

# A LOT TO ASK: REVIEW ESSAY OF MARTHA NUSSBAUM'S *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW*

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The title of Martha Nussbaum's recent book *From Disgust to Humanity: Sexual Orientation and Constitutional Law* encapsulates well the book's normative and descriptive claims. In Nussbaum's descriptive account, the politics of disgust have been and remain at the root of all opposition to recognition of legal rights for homosexuals, whether the issue be sodomy laws, discrimination on the basis of sexual orientation, same-sex marriage or venues for public sex. Although she acknowledges that explicit appeals to disgust have declined in recent years, Nussbaum argues that disgust "has not gone away, it has gone underground."<sup>1</sup> In Nussbaum's normative view, disgust not only should be ruled categorically out of bounds as a basis for law and policy, but must be thoroughly extirpated and replaced with a "politics of humanity" involving not only sympathy, imagination, and respect, but "something else, something closer to love."<sup>2</sup>

From the moment early in its conception when she first sought my input on this new book, I had to confess myself troubled by its central claims, given my own very different take on the constitutional law of sexual orientation.<sup>3</sup> As I shall explain in the remainder of this essay, it seems to

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<sup>1</sup> MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW*, at xv (2010) [hereinafter NUSSBAUM, *FROM DISGUST TO HUMANITY*].

<sup>2</sup> *Id.* at xvii.

<sup>3</sup> See, e.g., Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 SUP. CT. REV. 75 [hereinafter Case, *Of "This" and "That"*]; Mary Anne Case, *Marriage Licenses*, 2004 Lockhart Lecture (October 26, 2004), 89 MINN. L. REV. 1758 (2005); Mary

me that *From Disgust to Humanity* descriptively accounts for too little and normatively asks for too much. Although I am a lawyer and not a moral philosopher, I shall begin by questioning the more philosophical, less legal aspect of Nussbaum's normative claims before moving on to give an alternate account of developments in the law.

First let me ask, what is the minimum Nussbaum now demands of the opponents of homosexuality? From this overarching question a number of subsidiary questions arise. These include: If disgust has indeed, as Nussbaum acknowledges, "gone underground" in contemporary debates about gay rights, is this a bad thing? If disgust is out-of-bounds, is there, in Nussbaum's view, a more appropriate emotion for opponents of homosexuality to mobilize in aid of their opposition? Or is Nussbaum in effect demanding nothing short of complete capitulation from them?

Nussbaum has long been of the view that disgust is always an illegitimate emotion on which to ground law and policy. She first developed this view a decade ago in response to William Ian Miller and Dan Kahan. Miller, in *The Anatomy of Disgust*, while acknowledging that "the idiom of disgust" had its dangers, argues that it not only is well nigh indispensable, it also has "certain virtues for voicing moral assertions. It signals seriousness, commitment, indisputability, presentness and reality."<sup>4</sup> Kahan, embracing Miller's account, seeks to "redeem disgust in the eyes of those who value equality, solidarity, and other progressive values" and, thus redeemed, to mobilize it for use in the criminal law.<sup>5</sup> Nussbaum insisted in response that, as with envy and jealousy, "the specific cognitive content of disgust makes it always of dubious reliability in social life, but especially in the life of the law."<sup>6</sup> As Nussbaum sees it, taking her cue from Paul Rozin,<sup>7</sup> disgust is "anti-social";<sup>8</sup> it involves a discomfort with and repudiation of our animal

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Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993).

<sup>4</sup> WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 180 (1997).

<sup>5</sup> Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF THE LAW* 63 (Susan Bandes ed., 2001).

<sup>6</sup> Martha C. Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies and the Law*, in *THE PASSIONS OF THE LAW* 22 (Susan Bandes ed., 2001).

<sup>7</sup> *Id.* at 23–25.

<sup>8</sup> *Id.* at 28.

nature which is then “projected outwards onto vulnerable people and groups.”<sup>9</sup>

Nussbaum does not, however, repudiate the use of all emotions in formulating law and policy. In earlier work, she suggested that anger or indignation compared favorably with disgust in this regard:

Indignation, by contrast [with disgust], centrally involves the idea of a wrong or a harm . . . done, whether to the person angered or to someone or something to whom that person ascribes importance. . . . Because the notion of harm or damage lies at the core of anger’s cognitive content, it is clear that it rests on reasoning that can be publicly articulated and publicly shaped. Damages and harms are a central part of what any public culture, and any system of law, must deal with; they are therefore a staple of public persuasion and public argument.<sup>10</sup>

Although she acknowledged in *Hiding from Humanity* that “the reasons underlying a person’s anger . . . can be false or groundless,”<sup>11</sup> she went on to valorize anger as a basis for legal sanctions in a variety of situations for which scholars such as Dan Kahan had in her view inappropriately foregrounded and endorsed the language of disgust. “To violations of the equality of a fellow citizen, the appropriate response is anger, not disgust,”<sup>12</sup> she claimed, going on to make the same argument with respect to a variety of sex crimes, including necrophilia and the use of “religiously charged objects for sexual purposes” such as the “the sexual profanation of a religious sanctuary”:<sup>13</sup>

What we feel when a religious sanctuary is violated is outrage: outrage because the protection of religion is a value to which we have deeply committed ourselves as a society. Similarly, what we feel when someone takes the corpse of our loved one and damages it is anger, because it is a particularly grave kind of harm, whether or not we also view it as similar to a rape. When the surviving spouse has sex with the corpse, we may feel pity,

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<sup>9</sup> *Id.* at 22.

<sup>10</sup> MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 99 (2004) [hereinafter *NUSSBAUM, HIDING FROM HUMANITY*].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 147.

<sup>13</sup> *Id.* at 155–56.

but we will also feel outrage that he was prepared to care so little about whether there was a living and consenting being there. In all of these cases, we may also feel disgust, but perfectly good reasons for whatever legal regulation we might wish to contemplate are contained in our response of outrage.<sup>14</sup>

Outrage is indeed what many opponents of gay rights say they feel at many of the examples of homosexual activity Nussbaum's new book is concerned with, from public displays of affection by gay couples and gay pride events, to legal recognition of same-sex marriage and adoption of children by same-sex couples, from the presence of sex clubs in neighborhoods to the presence of gay teachers and gay-themed readings in public school classrooms. But the word "outrage" only appears in *From Disgust to Humanity* to describe the reaction Nussbaum, and by implication any right thinking person, has to the words and actions of gay rights opponents such as Paul Cameron,<sup>15</sup> never once as a reaction she recommends to those opponents in preference to disgust.<sup>16</sup> Nussbaum seems to see gay rights opponents only as "outrageous," not as outraged.

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<sup>14</sup> *Id.* at 157. Additionally, with respect to a court's refusal to accede to the request of a convicted "murderer named Beldotti [who] apparently killed in order to gratify sadistic sexual desires" that "the dildoes, photos of the victim, the trash bags in which she had been placed, and other sexual paraphernalia be returned to his representatives outside prison," Nussbaum insisted in *Hiding from Humanity* that "outrage is sufficient to explain the result and why it is correct; we do not need to rely on disgust." NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 10, at 170. I include this example because it also involves sex acts as to which Nussbaum has recommended outrage as an alternative to disgust in calibrating a legal response, but I relegate it to a footnote because, as Nussbaum herself points out and I agree, there are a number of justificatory explanations for the legal result in the *Beldotti* case that go well beyond a need to rely on either emotion.

<sup>15</sup> See NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 1, at 79–80 (noting that in *Bowers v. Hardwick*, "Paul Cameron's most outrageous claims were not foregrounded"); see also *id.* at 55 ("To most Americans today, however, it seems outrageous that the police would have the right to enter someone's bedroom to see what sexual acts are being performed there.").

<sup>16</sup> Nussbaum does not recommend anger or indignation in response to gay rights opponents either. I am not sure there is a distinction relevant for present purposes between "outrage," "anger" and "indignation," words dictionaries tend to treat as synonyms. To the extent Nussbaum does distinguish between them, the distinction she makes is puzzling, in that she seems to be more receptive to "outrage" and "anger" than to "indignation" as a basis for law and policy, notwithstanding that "indignation" is usually defined as "anger aroused by something unjust, unworthy, or mean." This may result from her association of the word "indignation" with Devlin's use of it in *The Enforcement of Morals*, where, in an argument of which she disapproves, he couples "indignation" with "intolerance" and "disgust" as essential "forces behind the moral law" which justify prohibitions on homosexual sex.

Because I do not view ratcheting up the level of anger in the gay rights debate as conducive to either civil peace or moral progress, I must confess myself relieved that Nussbaum does not in the end recommend outrage as a substitute for disgust to gay rights opponents. I am troubled, however, that her reasons for failing to do so seem to amount to an unwillingness to recognize any scope whatsoever for legitimate opposition to what Scalia infamously dubbed “the so-called homosexual agenda, by which [he] mean[s] the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”<sup>17</sup> To be clear, like Nussbaum, I have wholeheartedly signed on to this agenda. But I do not think much in the way of legal or social progress toward it will be achieved if we misunderstand or misrepresent the views of our opponents or if we ask too much of them. Later in this essay, I shall give a fuller account of why in my view attempting to reduce all opposition to gay rights to disgust is as a descriptive matter neither accurate nor helpful.

Before doing so, however, let me consider further the normative demands Nussbaum makes of gay rights opponents. According to Nussbaum, “Disgust has two opponents today, each increasingly powerful in social, political, and even legal life: respect, and sympathy.”<sup>18</sup> By speaking in the context of the regulation of homosexuality only of the “opponents” of disgust, rather than of alternatives to it, as she did when discussing other regulatory regimes for which the language of disgust had been mobilized such as those governing animal cruelty and necrophilia, Nussbaum signals her unwillingness seriously to consider any alternative reasons to those sounding in disgust for laws or policies disfavoring homosexuality. She demands of gay rights opponents, not a transformation of rhetoric, but no less than “a transformation at the level of the human heart.”<sup>19</sup> They should, in her view, cultivate what Adam Smith called “humanity” (defined by Nussbaum as “a capacity for generous and flexible engagement with the sufferings and hopes of other people”) and what Cicero called “humanitas” (defined by Nussbaum as “a kind of responsiveness to others that prominently included the ability to imagine

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PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 17 (1965). For Nussbaum’s critique of Devlin, see, e.g., NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 10, at 75. I will suggest below ways in which I think Nussbaum fails to take full account of Devlin’s argument.

