the conduct then is "so abominable that its mere presence is an offence." (p. 10)

common to compare the struggle for gay rights with previous battles for civil rights, it is less common to compare perspectives on sexual orientation with perspectives on religious freedom. Nussbaum will captivate her readers who care about both religious freedom and sexual orientation and leave them wondering why nobody had analogized these issues before. However, it is possible that this response is simply the happy relief of a reader who has just spent a whole chapter mired in disgust and is pleased to be filled with hope on high—the promise of our Constitution.

How does one compare sex and religion? Nussbaum points to the importance of both religion and sexual happiness to our self-definition, identity, and self-expression (p. 39). She concludes that even if sex is unlike religion in many ways, it is still very personal, very intimate, “connected to a sense of life’s ultimate significance, and utterly non-trivial.” (p. 39)

As a result, the origins of religious freedom in our country, for Nussbaum, have wisdom for those seeking sexual freedom. Our Constitution was not shaped by notions of religious freedom because colonists actually had respect for differing beliefs and practices, but rather because they “were inspired by a more basic underlying idea of respect for persons, for our fellow citizens as bearers of human dignity and conscience.” (p. 38) Even if we believe our fellow citizens are wrong, we can recognize that they are still like us in some ways and that they deserve the respect of our laws.

After all, “misogynists and racists can support the legal regime inaugurated by *Brown*, *Loving*, and the gender regime . . . just so long as they hold the basic view that all citizens are and ought to be equal under the law.” (p. 44) This is undoubtedly true, and yet, feels divorced from the state of mind that leads to misogyny and racism in the first place. Misogyny and racism seem irrationally disrespectful and yet, equality under the law so rational and respectful—opposites. Nussbaum must sense this dichotomy, because she concludes her second chapter discussing the need for imagination, or the ability to envision what somebody else is pursuing, and respect that they, too, are a *person*. Can a hateful person believe so much in equality that they can retain some respect for the other as a person? It seems that once you have the ability to respect, hate becomes very hard.

**Sodomy Laws: “Under the laws that used to exist in all states, what people did consensually and in seclusion, without inflicting anything on outsiders, without even the knowledge of outsiders, could become the basis for criminal prosecution and, often, for severe criminal punishment.” (p. 55)**

For Nussbaum, a shift in judicial imagination is frequently what enables a shift in the law. In her third chapter, she addresses sodomy laws and the complex issues of privacy and liberty that are raised when these laws are challenged. Sodomy laws are part of an old tradition; until 1961, all fifty states outlawed sodomy in some form (p. 61). These laws have two purposes according to Nussbaum: regulating nonprocreative sex acts and policing homosexual behavior (p. 61).

The intrusiveness of sodomy laws is perhaps the most obvious problem, but Nussbaum's examination of the laws of several states reveals that they are also "intolerably vague." (p. 67) Further, they are either facially discriminatory or applied in a discriminatory manner because the "prudent heterosexual can be a law-abiding citizen without giving up sex while the homosexual basically has to give up sexual relations completely." (p. 67)

Nussbaum gets more specific—on both a personal and legal level—with *Bowers v. Hardwick*<sup>4</sup> and its overruling in *Lawrence v. Texas*.<sup>5</sup> These cases and this shift will be familiar to those who have taken constitutional law, but Nussbaum digs deeper than most constitutional law courses. Readers are treated to the litigants' story, the outside forces, and, of course, the always-familiar judicial reasoning.

The litigation that led to the Supreme Court's decision in *Bowers* all began when a police officer walked into Michael Hardwick's bedroom and arrested him for sodomy (p. 78). And yet, as familiar as the legal community is with the court's reasoning, few law students know what led up to that pivotal intrusion. That same officer had originally stopped outside a gay bar as Hardwick was leaving and throwing away his beer (p. 77). The officer questioned Hardwick and gave him a ticket for drinking in public (p. 77). The ticket was filled out incorrectly—with two different dates to appear in court in two different locations (p. 77). When Hardwick did not appear in court on the first date, the same officer rushed a warrant for his arrest (p. 77). Then, the same officer visited Hardwick's home once when he was not there. The officer returned to Hardwick's home and entered his bedroom and found Hardwick engaging in oral sex (p. 78).

