

LIBERALISM, DEVELOPMENT, AND GENDER: RESPONSES TO THE PAPERS

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I must begin by warmly thanking all the people here at Columbia who made this Symposium possible. I feel immensely honored and grateful for all of the time the participants spent with my work and for their acute criticisms. I shall introduce my specific responses to the papers by saying something about the ways that gender and sexuality figure in my work over the years. Then, I shall move through the papers, grouping them by thematic sections, but considering each separately to some extent, because I really learned so much from each of them.

I. OVERVIEW: MY WORK ON GENDER AND SEXUALITY

My career as a philosopher has focused on two distinct types of issues. Often, they seem very different, so different that graduate students and other students who are attached to one or the other set of issues often do not link them, although I myself always do.

First, there is philosophical reflection about the emotions, their structure, and their role in human life and the ethical life. And, second, there is normative political philosophy, where I have been working for some time on the development of the “capabilities approach” that so many people in this Symposium have talked about. The two projects do intersect, clearly, in a number of ways. One area of intersection comes from the fact that I hold that emotions have a complicated cognitive content and that they are, therefore, shaped by social norms. They contain appraisals of what is important, and those appraisals are, in turn, shaped not just by childhood development but by normative views that we learn in our social and political culture. That means that we have to think about how society does shape them. And it also means that, to some degree anyway, it is in our power to affect changes in that shaping. Certain forms of domination and humiliation that might be very common might possibly be different in the

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next generation, and the emotions that sustain them would be different. So we have to think about how to shape the emotions, not just how to control them. And I think that it is one thing we learn when we think about the emotions in a way informed by normative political philosophy: an insight into the ways in which political structure and political norms may actually influence the personality at a deep level.

Currently, in fact, my main long-term project concerns the political emotions that support the institutions that would be required by my capabilities approach. My wonderful editor, Terry Moore, who died two years ago, said to me, "You know, you've written about capabilities, and you've written about compassion, but why not bring the two together? Ask how we can produce people who would actually build and sustain this society you have in mind." That, of course, is an important thing to do, and I am trying to figure out how to do it. The project, however, is not just to talk about compassion, which is basically supportive of good political institutions, although it may be narrow and uneven. There are, however, some emotions that are particularly threatening to the operations of a decent society, and we also need to talk about those: shame and disgust, in particular, but I also think that anger has a very bad and excessive side. So writing about political norms well requires thinking well about the emotions that both support and threaten these norms.

On the other side, thinking well about emotions requires thinking about certain issues that are also central in political philosophy: in particular, narcissism and hierarchy. One of my great interests is thinking about how people's emotions begin, early in a young child's life, as narcissistic and self-focused, not animated by any sense of the other person as a real person with real needs, and so on, and how, as a child matures, if things go well, the child can become capable of sympathy and concern for another person seen as a separate being who is not simply that child's slave. But of course, things don't always go well, and narcissism remains I think a very pervasive danger in the emotional life. Naturally, that leads into politics. Such tendencies to narcissism may be influenced in various ways by the political culture, and their presence has major political consequences. As time goes on, I have gotten more and more persuaded that Gandhi was absolutely right: the real conflict of civilization is inside each person. It is certainly not the conflict between Islam and the West, but it is not even simply the conflict between respectful people and dominating people within a given society, although that is real and important. At a deeper level, as Gandhi said, we must consider the conflict within each person, between the tendency to dominate the other and to think of the other as a slave and the

capacity for concern and respect. So my book, *The Clash Within*,¹ was really all about that. Therefore, thought about gender norms played an important role in that book, as I shall later describe.

My work on gender spans these two big categories: theory of emotion and normative political philosophy. Let me briefly describe how those concerns play out in several books. *Sex and Social Justice*,² which quite a few people of the papers mention, is a collection of essays. It is quite heterogeneous, but it is held together by the aim of describing a certain kind of liberalism, which is, I believe, also radical and to some extent informed by queer theory. The capabilities approach is treated there, but so too are more specific political matters such as justice for gays and lesbians, the decriminalization of sex work and so on. Throughout, I try to respond to some criticisms feminists of various types have made of the liberal tradition in political philosophy, in the process articulating my radical form of liberalism, which I connect to Mill, to whom I actually also give a radical and queer reading. I recently authored a paper for Mill's bicentennial called *Mill's Feminism: Liberal, Radical and Queer*,³ and I really do think that characterization makes sense, although Mill himself might be quite alarmed by the word "queer," Victorian gentleman that he was. I believe that Mill, like radical feminists, understood how hierarchy deforms not just practice but also emotion and desire; he was determined to call into question the norms of family life that produce deformed expectations and patterns of desire. He also was resolutely determined to call into question conventional categories of all sorts and to recommend spaces for experiments in living that would be quite diverse, and that would be protected from both legal and societal intervention by strong norms of liberty. That is the sense in which his feminism has a queer aspect. And although he didn't write about sexual orientation, as Bentham did—Bentham actually had very interesting things to say about sexual orientation⁴—Mill's general radicalism about tradition and convention pushed his thought in a direction that it is appropriate to call queer.

¹ MARTHA C. NUSSBAUM, *THE CLASH WITHIN* (2007) [hereinafter *THE CLASH WITHIN*].

² MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999).

³ Martha C. Nussbaum, *Mill's Feminism: Liberal, Radical and Queer*, in JOHN STUART MILL: THOUGHT AND INFLUENCE, A BICENTENNIAL REAPPRAISAL (Georgios Varouxakis & Paul Kelly eds., 2010).

⁴ Jeremy Bentham, Offenses against Oneself (1785), in 3 J. HOMOSEXUALITY 389, 4 J. HOMOSEXUALITY 1 (1978), available at <http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/bentham/index.html>.

*Women and Human Development*⁵ was my first systematic book-length account of the capabilities approach, which I elaborated more fully and, I think, in some ways more adequately, in *Frontiers of Justice*.⁶ But it was also a book about women and gender issues. Why and how did the two concerns come together? In *Women and Human Development*, I focused on women's situations both for their intrinsic interest and importance, and also in order to use those issues as a test of standard theories of development, showing that the inability of those theories to treat women's inequality adequately is a sign of a more general inadequacy in those theories. One of the ways in which you quickly see how the GNP per capita model of development fails is to see that it doesn't notice the inequalities women suffer both in the workplace and in the household. You also can test utilitarian models by noticing that models which are based on people's existing preferences are often biased in the direction of the status quo, and will often validate what are known as adaptive preferences; that is, preferences that are adjusted to a bad state of affairs. Women are a very standard example in the adaptive preferences literature.⁷ And my collaborator, Amartya Sen, focused on this case in his own important writing on adaptive preferences. Women, he argues (and demonstrates empirically), often adopt images of the proper woman, and then report satisfaction with that situation, saying, for example, "We prefer not to have more education." But that might show a limitation of the preference-based model rather than a limitation of education for women. It was for that sort of reason that my focus on women had a two-fold role to play in my argument.⁸

My opponent throughout that book was both economic and classical utilitarianism, which still dominates the world of development and policy-making. But I also criticized some aspects of mainstream liberal theory, in the chapter on the family.⁹ In that chapter I said that John Rawls had adopted too much of the old public-private distinction, even though he

⁵ MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) [hereinafter *WOMEN AND HUMAN DEVELOPMENT*].