<sup>17</sup> *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J. dissenting).

<sup>18</sup> NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 1, at xv.

<sup>19</sup> *Id.* at xx.

their experiences”).<sup>20</sup> For this politics of humanity “respect, as usually conceived, is not sufficient . . . something else, something closer to love, must also be involved,” Nussbaum insists.<sup>21</sup>

I fear I am not as sanguine as Nussbaum seems to be that the necessary result of imaginative engagement with the experiences of gay people will inevitably be embrace of what Scalia calls the homosexual agenda. Imagination is not what Paul Cameron, focused as he is on vivid images of sweaty, bloody, sticky, dangerous “fecal sex,”<sup>22</sup> seems to lack. Nussbaum, who thinks Cameron views gays as inhuman “slimy slug[s],”<sup>23</sup> would respond that his all too vivid imagination lacks sympathy and responsiveness to others, but, whether or not this is true of Cameron, it is surely not true of all opponents of gay rights.<sup>24</sup> At least some of those who favor legal restrictions on homosexual conduct do so not because they fail to imagine that choices faced by gay people are “relevantly similar to their own,”<sup>25</sup> but because they can imagine it all too well. Consider, for example, the reaction of one of my employers at the time, a partner at a large New York law firm and a married father, on the day *Bowers v. Hardwick*<sup>26</sup> came down. “This is a great decision,” he insisted, “because we are all inherently bisexual and it saves us from ourselves.” Nussbaum seems to assume that imagination and sympathy will necessarily lead heterosexuals to analogize gay desires to their own socially approved desires for respectable love; she should consider more seriously the risk that some heterosexuals will instead draw an analogy to those of their own desires they see themselves as having nobly struggled to suppress in the interests of respectability, moral virtue or social order, whether those dark desires be for promiscuity, adultery, BDSM, fetish sex, or homosexuality itself. Even if engaging in homosexual activity or a homosexual “lifestyle” is not just the province of “others” but

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<sup>20</sup> *Id.* at xviii (internal citations omitted).

<sup>21</sup> *Id.* at xviii.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at xvii.

<sup>24</sup> I am grateful to Mary Anne Franks for focusing my attention on this point.

<sup>25</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at 48.

<sup>26</sup> 478 U.S. 186 (1986).

something one might be tempted to do oneself, it does not necessarily follow that one will welcome legal approval to do so.<sup>27</sup>

Moreover, some really do hate the sin but love the sinner. Focus on the Family's decision to use the name "Love Won Out" for the program in which it urges church leaders and family members to respond "in a Christ-like way to the issue of homosexuality" and seeks to offer "hope . . . to those struggling with same-sex attraction" cannot easily be dismissed as hypocritical or self-deceptive.<sup>28</sup> Love Won Out's hope is that, with the love of Christ and their family to strengthen them, those who struggle with same-sex attraction—which the program stresses is not their own fault but the result of, for example, childhood sexual molestation or an inadequate display of paternal love<sup>29</sup>—will be able to turn away from a gay lifestyle "fraught with all sorts of dangers and misery."<sup>30</sup> Precisely their love leads some to wish to do all in their power to rescue those they love from homosexuality, and, in their view, the law should aid them by putting brakes on the slide down the slippery slope to acceptance of homosexuality.

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<sup>27</sup> See analysis of the *Lawrence* briefing in Case, *Of "This" and "That," supra* note 3, at 90 ("While O'Connor may be right that 'those harmed by this law are those who have a same sex sexual orientation,' on the view of many of Respondent's amici those most benefited by the law are those without such an orientation who might otherwise be tempted. The assumption in briefs supporting the Respondent is that anyone can do these acts and anyone who does do them can be harmed by them.").

<sup>28</sup> See Love Won Out, <http://www.lovewonout.com> (last visited Feb. 1, 2010). Their "goals include aiding parents who want to learn how to better love their sons or daughters without compromising their faith." "Thank you for giving me hope for a loving relationship with my son," writes one parent on their website. Love Won Out: Frequently Asked Questions, <http://www.lovewonout.com/questions/> (last visited Feb. 1, 2010).

<sup>29</sup> "We advise fathers, if you don't hug your sons, some other man will," psychologist Joseph Nicolosi, president of the National Association for Research and Treatment of Homosexuality ("NARTH") tells Love Won Out participants. Jim Burroway, *Part 2: 'Love Won Out' - Parents Struggle With 'No Exceptions'*, BOX TURTLE BULLETIN (Feb. 22, 2007), <http://www.boxturtlebulletin.com/2007/02/22/228> (last visited Feb. 1, 2010).

<sup>30</sup> Jim Burroway, *Part 3: 'Love Won Out': A Whole New Dialect*, BOX TURTLE BULLETIN (Mar. 6, 2007), <http://www.boxturtlebulletin.com/2007/03/06/243> (last visited Feb. 1, 2010). Burroway, the editor of *Box Turtle Bulletin* and a gay rights activist, wrote a multipart series reporting his experiences attending a Love Won Out conference, concluding somewhat to his surprise that "there was nothing exotic or frightening about the seven hundred people who attended. . . . In fact, I found the people there to be exceptionally warm, friendly and cheerful." Jim Burroway, *Part 1: 'Love Won Out'—What's Love Got To Do With It?*, BOX TURTLE BULLETIN (Feb. 15, 2007), <http://www.boxturtlebulletin.com/2007/02/15/224>.

It is also far from clear that Nussbaum's demands on behalf of gay people would respond to the preferences of all those who have embraced, rather than struggled against, their own homosexual desires. At least some segments of the queer community might value less than Nussbaum does on their behalf the demand that others "see [them] in a certain way . . . endowing [them] with life and purpose, rather than with dirt and dross, with human dignity rather than with foulness."<sup>31</sup> Some queer projects repudiate the demand for such recognition, and instead embrace shame, dirt, outlaw status, even death and purposelessness. It may be as disrespectful of them as it of their opponents to demand imaginative sanitization on their behalf.<sup>32</sup>

Even as a project in moral philosophy, therefore, I have my doubts that Nussbaum's demand for love as a component of a politics of humanity in relation to homosexuality will succeed in the way she hopes. But Nussbaum defines her project as one in constitutional law, and in this context love seems far too much to ask. Martin Luther King, Jr. had it right in my view when he said, "The law may not be able to make a man love me, but at least it can keep him from lynching me."<sup>33</sup> Kendall Thomas was also right when he used King's statement as the epigraph for his 1992 article arguing that constitutional law needed to take into account the ways in which rulings like *Bowers v. Hardwick* were seen to license gay bashing,<sup>34</sup> not out of love for gays and lesbians, but simply so as not to breach "the

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<sup>31</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at 50.

<sup>32</sup> I am grateful to Katherine Franke for encouraging me in comments at the Nussbaum Symposium at Columbia to address this additional difficulty with Nussbaum's proposals, something I confessed myself hesitant to do because I was having difficulty enough struggling to understand and do justice to Nussbaum's arguments and to the arguments of opponents of gay rights without adding to the mix shame-embracing queer theorists, whose arguments I am particularly unconvinced I can understand or do justice to, notwithstanding the generous help I have gotten from Katherine and from Janet Halley.

<sup>33</sup> Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992). Another way of putting this objection is by analogy to Mary Becker's critique of Katherine Franke's *Theorizing Yes*. I am all for love, just as Becker is "all for more emphasis on women's right to sexual pleasure." But I would no more look to the law for love than Becker "would . . . look to lawyers for a theory of female sexual pleasure. Law solves problems, redresses harms, redistributes income. Given the purpose of law, the focus of legal feminism on sex has appropriately involved sexual harms." Mary Becker, *Commentary: Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1525 (2001) (discussing Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001)).

<sup>34</sup> Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1431 (1992).

most basic term of the social compact: the affirmative obligation of the state to use the lawful authority of government to protect citizens from lawless violence.”<sup>35</sup>

If love is beyond the law’s power to require or bestow, if love cannot be expected to be either a cause or an effect of the legal regulation of homosexuality, what of sympathy and respect? First, it is far from clear that the two necessarily lead in the same direction or that the direction either leads is inevitably one of which Nussbaum would approve. One who remains convinced that moral opprobrium should continue to attach to homosexual conduct might respond to Nussbaum’s call for respect that the highest form of respect he or she can show to gay men and lesbians is to take them seriously as moral agents,<sup>36</sup> rather than as sick, weak or helpless slaves of their sexual desires. Respect might lead an opponent to eschew anti-gay slurs, but, like love, it might motivate such an opponent even more strenuously and directly to attempt to change, or, failing that, to condemn another’s homosexual behavior. One sort of sympathy is potentially associated with pity, which not only is in some tension with respect, but is very much not what Nussbaum is urging on opponents of gay rights.<sup>37</sup> It may well be this sort of sympathy that leads some to join Nussbaum in favoring laws against animal cruelty.<sup>38</sup> This sort of sympathy may have

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<sup>35</sup> *Id.* at 1490. This is not to say I agree fully with Thomas’s argument that the constitutionality of an otherwise valid criminal law must be called into question if it is seen to license private violence, a claim I do not think can be generalized beyond the consensual criminal sodomy laws on which he focuses. Pedophiles too can attract private violence as a result of the stigma attached to their crimes, but this does not constitutionally oblige us to eliminate criminal penalties for sex with children rather than to offer better protection even to convicted criminals from such private violence.