When the case reached the Court, the Justices upheld Georgia's sodomy law by a five to four vote (p. 79). Nussbaum blames a lack of empathetic imagination and categorizes the case as one that no technical legal argument can resolve. Regardless, Justice White—along with Justice Burger, in a concurrence—took a narrow legal approach that is "morally obtuse in a way that shocks." (pp. 80-81) Justice Burger's concurrence states: "To hold that the act of homosexual sodomy is somehow protected by a fundamental right would be to cast aside millennia of moral teaching." (p. 80) Though she does not cite any literal disgust language, Nussbaum believes that these opinions "inhabit the same world" as disgust-based condemnation because the sentiment is there (p. 82). The Justices let a perception based in stigma determine that a right does not exist.<sup>6</sup>

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4. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

5. *Lawrence v. Texas*, 539 U.S. 558 (2003).

6. Nussbaum explains:

Even at the time, when widespread animus and prejudice against homosexuals still existed in the United States, it should have been easy to see that what they were asking to be able to do legally bore not "no resemblance," but a very close resemblance to what heterosexuals often do legally. . . . What he was doing in his bedroom was exactly like what millions of heterosexuals, married and unmarried, were doing legally all over America. (pp. 81-82)

This is the most legalistic end of the politics of disgust; and as Nussbaum is trying to make the connection, it seems like an attenuated link to the visceral and emotional politics of disgust. Yet, this is one of the ugliest gay rights cases in Supreme Court jurisprudence. Maybe a judicial opinion, with its abstraction and formality, will never nakedly reveal the rhetoric of disgust, just hint at its undercurrents.<sup>7</sup>

But in 2003, sixteen years after *Bowers* was decided, the Supreme Court overruled it in *Lawrence*. The *Lawrence* Court held that *Bowers* “was not correct when it was decided and it is not correct today” and instead based its decision on both due process and equal protection liberties (pp. 86-87). However, Nussbaum is not without criticisms. *Lawrence*, she says, relies too much on the murky legal issue of privacy (p. 87).<sup>8</sup> Further, the opinion focuses too much on the fact that the sex occurred in a home (p. 88). For Nussbaum, the location makes no difference; all that matters is the presence of consent and whether somebody was subjected to direct offense (p. 88). Still, *Lawrence* put the politics of humanity in the judicial sphere.

***Romer*: “The changes envisaged in Amendment 2 are sweeping. Gays and lesbians are singled out from all others and put in a special class of their own: only they may not seek or enjoy specific legal protection from discrimination.” (p. 100)**

By the fourth chapter, the reader has settled into the legal portion of the book—just in time for an examination of the famous equal protection case, *Romer v. Evans*.<sup>9</sup> In *Romer*, the Court found that a Colorado amendment (Amendment 2) that disqualified gays and lesbians from antidiscrimination provisions demonstrated irrational animus, and thus failed rational basis review (p. 111).

More than any of the other chapters, chapter four is a *story*—multi-dimensional and detailed. Nussbaum follows *Romer* more closely than she follows any of the other cases analyzed in the book—perhaps because she was one

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7. The role of the rhetoric of disgust in judicial opinions is an interesting one. The absence of literal disgust language complicates the reader’s assessment of Nussbaum’s thesis. Perhaps the absence of a Devlinesque disgust rationale even *further* undermines the politics of disgust. On the other hand, perhaps the absence of this language is simply indicative of where we are in the transition between disgust and humanity.