⁶ MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter *FRONTIERS OF JUSTICE*].

⁷ On all of this, see *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 5, chs. 12.

⁸ See also Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, *FEMINIST ECON.*, Vol. 9.2, 2003, at 33.

⁹ *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 5, ch. 4.

says that that's not what he's doing. My conclusion was that Rawls had not been sufficiently critical of the internal distribution that is going on in the family. Although he grants that the family is a political institution, indeed part of society's "basic structure," he insulates it to a degree from the demands of justice.¹⁰

The focus on India in that book was dictated, first, by my love of India. And I think that's extremely important, and it is important in all my work subsequently. But it is also because I thought that it was very important, in doing my type of feminist theoretical work, to get real and have a sense of one nation in all of its historical complexity, rural-urban differences, regional differences, religious differences, and so on. I was discontent with books that had one example from Iran and one example from China, without giving any sense that the author really knew the history or political complexities of those countries. And so I chose India because I already loved it and I'd spent a lot of time there and thinking about it. But there's a methodological point, too, which comes out in some of the papers in this Symposium: that is, my interest in using deep immersion in a particular situation in order to portray the whole range of problems that one might encounter there. Immersion permits the theorist to get the right problems onto the table, not just the ones that she's most familiar with back home; it also shows how thinking about problems in any context requires detailed familiarity with that context. If one were going to implement a similar approach in another place, one would have to just do that kind of detailed work in that place. That's why I was so delighted that some of the papers had done this rich kind of work—Tracy Higgins¹¹ about South Africa, Amrita Basu¹² about India, and Aili Tripp¹³ about quite a number of countries—because I think it is only that detailed kind of work that would enable one to even notice what capabilities are involved and how they might be implemented, but also how they might be further specified at a concrete level.

¹⁰ On all of this, see *id.*, ch. 4.

¹¹ Tracy E. Higgins, *Feminism as Liberalism: A Tribute to the Work of Martha Nussbaum*, 19 COLUM. J. GENDER & L. 65 (2010).

¹² Amrita Basu, *Who Secures Women's Capabilities in Martha Nussbaum's Quest for Social Justice?*, 19 COLUM. J. GENDER & L. 201 (2010).

¹³ Aili Mari Tripp, *Creating Collective Capabilities: Women, Agency and the Politics of Representation*, 19 COLUM. J. GENDER & L. 219 (2010).

Here I want to mention the Human Development and Capability Association, which is about to hold its sixth annual meeting.¹⁴ One of the reasons that Sen and I founded it—or perhaps I should say that we agreed to serve as figureheads, as it was actually a group of younger scholars from a range of nations and disciplines who did all of the work—was to bring people together across regional and national boundaries, across disciplinary boundaries, and across boundaries of academic rank and age and so on, to talk about these issues. The association also aims to promote dialogue between academics and development practitioners. And it was precisely because we saw that the rich contextual work was so crucial—and interdisciplinary work as well—that we wanted to have this international association, which now has 700 members from seventy different countries. Our annual meetings—plenary papers published in the *Journal of Human Development and Capability*—are rich databases of concrete approaches to implementation but also to further specification.

Now on to other books more quickly. *Frontiers of Justice* was not discussed by very many of the papers (though Janet Jakobsen's includes a splendid discussion of it¹⁵), but I view it as my best account of the capabilities approach. It addressed some key questions I had not previously addressed, such as whether we want an equal level of capability for all or only a threshold. At the same time, a lot of detailed philosophical points are much more fully worked out in that book than in *Women and Human Development*. But another thing that is important is that it is a book that is entirely about power really, and this has come up in quite a few of the papers. It is a book that says a certain initially very attractive part of the liberal tradition, namely the social contract theory, does not go deep enough, if what we want is to criticize differences of power that are rooted in people's very physical capacities. The social contract tradition, in its history, was aiming to criticize artificial hierarchies of wealth, rank, and class, and that it did very well. And I think, up to a point, you can adapt it, as John Rawls did,¹⁶ to criticize artificial hierarchies of race and gender.

However, when you get to the issues that I call the three frontiers of justice in today's world—justice for people with disabilities, justice across national boundaries, and justice for non-human animals—we find that the

¹⁴ Human Development and Capability Association, Home Page, <http://www.capabilityapproach.com> (last visited Feb. 1, 2010).

¹⁵ Janet R. Jakobsen, *Queer Relations: A Reading of Martha Nussbaum on Same-Sex Marriage*, 19 COLUM. J. GENDER & L. 133 (2010).

¹⁶ JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999).

social contract tradition did not address them well enough, and sometimes not at all. The idea that there's a contract between people who are stripped of all artificial advantages, but are posited as roughly equal in physical and mental capacities, is not going to do enough work when we get to these three issues, and Rawls knew that. He actually said that his theory faced limitations in just those places.¹⁷ We have to think, then, how to imagine justice between people and creatures who are systematically unequal in physical and mental powers. And that's a complicated exercise, but I try to argue that a version of the capabilities approach goes further, at least there—I don't claim it goes further everywhere—than Rawls's very great theory.

Turning now to the books on emotions—*Upheavals of Thought*¹⁸ and *Hiding from Humanity*¹⁹—gender issues were quite salient in both of them, but particularly in the latter. *Hiding* was actually inspired by reviewing William Ian Miller's very interesting book, *The Anatomy of Disgust*,²⁰ a very perceptive book about disgust by a law professor—but it said nothing about law. I thought to myself there are a lot of places where disgust is playing a prominent role in the law, and it would be interesting to think about that. So that's how I got started on that book. I begin by identifying the practical importance of disgust in a number of areas of law, including various parts of criminal law such as the reasonable provocation defense, sodomy laws, etc., and then going on to consider obscenity law. I then look at theories in which disgust plays a central role as a criterion of legal regulability: Devlin's famous theory,²¹ but also, more recently, that of Leon Kass, who was until recently Chair of the President's Council for Bioethics. Kass wrote an influential article called "*The Wisdom of Repugnance*," arguing, like Devlin, that widespread disgust for a practice

¹⁷ *Id.*

¹⁸ MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT* (2001).

¹⁹ MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* (2004) [hereinafter *HIDING FROM HUMANITY*].

²⁰ See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1998); and Martha C. Nussbaum, *Review of William Ian Miller's The Anatomy of Disgust*, *THE NEW REPUBLIC*, Nov. 17, 1997, at 32–38.