<sup>36</sup> I have made a similar argument in the context of my critique of the German abortion laws’ mandatory counseling requirement, suggesting that perhaps “it better befits women’s dignity as independent responsible legal actors to send them to jail for aborting, rather than to mandatory counseling before they do so.” See Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in *CONSTITUTING EQUALITY* 93 (Susan H. Williams ed., 2009)

<sup>37</sup> As Katie Oliviero has observed, “while it can incite the compassionate desire to protect, vulnerability can also cue disgust, empathy’s repressed other.” See Katie E. Oliviero, *Sensational Vulnerability: Constructions of Imperiled Citizenship, Intimacy and Personhood in 21st Century Social Change* Ch. 3 *Sensational Nation: The Minutemen, Gendered Vulnerability, and Exemplary Citizenship* (Ph.D Dissertation) (draft of October 1, 2009 on file with the author).

<sup>38</sup> It does not follow from the adoption of an anti-cruelty agenda, for example by the Humane Society, that the humanity of the animals, as opposed to that of the anti-cruelty advocates, is at stake.

already played a part in the development of the constitutional law of sexual orientation, as John Jeffries's biography of Lewis Powell suggests. Jeffries, a former Powell clerk, gave the following explanation of Powell's puzzling insistence, in the course of deliberations in *Bowers v. Hardwick*, that he had never met a homosexual, notwithstanding that a substantial number of his clerks, including one in chambers during the term *Bowers* was before the Court, were gay or lesbian:

In [Powell's] upbringing, homosexuality was at least a failing, if not a sin. He later came to think of it as an abnormality, an affliction for which its bearers should not be blamed but which was vaguely scandalous. . . . He would not infer such misfortune without direct knowledge. . . . Powell routinely turned a blind eye to what he considered the failings of others. . . . His recollections of those who worked for him always focused on their abilities and achievements, not on their shortcomings.<sup>39</sup>

Although the gay clerk in Powell's chambers for the *Bowers* case, C. Cabell Chinnis, did not in so many words declare his own homosexuality to Powell, he did answer Powell's question "why don't homosexuals have sex with women" by "very bluntly sa[y]ing, 'Justice Powell, a gay man cannot have an erection to perform intercourse with a woman.'" When Powell responded "that he thought sodomy required an erection, [Chinnis] told him that gay men did, in fact, have erections with men but that was different, they were sexually aroused." What most struck Chinnis about this interchange was "that the concept of homosexuality had no content for [Powell]. He had no frame of reference."<sup>40</sup>

Powell exhibited sympathy for gay people to what may have been the best of his imaginative abilities, not only in asking the question of Chinnis, but also in what he made of the answer. Powell noted after conference in *Bowers*,

I would not argue that every person has a fundamental right to engage in sodomy any time, any place. There are men who can gratify their sexual desire only with another man. Given this fact, I find it difficult lawfully to imprison such a person who confined his abnormality to a private setting with a consenting homo . . .

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<sup>39</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 528 (1994).

<sup>40</sup> JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 274 (2001).

Possibly I could Remand to determine whether Hardwick suffers from this abnormality.<sup>41</sup>

Powell even “raised the possibility that the Constitution might protect homosexual relationships that resemble marriage—stable, monogamous relationships involving members of the same sex,” but was talked out of this approach by his Mormon clerk, Mike Mosman, who warned that

once you conclude that homosexual and heterosexual “marriages” are of equal Constitutional status, you would necessarily suggest that homosexuals have a right to adopt and raise children. Further, states would have great difficulty justifying other restrictions on homosexuality—such as no avowed homosexual public school teachers—since the Constitution would place homosexual and heterosexual relationships on a par with each other. These possibilities suggest that the “marriage” idea has too many implications for other cases that you might want to decide differently.<sup>42</sup>

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<sup>41</sup> Handwritten notes by Justice Powell, dated April 3, 1986, from Powell archives, *Bowers v. Hardwick* file, Washington & Lee. See Case, *Of “This” and “That,” supra* note 3, at 91, n.71 (“Could we view homosexuals like drug addicts in the Netherlands, entitled to their fix once they can demonstrate they can’t shake the habit? Or like prostitutes who can ply their trade once they register?”).

<sup>42</sup> See Case, *Of “This” and “That,” supra* note 3, at 107–08, n.140 (quoting Memo dated April 1, 1986, identified in Powell’s hand as “Prepared for me by Mike after we had discussed this troublesome case,” from Powell archives, *Bowers v. Hardwick* file, Washington & Lee.). Before this memo, most of the worries Powell articulated concerning the implications of a victory for Hardwick and the absence of a “limiting principle” concerned the substantive due process parade of horrors, rather than implications sounding in equal protection. Both Powell’s own notes worrying about the absence of a “limiting principle” and Mosman’s earlier memo dated March 29, 1986, had repeatedly expressed concern that the result of the Court’s ruling for Hardwick might be “unchecked sexual freedom, including prostitution because ‘no limiting principle comes to mind.’” See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 298 (2001) (observing that Powell’s handwritten notes ask about a due process parade of horrors such as “Bigamy? Incest? Prostitution? Adultery?” and not an equal protection parade of horrors such as “Homosexual marriage? Homosexual teachers? Homosexual soldiers? Adoption by homosexuals?”). The hints that Powell might have been most willing to protect homosexual relationships for which he himself appears to have used the term marriage are a fascinating contrast to the conventional progress of debates on the subject, in which marriage is the very last thing to attract support, with many persons who favor employment non-discrimination and tolerate homosexual sexual conduct and gay and lesbian parenting still balking at recognition of gay couples. For further discussion, see Case, *Of “This” and “That,” supra* note 3, at 107.

In the end, Powell's sympathy extended only so far as to lead him to say, in a separate concurring opinion, that were Georgia to enforce the letter of its sodomy law and imprison someone like Michael Hardwick "for a single private, consensual act of sodomy" it "would create a serious Eighth Amendment issue."<sup>43</sup>

The constitutional case that best fits Nussbaum's trajectory from disgust to humanity is *Romer v. Evans*.<sup>44</sup> As Nussbaum details in her new book, Paul Cameron was hired as a consultant in the crafting and defense of Colorado's Amendment 2,<sup>45</sup> and his brand of disgust is on the surface of some of the literature circulated in support of the ballot initiative that added Amendment 2 to the Colorado constitution.<sup>46</sup> The politics of humanity, by contrast, were front and center when the case reached the U.S. Supreme Court. Indeed, as I have previously noted, *Romer* may have marked the turning point in the trajectory of Justice Kennedy, author of the majority opinion in both *Romer* and *Lawrence*:

In atmospheric terms, what being confronted with Amendment 2 may have done for the Court in general and Justice Kennedy in particular is to cause them to think of gay rights in terms of a bashed gay person in Colorado potentially bleeding to death in the streets in front of a hospital that would not admit him and left with potentially no state recourse against the bigots who bashed him, the police who declined to stop them, and the hospital prepared to let him die. [I take this image fairly directly from the oral argument in *Romer*, at which the questioning Justices, by means of examples much like this, struggled to understand the scope and implications of Amendment 2's sweeping language for the lives of gays, lesbians, and bisexuals in Colorado.] This is a much better image for the future of litigation for the rights of gays, lesbians, and bisexuals than the image of Michael Hardwick in his bedroom with his one-night-stand's penis in his mouth.... From what can be gauged from his opinions and public statements, Justice Kennedy more than most Justices is often motivated by a visceral sense of what is unjust. . . . So one way for gays and lesbians to keep winning may be for them to be able vividly to present themselves as victims of injustice, not, in the

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<sup>43</sup> *Bowers*, 478 U.S. at 197 (Powell, J., concurring).

<sup>44</sup> 517 U.S. 620 (1996).

<sup>45</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at .102.

<sup>46</sup> *Id.* at 102.

future, necessarily as the abject outlaws Amendment 2 would have made them, but with the “dignity” the Court vouchsafed them in *Lawrence*.<sup>47</sup>

Given her participation in the case as an expert witness on ancient attitudes toward homosexuality, it is understandable that *Romer* centrally shapes Nussbaum’s view of the constitutional law of sexual orientation.<sup>48</sup> *Romer* is no doubt an important case, and, in ways I have previously explored, can be seen to lead directly to the equally important *Lawrence* case.<sup>49</sup> But *Romer* is also in many ways an anomalous case, presenting few of the difficult problems the constitutional law of sexual orientation has faced and will face in the future. Justice Kennedy was quite right to begin his questioning at oral argument with,<sup>50</sup> and to include as a central feature of his majority opinion, the observation that Amendment 2

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<sup>47</sup> Case, *Of “This” and “That,” supra* note 3, at 105–6. I continue to believe, as I said in 2003, “that (1) sexual minorities should not have to be cast as abject victims in order to gain the Court’s solicitude, and (2) former Advocate publisher David Goodstein had a point when he said, ‘Never forget one thing: What this movement is about is fucking.’” *Id.* at n.134.

<sup>48</sup> In addition to her participation in *Romer*, Nussbaum’s work on India may have led her to focus on disgust. Not only does the analogy of disgust for dalits play a significant role in *From Disgust to Humanity, supra* note 1, 21–23, a recent Delhi High Court decision striking down a criminal sodomy law comes closer than any U.S. decision I know to following the model Nussbaum’s book assumes. *Naz Found. v. Govt. of NCT of Delhi*, WP(C) No.7455/2001 (July 2, 2009). The Delhi High Court insists in its decision that “[p]ublic disapproval or disgust for a certain class of persons can in no way serve to uphold the constitutionality of a statute.” *Id.* at 22. The court then rejects the argument that “Indian society considers homosexuality to be repugnant, immoral and contrary to the cultural norms of the country.” *Id.* at 24. Interestingly, the Delhi High Court explicitly included in the “class of vulnerable people that is continually victimized and directly affected by” the law in question not only “the gay community” but “MSM” (men having sex with men) and “trans-gendered individuals.” *Id.* at 7, 6.

<sup>49</sup> See, e.g., Case, *Of “This” and “That,” supra* note 3, at 105, n.132 (2003) (noting that “Scalia’s dissent insisting that *Bowers* and *Romer* could not both stand backfired on Scalia” because “the Justices in the majority in *Romer* were given, in the connection that dissent drew between *Bowers* and Amendment 2, a further reason to call the legitimacy of *Bowers* into question”).