8. Earlier in the chapter, Nussbaum analyzes *Griswold v. Connecticut* and is critical of how notions of privacy and enumeration muddies judicial analyses. *Griswold v. Connecticut*, 381 U.S. 479 (1965). She states:

Privacy is one of the most vague and confusing concepts in the law. It includes ideas of informational secrecy, modesty, seclusion, and decisional autonomy, in a potentially confusing way. In the area of sexual liberty, the idea of privacy suggests an idea of decisional freedom, the idea that certain choices (of intimate association, of childbearing and contraception) are for people to make on their own, with no supervision from the state. It also suggests an idea of seclusion, pertinent to the protection of others from offense, and the idea of the home as privileged space, where government has no business. (pp. 74-75)

9. *Romer v. Evans*, 517 U.S. 620 (1996).

of the witnesses who testified at trial.<sup>10</sup> Reading Nussbaum's description of Colorado politics and the vitriol that made its way out of witnesses' mouths in the courtroom made me wonder whether it was the experience of testifying in court that first made her believe disgust-based politics was playing a role in sexual-orientation discrimination. The scene she paints drips with the politics of disgust (pp. 108-09). It is so bad, actually, that Nussbaum believes the history of Amendment 2 could help show the extent to which gays and lesbians have been discriminated against in future equal protection challenges (p. 122). Nevertheless, disgust was presented to the court, and yet, in *Romer*, humanity prevailed. As Nussbaum explains, "[r]arely had disgust been so openly on display in a Supreme Court case, and rarely has the Court rejected its politics so plainly." (p. 123)

**Marriage: "In other words, marriage is a fundamental liberty right of individuals, and because of that, it also involves an equality dimension: groups of people cannot be forced out of that fundamental right without some overwhelming reason." (p. 154)**

In the fifth chapter, the book aligns with the modern debate about marriage—both the legalization of gay marriage and heterosexual marriage. Nussbaum clearly and methodically dismantles the most common objections to same-sex marriage.

Often, those in opposition to same-sex marriage assert that their position defends traditional marriage, and consequently, Nussbaum begins by looking at the complicated institution of marriage itself. The state treats it solemnly and yet casually. Just filling out a form allows anybody to marry (p. 130). Yet those who want to protect marriage "wax nostalgic" for something that never existed (p. 133). Historically, marriage was not the personification of figurines atop a wedding cake; rather, polygamy was common during the time of the Old Testament; in ancient Rome, most men married multiple times; and even in early American history, people did not bother divorcing before marrying again (pp. 134-35). Moreover, those in defense of marriage bemoan the divorce rate today. Yet, the divorce rate is high today partly as a result of women's political empowerment, which has enabled women to leave bad marriages, and partly because people are living longer (pp. 138, 146).

Still, after undermining the nostalgia-for-marriage arguments, Nussbaum assumes, for the sake of argument, that marriage is evolving in a problematic way. She asks, then, why society does not adopt policies that promote marriage like family and medical leave, marital counseling, and better domestic violence laws (p. 146). The "objector" might retort that the legitimation of same-sex mar-

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10. See Daniel Mendelsohn, *The Stand: Expert Witnesses and Ancient Mysteries in a Colorado Courtroom*, LINGUA FRANCA, Sept.-Oct. 1996, available at <http://linguafranca.mirror.theinfo.org/9609/stand.html>.

riage demeans traditional marriage, thus making it less valuable (p. 146). But it is with this argument that Nussbaum returns to the politics of disgust theory: “[t]he idea that same-sex unions will sully traditional marriage therefore cannot be understood without moving to the terrain of disgust and contamination.” (p. 148)

Nussbaum’s legal discussion of a “right to marry” starts off a little more uncertainly than much of her other legal analysis, but her conclusions anticipate the ones Judge Walker made in the constitutional challenge to California’s Proposition 8. Is there a fundamental “right to marry,” or is it instead is a discrimination right? (pp. 150-51) If it is just a discrimination right, then the state could just not offer marriages at all, so long as it does not offer them unequally (p. 151). But a few judicial opinions, including *Loving v. Virginia*,<sup>11</sup> have discussed marriage as though it were a fundamental right, and those decisions have intermingled a due process analysis in with the equal protection analysis that would not apply if marriage were simply a discrimination right (p. 151). Ultimately, Nussbaum concludes that “marriage is a fundamental liberty right of individuals, and because it is that, it also involves an equality dimension.” (p. 154)<sup>12</sup>