²¹ LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (Oxford U. Press 1996) (1968).

was a sufficient ground to forbid that practice under law.²² These were the theories at which I took aim, and I tried to reach some of those conclusions of Mill's *On Liberty*²³ through a different route. I am not very satisfied, in a number of ways, with the arguments of *On Liberty*, and so I thought that by showing, through a detailed conceptual and empirical study of those two emotions, why disgust and shame were unreliable and how they operate to stigmatize and subordinate, we could get to some of Mill's conclusions by a different path, delving more deeply into those emotions.²⁴ Gender was important in that book because I discussed both sexual orientation disgust and misogynistic disgust, not only those, but those are two important cases.

My other books that deal with emotions are also pertinent in a more indirect way: *The Fragility of Goodness*²⁵ and *The Therapy of Desire*,²⁶ which consider ancient Greek and Roman views of emotions; *Love's Knowledge*,²⁷ which investigates the relationship between literature and normative ethics; and *Poetic Justice*,²⁸ which looks at the role of imaginative literature and the emotions it construct in the law. On the political philosophy side, *Cultivating Humanity*,²⁹ which confronts issues involved in the broadening of traditional liberal arts education, argues that gender studies supply a crucial part of the preparation of young citizens. *The Clash Within*,³⁰ a study of religious violence in India, looks closely at the baneful role played by stereotypes of humiliated masculinity in fueling violence against Muslims, and, particularly, Muslim women. And last year's *Liberty of Conscience*³¹ develops some norms involved in the legal

²² Leon Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Human Beings*, THE NEW REPUBLIC, June 2, 1997, at 17, reprinted in THE ETHICS OF HUMAN CLONING 3 (Leon Kass & James Q. Wilson eds., 1998).

²³ JOHN STUART MILL, ON LIBERTY (Oxford 2008) (1859).

²⁴ See HIDING FROM HUMANITY, *supra* note 19, ch. 7 for that critique.

²⁵ MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS (2d ed. 2001).

²⁶ MARTHA C. NUSSBAUM, THE THERAPY OF DESIRE (2004).

²⁷ MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (1990).

²⁸ MARTHA C. NUSSBAUM, POETIC JUSTICE (1995).

²⁹ MARTHA C. NUSSBAUM, CULTIVATING HUMANITY (1997).

³⁰ See THE CLASH WITHIN, *supra* note 1.

³¹ MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE (2008) [hereinafter LIBERTY OF CONSCIENCE].

protection of religious freedom and equality, focusing in the final chapter on the issues of gender and sexual orientation.

My most recent book, *From Disgust to Humanity: Sexual Orientation and Constitutional Law*,³² was released this January. I am very grateful to the Symposium participants for pouring over early manuscripts. I never expected that, but I was very grateful and happy. The new book is, in a way, a continuation of the older project on shame and disgust, except that the older project focused for the most part on the criminal law, and here I focus on constitutional law. It is for a series on constitutional law, and so that is its focus. And I am trying, as is the spirit of that series that Geof Stone is editing, to address the general public. And so rhetoric becomes important, and I will talk more about that later.

II. FEMINISM AS LIBERALISM

The papers in this section explore the form of liberalism that I have tried for a long time to develop, a form that learns from radical feminism and also from queer theory, but that also maintains the classic liberal commitment to equality and non-hierarchy, and also to the idea that each person ought to be treated as an end, rather than as a mere means of the ends of others. I take the animating vision of liberalism to be its anti-feudalism and anti-monarchialism—the eradication of all class-based and caste-based distinctions in favor of a politics of equal respect and equal liberty.

Turning, first, to Carlos Ball's³³ paper: I think it is a marvelous and sensitive exploration of the role of commonality and universality in my work in political philosophy, and my ideas about what it is, and what it isn't. Ball puts together extremely nicely so many things that I say in different places. One thing I want to bring out just a bit more explicitly than Ball did is the distinction between descriptive universalism and normative universalism. I think that is extremely important and fundamental, and Amrita Basu³⁴ did talk about it some in her paper. But I think it is important to say that I do not ever think of myself as announcing a universal theory of what human nature is or what women's experience is, or anything like that.

³² MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010) [hereinafter *FROM DISGUST TO HUMANITY*].

³³ Carlos A. Ball, *Martha Nussbaum, Essentialism, and Human Sexuality*, 19 COLUM. J. GENDER & L. 3 (2010).

³⁴ Basu, *supra* note 12, at 201.

First of all, it is dubious that there are such universals. But even if there were, they couldn't do any normative work without a lot of further argumentation. The fact that a lot of human beings, and perhaps all, have the capacity for cruelty, doesn't give us any good normative reasons to support the development of the capacity for cruelty. So I think we get norms from norms and not from the way things are. The descriptive does not entail anything more than all that by itself, although it may show us the materials we have to work with and some tendencies we may need to guard against.

So what I am doing instead is defending certain norms universally as good things for all, cross-culturally. And that really doesn't entail that I think people's experiences are very similar, although, as Ball suggested, certain similarities that we do observe play some role in thinking about norms, in a limited way: for example, understanding what people's nutritional needs are. Nutritional need (controlling for size, activity level, and so forth) is something that is descriptively relatively universal. And then, of course, that account plays some role in talking about what a just health care scheme is and what a just nutritional policy is. But it is important that I do not simply read norms off from facts, and very few areas are informed by facts in any simple way.

I used to have a category called *basic capabilities*: the innate abilities with which people come into the world. And I used to say that, although the capabilities on my list are norms that we're striving for, to which people are entitled because of their human dignity, still, we ascribe entitlements to people on the basis of their possession of a lower-level ability, a basic capability, so-called, for reaching that higher developmental level. Now already, in my first article on that, in 1988, I immediately said, "Well, the potential for denying wrongly that people have these innate abilities is enormous, so we really shouldn't let politicians argue about which people do or don't have them. We should proceed as if everyone has those basic capabilities."³⁵ So I resisted a political use of the notion, but I still was using the notion. By now I've rejected it, utterly, for the following reasons. I have been thinking about people with disabilities and thinking about the tremendous importance of extending to them the same political entitlements as others, and applying the same norms as to others. I realized that there's just no point, any more, in using the category of basic capability, because a person with severe cognitive disabilities may not have, as an individual, the capacity for speech or the capacity for practically all of the things on my list. Nonetheless, it is my view (and this is something I

³⁵ Martha C. Nussbaum, *Nature, Function, and Capability: Aristotle on Political Distribution*, OXFORD STUD. IN ANCIENT PHIL., Supp. Vol. 1 at 145 (1988).

said in a conference that Eva Kittay organized last September, whose proceedings were included in a recent issue of *Metaphilosophy*)³⁶ that people with very severe cognitive disabilities, any child that is born of two human parents, short of someone in a persistent vegetative condition or an encephalic person—anyone who exhibits some form of striving and awareness—is normatively entitled to all of the capabilities on the list. Now how do they get there if they don't have the basic capabilities? Well, through some combination of guardianship and assistance. And so, for example, I even hold that people with severe cognitive impairments retain the right to vote. Maybe the person who actually does the voting will have to be a guardian. Similarly, I hold that they have a right to jury service, although that role may again have to be played by a guardian. You see that I've gone very far in the direction of rejecting the category of basic capabilities and, therefore, toward utterly rejecting descriptive universalism.

