

MARTHA NUSSBAUM, ESSENTIALISM, AND HUMAN SEXUALITY

CARLOS A. BALL*

It is an honor to participate in this program recognizing the work of Professor Martha Nussbaum. A few years ago, after being fortunate enough to have been awarded tenure, the university library at the institution where I worked at the time asked me to choose a book I valued for an exhibit of books chosen by recently tenured professors. I chose Nussbaum's *Women and Human Development*, a book that has had a deep intellectual influence on me.¹ One of the chapters in that book is titled "In Defense of Universal Values," a topic that is relevant to this Article.

Critiques of essentialism are a common theme in the writings of many contemporary academics. Indeed, queer theorists, critical race theorists, post-structuralists, post-colonialists, and many feminists consistently take issue with the notion that there are attributes or traits that are intrinsically constitutive of categories such as men and women, heterosexuals and homosexuals, disabled and non-disabled, and so on.² The emphases and nuances of the anti-essentialist critiques differ depending on membership in particular academic camps and disciplines. However, the critiques uniformly reject moral, philosophical, and political understandings that are explicitly or implicitly grounded in the notion that identities—and for some critics, even the very idea of a "human being"—are static and fixed, that is, immune or separate from forces of social construction. Anti-essentialist critiques hold instead that much (or all) of what constitutes us as individuals is socially constructed and therefore fluid and contestable.

* Professor of Law & Judge Frederick Lacey Scholar, Rutgers University School of Law (Newark). I would like to thank Andy Koppelman and Ed Stein for providing me with helpful comments on an earlier draft of this Article.

¹ MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) [hereinafter NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*].

² The anti-essentialist scholarship is vast. For some representative examples, see NANCY E. DOWD & MICHELLE S. JACOBS, *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* (2003); ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF ELUSION IN FEMINIST THOUGHT* (1988); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1989).

From an anti-essentialist perspective, Martha Nussbaum's liberal humanism is intrinsically suspect. Nussbaum, after all, grounds her moral and political philosophy in a particular understanding of what it means to be human, one that is driven by certain capabilities that she argues are necessary to lead a fully human life. Although Nussbaum does not usually refer to herself as an essentialist³—few do, since the term is largely used only in a pejorative sense—her capabilities approach to justice is explicitly universalist;⁴ it is grounded in commonalities and found across time and place, allowing us to recognize each other as human.⁵

It is important to note that Nussbaum's universalism is of a very different order than that usually associated with liberal political theory because it refuses to locate the source of human dignity, which serves as the foundation of her moral and political philosophy, solely in man's capacity to reason. Instead, Nussbaum contends that the capability to affiliate with others also plays an architectonic role in our lives because we exercise most of our important capabilities with and through others. As she explains, "[t]o plan for one's own life without being able to do so in complex forms of discourse, concern, and reciprocity with other human beings is . . . to behave in an incompletely human way."⁶

In addition, Nussbaum's conception of what it means to be human is decidedly non-metaphysical. It is derived not from philosophical principles gleaned through the application of abstract reasoning, but from the interpretation of human practices and experiences, including the stories we tell each other about our lives and aspirations. It is also not dependent on "facts of human nature," whether physiological or psychological, that are separate from our ethical evaluations of what is necessary to lead a full human life. For Nussbaum, in other words, the value of central human

³ Nussbaum's most explicit defense of essentialism can be found in Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992) [hereinafter Nussbaum, *Human Functioning and Social Justice*]. When the same article was published in a different journal a year later, however, the word "essentialism" in the title was replaced with "universalism." See Martha C. Nussbaum, *Social Justice and Universalism: In Defense of an Aristotelian Account of Human Flourishing*, 90 MOD. PHILOLOGY S46 (1993) (Supp.).

⁴ Nussbaum has elaborated on the capabilities approach in many writings. The two most comprehensive elaborations can be found in MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter NUSSBAUM, *FRONTIERS OF JUSTICE*] and NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 1.