Her conclusion that marriage is a fundamental right is interesting in the context of her previous discussion of marriage and what seems like her skepticism of any role for the state in marriage. This exemplifies a tension in the scholarship and the gay community: a desire for equality combined with uncertainty about whether state-sponsored marriage is the best fight.<sup>13</sup> Some believe that state-sponsored marriage—the state’s preference for couple-hood—might not make sense for everybody.<sup>14</sup>

Interestingly, Judge Walker began the legal portion of his decision in the Proposition 8 case, *Perry v. Schwarzenegger*, with a clear proclamation: “[t]he freedom to marry is recognized as a fundamental right and protected by the Due Process Clause.”<sup>15</sup> The parties in the case, however, did not dispute whether the right was fundamental, just whether plaintiffs were seeking to exercise that fundamental right or to create a new one, a right to “same-sex marriage.”<sup>16</sup> Judge Walker then examined the history of marriage to determine if the specific right

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11. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (calling marriage “one of the basic civil rights of man”).

12. In support of this conclusion, Nussbaum cites *Turner v. Safley*, 482 U.S. 78 (1987), which “determine[d] that the restriction of prison marriages violates the Due Process Clause’s privacy right.” (p. 153) For Nussbaum, the Court’s finding of unconstitutionality based, in part, on due process grounds indicates that marriage is a fundamental right.

13. Patrick J. Egan & Kenneth Sherrill, *Marriage and the Shifting Priorities of a New Generation of Gays and Lesbians*, P.S.: POL. SCI. & POL., Apr. 2005, at 229.

14. See, e.g., Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003) (examining the legal benefits of marriage).

15. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010).

16. *Id.* at 991-92.

the plaintiffs were seeking to exercise is fundamental and determined that it is.<sup>17</sup> He continued: “[t]o characterize plaintiffs objective as ‘the right to same-sex marriage’ would suggest that plaintiffs seek something different from what opposite-sex couples across the state enjoy—namely, marriage.”<sup>18</sup>

After Nussbaum anticipates Judge Walker’s holding that marriage is a fundamental right, she shifts to an analysis of the state court decisions that were on the books at the time of her writing in 2009 (p. 156). She considers the equal protection analyses that these courts—Massachusetts, California, Connecticut, and Iowa—have performed, their determinations of what level of review is necessary, and what state interests lie in favor of restricting marriage (pp. 158-60). Judge Walker, for one, found that sexual orientation classifications should be subject to strict scrutiny, *but* that Proposition 8 does not even pass rational basis review.<sup>19</sup> As to the state interests, three of the courts Nussbaum cites determined that neither an interest in tradition nor policy considerations were “sufficiently strong,” as did Judge Walker (p. 160). Nussbaum’s favorable commentary about these opinions would likely reflect her thoughts on Judge Walker’s similar reasoning in the Proposition 8 decision—that “as legal reasoning it is extremely well done.” (p. 160) Nussbaum continues: “[t]his is exactly the sort of situation in which judges have a legitimate role to play, standing up for minorities whose fundamental rights have not been given a fair hearing in the majoritarian political process.” (p. 160)

**Sex Clubs & Public Sex: “It is not implausible for gay men to think that they cannot enjoy full social equality so long as panic-driven crusades against bathhouses and male sex clubs are a major part of social policy.” (p. 170)**

In her last chapter, Nussbaum comes full circle and settles back into one of the most disgust-prone topics: sex clubs, public sex, and risky choices in the context of both nuisance law and constitutional law. Same-sex establishments are policed much more than heterosexual swingers clubs (p. 169). This disparity, according to Nussbaum, can be a barrier to full social equality (p. 170). Because of the nature of public sex, this chapter returns to the heavy disgust rhetoric of the early chapters, and it is only after the chapter begins that the reader realizes how long it has been gone.