Now it is a big issue whether the role of the species is useful any more, and I think it is. I think, for example, that it is important to point out that a person with severe cognitive impairments is still human: she is not at all like a chimpanzee, and does not have the option of going off and living a happy life in a chimpanzee community, an option wrongly suggested by some utilitarian comparisons. The human community is her home, and she therefore needs to have the central human goods. In talking about non-human animals, as well, I want to preserve a role for the species.³⁷ But I don't want to go into that here because I think it would take too long and it would take us far away from our topic. But now, back to Carlos Ball's paper: where sexuality is concerned, what I defend normatively is a universal right to liberty and sexual choice. And I defend that without at all presuming that sexuality is similarly configured in all cultures. And of course, as he said, I am perfectly aware that it isn't,³⁸ and I am siding very strongly with the social constructionists on that question. In fact, the whole point of the protection of big spaces around the person is to permit many different projects to flourish, so long as the equal rights of others are not damaged. I believe sexuality in that respect is similar to religion. That is, to defend religious liberty as a universal norm does not at all entail that you think the search for meaning, whether religious or secular, takes a similar form in all societies, or even in all parts of your society, and of course it

³⁶ See Martha C. Nussbaum, *The Capabilities Of People With Cognitive Disabilities*, 40 *METAPHILOSOPHY* 331 (2009).

³⁷ See *FRONTIERS OF JUSTICE*, *supra* note 6, ch. 6.

³⁸ Ball, *supra* note 33, at 8–9.

doesn't. But the more variety there is the more important it will be to defend those spaces around the person where the nonstandard project can flourish, and to defend them on equal terms for all.³⁹

Now of course, that's not so simple because—and I think Ball nicely gets at this—there are some ways of framing the universal norm that skew policy in the direction of a standard and well-known lifestyle rather than something else. The same problem exists in the area of religion, as we know, because the “free exercise of religion” was initially understood in a pretty Protestant way, as involving the freedom of belief and maybe also the freedom of a standard type of religious practice. Things that came along later, such as the understanding that some religions involve a whole communal way of life, as in *Wisconsin v. Yoder*,⁴⁰ or that some religions involve a particular relation to the land, as in Native American cases, those were hard-won struggles to reformulate and somehow rethink the norm of free exercise. And I don't think we've yet finished that process; the norm of what religious liberty is has to be rethought continually, in keeping with our growing understanding of the variety that exists within our society and the many different projects that people are pursuing.

I think that has to happen with sexuality. We start perhaps with the “vanilla” policy of protecting same-sex couples who want to join the bourgeois mainstream. We have not even reached this point as a nation, but already, we can see that that's much too underprotective, it is much too narrow, and it is really unfair. But then, the question is how exactly do we formulate the norm so as to accommodate a much wider range of sexual choices, and I think that's a project that we are still working on. *Lawrence v. Texas*⁴¹ was quite a mess because at times the opinion speaks about free people, and so on. But then, there is also talk of relationships. As several here have said or written, there are so many different things in that opinion that you can't really tell how far the notion of sexual liberty is being rethought or extended. But the Fifth Circuit, at least, said that *Lawrence* recognizes an individual liberty right that entails the right to purchase a sex toy.⁴² I think that's progress in the right direction, and I think we should keep on rethinking the norm. But the individual liberty right ought not to be

³⁹ See LIBERTY OF CONSCIENCE, *supra* note 31, chs. 1–3.

⁴⁰ 402 U.S. 994 (1971).

⁴¹ 539 U.S. 558 (2003).

⁴² *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743–44 (5th Cir. 2008), *petition for rehearing en banc denied*, 538 F.3d 355 (5th Cir. 2008). I discuss this and other cases in FROM DISGUST TO HUMANITY, *supra* note 32, ch. 6.

limited to people who only choose a certain kind of relationship or have a certain kind of intimacy. So I think that Ball is quite right to see that, even though my universalism is normative, the norm itself could be badly articulated if we have too thin a sense of the descriptive variety. I am trying to struggle with that.

Now just to say a few things more about how a normative view like mine is sensitive to plurality and difference, this is something I say in several places.⁴³ But I think it is worth putting that on the table here. First of all, I think it could be important, and I loved Carlos' quote from Peter Cicchino,⁴⁴ to say that it is in a self-critical and open-ended spirit that the list is put there on the table. I think it is important to put out something that can be discussed. But it is always subject to revision and contestation. Second, the list is very abstract. And I think it is good for it to be abstract, because that leaves it open to different societies and different groups within societies to specify those abstract norms in a way that suits their history and traditions. And here Alice Kessler-Harris's paper⁴⁵ is very relevant: a reason that any person who's involved in this topic should do good historical work is that this work is invaluable in thinking through what we want in our society, what concrete shape that norm should take. An example that I often give is that the free speech right that Americans have is quite different from the free speech right that Germans have. In Germany, the dissemination of anti-Semitic literature and the making of anti-Semitic speech is all illegal. In the United States, such things are held to be protected by the First Amendment. And I think both are right choices for the different histories and different cultures. So you really have to know the history well before you get a sense of what you want to defend when you're actually putting an abstract norm into a constitution.

The next thing to emphasize is that I think the list is put out for political purposes. It is part of what Rawls call political liberalism.⁴⁶ So it is a partial moral conception, as he puts it, that is explicitly introduced for political purposes only, and it does not preclude people having lots of different accounts of the different things in their more comprehensive views of life. It is meant to be the object of a consensus among people who are

⁴³ For example, in *FRONTIERS OF JUSTICE*, *supra* note 6, and *Capabilities as Fundamental Entitlements*, *supra* note 8.

⁴⁴ Ball, *supra* note 33, at 18.

⁴⁵ Alice Kessler-Harris, *Legal Theory & Gendered History*, 19 COLUM. J. GENDER & L. 125 (2010).

⁴⁶ See JOHN RAWLS, *POLITICAL LIBERALISM* (2d ed. 2005).

different, but we hope that they can meet at this place, very much in the way that the Universal Declaration of Human Rights sought a consensus among people who held very different views of human life. It is meant not to negate these differences but to be the object of a consensus among the people who differ.

Then, the fourth point, I think by saying that the appropriate goal is capability or empowerment and not actual functioning, we protect pluralism in yet another way. There are a lot of people who will accept, happily, the normative importance of a certain capability who wouldn't like to use the function. The old-order Amish don't want to participate in politics. But they don't object to being citizens of a country that offers the right to vote to all citizens. People who hate religion, and would certainly object to any kind of religious functioning, are not unhappy to be in a society that gives people the freedom of religion. Making capability, not functioning, the goal protects pluralism.