⁵ *Id.*

⁶ NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 1, at 82.

capabilities is determined through ethical interpretations and evaluations of human experiences, rather than through the discovery of so-called natural principles or facts that are independent of those evaluations.⁷

There was a time early on in Nussbaum's elaboration of the capabilities approach when she criticized John Rawls for deploying an unduly restrictive understanding of the good in determining what is necessary to promote human flourishing.⁸ However, a few years later, at around the time that Rawls published his book *Political Liberalism*,⁹ Nussbaum started describing the capabilities approach in terms of a Rawlsian overlapping consensus that can be reached by individuals with different conceptions of the good.¹⁰ Nussbaum now argued that the capabilities view, like Rawls's political conception of justice, "is not grounded in any theory of the human being that goes beneath politics."¹¹

As I have noted elsewhere, it is not clear that Nussbaum's conception of what it means to be human and to lead a full human life is indeed as thin as that of Rawls.¹² I do not, however, explore that issue further in this Article. Instead, I focus on Nussbaum's understanding of sex and sexuality to try to determine which of their aspects she deems to be universal and which she thinks are constituted through forces of social construction. I do this because I believe it is important to make it clear that Nussbaum's human liberalism is consistent with the prevailing view in queer and gay/lesbian studies that sexual orientation identities are the result of social constructivist forces. It would be a mistake for those who are

⁷ MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 40 (1999) (noting that the capabilities approach's "account of the human is . . . neither ahistorical nor a priori").

⁸ Martha C. Nussbaum, *Aristotelian Social Democracy*, in *LIBERALISM AND THE GOOD* 203, 227 (R. Bruce Douglass et al. eds., 1990).

⁹ JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

¹⁰ Nussbaum did so explicitly for the first time in a paper first read in 1994 and published in 1998. See Martha C. Nussbaum, *The Good As Discipline, the Good As Freedom*, in *ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP* 312, 314–15 (David A. Crocker & Toby Linden eds., 1998).

¹¹ Martha C. Nussbaum, *Political Animals: Luck, Love, and Dignity*, 29 *METAPHILOSOPHY* 273, 284 (1998) (footnote omitted); see also Martha C. Nussbaum, *Aristotle, Politics, and Human Capabilities: A Response to Anthony, Arneson, Charlesworth, and Mulgan*, 111 *ETHICS* 102, 119 (2000) ("[M]y use of an idea of the human being [is] close[] to the Rawlsian idea of a concept of the person.").

¹² CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 85–87 (2003).

interested in promoting pluralism and diversity in matters of sexuality to be skeptical of Nussbaum's human liberalism because of its universalist (or essentialist) underpinnings. In fact, that liberalism, for reasons I will explain, has much to offer lesbian, gay, bisexual, and transgender ("LGBT") people.

Part I begins by providing a brief history of the debate within sexuality studies between essentialists and social constructionists. Part II discusses Nussbaum's writings on sexuality and assesses the extent to which they are consistent with a social constructionist understanding of sexual orientation. Finally, Part III explains why Nussbaum's liberal humanism, which encourages us to recognize the humanity of those who seem least like us, is a compelling form of argumentation on behalf of sexual minorities.

I. THE ESSENTIALIST VS. SOCIAL CONSTRUCTIONIST DEBATE ON SEXUAL IDENTITY CATEGORIES

As far as we can tell from the historical record, "erotic and sexual interactions between persons of the same sex are attested in almost all cultures known to us across time and across the globe."¹³ Some scholars have looked at this consistency through time and place and concluded that "gay people," that is, individuals who have a distinct identity based on their same-sex erotic preferences, have always existed. These writers, in other words, believe that there are "objective, intrinsic, culture-independent facts about what a person's sexual orientation is."¹⁴

This so-called essentialist position in matters of sexuality is usually associated with the late historian John Boswell. As he made clear in the title of his 1980 book, *Christianity, Social Tolerance and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*, Boswell believed that "gay people," as a distinct category of individuals, have existed in all Western societies.¹⁵ Although Boswell, like almost everyone else, eschewed the label of "essentialist," he

¹³ SUSAN ACKERMAN, *WHEN HEROES LOVE: THE AMBIGUITY OF EROS IN THE STORIES OF GILGAMISH AND DAVID* 4 (2005).

¹⁴ EDWARD STEIN, *Introduction*, in *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* 3, 5 (1990) [hereinafter *FORMS OF DESIRE*].

¹⁵ JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1980).

believed that there have always been people whose “erotic inclination toward their own gender [is] a distinguishing characteristic.”¹⁶

Boswell’s position, of course, was inconsistent with that of Michel Foucault as set forth in his highly influential book *The History of Sexuality, Volume I*.¹⁷ In that book, Foucault famously contended that there is nothing intrinsic or fixed about human sexuality; instead, what we think of as sexuality is a byproduct of the work of systems of knowledge and power as represented, most specifically, by scientific, medical, and psychiatric disciplines. According to Foucault, one of the defining characteristics of the modern era is the extent to which these disciplines have grabbed hold of sexuality by studying, analyzing, and schematizing it through an endless discussion and cataloging of sexual desires, tendencies, and acts.¹⁸ It is from these discursive processes that what had before been viewed simply as the sexual act of sodomy became the basis for a social identity. As Foucault quipped, “[t]he sodomite had been a temporary aberration; the homosexual was now a species.”¹⁹ He added that while under

ancient civil or canonical codes, sodomy was a category of forbidden acts, . . . [in the] nineteenth-century [the] homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology. . . . Nothing that went into his total composition was unaffected by his sexuality.²⁰