<sup>50</sup> Transcript of Oral Argument, 1995 WL 605822 (U.S.) at \*3, *Romer v. Evans*, 517 U.S. 620 (1996) (“Here, the classification seems to be adopted for its own sake. I’ve never seen a case like this. . . . Here, the classification is adopted to fence out, in the Colorado supreme court’s words, the class for all purposes, and I’ve never seen a statute like that.”).

identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.<sup>51</sup>

Among *Romer*'s anomalies as a gay rights case is that it is squarely about identities, not about acts or agendas. Amendment 2 on its face explicitly targets "Homosexual, Lesbian or Bisexual Orientation." It does not limit itself to targeting homosexual "conduct, practices or relationships."<sup>52</sup> It also does not concern itself with classification by sexual orientation more generally, leaving intact, for example, those portions of the local Colorado sexual orientation non-discrimination laws that protect heterosexuals against discrimination.<sup>53</sup> It then takes the "class of persons" identified by "homosexual, lesbian or bisexual orientation" and removes the protection of the laws from them wholesale. As Kennedy rightly held:

Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. . . . A State cannot so deem a class of persons a stranger to its laws.<sup>54</sup>

It is important to note, first, that *no* class of persons, "even the most heinous felons convicted under the most unimpeachable of criminal laws, could constitutionally have the protection of the laws removed from them on so wholesale a basis as that found in Amendment 2."<sup>55</sup> To say that the United States Constitution prevents Colorado from conferring outlaw or pariah status on homosexuals does not distinguish homosexuals from pedophiles, necrophiliacs, or mass murderers. To say they cannot be made strangers to a state's laws does not make them favorites of the laws. Nor

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<sup>51</sup> *Romer*, 517 U.S. at 633.

<sup>52</sup> COLO. CONST. amend. 2 (2002) (*cited in Romer*, 517 U.S. at 624). This alone puts Amendment 2 dangerously close to the constitutionally prohibited category of status offense. *See Robinson v. California*, 370 U.S. 660 (1962) (holding unconstitutional the criminalization of the status of being a drug addict).

<sup>53</sup> After its passage, for example, a heterosexual job applicant in Denver could still file a complaint pursuant to local ordinance if she had been denied employment or housing on grounds of her heterosexuality.

<sup>54</sup> *Romer*, 517 U.S. at 635.

<sup>55</sup> Case, *Of "This" and "That," supra* note 3, at 93.

does it put sexual orientation where Nussbaum wants to see it, on a par with race and sex as “warrant[ing] some form of heightened scrutiny.”<sup>56</sup>

Had the language of Amendment 2 been slightly more careful and less sweeping, had it actually done only what its proponents claimed it was intended to do, which was to trump local Colorado laws protecting gays and lesbians against private discrimination in employment, housing, and public accommodation in cities such as Aspen, Boulder, and Denver,<sup>57</sup> the case might have come out differently, depriving Nussbaum and other gay rights advocates of an enormously useful precedent. Some evidence for this limiting interpretation of *Romer* is the fate on remand after *Romer* of *Equality Foundation v. City of Cincinnati*.<sup>58</sup> The anti-gay-rights provision at issue in *Equality Foundation* differed from that in *Romer* first in being an amendment to a city charter, not to a state constitution, thereby eliminating from the case the issue of the placement of unusual procedural hurdles in the path of future gay rights advocates, an issue which had been crucial to the Supreme Court of Colorado’s analysis of Amendment 2. Perhaps more importantly, the Cincinnati charter provision challenged by *Equality Foundation*, unlike Amendment 2, did not purport to deprive gays, lesbians, and bisexuals of any “claim of discrimination,” but merely to deny them “any claim of minority or protected status, quota preference or other preferential treatment.”<sup>59</sup> This led the Sixth Circuit to uphold the charter provision on remand, on the grounds that it “merely removed municipally enacted special protection from gays and lesbians,”<sup>60</sup> a holding the U.S. Supreme Court did not overturn.<sup>61</sup>

One way of exploring *Romer*’s limits for Nussbaum’s purposes, as well as to examine how much opposition to legal recognition of gay rights can fairly be said to rest on disgust alone, is to examine Scalia’s dissents in *Romer* and *Lawrence* in conjunction with Patrick Devlin’s arguments in *The Enforcement of Morals*. Tellingly, Scalia begins his *Romer* dissent by accusing the Court of having “mistaken a Kulturkampf for a fit of spite.”<sup>62</sup>

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<sup>56</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at 114.

<sup>57</sup> See, e.g., *Romer*, 517 U.S. at 624.

<sup>58</sup> *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded* 518 U.S. 1001 (1996).

<sup>59</sup> *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 291 (6th Cir. 1997).

<sup>60</sup> *Id.* at 301.

<sup>61</sup> *Equality Found. v. City of Cincinnati*, 525 U.S. 943 (1998).

<sup>62</sup> *Romer*, 517 U.S. at 636 (Scalia, J. dissenting).

(Had he been addressing Nussbaum instead, he might have substituted the emotion of disgust for that of anger, and instead accused her of mistaking a Kulturkampf for a fit of projectile vomiting.) Setting forth his sense of what is at stake in this Kulturkampf,<sup>63</sup> Scalia describes Amendment 2 as not motivated by “a ‘bare . . . desire to harm’ homosexuals,” rather as “a modest attempt by seemingly [sic] tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”<sup>64</sup> Scalia’s framing of the issues at stake raises several related but distinct questions of central importance to Nussbaum’s project: What, if any, constitutionally permissible legal avenues now remain open to opponents of “the homosexual agenda” and what, if any, constitutionally cognizable justifications remain available for them to mobilize in aid of their resistance if disgust and a bare desire to harm have been ruled out? To the extent that the opponents’ arguments are now on their face being made with ordinary public-regarding reasons, what difference if any should it make whether disgust underlies them? And is it the case that there is no feasible intermediate stopping point in law and policy between attaching moral opprobrium to homosexuality and embracing it fully as morally acceptable?

Although he fails to acknowledge the ways in which Amendment 2, by on its face targeting gay, lesbian and bisexual individuals on the basis of orientation alone for disadvantage, is an exception, Scalia correctly describes the core of the current Kulturkampf over homosexuality as about acts and agendas rather than identities:

Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct.<sup>65</sup>

Even if we ratchet down the level of opposition to homosexual conduct considerably below what Scalia calls “animus,” Archbishop of Canterbury Rowan Williams’s recent observation in the context of the disputes concerning homosexuality that threaten to divide his Anglican

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<sup>63</sup> In continuing to use Scalia’s chosen German term “Kulturkampf” rather than the English term “culture war” often invoked in this context, I intend to stress that my focus here is on the aspects of the culture war over homosexuality being fought in and through the law.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 644.

Communion still has resonance for issues of sexual orientation in U.S. constitutional law: “The question is not a simple one of human rights or human dignity. It is that a certain choice of lifestyle has certain consequences.”<sup>66</sup>

The disadvantaging of blacks simply on account of their race and women simply on account of their sex led to heightened scrutiny for race and sex in American constitutional law, just as the disadvantaging of members of backward castes in India, in ways that fit well with Nussbaum’s trajectory from disgust to humanity, led to special protections for them under the Indian constitution.<sup>67</sup> But Kennedy is right to see Amendment 2 as quite exceptional. A small minority of outstanding legal restrictions on the basis of sexual orientation focus primarily or exclusively on homosexual identity; these typically involve not “a broad and undifferentiated disability”<sup>68</sup> but one that, however important, is narrow. And even these do not rest on status alone, but tend to define status in terms of conduct. Thus, for example, the military’s Don’t Ask Don’t Tell policy (“DADT”) provides that

servicemembers will be separated for homosexual conduct. . . .  
Homosexual conduct is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.<sup>69</sup>

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<sup>66</sup> Rowan Williams, *Communion, Covenant and our Anglican Future: Reflections on the Episcopal Church’s 2009 General Convention from the Archbishop of Canterbury for the Bishops, Clergy and Faithful of the Anglican Communion*, Anglican Communion News Service (July 28, 2009), <http://www.anglicancommunion.org/acns/news.cfm/2009/7/28/ACNS4641> (last visited Feb. 1, 2010). For my critique of Williams’s Reflections, see Mary Anne Case, *Homosexuality and the Anglican debate*, in *The Immanent Frame*, SSRC (2009) at <http://blogs.ssrc.org/tif/2009/08/04/homosexuality-and-the-anglican-debate/> (last visited Feb. 1, 2010).

<sup>67</sup> See, e.g. INDIA CONST. art. 243D (reserving seats in every Panchayat for members of scheduled castes).

<sup>68</sup> *Romer*, 517 U.S. at 632.

<sup>69</sup> Secretary of Defense Les Aspin’s July 19, 1993 Memorandum to the Joint Chiefs, cited in Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1661 n.77 (1993). In earlier work, I explored in detail the relationship between act and identity in DADT. See *id.* at 1661 and Case, *Of “This” and “That,” supra* note 3, at 90.

According to Scalia, opponents of homosexuality, when they are in the political majority, should be able to harness government to discourage or to express opposition to homosexual conduct. At the very least, however, in his view, these opponents should be protected in their private choices to avoid associating with those who engage in homosexual conduct. As he says in his *Lawrence* dissent:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.<sup>70</sup>

Scalia targets the confused fault line between "equal rights" and "special rights" for homosexuals when he describes in his *Romer* dissent the Association of American Law Schools' sexual orientation non-discrimination policy for employers seeking to interview law students at member schools as follows:

The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, *then* he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals.<sup>71</sup>

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<sup>70</sup> *Lawrence*, 539 U.S. at 602 (Scalia, J. dissenting).