Fifth, the major liberties that protect pluralism are on the list. And by having a universal statement that these are valuable, we give pluralism a very crucial kind of defense. If you think about how you could have meaningful pluralism of different ways of life without strong protection of the freedom of expression, the freedom of association, the freedom of religious exercise and belief, it is very hard. So I think by defending those and saying we defend them for all, then precisely you give the different a place to speak and a place to emerge.

And then, just one more final point, the view is intended for persuasion, not coercive implementation. It is put out there as something in the international political arena that people can debate that they may be persuaded by. They may want to use it in a constitution or something else. But it is not meant to be implemented against the will of the people. And so when Alice Kessler-Harris asks, as she did in her Symposium lecture, "Well who's going to say what the good is,"⁴⁷ well the answer that I have given is the people will say that when they make their constitution, and when they choose the structures of implementation for that constitution. I am very opposed to any kind of forcible intervention in the affairs of any other democratic society, except in the most extreme cases of genocide and gross crimes against humanity. If the government is illegitimate, there may be a weaker standard. But if we're thinking about nations that have a reasonable level of legitimacy, then I think, you know, military intervention is virtually always off the map. And you know, even when intervention might possibly be defended on moral grounds—let's say we decided that

⁴⁷ See Kessler-Harris, *supra* note 45, at 126, for extended discussion.

the genocide in Gujarat was genocide, as I believe it was⁴⁸—still, even then, prudentially, it would be exceedingly stupid for any other nation to march its troops into Gujarat. So even when it could be morally defended, usually, it's a very bad idea.

Now I want to now move on to Nancy Levit's fascinating paper.⁴⁹ It pinpoints exactly the problem I have already raised about how to frame a general norm that is not exclusionary. I found particularly interesting Levit's discussion of rhetoric and persuasion. Her account articulates a way in which I found myself deeply torn as I was writing *From Disgust to Humanity*. On the one hand, I have very strong views about sexual liberty that entail that sex work should be decriminalized, that polygamy of a sex-equal kind—such as the sort that Elizabeth Emens discusses in her work on polyamory⁵⁰—should be legal. So I have views that in terms of the mainstream are far out. And if I put those views out there in the new book, it could undermine the persuasiveness of my argument for the things that I think maybe I can persuade people of, about same-sex marriage and so on. So I went through some torment on this with different drafts and the final product is much more out there than the initial drafts where I thought, "Well maybe I can say, 'Oh, well, maybe the state could regulate incest and polygamy.'" I've moved away from that, because I really don't think the arguments in that area are good, and so I've gone back to openly stating what I think. I also decided to include a final chapter about sex toys, bathhouses, and public sex because I really feel it is very important to say what I think about sexual liberty and to frame it broadly. Whether that will make the whole argumentless persuasive, I don't know. But, you know, I grew tired of being cautious. That's not my nature.

Furthermore, my overall theoretical approach entails this bolder set of conclusions. What I am doing is asking people to think about sex the way we've learned to think about religion; that is, something where we should give people plenty of spaces to conduct experiments in living, even if they don't like what the people are doing. Once, that was a very hard case to make in the area of religion. People thought, "Oh, these practices are satanic, and we ought to kick them out of Massachusetts," and so on. But by now, we've kind of accepted the importance of respecting people who have

⁴⁸ See THE CLASH WITHIN, *supra* note 1, ch. 1.

⁴⁹ Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21 (2010).

⁵⁰ See Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L & SOC. CHANGE 277 (2004).

beliefs and practices that the dominant group rejects. So what I am asking people to do is to think that way about sex. But I think it is actually hard for people to think about things that they are really scared of and that arouse deep emotions. So I'm hoping that I haven't totally lost my audience, but I have rewritten the book in ways that wrestle with Nancy Levit's question.

Tracy Higgins presents a very accurate and fine description of my position on liberalism.⁵¹ But let me just say what I think of the liberal tradition. As I have mentioned, I think the core idea of the liberal tradition is anti-feudal and anti-monarchical. It is all about overturning wrongful hierarchies of power in order to assert the equal dignity and equal freedom of each person. Seen from this viewpoint, liberalism always should have criticized the hierarchy of power in the household. And I think Mill was entirely right here: it was just simply defense of one's own particular privilege and shortsightedness and just badness that led all of the liberal theorists to neglect the household as a place where unjust power prevails. Mill rightly says, "How can they, in good conscience, attack all of these artificial hierarchies, and then say, 'Well, just in virtue of being born a male you get all sorts of unearned privileges?'" That is just feudalism."⁵² I think Mill was right to say that a critique of the family was part of the liberal project all along, only it was not executed because people were defending their own power. And so I think the public-private distinction, although it's a big deal for a lot of the liberal theorists, was not an integral part of the deepest aspect of the liberal project seen from the point of view that I've just stated.⁵³

There is another distinction that I think is important in the liberal project, and that is the one that Rawls draws attention to—the distinction between the political doctrine that shapes our shared institutions and the rest of the comprehensive schemes of life that we all differently pursue.⁵⁴ That

⁵¹ See generally Higgins, *supra* note 11.

⁵² JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 11, 87 (Susan M. Okin ed., Hackett 1988) (1861).

⁵³ For my critique of that distinction, see Martha C. Nussbaum, *Sex Equality, Liberty, and Privacy: A Comparative Approach to the Feminist Critique*, in *INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* 242 (Zoya Hasan, Eshwaran Sridharan & Ratna Sudarshan eds., 2002). For a shortened version, see Martha C. Nussbaum, *What's Privacy Got to Do with It? A Comparative Approach to the Feminist Critique*, in *WOMEN AND THE UNITED STATES CONSTITUTION: HISTORY, INTERPRETATION, PRACTICE* 153 (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003).

⁵⁴ JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

is not the same as the public-private distinction, because it doesn't say the home is a special place or that it is off limits to politics and so on. But it does say that there are some things that are the business of government because we're all equally included in them and we all share them, and then there are other things that are rightly not gone into by government such as people's different religions, their different comprehensive conceptions. Here there is room for something like the notion of privacy to emerge, but to use the word "privacy" I think would be so confusing and misleading. I don't like to use that word at all. So I think, in answer to Higgins I would say that it's not like I've taken a tradition that's got all these flaws, and then I've just fixed them. I think that all along there was something deep in it that was going in the right direction, but the shortsightedness of many theorists stopped them from seeing the full implications of their principles.

III. GENDER AND DEVELOPMENT

Of course much of my work on gender has been in the context of thinking about the normative goals of development policy. A lot of the same issues about descriptive and normative universalism and so on come up in this area. My claim was never that all women share certain characteristics or that all women share certain experiences, but rather that certain universal norms are good things to strive for everywhere. But of course, as in the other area, it is very important to actually look around and see the variety of people's lives, so that you don't frame the universal norm in too narrow a way. And so for me, learning about the varieties of family structures, the varieties of women's work and so on, was extremely important, and I continue to learn from the wonderful comparative work that people here and elsewhere are doing on these questions. One reason I founded the Center of Comparative Constitutionalism⁵⁵ is that I think that's how we start to learn much more about the relationship between experience and political norms.