¹⁶ *Id.* at 44. Boswell clarified later that although most gay people in earlier western societies may not have been conscious of their sexual orientation as a distinguishing characteristic, that characteristic nonetheless existed. John Boswell, *Revolutions, Universals, and Sexual Categories*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 17, 35 (Martin Duberman et. al eds., 1989). In another essay, Boswell argued that in western “ancient and medieval societies,” the concepts (if not the terms) of homosexuals and heterosexuals were “common and familiar.” John Boswell, *Categories, Experience and Sexuality*, in *FORMS OF DESIRE*, *supra* note 14, at 133, 172. Those concepts “received little attention in the records of these cultures not because few people recognized them, but because they had little social or ethical impact.” *Id.* (footnote omitted).

¹⁷ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION* (Robert Hurley trans., 1978).

¹⁸ *Id.* at 42–49.

¹⁹ *Id.* at 43.

²⁰ *Id.* Although these passages in Foucault’s book have been generally interpreted as standing for the proposition that sexual identities are a modern invention, David Halperin argues that Foucault’s point was more limited because it sought only to contrast an earlier

Foucault's work has served as the foundation for that of many sexuality scholars who have both embraced and elaborated on a socially constructed understanding of sexual identity categories. These writers have in part supported their position linguistically by noting that the word "homosexual" did not exist before scientific discourses first put it to use in the second half of the nineteenth century.²¹ The absence of such a term through most of history strongly suggests to the social constructionists that homosexuality—though not necessarily homosexual sex—is a modern invention. As Robert Padgug puts it, "[h]omosexual' and 'heterosexual' behavior may be universal; homosexual and heterosexual *identity and consciousness* are modern realities. . . . To 'commit' a homosexual act is one thing; to *be* a homosexual is something entirely different."²²

In addition, social constructionists point to historical evidence from before the second half of the nineteenth century, which suggests that many societies failed to problematize sexuality along the (for us) familiar homosexual/heterosexual axis. For example, David Halperin, relying on the work of the historian George Chauncey, points out that the scientific and medical professions in Western countries during the first half of the nineteenth century viewed same-sex sexual acts as a manifestation of "sexual inversion," a categorization of sexual deviance without a clear correlation to what we today consider to constitute homosexuality.²³ The classicist Halperin also argues that Aristophanes's famous myth in Plato's

legal discourse that spoke of acts (sodomy) with a later psychiatric discourse that spoke of sexual subjects (homosexuals). Halperin explains that this "schematic opposition between sodomy and homosexuality is first and foremost a discursive analysis, not a social history. *It is not an empirical claim about the historical existence or nonexistence of sexually deviant individuals.*" David M. Halperin, *Forgetting Foucault*, in *THE SLEEP OF REASON: EROTIC EXPERIENCE AND SEXUAL ETHICS IN ANCIENT GREECE AND ROME* 21, 28 (Martha C. Nussbaum & Juha Sihvola eds., 2002). Halperin then proceeds to argue that it is incorrect to believe "that sexual acts were unconnected to sexual identities before the nineteenth century." *Id.* at 38.

²¹ See ACKERMAN, *supra* note 13, at 4–5 ("The initial evidence that many social constructionists advance in favor of the theory of the homosexual as a distinct and novel creation of modern Euro-American society is linguistic: the fact that the very terms *homosexual* and *homosexuality* . . . are recent creations, products of late-nineteenth century scientific discourse.").

²² Robert Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, in *FORMS OF DESIRE*, *supra* note 14, 43, 58–59.

²³ DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* 15 (1990) (citing George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 114 *SALMAGUNDI* 58–59 (1982–83)).

Symposium shows that the Greeks did not classify or distinguish individuals according to the gender of their sexual partners.²⁴

Martha Nussbaum, of course, in addition to being a moral and political philosopher, is also a classicist. And, it turns out, Nussbaum is largely in agreement with Halperin and others regarding the social construction of sexual identity categories.

II. THE LOCAL AND THE UNIVERSAL IN NUSSBAUM'S WRITINGS ON SEX AND SEXUALITY

In an article published in the *Virginia Law Review* in 1994, Professor Nussbaum discusses in some detail her interpretation of what ancient Greeks, and in particular leading ancient Greek philosophers, thought about same-sex sexual acts and relationships.²⁵ The article was an outgrowth of Nussbaum's participation in the litigation challenging the constitutionality of Colorado's Amendment 2, the state constitutional provision—eventually struck down by the Supreme Court in *Romer v. Evans*²⁶—which would have denied lesbians, gay men, and bisexuals the opportunity to seek sexual orientation antidiscrimination protection under the law.