At this point in the book, Nussbaum first engages a field of law that is *not* constitutional law. She discusses sex clubs and public sex in the context of nui-

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17. *Id.* at 992. Judge Walker’s discussion of history moves from the race restrictions on marital partners outlawed in *Loving* to the transformation of marriage from a “male-dominated institution to an institution recognizing men and women as equals.” *Id.* at 993-94. “Yet, individuals retained the right to marry; that right did not become different just because marriage became compatible with gender equality.” *Id.* at 994.

18. *Id.* at 994.

19. *Id.* at 994-95.

sance law. This topic is the perfect forum for her to focus on John Stuart Mill's principles of self-regarding behavior and other-regarding behavior and how activity that does not cause harm to anybody else should not be regulated. Where Devlin and Kass use disgust, Nussbaum and Mill use harm as the test for regulability.

Those who argue against sex clubs where consensual sex (self-regarding behavior) occurs do so because, from their perspective, it causes harm to patrons (p. 177). However, all sorts of dangerous behaviors are not regulated. For instance, Nussbaum cites, as an example, alcohol, which can lead to violence, drunk driving, and sexual assault, and, yet, is barely regulated (p. 178). In response to the argument that criminal activity increases because criminals are drawn to sex clubs, Nussbaum argues that "[w]e should target criminals, not places of consensual activity that are sometimes patronized by criminals." (p. 182) Thus, Nussbaum concludes that, because none of the non-self-regarding justifications for regulation withstand scrutiny, there is no reason to ban sex clubs other than the disgust rationale—people picturing what is going on inside, being disgusted, and deciding to regulate (p. 177).

Interestingly, this public sex chapter—although not one of the more prevalent issues today—might be the one that best highlights and supports Nussbaum's thesis. In that way the chapter reinvigorates her thesis with the rhetoric and theorists that support it before she concludes her book.

**Conclusion: "In this area, unlike the area of race, the law has been relatively slow to protect equal rights, and the impetus toward a politics of humanity has come, more often, from the friendships of young people and, perhaps above all, from the arts, which have given us models of dignity, equality, and joy that can hardly fail to work upon people's insides in ways that prompt change." (p. 205)**

This is a book about an emotion—disgust—and how it plays into the rational enterprise that is constitutional law. Disgust forms a wall that prevents the necessary imagination or respect for another. Without that imagination, it is impossible to build an effective constitutional jurisprudence centered on ideals like equality. But if disgust truly inhibits the imagination component—which seems to be the key to this whole endeavor—the reader is left asking, what is left for the law? If the law must come after humanity or imagination—each a form of acceptance—is the law really all that important at all? It becomes difficult to determine what the role of the law is. In other words, do we need the law once we have humanity? What should lawyers do?

On a larger level, how does change happen? Between *Bowers* and *Lawrence*, between one of the most hateful Supreme Court decisions and one that turned that hate on its head, something changed. Nussbaum believes this change can be attributed to a change in "general societal attitudes." (p. 85) She claims, "[c]oming out, together with the daily operation of imagination, concern, and

friendship, had a large effect on people's views." (p. 85) Then, over a hundred pages later, in her closing, she once again returns to the power of personal relationships in creating the respect that is so crucial to the politics of humanity. This respect can stem from the real-life experience of knowing more and more people who are coming out of the closet, just as Harvey Milk encouraged his community to do in San Francisco to create a similar change in the 1970s (p. 206).<sup>20</sup> Or it can happen via the mass media, as people today all across the country watch Sean Penn play Harvey Milk with such "exuberant joy." (pp. 206-08)

But even amid such powerful personal relationships and experiences, Nussbaum believes there is a place for the law:

We should not think that legal change can effect social change on its own. That did not happen with race, and it will not happen here. Law, however, can set out parameters that express equal respect, ruling certain odious arrangements off-limits and guaranteeing all citizens equal protection of the laws that exist. In this way law protects the rights of the vulnerable and *sends a signal* to the whole society that liberty and equality are made for us all. (p. 209) (emphasis added)

The relationship between legal and social change is challenging for anybody to grapple with, and it is particularly difficult for social-justice-minded law students and attorneys. We want the law to be our shield and our sword, an all-powerful tool that both begins social change and protects citizens. But Nussbaum tells a story where social forces seem to be the change agent, rather than the law. It is a different narrative than the idealistic, lawyers-can-change-the-world tale so common in law school personal statements.