Amrita Basu's paper rightly asks about the limits of state action and the importance of civil society and social movements.⁵⁶ I am very grateful to her for reading me so closely and precisely. Let me now try to face her question about why I am so focused on the state. There are several reasons for that focus. First, it reflects my longstanding interest in constitutional law. I mean, I think of these political principles quite increasingly as the

⁵⁵ University of Chicago, Center of Comparative Constitutionalism, Mission, <http://ccc.uchicago.edu/mission.html> (last visited Feb 1, 2010).

⁵⁶ See generally Basu, *supra* note 12.

underpinning for constitution making and constitutional interpretation in a variety of societies. And I am very interested in comparative constitutionalism. I am interested in both the Indian and U.S. constitutional traditions. And so of course, then, inevitably, I am focused on the nation and what a nation's political structure does to implement and make real the capabilities. One place where I have been working that out recently was in my Supreme Court Foreword in the *Harvard Law Review*, where I argue that the U.S. constitutional tradition had a very uneven record vis-à-vis the capabilities approach.⁵⁷ But certainly, in the term that I was asked to write about, which was 2006, there was an alarming falling away even from the sort of concern for equal capabilities that our tradition has had in some areas, particularly in interpreting the Equal Protection Clause of the Fourteenth Amendment. Instead of asking real questions about what people are actually able to do and to be, there has been a recent tendency to assume a posture of what I call "lofty formalism," from which these questions about capability cannot even be seen. In short, then, I am interested in questions about constitutionalism and the state, and I write about them because of that interest, not because I don't think the other questions are important. And I assume that there are lots of other people who are going to do the other project, Basu prominently among them.

But there is another deeper and more philosophical reason for my focus on the state, and that is my adherence to political liberalism, which I have already mentioned. I think that in a nation where people have many different reasonable comprehensive conceptions of the good, we are not justified in framing, for political purposes, a fully comprehensive doctrine. Instead, we ought to seek political principles that can be the object of an overlapping consensus among people with many different comprehensive views of life, religious and secular. This will require abstemiousness, since we should not use metaphysical, epistemological, or ethical notions that are not broadly shared (for example, the notion of the soul, or the notion of original sin, or the notion of self-evident truth).

But many social movements, rightly, are imbued with the spirit of a given comprehensive doctrine: they might be Gandhian, or they might be religious in some other way, or they might be animated by the spirit of some secular comprehensive doctrine, such as Marxism. Such movements can be tremendous supports, not only for people's lives but also for political progress and progress toward justice, but they shouldn't ever, in all of their comprehensive (and therefore divisive) specificity, enter straight into the

⁵⁷ Martha C. Nussbaum, Foreword, *Constitutions and Capabilities*, "Perception" against Lofty Formalism, 121 HARV. L. REV. 9 (2007).

framing of the political principles themselves, because that would be to establish a given comprehensive doctrine and, inevitably, to disestablish some others that do not agree with it. So that's another reason why, as a political thinker, I don't focus on social movements.

Sometimes that issue about pluralism and political liberalism does not pose a problem. You could probably take many of the women's movements in India and put most of what they are asking for straight into the political principles and not feel that any problems have been created, since they are really seeking a full realization of the rights women have already been granted in the Constitution. But if you think about something like the faith-based initiatives in our country, where there's a social movement linked to government, then I think it's quite problematic. Such movements privilege certain religious positions and marginalize others and, of course, then, marginalize non-religion. I think it is a scary thing about the new administration that they want to continue this practice, and I am very disturbed about the whole issue. So I think social movements, from the point of view of the political, always have to be kept at a certain distance, at least until we figure out whether their content is something that we can all share without any kind of marginalization or subordination.

During the discussion at the conference, Basu emphasized, agreeing with me, that women's movements are often very consonant with the political principles embodied in the capabilities approach. I agree with that, and that was my reason for thinking that much of what they aim at could straightforwardly be embodied in a political conception.

Basu also made the valuable point that many social movements, to the extent that social movements are internally pluralist, create arenas in which contestation and debate takes place, fostering deliberation about issues of social justice. I agree with this too. Not all social movements foster debate and contestation: the *shakhas* of India's RSS are a horrifying example of how a powerful social movement can foster group-think, prejudice, and uncritical devotion to an aggressive ideal.⁵⁸ I know Basu agrees. But if we are dealing with social movements of the sort she mentions, we should certainly applaud the way in which they can reinforce deliberation. In my work in India I've noticed that the sort of education fostered by the women's movement does much better in promoting deliberation, on the whole, than does the education in government schools, dominated as it is by rote learning.⁵⁹ The educational tradition in Bengal started by Rabindranath Tagore, which I love, uses the arts to stimulate

⁵⁸ See THE CLASH WITHIN, *supra* note 1, ch. 5.

⁵⁹ See *id.*, ch. 8.

reflection and self-expression, and this type of education, in India today, is fostered almost nowhere else but in women's movements.⁶⁰

Basu then claims that it is difficult to think about the creation of constitutions that have really embraced the goal of prohibiting discrimination on grounds of sex and sexual orientation, without thinking at the same time about social movements.⁶¹ Especially if one thinks about recent attempts at formulating constitutions in Eastern and Central Europe and in South Africa, those provisions that prohibit discrimination are there by virtue of struggles of social movements to put them there. I agree with this as well. Social movements have been extremely important in both creating and sustaining good constitutions.

I grant Basu all of these points, then. But I continue to think that one must recognize that not all of what is fostered even in the best social movements can automatically go into your constitution, because of pluralism. And I also think it may turn out that some of the social movements will make it hard for you to get things that ought to go into your constitution. I think it is absolutely amazing and wonderful that South Africa got a right to nondiscrimination on the grounds of sexual orientation. I think it could not have been taken for granted, however, given the nature of the social movements involved. It took a lot of work by individual leaders, lawyers, political leaders, and so forth, who insisted on that in the very painful debate that they had. And, by the way, that debate was very much inflected by ideas about disgust. Justice Albie Sachs of the South African Constitutional Court, and one of the leading freedom fighters and constitutional framers, just came to our university, and he was talking about his own self-criticism when he realized that he felt disgust for gay people when he was asked to march in the Gay Pride Parade. He began to reflect, and ended up doing a lot of valuable thinking about stigma and marginalization. So the South African Constitution owes a lot to such astute individuals who are already very self-critical, who are already questioning gender norms—because after all in Sachs's autobiography, he makes it clear that he sees his own political stance as one that challenges entrenched notions of masculinity.⁶² He is complicating notions of gender in everything he does. So I think you needn't have gotten that, and social movements by themselves would not have produced that. In the social movements of the

⁶⁰ See KATHLEEN M. O'CONNELL, *RABINDRANATH TAGORE: THE POET AS EDUCATOR* (2002); and *THE CLASH WITHIN*, *supra* note 1, ch. 3.

⁶¹ Basu, *supra* note 12, at 210–16.