The year before the article appeared, Nussbaum testified as an expert witness during a trial held to assess the constitutionality of Amendment 2.²⁷ In support of its position that homosexuality harms society because it undermines the family and the well-being of children, the state introduced expert witness statements from conservative philosophers John Finnis, Robert George, and Harvey Mansfield.²⁸ All three of these men contended that the Greek tradition supported the view that homosexuality was both morally wrong and a threat to society, thus necessitating legal responses such as Amendment 2.²⁹ Nussbaum was called to the stand by the plaintiffs' lawyers primarily to respond to this claim.³⁰ In doing so, she

²⁴ *Id.* at 18–21.

²⁵ Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515 (1994) [hereinafter Nussbaum, *Platonic Love*].

²⁶ 517 U.S. 620 (1996).

²⁷ Nussbaum, *Platonic Love*, *supra* note 25, at 1517.

²⁸ *Id.* at 1522.

²⁹ *Id.* at 1522–23.

disputed the state's witnesses' contentions that the ancient Greek tradition supported arguments on behalf of Amendment 2.³¹ She later elaborated on her interpretation of that tradition and its relevance to contemporary gay rights debates in her law review article.³²

In the article, Nussbaum explains that the Greeks, rather than problematizing sexuality along gender lines, and thus creating gender-based sexuality categories, focused instead on other criteria such as the age of the sexual partners and the need to discourage "habits of passivity" in matters of sexuality.³³ Although gender in contemporary times plays a determinative role in our understandings and assessments of sexuality, Nussbaum writes that "in Greek culture and practices, the gender of the partner assumes far less importance . . . and is usually taken as less salient than many other facts about a sexual act. Nor are people very often categorized socially in accordance with their orientation toward partners of a particular gender."³⁴

Nussbaum also emphasizes the social contingency of what is often thought to be natural and appropriate in matters of sexuality. In response to the claim by the state's academic witnesses that homosexuality is problematic because it is unnatural, Nussbaum argues that the ancient Greek texts, by morally de-problematizing both sexual desire in general and same-sex sexual conduct in particular, "force us to confront the fact that much of what we consider necessary and natural in our own practices is actually local and nonuniversal."³⁵

Since Nussbaum's article ultimately concludes that the ancient Greeks not only failed to problematize same-sex sexual relations, but that they also saw them as good and valuable manifestations of sexual

³⁰ *Id.* at 1523.

³¹ *Id.*

³² Nussbaum, *Platonic Love*, *supra* note 25.

³³ *Id.* at 1549.

³⁴ *Id.* at 1544.

³⁵ *Id.* at 1518–19. Nussbaum notes that the Greeks showed "that it was possible not to single out the sexual appetite from the other appetites, as a source of special anxiety and shame; that it was possible not to categorize persons in accordance with a binary division between the homosexual and the heterosexual; [and] that it was possible to regard the gender of one's sexual partner as just one factor in a sexual coupling, and not the most morally relevant at that." *Id.* at 1598.

intimacy,³⁶ she addresses the possible objection that perhaps the cultural asymmetry between the “ancient sexual scene” and our own makes the former irrelevant to contemporary disputes over gay issues.³⁷ She responds to this objection by noting that “this asymmetry between cultures is exactly what reading the Greeks is supposed to reveal to us: the fact that a society may tolerate and even encourage sexual acts between members of the same sex *without* regarding sex as the most morally salient feature about the act, and without problematizing same-sex desire itself in a special way.”³⁸

At the same time, however, Nussbaum makes it clear that the Greeks’ understanding of sexuality was not *so* different than our own that they lacked “any conception of an erotic preference for members of one’s own gender.”³⁹ Nussbaum points out that in Plato’s *Symposium*, “[b]oth Pausanias and Aristophanes know and casually refer to people who have such preferences, indicating as they do so that they are referring to a widely accepted fact about human life. . . . [L]ike the preferences of homosexuals today, their preference for same-sex acts is *a stable and deep aspect of their personalities*.”⁴⁰

Nussbaum in this last sentence posits that some individuals have a deeply held preference for sexual relations with those of their own sex.⁴¹ I

³⁶ *Id.* at 1597. Nussbaum argues that:

[The major Greek philosophers] all believe that same-sex sexual desire, including a characteristic orientation of that desire, can be an extremely valuable element in human life, expressive of love and friendship and powerfully linked to other social and intellectual ends. Relationships that involve sexual desire of this kind can be a major vehicle of human aspiration and are generally deemed more valuable as vehicles than are marital relationships, whose ends are generally assumed to be less profound.”