And now, after a thorough examination of the social and legal history surrounding gay and lesbian rights, we are left wondering if perhaps the law cannot create the change but rather merely "send a signal." (p. 209) Still, maybe a legal signal, in the right social environment, can effect change as well. It is no insignificant signal. As Nussbaum puts it, "[c]onstitutional law expresses our deepest sense, as a society, of what freedom and equality are; of what it means to have fundamental rights; of what it means to have certain protected areas of both liberty and equality that are seen as inherent in the very idea of human dignity." (p. 208)

I finished *From Disgust to Humanity* just as Judge Walker was issuing his decision that Proposition 8 was unconstitutional. Right now, the future of that litigation is uncertain, except that it is certain to continue. And yet, Judge Walker's decision, and the politics of humanity inside it, has been written about in newspapers, featured on television, and has been the topic of conversation across this great country.<sup>21</sup> An editorial in the *New York Times* from the day

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20. MILK (Focus Features 2008).

21. See, e.g., Maura Dolan, *Judge Strikes Down Prop. 8, Allows Gay Marriage in California*, L.A. TIMES (Aug. 4, 2010), <http://latimesblogs.latimes.com/lanow/2010/08/prop8-gay->

Judge Walker's decision came down expressed this sense that his opinion did more than simply express the law. It stated: "The decision, though an instant landmark in American legal history, is more than that. It also is a stirring and eloquently reasoned denunciation of all forms of irrational discrimination, the latest link in a chain of pathbreaking decisions that permitted interracial marriages and decriminalized gay sex between consenting adults."<sup>22</sup>

Sending a signal. Expressing our deepest sense of freedom and equality.<sup>23</sup> We will just have to wait and see if—or rather when, and in what form—the politics of humanity prevails.

*Kate Ericsson*

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marriage.html; Jesse McKinley & John Schwartz, *California Rejects Same-Sex Marriage Bans in California*, N.Y. TIMES (Aug. 4, 2010), [http://www.nytimes.com/2010/08/05/us/05prop.html?ref=vaughn\\_r\\_walker](http://www.nytimes.com/2010/08/05/us/05prop.html?ref=vaughn_r_walker); John Schwartz, *In Same Sex-Ruling, an Eye on Supreme Court*, N.Y. TIMES (Aug. 4, 2010), [http://www.nytimes.com/2010/08/06/us/06assess.html?ref=vaughn\\_r\\_walker](http://www.nytimes.com/2010/08/06/us/06assess.html?ref=vaughn_r_walker).

22. *Marriage is a Constitutional Right*, N.Y. TIMES (Aug. 4, 2010), [http://www.nytimes.com/2010/08/05/opinion/05thu1.html?ref=vaughn\\_r\\_walker](http://www.nytimes.com/2010/08/05/opinion/05thu1.html?ref=vaughn_r_walker).

23. *See also Excerpts From the Judge's Ruling on Proposition 8*, N.Y. TIMES (Aug. 5, 2010), [http://query.nytimes.com/gst/fullpage.html?res=9C0DE6D8163EF936A3575BC0A9669D8B63&ref=vaughn\\_r\\_walker](http://query.nytimes.com/gst/fullpage.html?res=9C0DE6D8163EF936A3575BC0A9669D8B63&ref=vaughn_r_walker) (publishing particularly powerful quotations from Judge Walker's decision). It is also worth noting that the *New York Times* website, as did other prominent media outlets, posted a link to the full text of the decision—all 138 pages of it.