⁶² ALBIE SACHS, *THE SOFT VENGEANCE OF A FREEDOM FIGHTER* (2000).

Vietnam War era, we could see valuable ideals being linked to a remarkable degree of obtuseness about sexism. These movements may well have said exactly the right thing about Vietnam, but they had absolutely no awareness of women's issues. So maybe that's where I am coming from in my slight skepticism about movements. And you know, women have been fighting ever since to bring that awareness of gender into the progressive social movements of America, but how much have we really achieved? That's a question to be debated.

Now to Saskia Sassen.⁶³ Her paper has so much in it that I shall not be able to address very many points, but her point about capabilities and valance is a very intriguing and important one.⁶⁴ Here, in fact, we see a fundamental area of difference between me and Amartya Sen. Sen has always talked about capabilities as though there's nothing in them but good. And he writes about maximizing freedom, speaking of "the perspective of freedom" and of development as freedom.⁶⁵ In 2003, I had a debate with him on this: what I said was, "Look, you have to evaluate the capabilities."⁶⁶ First of all, there's no coherent project that consists in maximizing freedom as such, because some freedoms limit others. Moreover, every freedom requires limiting the freedoms of those who would interfere with its exercise. Second, some freedoms are important and worthy of constitutional protection, and some are quite trivial. That's one distinction you have to make: the freedom to ride a motorcycle without a helmet is just not one of those things that's deserving of constitutional protection, where I believe that the freedom of sexual choice is. And so we have to evaluate. But then, when we do that evaluation, some freedoms turn out to be actually bad. The freedom of industry to pollute the environment, the freedom to hang out signs saying, "No blacks here," those are freedoms all right, and some people really resent the state stopping them from doing that. The freedom to harass women in the workplace is a cherished male prerogative that law is now curtailing, and many men are very upset; they do feel their freedom has been diminished. But I would say those freedoms are bad from the get-go.

⁶³ Saskia Sassen, *Strategic Gendering as Capability: One Lens into the Complexity of Powerlessness*, 19 COLUM. J. GENDER & L. 179 (2010).

⁶⁴ *Id.* at 181–85, 199.

⁶⁵ See my discussion in *Capabilities as Fundamental Entitlements*, *supra* note 9, with references to Sen's writings, prominently including AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000).

⁶⁶ *Capabilities as Fundamental Entitlements*, *supra* note 9.

Now what Sen says to that is, “Oh, no, freedom is per se always good, but it can be used in bad ways.” So he says, for example, male strength is good, but it can be used to beat up women. Well what I want to say is, no, those are different cases. And the cases that I have just given are cases where, the bad is already included in the very description of the freedom. This difference comes out in this debate about whether there should be a list of central capabilities, and I think that’s all a question of what the purpose is. But I think, you know, whether you have a list or not, you can’t avoid this question of the evaluation of the capabilities.

I learned a tremendous amount from Aili Tripp’s paper,⁶⁷ and I really admire her project. I am hoping that she will present it someday at the Human Development and Capability Association, because it is so illuminating and relevant to our project. I just want to address two points, and one is the point about conflict that she raises. Tripp says that one criticism one might make of the capabilities approach is that there is no account of what you do when capabilities collide. That’s a question I get a lot, so it is important to answer it.

In a paper called *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, I take that up.⁶⁸ And what I say is if you really think that these ten capabilities are all entitlements that people have by virtue of their dignity, and that they are all essential to a life that is worthy of human dignity, then when two of them collide there are two separate questions you have to ask. The first question is what to do in the present case, and that’s what I call “the obvious question.” But the second question is: are any of the things open to you here free from serious wrongdoing, to which, in that case, the answer ought to be, no—there’s a tragic dimension to this. I call that “the tragic question.” If I have to deprive some people of something to which they are entitled on the basis of their human dignity, well that’s very bad. Now why is it useful to notice that? Isn’t that just moaning and groaning? I think it is very useful for the reasons that Hegel thought tragedy was useful. It helps you think ahead if you can say, “Well how did we get into this pickle where we’re stuck with this horrible conflict? Let’s design something where people don’t actually have that conflict.” And the example I give is that poor families in India often have a conflict between sending their kids to school and getting enough to eat themselves, because they need to use their children for labor, and so then they need to keep them out of

⁶⁷ See generally Tripp, *supra* note 13.

⁶⁸ Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, in *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* 169 (Matthew D. Adler & Eric Posner eds., 2000).

school. So that is a tragic case: the answer to the “tragic question” is no, there is no alternative open to those people that is free from serious wrongdoing. Whatever you do, people are being deprived of a fundamental human entitlement. Well the State of Kerala figured out a clever way to cut through that dilemma by saying, in the school, we’re going to give you a nutritious midday meal, and that meal is enough to offset the loss labor costs for the children. And then, the Supreme Court of India, seeing what a successful idea this was—and it did produce ninety-nine percent adolescent literacy rate for both boys and girls—ordered every state in India to serve a midday meal with at least 350 calories and fifteen grams of protein.⁶⁹ Now that’s judicial activism for you. I like it. And so I think there are many areas in which we want to have that happen, areas in which the tragedy is unnecessary where the tragedy was caused by stupidity and bad planning. I think many instances where people are being deprived of a fundamental entitlement are like that.

I just heard yesterday from a reporter that now they can synthesize meat from stem cells. And I think this, if it works, would put an end to so many tragic choices people have involving their nutrition and the lives of animals. So any kind of creative forward-looking solution to a tragic dilemma requires, first of all, recognizing that it is a tragic dilemma, which I think cost-benefit analysis usually doesn’t do, since it focuses exclusively on the “obvious question.” And then we try to design a future in which people don’t have to face that.

As to Tripp’s point about collective capabilities⁷⁰: I am not at all opposed to collective solutions. I think it’s good to articulate the goal in individual terms because I really think it is very important that each individual is an end and not a mere means to the ends of the others. And in any group, there can be hierarchies and differences of power. When we give rights to a group qua group, we often only further empower the powerful ones within the group. We see this happening all the time with systems of personal law, which are dominated by male clerics, and end up subordinating women. Of course, some groups are not like that, but any group could become like that.

So I think, in principle, it’s good for constitutional entitlements to be formulated as individual entitlements, but, first, the entitlements include affiliational entitlements, which could not possibly be satisfied without

⁶⁹ See *People's Union for Civil Liberties v. Union of India & Ors.* (S.C. 2001) Writ Petition (Civil) No. 196/2001.