Id. at 1597.

³⁷ *Id.* at 1602.

³⁸ *Id.* at 1603. See also David M. Halperin, *Introduction* to BEFORE SEXUALITY: THE CONSTRUCTION OF EROTIC EXPERIENCE IN THE ANCIENT GREEK WORLD 1, 6 (David M. Halperin et al. eds., 1990) (“[T]he study of classical antiquity offers us a special opportunity to test our assumptions about what aspects of our lives might truly be common to all human beings and what aspects are distinctive to the modern world.”).

³⁹ Nussbaum, *Platonic Love*, *supra* note 25, at 1603.

⁴⁰ *Id.* (emphasis added).

⁴¹ In her recent book, Nussbaum also describes sexual orientation as “a deep-seated characteristic.” MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION

will let others debate whether a same-sex sexual orientation is as stable and as psychologically hard-wired, so to speak, as Nussbaum suggests. It is important to note, however, that the question of what explains same-sex sexual desire is a different one from that of whether sexual identity categories—roughly comparable to those that we have today—were reflected in the norms and practices of ancient Greece. The fact that some individuals in ancient Greece may have had a deeply held preference for sexual relations with others of their own sex does not mean that society viewed them as belonging to a distinct category of individuals defined by that desire in a way that is comparable to how society views gay people today.

Indeed, Nussbaum makes it clear that the Greeks did not seek to define or categorize individuals according to the sex (as opposed to the age and social class) of their sexual partners. In the end, Nussbaum concludes, what we know about Greek norms and practices shows that the existence of individuals who prefer same-sex sex over different-sex sex does not mean that it is natural or necessary to problematize, or attach moral meaning to, that preference.⁴² This conclusion, of course, is entirely consistent with a social constructionist understanding of sexual identity categories.⁴³

In recognizing, then, that some societies fail to problematize the conjunction of sexuality and gender in the way that modern Western societies have done, Nussbaum, when it comes to sexual identity categories, far from being an essentialist, is instead a social constructionist. Nussbaum locates a universalism in matters of sex not at the level of sexual identity, but at a deeper level that understands the experience of sexual desire (of some kind) and the seeking to satisfy sexual needs (of some kind) to be part of what defines us as humans. As she puts it, “sexual need and desire are features of more or less every human life. It is . . . a most important basis for the recognition of others different from ourselves as human beings.”⁴⁴

AND CONSTITUTIONAL LAW, at xvi (2010) [hereinafter NUSSBAUM, FROM DISGUST TO HUMANITY].

⁴² Nussbaum, *Platonic Love*, *supra* note 25, at 1544–45.

⁴³ Nussbaum notes elsewhere that while “[p]leasure and sexual contact are ubiquitous, . . . it is society that has shaped them in a particular way, has marked certain practices as salient and central, and has created certain desires corresponding to those practices.” Martha C. Nussbaum, *Millean Liberty and Sexual Orientation: A Discussion of Edward Stein’s Mismeasure of Desire*, 21 LAW. & PHIL. 317, 320 (2002) (footnote omitted) [hereinafter Nussbaum, *Millean Liberty*].

⁴⁴ Nussbaum, *Human Functioning and Social Justice*, *supra* note 3, at 217–18.

For Nussbaum, sex is morally significant because it is an important means through which we define and determine who we are as individuals. As she puts it in her recent book *From Disgust to Humanity: Sexual Orientation and Constitutional Law*, for most people sex “is a central part of one’s search for the meaning of life. . . . [I]t is connected to a sense of life’s ultimate significance, and utterly non-trivial. . . . [I]t goes to the heart of people’s self-definition, their search for identity and self-expression.”⁴⁵

It is not surprising, therefore, that Nussbaum includes “having opportunities for sexual satisfaction”⁴⁶ in her list of “central human capabilities . . . that . . . are implicit in the idea of a life worthy of human dignity.”⁴⁷ And, as she has made clear from the beginning of her articulation of the capabilities approach to justice, that “approach is fully *universal*: the [central human] capabilities . . . are held to be important for each and every citizen, in each and every nation, and each person is to be treated as an end.”⁴⁸

An important and recurrent critique of the liberal humanism of thinkers like Martha Nussbaum is that, in emphasizing the moral value of what individuals *qua* humans share, it occludes differences. This occlusion, it is argued, is problematic for two principal reasons. First, liberal humanism glosses over the bad (or harmful) differences that are created and reified by hierarchical and subordinating social mechanisms.⁴⁹ Second, liberal humanism undervalues and underappreciates the good (or beneficial) differences that, when encouraged and promoted, can serve to undermine oppressive and subordinating socially-imposed categories.⁵⁰

⁴⁵ NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 41, at 39.