<sup>71</sup> *Romer*, 517 U.S. at 652–53 (1996). I have previously noted the analogies between Scalia's list and that drawn up by gay rights pioneer Franklin Kameny, who asked in a petition for certiorari, after noting that "some people consider dancing, liquor and even drinking coffee and tea immoral," "[w]ill they next year, term as immoral left-handedness, red-headedness, a liking for horsemeat steaks, or membership in either political party or none at all?" *Kameny v. Brucker*, Petition for Writ of Certiorari at 27 (filed Jan 27, 1961) (challenging dismissal of astronomer from federal civil service job for being a homosexual and for having failed fully to disclose the reason for his arrest in a San Francisco men's room); see also Case, *Of "This" and "That," supra* note 3, at 114 (2003).

Several things are worthy of note about the analogies Scalia draws to discrimination against homosexuals. First, the items on his list refer generally to activities or beliefs, not identities *tout court*. Moreover, they are of the sort to which some would apply the adage “*de gustibus non est disputandum*” (generally translated into English as “There’s no accounting for taste”). “Disgust” has at its root the same Latin noun—etymologically disgust is dis-taste. Both taste for and aversion to an activity or belief may be difficult to account for, and prejudice in favor of or against any of the items on Scalia’s list in a candidate’s background may therefore seem an arbitrary, if generally legally permissible, basis for choosing among job candidates.<sup>72</sup> But difficult though it often may be to justify investing a job applicant’s choice of prep school, country club, or team rooting interest with moral significance,<sup>73</sup> the same cannot be said of decisions about what animal products to eat<sup>74</sup> or wear or whom to have sex with or vote for. Even Nussbaum should concede that more than mere disgust can motivate, for example, someone committed to animal rights and progressive politics to wish to avoid associating, even professionally, with a meat-eating, fur-wearing, card-carrying Republican. Nussbaum has previously, in the context of arguing against criminal prohibitions on prostitution, offered cogent arguments against viewing sex acts as special.<sup>75</sup> I would be interested in hearing whether and why she now thinks, to the contrary, that sexuality really should be special in constitutional law and in anti-discrimination law more broadly. As Liz Emens asked in her comments on my paper at Columbia’s Nussbaum symposium, is the politics of humanity Nussbaum recommends in her new book “a *sexual* politics in any distinctive way, or . . . ultimately, is it a politics of everything without any

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<sup>72</sup> One increasingly proposed global response takes the form of statutory protection of employees in both the public and private sector against discharge for legal off-duty conduct. Although smokers’ advocates have been most prominent in lobbying for such protections, the statutory protections have been mobilized to defend those discharged for sexual conduct as well. Colorado had such a statute in place at the time of the Amendment 2 controversy. See COLO. REV. STAT. §24-34-402.5 (Supp. 1995).

<sup>73</sup> It may matter in this regard if the “wrong country club” is the one that admits blacks and Jews or the one that excludes them.

<sup>74</sup> See, e.g., Pamela S. Karlan, *Richard Posner’s Just-So Stories: The Phallacies of Sex and Reason*, 1 VA. J. SOC. POL’Y & L. 229, 256 (1993) (arguing, in opposition to Richard Posner, “that eating hardly provides a model, either historically or today, of a morally indifferent human activity that can be explained by a few standard economic concepts”).

<sup>75</sup> Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693 (1998).

specialness to sex?” Although the term “special rights” has been terribly misused in the context of sexual orientation, it is worth asking what is unique about homosexuality in particular—as compared with other sexual practices, tastes or predilections as well as with other life-choices or inclinations—that apparently leads Nussbaum to wish to grant it special protections. If it is permissible for people to lose jobs on account of their sexual promiscuity or celibacy, let alone their vegetarianism or libertarianism, why not for their homosexual practices?<sup>76</sup>

Nussbaum would, I suspect, argue that being gay is more like being a Catholic than being a Republican or a carnivore. She proposes carrying over into the area of sexual orientation “the norm in the area of religion, where we are used to the idea that we should live on terms of respect with people whose choices we think bad, or even sinful, and to the related idea that such deeply meaningful personal choices require the protection, for all, of a sphere of personal freedom.”<sup>77</sup> But she does not explain in any detail—and I am at a loss to understand—how she thinks such a norm would work in practice. What helped the free exercise and establishment clauses work so well in tandem to maintain religious peace and freedom in the U.S. context is that, as it happens, most of the deepest disagreements between major religious groups in the United States in prior centuries happened to be about what to believe and how to worship rather than how to live in society. One major exception, the Mormon practice of polygamy, was not in fact tolerated, but promptly and harshly quashed, as Scalia notes in his *Romer* dissent.<sup>78</sup> A more minor exception, the use of controlled mind-altering drugs in religious ritual, was held by the Supreme Court, in an opinion by Scalia, not to require a religious exemption from a general law making use of such drugs illegal. Importantly for present purposes, the *Smith* case did not involve a criminal prosecution, but the question of whether a religiously-motivated user of peyote who had been fired by a private

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<sup>76</sup> For examples of how moral disapproval of a wide variety of adult consensual sexual behaviors apart from homosexuality, even in the absence of a criminal law backing up this disapproval, still plays a major role in many employment and family law decisions, see Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 112 (2003).

<sup>77</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at xv.

<sup>78</sup> *Romer*, 517 U.S. at 648 (1996); *cf.* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 114 (1965) (arguing that either polygamy or monogamy or free love might plausibly be the basis for a well-functioning society, so long as there was “some common agreement on what is right and what is wrong. . . . Whether the new belief is better or worse than the old, it is the interregnum of disbelief that is perilous.”).

employer on account of his peyote use could be denied state unemployment compensation.<sup>79</sup>

One way of examining whether opposition to homosexuality by the likes of Devlin really can be reduced to nothing but disgust is to consider an analogy to opposition to the legalization of such controlled, mind-altering drugs as peyote, marijuana or alcohol. For some, consumption of marijuana, like alcohol, is sacramental; others, who do not consume it as part of a narrowly religious ceremony, still claim spiritual benefits from its use; some see its use as a casual taste or preference, others see it as a central lifestyle choice, while still others credibly claim significant health benefits from its use, such as the alleviation of chronic nausea. Unlike alcohol, marijuana is opposed by few for purely religious reasons, nor is disgust at it much in evidence among its opponents ; but many opponents of legalization do stress the social harms overindulgence in it may cause and still others take the position that any clouding of one's judgement or one's cognitive faculties is to be avoided. U.S. constitutional law has come nowhere near recognizing a generalized constitutional right to be free of criminal penalties for using marijuana or other intoxicating substances, on Millian or any other grounds. Nor has it endorsed civil constitutional anti-discrimination claims by drug users, even when the drugs are legally obtained.<sup>80</sup>

Devlin seems to see homosexuality as akin to a contagion<sup>81</sup> or addiction, like drugs or gambling. A sex club for him would be like an

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<sup>79</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>80</sup> *See, e.g., New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (upholding Transit Authority's categorical refusal to employ narcotic drug users as applied to participants in a methadone maintenance program).

<sup>81</sup> Rehnquist, who joined Scalia in his *Romer* and *Lawrence* dissents, also once used the language of contagion to describe the need to protect against the spread of homosexuality. In dissenting from the denial of certiorari in *Ratchford v. Gay Lib*, he claimed that the question presented of whether a support group for gay students had a constitutional right to official recognition from the University of Missouri as a student organization despite the University's concerns that it would "tend to expand homosexual behavior which will cause increased violations of [the State's sodomy statute]," was "akin to [asking] whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined." 434 U.S. 1080, 1081, 1084 (1978). Even in this early case, I would argue, more than disgust is at issue, however—the reason why the measles sufferers analogized to gay people are to be quarantined is not because measles is seen as a disgusting disease, but because it is seen as both harmful and at risk of spreading. The argument in *Ratchford* sounds more in pathology than in disgust.

opium den or a shooting gallery, and his concerns include “corrupting the youth.”<sup>82</sup> In part this may be the result of his making the now unfashionable assumption that sexual orientation is not innate and fixed, but at least to some extent learned and malleable, with its appeal closer to the universalizing than the minoritizing end of the spectrum, so that more than a few youths could be tempted by homosexuality, as they could be by gambling, drugs or drink, even though a minority might have a greater predisposition to addiction than most others. Society, not just the individuals concerned, would in Devlin’s view be concretely harmed if too many individuals in it were “constantly drunk, drugged, or debauched” and in consequence “not likely to be useful members of the community.”<sup>83</sup>

For Devlin, it appears, prohibiting homosexual acts, as well as prohibiting drug use, may be like requiring the wearing of motorcycle helmets—the negative social externalities offer some justification for restricting the liberty of individuals. Devlin’s argument here has resonance with the historical argument that mutually consensual private violence that led to actual bodily harm could be criminally prosecuted if the harm amounted to maiming, because a maimed individual could no longer effectively bear arms in support of his country. Such an individual might be able to consent to the harm done to him personally, but not to the resulting societal harm caused by his disability. Interestingly, continuing public policy concerns about both maiming and corrupting the youth were raised by members of the British House of Lords in the so-called *Spanner* case, *R.v. Brown*, as justifications for continuing to allow criminal prosecution of “consensual sado-masochistic homosexual encounters which occasioned actual bodily harm.”<sup>84</sup> Those who no longer think youth are at risk of “corruption” into homosexuality, including Nussbaum, should ask themselves whether their plea for tolerance, including not only the removal of criminal penalties but protection through anti-discrimination laws, would extend to minority sexual tastes other than homosexuality, such as hard-core SM.

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<sup>82</sup> PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* v (1965).

<sup>83</sup> *Id.* at 106 .

<sup>84</sup> See *R.v. Brown*, [1993] 2 All ER 75 (House of Lords) (“Consensual sado-masochistic homosexual encounters which occasioned actual bodily harm to the victim” could be prosecuted as criminal assaults “notwithstanding the victim’s consent to the acts inflicted on him, because public policy required that society be protected by criminal sanctions against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury”).