⁴⁶ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 5, at 76.

⁴⁷ *Id.* at 70; *see also* Nussbaum, *Milean Liberty*, *supra* note 43, at 334 (suggesting that “sexual fulfillment is a very important part of human life”).

⁴⁸ NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 5, at 78.

⁴⁹ *See* Carol Quillen, *Feminist Theory, Justice, and the Lure of the Human*, 27 *SIGNS* 87, 96 (2001) (“[W]hat we most need to understand and evaluate is precisely what the discourse of human liberalism occludes: the difference-making mechanisms that function within it, or in some cases in spite of it, to create or perpetuate systemic hierarchies among persons.”).

⁵⁰ *See id.* at 99 (“A theory that assumes or posits the human person as . . . an autonomous moral agent can occlude or dismiss as irrelevant precisely the processes that differentiate and individuate us.”).

It is this latter criticism that seems particularly relevant to contemporary debates about the status of LGBT people in our society. Several queer theorists and lesbian feminists have raised concerns about framing political and legal issues affecting sexual minorities in ways that encourage LGBT people to assimilate by embracing heteronormative values. This concern has been expressed particularly strongly in the context of same-sex marriage. Although queer theorists worry primarily about sexual freedom and lesbian feminists primarily about patriarchy, both sets of critics argue that the gay rights movement's pursuit of marriage encourages LGBT people to form relationships that mimic the traditional ideal for different-sex relationships, thus discouraging potentially more radical and transformative modes of sexuality.⁵¹ Some of these critics also note that the admission of gay people into the institution of marriage will inevitably lead to the greater stigmatization of those who choose not to structure their personal relationships in ways that replicate traditional heterosexual norms.⁵²

If there is anything that we can learn from our nation's long and protracted battles over racial and gender equality, it is that there is no easy or obvious way of finding the appropriate balance between emphasizing considerations of sameness versus considerations of difference, nor is there an easy or obvious way to address the stigmatization, marginalization, and oppression of minority groups. To argue from the perspective of sameness, as already suggested, can occlude important and meaningful differences between those who subordinate and those who are victims of subordination. In contrast, to argue from the perspective of difference can occlude important and meaningful similarities between those at the top and those at the bottom of social, political, and economic hierarchies. Given that the queer theory and lesbian feminist literature generally emphasizes the dangers of relying *too much* on sameness arguments, I finish this Article by addressing some of the dangers of relying *too little* on sameness considerations in advancing the interests of sexual minorities in our society.

⁵¹ For representative articulations of the feminist and queer theory critiques of the pursuit of same-sex marriage as a civil rights goal, see generally Claudia Card, *Against Marriage and Motherhood*, HYPATIA, Summer 1996, at 1; NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999).

⁵² See Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK, 1989, at 9, 14–17, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 683, 685 (3rd ed. 2008) (“Ironically, gay marriage, instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context.”).

III. LIBERAL HUMANISM: WHAT IS IT GOOD FOR?

In her recent book, *From Disgust to Humanity*, Nussbaum describes what she calls a “politics of humanity,” which she defines as “a political attitude that combines respect with curiosity and imaginative attunement.”⁵³ This politics holds that we cannot fully and meaningfully respect others unless we seek to imagine, and sympathize with, their experiences. For Nussbaum, this attitude, which she acknowledges is “something close[] to love,” is a necessary prerequisite for the attainment of true equality by marginalized groups.⁵⁴

A politics of humanity encourages all of us to use our imagination to see the world through the eyes of those whom we understand the least. For some of us, those whom we understand the least may be LGBT people; for others it may be religious fundamentalists; and for yet others it may be those who seek to subordinate women. A politics of humanity asks us to do hard psychological and emotional work by seeking to recognize ourselves in those with whom we seem to share the least.

A politics of humanity can be particularly useful in undermining a politics of disgust, which Nussbaum contends serves as the foundation for much of the antigay rhetoric deployed by social conservatives today. The emotion of disgust, Nussbaum notes, “expresses a universal human discomfort with bodily reality, but then uses that discomfort to target and subordinate vulnerable minorities.”⁵⁵

Nussbaum explains that much of the hatred and discrimination aimed at sexual minorities is grounded in responses of disgust to their (actual or perceived) sexual practices. A politics of humanity encourages all of us, including those who deem same-sex sexual desire and conduct to be “disgusting,” to focus on what we share with those whose norms or practices we find disturbing. This change in vantage point can help to shift our judgments from ones grounded in disgust and shame to ones based on (potential) understanding.

It seems to me that much of the progress that we have made in this country over the last generation in achieving partial equality and toleration for sexual minorities is the result of the fact that a growing number of straight Americans are recognizing themselves in the lives and aspirations of LGBT people. There is perhaps no better indication of this than the fact

⁵³ NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 41, at xviii..

⁵⁴ *Id.*

⁵⁵ *Id.* at xv.

that a majority of Americans now support the legal recognition of same-sex relationships,⁵⁶ with a growing number of them agreeing that LGBT people should be provided with the opportunity of marrying the person of their choice.⁵⁷ This fundamental change in the views of many Americans could not have taken place without at least an implicit understanding on their part that the love and care found in many same-sex relationships are no different than the love and care found in many different-sex relationships.

It used to be that the vast majority of Americans could not get past their feelings of repulsion at the thought of sexual intimacy between two individuals of the same sex. There was a time, not too long ago, when most people saw same-sex sexual conduct and relations as so unnatural and perverse as to be, in a crucial sense, less than human. Indeed, it is no coincidence that sodomy statutes in the United States—mostly codified as measures aimed at “crimes against nature”—covered not only acts like anal and oral intercourse, but also bestiality.⁵⁸ Reflecting this line of thinking, the conservative legal philosopher John Finnis has argued that same-gender sexual intimacy is, morally speaking, akin to the “[c]opulation of humans with animals.”⁵⁹

Those who seek to dehumanize LGBT people view them exclusively through the prism of sex rather than seeing them as full human beings who share with others a myriad of complex needs and capabilities.

⁵⁶ A recent national poll conducted by the Pew Research Center for the People and the Press found that “[a] clear majority of Americans (57%) favors allowing gay and lesbian couples to enter into . . . civil unions.” Press Release, Pew Research Center for the People & the Press, Majority Continues to Support Civil Unions (Oct. 9, 2009), *available at* <http://people-press.org/reports/pdf/553.pdf>.

⁵⁷ Adam Nagourney, *Signs G.O.P. is Rethinking Stance on Gay Marriage*, N.Y. TIMES, Apr. 28, 2009 (reporting on recent poll finding that forty-two percent of respondents “supported gay marriage, compared with 22 percent in March 2004”).

⁵⁸ WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 20 (2008) (noting that “American courts and commentators uniformly followed the English buggery precedents in regarding [sodomy] as the penetration of a man’s penis inside the rectum of an animal, of a woman or girl, or of another man or boy”).

⁵⁹ The full quotation is as follows: “Copulation of humans with animals is repudiated because it treats human sexual activity and satisfaction as something appropriately sought in a manner as divorced from the actualizing of an intelligible common good as is the instinctive coupling of beasts—and so treats human bodily life, in one of its most intense activities, as appropriately lived as merely animal. The deliberate genital coupling of persons of the same sex is repudiated for a very similar reason.” John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1069 (1994).

This form of dehumanization has both moral and political implications. Morally it means that LGBT people are defined solely by their sexuality rather than by the content of their character, relationships, and aspirations. Politically it means that the resistance to gay rights positions has been driven, as David Richards puts it, by “a dehumanizing obsession with homosexuality solely in terms of a rather bleakly impersonal interpretation of same-gender sex acts . . . an interpretation that deracinates such sex acts from the life of the person that is recognizably human or humane.”⁶⁰

Although there are clearly some who continue to promote the dehumanization of LGBT people, there is a growing segment of the population that is looking beyond sexuality’s surfaces—as represented by the gender of sexual partners and the use of particular body parts in particular ways in the pursuit of sexual pleasure—in order to focus on something considerably deeper, that is, on the shared needs and capabilities associated with sexual desire and intimacy. In doing so, a growing segment of the population is increasingly looking beyond differences based on sexual orientation and focusing instead on a humanity that is shared with LGBT people.

To put it differently, the burden of proof regarding the basic humanity of LGBT people is shifting. Not too long ago, LGBT people had to prove that their sexual desires, acts, and relationships were not inconsistent with what it means to be human. Increasingly these days, the burden is on those who seek to deny that the sexual intimacy of LGBT is recognizable as a manifestation of human needs and capabilities related to sex and sexuality.⁶¹

I agree with Nussbaum that it is possible to make defensible judgments about capabilities that are central to the leading of a full human

⁶⁰ DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 183–84 (1999).