One reason Devlin associates homosexuality with negative externalities may be because Devlin cannot seem to imagine that gay sex can be domesticated, perhaps because he wrote so long before serious and widespread talk of same-sex marriage or the gaby boom. He might today join conservative gay male proponents of same-sex marriage in urging that, far from being prevented from marrying, gays, and in particular gay men, should be “expected” to marry and should be “disapproved of or pitied” if they fail to settle down with a lawfully wed spouse.<sup>85</sup> Thus, Devlin might well be completely wrong about the social costs of homosexuality, but he makes a case concerning such social costs using the same sorts of public reasons others still successfully use to justify drug laws, reasons I do not think can fairly be equated with disgust. There is a world of difference between Nussbaum’s claim as a normative matter that the law should not be built on disgust and her descriptive assertion that as a matter of fact any law disfavoring homosexuality must necessarily be grounded only on disgust.

Instead of analogizing to debates about controlled intoxicating substances, Nussbaum analogizes debates about homosexuality to debates about the eating of pork. This is convenient for her argument, not only because the discussion of pork has a Millian pedigree,<sup>86</sup> but because, unlike some other religiously based food restrictions, the prohibition on pork for both Jews and Muslims does not purport to rest on any ground other than religious ritual or the command of God. What if the analogy were instead to prohibitions on the eating of all meat? When adopted by religious adherents, such as Hindus or Buddhists or Catholics during Lent, the prohibition on meat can sometimes be seen as motivated only by ritual or the command of God, but, even for some religious believers and certainly for those many people who are vegetarians without a religious basis, other reasons are frequently given, including commitment to non-violence, to reduced environmental impact, to the avoidance of animal exploitation or cruelty, and to bodily health and purity. These latter reasons Nussbaum must surely admit to be “public arguments bearing on the lives of all citizens in a decent society,”<sup>87</sup> not merely “religiously grounded abhorrence” such as that of Muslims and Jews for pork.<sup>88</sup> I presume

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<sup>85</sup> See Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage*, THE NEW REPUBLIC, May 6, 1996, reprinted in Andrew Sullivan, SAME SEX MARRIAGE PRO AND CON: A READER 169, 180.

<sup>86</sup> See JOHN STUART MILL, ON LIBERTY, ch. 4, 53–72 (1869).

<sup>87</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at 141.

<sup>88</sup> *Id.*

Nussbaum would not see a law banning the slaughter of all animals for their meat as impermissible in the same way she assumes a ban on pork alone would be, even if passage of such a ban were spearheaded by religiously motivated vegetarians. Nussbaum needs to demonstrate and not merely tacitly assume that bans on, for example, same-sex marriage or sodomy, are more like bans on pork than bans on the slaughter of all meat.

Instead, she completely ignores some of the arguments to which she should respond. For example, she confidently makes the categorical assertion that the same-sex marriage debate “is really not about whether same-sex relationships can involve the content of marriage. . . . Certainly none would deny that gays and lesbians are capable of sexual intimacy.”<sup>89</sup> Is she blind to or just blinking the fact that this is precisely what natural law theorists like Robert George, Germain Grisez and John Finnis do vehemently deny? For these theorists, not all sexual activity is “sexual intimacy.” As they see it, only uncontracepted vaginal intercourse—the “one flesh union” of “a male and a female body in a way that is suitable for reproduction”<sup>90</sup>—can truly be called sexual intimacy. What gays and lesbians may perceive as sexual intimacy is, according to these theorists, an illusion: “each one’s experience of intimacy is private and incommunicable, and is no more a common good than is the mere experience of sexual arousal and orgasm.”<sup>91</sup> It may well be that it is not possible to hold such views without religious faith to ground them, but assuming these views out of existence is not enough to refute them or conclusively demonstrate their necessary reliance on a religious foundation. Not all those who think it is wrong and ought to be illegal to contaminate the human body with meat or alcohol or mind-altering drugs see the body as a temple in the religious sense. Nor would it make much sense to ascribe their aversion to meat or alcohol or drugs simply to disgust. Similarly, I can imagine that some who, for example, find anal sex objectionable do so on purely religious grounds, some out of disgust, some out of genuine concern for the risk of physical trauma and infection, but some because they view such acts as inconsistent with their non-religious sense of the dignity of the human body. Millian and constitutional arguments may be enough to prevent such people from

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<sup>89</sup> *Id.* at 130.

<sup>90</sup> See Andrew Koppelman, *Forum: Sexual Morality and the Possibility of “Same-Sex Marriage”: Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 61 (1997) (setting forth and critiquing these new natural theories of sexual intimacy).

<sup>91</sup> GERMAIN GRISEZ, *THE WAY OF LORD JESUS*, VOL. 2 653 (1983), cited in Koppelman, *supra* note 90.

turning their objections into criminal prohibitions on adult consensual anal sex, but constitutional anti-discrimination protections will not necessarily follow, and even with respect to the criminal law there is some room for doubt in that no general criminal sodomy statute ever came close to the sort of narrow tailoring that has allowed the survival post-*Lawrence* of criminal prohibitions on certain sexual acts.<sup>92</sup>

Consider in this regard once again Nussbaum's approval in earlier work of the criminalization of necrophilia and other use of "religiously charged objects for sexual purposes," quoted above.<sup>93</sup> As I understand it, Nussbaum does not limit her approval of criminalization in such cases to situations where a conventional property interest is violated—it is not just when a legal stranger, but also when "the surviving spouse has sex with the corpse" that Nussbaum thinks outrage justifies criminalization.<sup>94</sup> It does not seem to matter to her argument whether the surviving spouse does this in the spirit of rape or of loving farewell; nor does it seem to matter whether or not the decedent would have approved or disapproved, felt violated or honored or indifferent, had she known what her spouse would do with her corpse. Why does the decision to have sex with a corpse seem to Nussbaum more appropriate for legal regulation to the extent of criminal prohibition than other decisions as to its disposition, such as the decision to embalm or cremate it? Public health concerns do not seem to underlie the outrage-motivated legal restrictions she is prepared to endorse. Nussbaum seems tacitly to be accepting here a view of the sacredness of the human body and of the deleterious social and moral consequences its sexual misuse can embody or engender. The arguments she seems to endorse in this connection are ones I have difficulty distinguishing from those some opponents of homosexuality make about homosexual sex.

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<sup>92</sup> See, e.g., Lambda Legal, *State Criminal Statutes on HIV Exposure*, <http://www.lambdalegal.org/our-work/publications/general/state-criminal-statutes-hiv.html> (last visited Feb. 1, 2010).

<sup>93</sup> NUSSBAUM, HIDING FROM HUMANITY, *supra* note 10, at 155.

<sup>94</sup> *Id.* at 157. It is less clear whether conventional property interests place a limit in Nussbaum's view on the permissibility of placing restrictions on the use of other "religiously charged objects for sexual purposes." *Id.* at 155. For example, one can purchase, from Divine-Interventions.Com, in addition to a "Baby Jesus butt plug" to be the "the centerpiece of . . . [a] Dildo Creche," a crucified Christ, Virgin Mary, Buddha, Moses or Satan dildo (but interestingly no Prophet Mohammed). Divine-Interventions.Com, Baby Jesus Butt Plug, <http://www.divine-interventions.com/baby.php> (last visited Feb. 1, 2010). In a country where the First Amendment precludes blasphemy laws, it is difficult to see how outrage can be the basis for legally preventing the purchaser of even a more conventional crucifix from using it for masturbatory purposes.

It is important to recognize that, in the aftermath of *Lawrence*, few of the open questions in the American constitutional law of sexual orientation are Millean. *Lawrence* put the criminalization of private, consensual adult homosexual activity out of bounds as a way of expressing disapproval of homosexuality. Private adult consensual homosexual activity now has a status in American law somewhere between necrophilia and interracial marriage. Not only did *Loving v. Virginia* hold it to be a constitutional violation of Equal Protection and Due Process for the state to criminalize interracial marriage or deny a marriage license to an interracial couple,<sup>95</sup> the subsequent case of *Bob Jones University* held a private religious university's policy against interracial dating to be so contrary to the public policy against race discrimination that the Internal Revenue Service could deny the university a tax exemption otherwise generally available to educational institutions.<sup>96</sup> As I understand Nussbaum's politics of humanity when it comes to sexual orientation, it certainly would require that prohibitions on same-sex marriage, like prohibitions on interracial marriage, be held unconstitutional. Would it also, in Nussbaum's view, require that opposition to same-sex marriage, or to homosexual conduct more generally, be against the public policy of the United States, in the way that opposition to interracial marriage has been held to be?<sup>97</sup>

In 1993, the commissioners of Cobb County, Georgia adopted resolutions proclaiming, *inter alia*, "that 'the traditional family structure' is in accord with community standards, . . . that 'lifestyles advocated by the gay community' are incompatible with those standards . . . and that Cobb County would not fund 'activities which seek to contravene these existing community standards.'"<sup>98</sup> Today far more units of local government are likely to proclaim Gay Pride Month than to join Cobb County in declaring themselves to be in official disapproval of homosexuality. Even in the

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<sup>95</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>96</sup> *Bob Jones University v. United States*, 461 U.S. 574 (1983).

<sup>97</sup> This is a concern increasingly raised by legal advocates on behalf of religiously motivated opponents of same-sex marriage. See, e.g., Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 103 (Douglas Laycock et al. eds., 2008).

<sup>98</sup> Joel Achenbach, *A Report from the Front Line of the 'Culture War'*, WASH. POST, Sept. 26, 1993, at G1. The resolution was prompted by commissioners' objections to the subsidized production of Terrence McNally's *Lips Together, Teeth Apart*. See, e.g., Caroline Davies, *The Man Who Dared to Say No*, MAIL ON SUNDAY, Aug. 22, 1993, at 8.

1990s, the principal identifiable concrete effect of Cobb County's resolutions was to penalize not "the gay community," but Cobb County itself: the Olympic torch, originally scheduled to travel through Cobb County, took a detour around it because the Olympic organizers wished to distance themselves from the county's announced opposition to "the gay community."<sup>99</sup> I suspect, however, that Nussbaum would not see allowing local governmental units the option to announce themselves either pro- or anti-gay as a desirable compromise allowing potential residents and visitors to sort themselves according to the public policy with respect to homosexuality they prefer. She might see those gay people already resident in Cobb County at the time of the passage of a resolution disapproving of the "lifestyles advocated by the[ir] community" as akin to Dissenters in a polity with an Established Church. As Justice O'Connor put it in an Establishment Clause case:

Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.<sup>100</sup>

It is, however, far easier for units of government, from the federal government down to the level of the school board, to avoid any endorsement or disapproval of a religion than to remain similarly agnostic or evenhanded with respect to "family structure[s]" or "lifestyles." There are a wide variety of contexts in which government necessarily takes some position on family structure. Consider, for example, the myriad legal questions concerning adoption by same-sex couples or gay individuals. The current gamut of state public policy on gay adoption ranges from Florida, until recently the only state in the union with a categorical ban on adoption by homosexuals, to Massachusetts, where Catholic Charities withdrew from the adoption business rather than comply with state sexual orientation non-discrimination requirements for licensed adoption agencies.<sup>101</sup> Adoption orders, once issued, present issues of full faith and credit as between states with radically different public policies. But Nussbaum's new book does not

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<sup>99</sup> See, e.g., Tim Harper, *Creationists Suffer Blow in Attack on Evolution*, HAMILTON SPECTATOR, Jan. 14, 2005, at A1.

<sup>100</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

<sup>101</sup> See, e.g., Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD, May 15, 2006.

address any of the constitutional questions the variety of public policies on gay adoption raises, not only for gay individuals and couples, but also for children, for social service agencies opposed to adoption by homosexuals, and for federalism.

Another seemingly intractable context in this regard is the curriculum of public schools. From the nineteenth century Bible wars, through the twentieth century conflicts over prayer in the schools, to the twenty-first century disputes over the teaching of evolution,<sup>102</sup> courts have regularly been asked to resolve constitutional questions concerning establishment and free exercise in the public schools. Yet it is certainly possible to imagine a public school curriculum that can avoid deeply contentious and constitutionally problematic discussion of religion. The same cannot as readily be imagined for discussions of sexuality.

Issues related to what Scalia calls the homosexual agenda inevitably arise, not only in classes specifically denominated sex-ed, but in virtually every other aspect of the curriculum, from history and social studies to biology and literature. In addition, public schools and other government funded educational programs inevitably find themselves in the business of teaching values, including civic values such as tolerance. Is there, then, a way for schools to avoid sending either a message of endorsement or a message of disapproval either to proponents or to opponents of “eliminating the moral opprobrium that has traditionally attached to homosexual conduct?”<sup>103</sup> So long as some see the mere mention of same-sex relationships without explicit condemnation as connoting approval and others would see the failure to mention such relationships as connoting disapproval, I do not see how such a way can be found.

Consider, for example, the federal lawsuit brought by parents in Massachusetts who objected that their local public school supplied first graders with “two books that portray diverse families, including families in which both parents are of the same gender.”<sup>104</sup> In addition to violations of their constitutional rights, the parents also claimed violation of the school’s statutory obligation to give them prior notice and the chance to opt-out of any “curriculum which primarily involves human sexual education or

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<sup>102</sup> Indeed, the same Cobb County that in 1993 resolved to disapprove of gay lifestyles more found itself in federal court a dozen years later over the warning stickers about the theory of evolution it wished to place in school textbooks. *See Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2005).

<sup>103</sup> *Lawrence*, 539 U.S. at 602.

<sup>104</sup> *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008).

human sexuality issues.”<sup>105</sup> As the First Circuit explained in upholding dismissal of the parents’ complaint, the components of the curriculum which these books addressed were not sexual education or human sexuality, but “Family Life” and “Interpersonal Relationships” as components of “Social and Emotional Health.”<sup>106</sup> The books were used to teach the students “about the significance of the family on individuals and society” and to “[d]escribe different types of families.”<sup>107</sup>

Although the First Circuit found that the parents’ rights had not been violated, it stressed that inclusion of such gay-friendly materials was discretionary with the school district and suggested that “the plaintiffs may seek recourse to the normal political processes for change in the town and state.”<sup>108</sup> This solution might satisfy Scalia, who declared himself willing to leave to the political process “disputes over such matters as the introduction into local schools of books teaching that homosexuality is an optional and fully acceptable ‘alternative life style,’”<sup>109</sup> but will it satisfy Nussbaum? What if the political process determined to eliminate affirmative portrayals of same-sex couples in government-funded educational materials, as U.S. Secretary of Education Margaret Spellings did when she forced out of a Public Broadcasting Service (“PBS”) television series which had received federal funding specifically to showcase the diversity of American families an episode featuring a lesbian civilly-united couple from Vermont who run a maple sugaring operation with their three children<sup>110</sup> on the grounds that “many parents would not want their young children exposed to the life-styles portrayed in this episode?”<sup>111</sup> What if the political process goes

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<sup>105</sup> *Id.* at 92.

<sup>106</sup> *Id.* at 91.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 107.

<sup>109</sup> *Romer*, 517 U.S. at 645.

<sup>110</sup> Julie Salamon, *A Child Learns a Harsh Lesson in Politics*, N.Y. TIMES, Feb. 5, 2005, at B7. The episode featuring the Vermonters was called “Sugartime,” and there were snide suggestions in the reporting on Spellings’s actions that “sugaring” was thought to refer to an exotic sexual practice, although in fact, of course, the reference was simply to the routine production of maple sugar.

<sup>111</sup> Derrick Z. Jackson, *Safe Harbor for Gay Bigotry*, BOSTON GLOBE, Feb. 2, 2005, at A15. The series had included, without objection from Spellings, a Muslim family who veiled their pre-teen daughter, as well as evangelical Christian and Mormon families. That no apparent account was taken of those “many parents” who might not want their children exposed to the religiously traditional “life-styles” portrayed in other episodes makes

beyond Spellings in requiring government funded education programs to discourage homosexual conduct as an undesirable form of sexual expression, as some federally funded marriage promotion and abstinence-only education programs in states without same-sex marriage implicitly do when they teach students that the only acceptable outlet for sexual activity is within a legal marriage?

Not only does government funded speech concerning homosexuality raise difficult questions, so does the collision of private speech with governmental regulatory authority. The public schools have been the locus in recent years of what might be called the T-shirt wars, with a number of federal constitutional lawsuits addressing the general question of whether “a public high school [may] prohibit students from wearing T-shirts with messages that condemn and denigrate other students on the basis of their sexual orientation,”<sup>112</sup> and specific questions as to whether a range of T-shirt slogans from “Homosexuality is Shameful ‘Romans 1:27’”<sup>113</sup> to “Straight Pride” and “Be Happy, Not Gay”<sup>114</sup> qualify for such a prohibition. That a number of the students wearing such T-shirts say they were motivated to do so in response, not only to other students’ messages supportive of homosexuality, but also to official school messages of tolerance for homosexuality,<sup>115</sup> reinforces once again how difficult it is for public schools to avoid being seen to take a position on the issue.

When units of government do endorse a message of tolerance or non-discrimination with respect to homosexuality, how much protection does the First Amendment offer individuals and groups who disagree? Before her appointment to the Supreme Court, Sonia Sotomayor faced such a question in a Second Circuit case challenging as the coercive suppression of speech Staten Island Borough President Guy Molinari’s letter to a billboard company strongly condemning its decision to put up, under contract with a religious group, billboards prominently displaying multiple translations of Leviticus 18:22 (which reads, in the King James Version,

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Spellings’s decision look like constitutionally problematic viewpoint discrimination. For further discussion, see Mary Anne Case, *Feminist Fundamentalism on the Frontier between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 394-5.

<sup>112</sup> Harper v. Poway, 445 F.3d 1166, 1170 (9th Cir. 2006).

<sup>113</sup> *Id.*

<sup>114</sup> Nuxoll v. Indian Prairie Sch. Dist. #204, No. 08-1050, 2008 U.S. App. LEXIS 8737 (7th Cir. 2008).

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

“Thou shalt not lie with mankind as with womankind: it is an abomination.”) in “Staten Island neighborhoods containing a significant number of gay and lesbian residents.”<sup>116</sup> And her future colleagues on the Supreme Court, in important cases such as *Hurley*<sup>117</sup> and *Boy Scouts v. Dale*<sup>118</sup> have wrestled with conflicts between First Amendment freedom of association and governmental commitment to non-discrimination on grounds of sexual orientation.

Given the multitude of difficult, fiercely-contested open constitutional questions concerning sexual orientation at the intersection of First Amendment guarantees of freedom of religion, speech and association, it is puzzling that the only First Amendment issues Nussbaum’s new book discusses in any detail are those concerning the regulation of sex clubs and public sex. Had Nussbaum discussed a case like *Boy Scouts v. Dale* in her new book, it might be clearer whether, given that she believes disgust still underlies all opposition to acceptance of homosexuality in private or public policy, she thinks it is or is not a step in the right direction that, as she puts it, disgust has “gone underground.”<sup>119</sup> On the one hand, she might argue, as some do with respect to overtly racist or sexist statements, that purging the language of disgust from public discourse is the first step to making it disappear from hearts and minds. On the other hand she might argue, as, again, some do with respect to overtly racist or sexist statements, that burying disgust-based arguments underground before they can effectively be dispelled leads those whose opposition to homosexuality is indeed based on disgust in a position of moral dumbfounding<sup>120</sup>—still as unshakably convinced of the rightness of their opposition but unable to marshal arguments in support of their position. Allowing disgust to be articulated instead of driving it underground may help disentangle disgust-based reasons from other reasons for disfavoring gay rights.

To say that all opposition to gay rights cannot be reduced to disgust is not to say that I find the other reasons for opposition to be better. But

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<sup>116</sup> *Okwedy v. Molinari*, 333 F.3d 339, 340 (2d Cir. 2003).

<sup>117</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

<sup>118</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>119</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at xv.