⁶¹ An example of this shift is reflected in the difference between the Supreme Court’s opinions in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003). In upholding the constitutionality of sodomy statutes in *Bowers*, the Court understood gay people as being incapable of forming relationships that were analogous to those of straight people. See *Bowers*, 478 U.S. at 191 (noting that “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated”). In contrast, the *Lawrence* Court, in striking down sodomy laws, viewed gay people as bearers of human dignity who have the right to make decisions relating to sexual intimacy without interference by the state. See *Lawrence*, 539 U.S. at 567 (noting that individuals have the right to “retain their dignity as free persons” in the face of regulations such as Texas’s sodomy statute that “seek to control . . . personal relationship[s]”).

life. Nussbaum's humanist approach is appealing not only because it is grounded in observations and judgments based on human practices and experiences, but also because its substantive content—in terms of the list of central capabilities that define our humanity—is purposefully open to contestation and debate. Her vision of the human, in other words, is neither fixed nor static; instead, it is open to revision, especially as we learn more about how the aspirations of subordinated groups are constrained by social norms and expectations. The late Peter Cicchino eloquently defended this view of human liberalism when he noted that it is crucial to think about what it means to be human and to lead a fully human life from within “[a] spirit of self-correction, of constant and careful attention to the rich texture and fine detail of human experience, and a profound sensitivity to the marginalized and the oppressed.”⁶²

For those who remain nervous about grounding a moral, philosophical, or political vision in so-called essentialist understandings of what it means to be human, I offer two additional thoughts. First, I understand that nervousness. To be human has too often been equated with the kinds of characteristics, interests, and priorities associated with being male, white, and heterosexual. When social regimes are constructed on top of this slanted and limited view of what it means to be human, those who do not fall under all three categories are vulnerable to stigmatization and subordination. But, in my opinion, the solution to the suffering and oppression that has undoubtedly emanated from racist, sexist, and homophobic understandings of what it means to be human is not to give up altogether on the concept of the human being as a source of moral and political judgments about which social arrangements and practices are fair and just. The better choice is to present and defend a more convincing and nonoppressive conception of what it means to be human and to lead a fully human life.

Second, I would urge those whose anti-essentialist proclivities are so strong that they simply cannot accept the substantive content of even the mildest and most open-ended form of human liberalism to think pragmatically. That is, I would urge them to view the concept of “the human,” even if it is entirely constituted through forces of social construction, as a politically useful tool.

The late philosopher Richard Rorty was one of the twentieth century's most vociferous critics of universalism and, as such, he objected

⁶² Peter M. Cicchino, *Building on Foundational Myths: Feminism and the Recovery of “Human Nature”: A Response to Martha Fineman*, 8 AM. U.J. GENDER SOC. POL'Y & L. 73, 84 (2000).

to any effort that emphasized, either morally or politically, shared commonalities that are constitutive of humans. For Rorty, there was nothing to human beings that was outside of or separate from their contingent ties and connections. As he explained it, “socialization, and thus historical circumstance, goes all the way down. . . . [T]here is nothing ‘beneath’ socialization or prior to history which is definatory of the human.”⁶³

Rather than focusing on what might be universally *true*, Rorty wanted us to talk about what might be *useful*.⁶⁴ In particular, in the sphere of politics, Rorty wanted to talk about what might be useful in creating a more egalitarian and tolerant society with less discrimination and other forms of group-based harms.⁶⁵

It has always puzzled me, however, that for a pragmatic thinker who claimed to be driven by the useful, Rorty seemed to underestimate the pragmatic value of humanist talk. Even if liberal humanists like Nussbaum overestimate the ability to which it is possible to speak of human similarities in matters of sex and sexuality, encouraging everyone to recognize in themselves the similarities in the sexual desires and experiences of others is politically useful. It seems to me, in other words, that Nussbaum’s liberal humanism in matters of sexuality can be defended, if nothing else, on politically pragmatic grounds. As already noted, much of the political progress that sexual minorities have made in this country has come about because a growing number of Americans now believe that, when it comes to sexual desires, conduct, and relationships, what they share with LGBT people is more important than what they do not.

It might be that an alternative political vision—one that does not rely on capabilities that we share as human beings—could achieve similar or even greater political gains. Until that vision is articulated and defended, however, I think it is best, as a political matter if nothing else, for sexual minorities to stick by the kind of liberal humanism defended by Martha Nussbaum.

⁶³ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY*, at xiii (1989).

⁶⁴ RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE*, at xxv (1999) (“The purpose of inquiry is to achieve agreement among human beings about what to do, to bring about consensus on the ends to be achieved and the means to be used to achieve those ends.”).

⁶⁵ See generally RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH CENTURY AMERICA* (1998).