<sup>120</sup> See Cass R. Sunstein, *Symposium: Emotions in Context: Exploring the Interaction Between Emotions and Legal Institutions: Some Effects of Moral Indignation on Law*, 33 VT. L. REV. 405 (2009).

their flaws cannot be addressed unless we face these reasons on their own terms rather than dismissing them, as Nussbaum does, as mere disguised disgust. Consider, for example, opposition to legal recognition of same-sex marriage. The New York Court of Appeals, in an opinion by Judge Robert Smith, held that the following constituted a sufficient basis for not extending civil marriage to same-sex couples:

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.<sup>121</sup>

As a feminist theorist and a constitutional law scholar, I find this rationale deeply disturbing.<sup>122</sup> It seems to me directly contrary to the federal constitutional prohibition on embodying in law any “fixed notions concerning the roles and abilities of males and females.”<sup>123</sup> As I have told Smith (who is, I am ashamed to say, an old friend of mine), he must have been assuming the Legislature wished to encourage more nudity in the home, because any other assumptions about “living models of what both a man and a woman are like” would run afoul of federal constitutional prohibitions on basing legal distinctions on sex stereotypes. Yet, however serious the problems with the “living models” rationale may be, it can easily be understood “without moving to the terrain of disgust and contamination.”<sup>124</sup>

The same can be said of another of Smith’s arguments, the much mocked claim that gays are “too good” to need marriage<sup>125</sup> because, while heterosexuals can “become parents as a result of accident or impulse,” gay and lesbian couples can do so only after planning and deliberation and hence have less need than unruly heterosexuals to be channeled into the

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<sup>121</sup> *Hernandez v. Robles*, 7 N.Y.3d 338, 359 (2006).

<sup>122</sup> See Mary Anne Case, *Feminist Fundamentalism and the Constitutionalization of Domestic Relations* (forthcoming 2010) (on file with author).

<sup>123</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); see also Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

<sup>124</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at 148.

<sup>125</sup> See, e.g., Kenji Yoshino, Op-Ed., *Too Good For Marriage*, N.Y. TIMES, July 14, 2006, at A19.

stability of marriage for the sake of their children.<sup>126</sup> (“The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.”<sup>127</sup>) Again, whatever other flaws this argument may have, it is directly contradictory to Nussbaum’s assertion that “[t]he only distinction between unworthy heterosexuals and the class of gays and lesbians that can possibly explain the difference in people’s reaction [to their marriages] is that the sex acts of the former do not disgust the majority, whereas the sex acts of the latter do.”<sup>128</sup> Far from seeming disgusted by them, Smith goes out of his way to acknowledge, not only the careful and thoughtful way in which homosexuals become parents, but also “that there has been serious injustice in the treatment of homosexuals” and to speak favorably of New York legislative responses such as the Sexual Orientation Non-Discrimination Act of 2002.<sup>129</sup> But if, for Smith, homosexuals are, like blacks, victims of a long history of unjust prejudice, women seem to remain like children and imbeciles, in special need of the protection of the laws. He seems much more interested in preserving sex role differentiation than in putting gays down.

Smith insists that “the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.”<sup>130</sup> In my view he can only reach this conclusion by focusing exclusively on the injustice of exclusion on gay and lesbian couples and ignoring any historical injustice to heterosexual women. Justice Johnson’s concurring and dissenting opinion in the Vermont same-sex marriage case, by tracing aspects of the history of the legal regulation of marriage Smith ignores, makes clear why “[v]iewing the discrimination [in the marriage laws] as sex-based . . . is important.”<sup>131</sup> As she correctly observes, the discrimination is “a vestige of sex-role stereotyping that applies to both men and women” in “that, historically, the marriage laws imposed sex-based

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<sup>126</sup> *Hernandez*, 7 N.Y.3d at 359.

<sup>127</sup> *Id.*

<sup>128</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 1, at 148.

<sup>129</sup> *Hernandez*, 7 N.Y.3d at 361.

<sup>130</sup> *Id.*

<sup>131</sup> *Baker v. Vt.*, 170 Vt. 194, 254 (1999) (Johnson, J. concurring and dissenting).

roles for the partners to a marriage—male provider and female dependent—that bore no relation to their inherent abilities to contribute to society.”<sup>132</sup> Worse, the intent and effect of the common law of marriage was to subordinate a woman completely to her husband, wiping out her own independent legal existence. Only with the passage in the nineteenth century of laws such as Vermont’s Rights of Married Women Act did state legislatures begin “to set a married woman free ‘from the thralldom of the common law.’”<sup>133</sup> As Justice Johnson notes,<sup>134</sup> it took until 1973 for the Supreme Court of Vermont to declare:

Having rejected the archaic principle that husband and wife are “one person,” it must necessarily follow that a married woman is a “person” under the Constitution of Vermont, and is entitled to all the rights guaranteed to a person.<sup>135</sup>

Acknowledging that a history of denying the full personhood of married women and a continued commitment to traditional fixed sex-roles outside the bedroom, not only disgust at gay sex,<sup>136</sup> can undergird opposition to legal recognition of same-sex marriages, as Justice Johnson demonstrates, does not weaken the constitutional case in favor of same-sex marriage, it strengthens it, given the strength of our existing well-established constitutional prohibitions against embodying fixed sex-roles in law.

Similarly, seeing that there are additional non-disgust based reasons for some religious opposition to legal recognition of same-sex marriage also strengthens, rather than weakens, the constitutional case for same-sex marriage. As I have explained at length in other work, because of the peculiar history of the intersection of religious and civil marriage in Anglo-American law, Protestant denominations in the United States have essentially abdicated the formation, definition, and, above all, the

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<sup>132</sup> *Id.* at 257.

<sup>133</sup> *Id.* (citation omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *Richard v. Richard*, 131 Vt. 98, 106 (1973)

<sup>136</sup> *Cf. Sexual Choice, Sexual Act: An Interview with Michel Foucault*, SALMAGUNDI, Fall 1982–Winter 1983, at 21 (“I think that what most bothers those who are not gay about gayness is the gay life-style, not sex acts themselves. . . . It is the prospect that gays will create as yet unforeseen kinds of relationships that many people cannot tolerate”).

dissolution of marriage to the state.<sup>137</sup> There is, for example, nothing like the Jewish *get* or Catholic annulment available to or required of Protestants. This leaves religiously conservative Protestants far more dependent on the state's regulation of marriage, far less able to distinguish conceptually between marriage as their religion defines it and as state law does, and, on a percentage basis, far more opposed to same-sex marriage than conservative Jews and Catholics, who otherwise, according to poll data, share their opposition to homosexuality, but who, unlike Protestants, have reason to understand full well that marriage in their faith tradition and marriage as the state defines it are not the same.

For Protestants today, therefore, state-licensed marriage may function in somewhat the same way as state-sponsored public schools did for Protestants in the past. In each case a state-sponsored institution could be put in service of sectarian ends by groups that substituted capture of the state institution for development of their own clearly religious alternatives. While Catholics and Jews, shut out of state education funding, founded private sectarian schools, the curriculum in the ostensibly non-sectarian public schools often tended to be infused with Protestant principles, and in a host of Establishment Clause cases concerning the public schools, Protestants resisted mightily any perceived attempt to make the institution of public education more neutral and secular and less clearly an embodiment of their values. Nowadays, similarly, evangelical Protestants' dependence on the state to articulate and enforce their view of marriage is manifest, not only in their comparatively more virulent opposition to same-sex marriage, but in the comparative zeal with which they seek to enshrine covenant marriage in state law. Protestants, unlike Catholics and Jews, have no established mechanism for denying divorce to members of their faith community without the state backing them up.

With marriage, as with the public schools, Protestants took a state-sponsored, state-funded, state-regulated institution, co-opted it for sectarian ends, became accustomed to their ownership and control, and then felt an understandable, though not justifiable, sense of loss and grievance when that ownership was challenged. This observation helps make sense of the frequently derided claim most often made by evangelical Protestants that

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<sup>137</sup> See, e.g., Mary Anne Case, *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758, 1792-7 (2005); *Why Evangelical Protestants are Right When they Claim that State Recognition of Same-Sex Marriage Threatens Their Marriages and What the Law Should Do About It* (unpublished manuscript on file with the author and podcast available at <http://webcast-law.uchicago.edu/podcast/caseCBI100108.mp3>). The arguments in this section of the review essay summarize those made at greater length in these two articles.

their own marriages would be threatened by state recognition of same-sex marriages. And a greater general awareness of the Establishment Clause problems inherent in the way civil and religious marriage have become imbricated once again strengthens, rather than weakens the constitutional case for civil marriage for same-sex couples.

It is my profound hope, as it is Martha Nussbaum's, that in our lifetime the U.S. Constitution will be held to guarantee equal marriage rites and rights to couples regardless of their sex. But for this development and for many other aspects of Nussbaum's proposed politics of humanity with respect to sexual orientation as it pertains to constitutional law, I think the better analogy is not the history of American law with respect to religious freedom, but rather its history with respect to slavery. For intractable practical reasons, even more than for ideological reasons, it proved, as Abraham Lincoln predicted, impossible to maintain a nation half slave and half free. Similarly, although we are in diametric disagreement about which side of the ongoing gay rights debates should be analogized to proponents of the legal recognition of slavery, one thing I agree with the most vehement opponents of gay rights about is that, in the end, compromise or a *cuius regio eius religio* solution on these issues in the U.S. is not possible, and a permanent state of tolerance as opposed to endorsement by government of one side or the other will be very difficult, if not impossible. Like Lincoln,

I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided. It will become all one thing or all the other. Either the opponents . . . will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward, till it shall become alike lawful in all the States, old as well as new—North as well as South.<sup>138</sup>

Demanding of the opponents of homosexuality that they tolerate—indeed, not just tolerate but live in a state that embraces—a vision of gay rights anything close to Nussbaum's is, I think we have to recognize, asking a lot; it is asking of the opponents of gay rights something close to what they are asking of gay rights activists today.

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<sup>138</sup> Abraham Lincoln, House Divided Speech (June 16, 1858), available at <http://showcase.netins.net/web/creative/lincoln/speeches/house.htm> (last visited Feb. 10, 2010).