⁷⁰ See generally Tripp, *supra* note 13. Saskia Sassen raised a related point in the discussion, and this part of my reply conflates my response to both.

promoting certain kinds of relationships. Care has been very much on my mind and how we get care and support relationships. That is a fundamental theme of *Frontiers of Justice*.⁷¹

Second, a normative focus on the individual does not at all prevent group remedies from being essential instruments of the production of capabilities for individuals. In the area of religion we've all understood, constitutionally, that protecting religious liberty of individuals entails giving churches certain rights, for example, rights to own property and rights to select their employees and so on. But this group right is instrumental to the individual rights it protects. I think affirmative action is a case of a group right that is instrumental to full individual rights: that is, the goal ought to be the full empowerment of each and every person, but a group-based remedy is often the best way to get there. Whether it is the best way is quite contextual. In 2009 our law school sponsored, with Jawaharlal Nehru University in New Delhi, a joint conference on affirmative action in higher education. And it was very interesting to see that discussion because, of course, the U.S. people were all quite quota-phobic and the Indian people were much more committed to quotas. But interesting questions came up. For example, in India it's so obvious that the quotas operate to benefit the privileged within each group, the so-call "creamy layer." So the Americans said, "Well why don't you just have an individualized admission system and factor in many different things such as economic disadvantage and so on?" One of the answers was, "With so much corruption, we could never manage such a system." So I think all of these factors need to be thought about. And I guess right now, right, my feeling is that given the totality of factors, for India the quota-based system is probably the best, although I think the quota should still be done in a way that takes in economic disadvantage much more than current forms do. And for the United States, maybe for higher education anyway, something more individualized could and does work quite well. The point is that in order to think well about this case we need, I think, first to conceive the goal as the full empowerment of each person, and then to ask how various group-based solutions do or do not promote that.

When we think about globalization, as Sassen does,⁷² thinking about group solutions and systemic conditions becomes even more important. In *Frontiers of Justice*, though I do not spend a lot of time on this issue, I observe that there are certain economic roles that are now being

⁷¹ See generally FRONTIERS OF JUSTICE, *supra* note 6.

⁷² See Sassen, *supra* note 62.

played mostly by multinational corporations, which suddenly have great importance in determining whether people get their capabilities or not.⁷³

How should we think about that? Well one thing I think we have to do is start with the goal that all the citizens of the world, meaning each and every person, should have the capabilities, and work backward from that. Then the question is who has the duties correlative with those rights. Some of them have to be assigned to the World Bank and the IMF, to corporations and so on. And figuring out how to do that is very, very complicated. I don't think that's really what I am professionally equipped to do, other than to throw out a few suggestions. But that is what I would hope to learn from Sassen's project. My dear colleague Iris Young,⁷⁴ who of course died unfortunately and prematurely last year, would always say to me, "You have to think more about structure." And I would say, "But Iris, you're the one who will do that." And she said, "No, no, no, you have to do it." Now, tragically, that reply is no longer available to me, so I will have to take Iris's suggestion and do the job myself. But I also look forward to learning a great deal from people who have expertise that I do not have.

IV. HISTORY, IDENTITY, SEXUALITY

Now I turn to the wonderful panel on history, identity, and sexuality. First, to Alice Kessler-Harris.⁷⁵ In talking about the descriptive and the normative, I have already given some reasons why I think history is so crucially important for any normative project: we need to be aware of the ways in which contexts of many sorts shape people's strivings, in order to get the right problems onto the table, and in order to make sure that we do not frame our norms in an obtuse and biased manner.

But now I want to talk about justification, because I believe that history, in a way, plays a role there too.⁷⁶ Basically, I follow the idea of political justification that John Rawls articulated first in *Theory of Justice*⁷⁷: what we ought to be doing is looking at our most deeply rooted ethical judgments, but also looking at the major theoretical options out there before

⁷³ *Id.*

⁷⁴ Iris Marion Young, 1949-2006: A Tribute, <http://cptgrad.uchicago.edu/irisyoung/> (last visited Feb. 1, 2010).

⁷⁵ See generally Kessler-Harris, *supra* note 45.

⁷⁶ See WOMEN AND HUMAN DEVELOPMENT, *supra* note 5, ch. 2.

⁷⁷ JOHN RAWLS, A THEORY OF JUSTICE (1970).

us, and we go back and forth between those. And we keep doing that as new theories come along and as new judgments come along. So it's an open-ended never-completed process. Reflective equilibrium is the name of the endpoint that we would have reached if the process were ever complete, but it's important that it is envisaged as not being likely to be complete. And so as time goes on, we might find that different judgments emerge. And then, of course, new theoretical alternatives emerge as well.

I think what I am doing in *Frontiers of Justice* is to say, well, now we have a new set of problems before us, and we must confront the social contract tradition with those.⁷⁸ And all of a sudden, a theory that looked pretty good before looks less good and we have to consider the merits of a different theory, and so on. Now sometimes, I think we do want to say that we were wrong all along and that what we're doing is discovering something that was true all along. And I guess I do think that with inequality of women this is what I want to say. And I think that the bad treatment of people with disabilities and of non-human animals was bad for a very long time, and we should not pretend that this problem has only recently emerged due to historical changes. But there are other things where the world changes in ways that really do give us reason to say something different. It might be that when we thought about education 500 years ago, we wouldn't think of education as something that required twelve or more years for everyone. Secondary education could be seen as inessential to a life worthy of human dignity, because there were many ways that people could live dignified lives that didn't involve that kind of education. Today, given the employment options people have, given the way politics works, given the way the global economy works, and so forth, if you're not numerate and literate and you don't have some technical education, you're cut off from opportunities in a way that you weren't before. So I think that's a way in which history could actually change the norm we ought to strive for—not, perhaps, at the most abstract level, but at the level of the more concrete specification, the level that you would try to agree about if you want to put a given capability into your constitution.

Janet Jakobsen's paper⁷⁹ is very impressive, and I agree with more or less everything she says. I do indeed want to be read in a "queer" direction, as I have said: as continually questioning traditional categories. And I find her discussion of religion extremely illuminating. I have long thought and said that religion need not be a support for patriarchy.

⁷⁸ See generally FRONTIERS OF JUSTICE, *supra* note 6, at 1–4.

⁷⁹ See generally Jakobsen, *supra* note 15.

Religions are as diverse as the cultures of which they are a part, and my own religious tradition, Reform Judaism, has a long history of feminist and progressive action and theorizing, including both internal religious support for same-sex marriage and political action on that issue.⁸⁰ I agree with Jakobsen that contemporary political opposition to same-sex marriage that claims religious support is best understood as being inspired, instead, by features of the wider culture, including norms of masculinity that construct and mobilize disgust in a particular way.⁸¹ I also admire the way in which she connects a critique of such norms—defining the “real man” in terms of total control and a lack of need for relationship—with more general social and political problems of care, dependency, and relationality. As she says, I have argued, in a similar spirit, that the image of the individual that animates popular thinking about the social contract is closely related to such norms of the real man, since individuals making the contract are hypothetically constructed as “free, equal, and independent,” none deeply needing the love and care of others.⁸²

Mary Anne Case’s paper is a major contribution.⁸³ Because of its length and detail, because it draws upon so much of her prior important work on sexual orientation and constitutional law, I cannot hope to do full justice to its valuable arguments here. I think it is wonderful that a very different perspective on these matters should be articulated in this Symposium, and I believe that the existence of different routes to a shared set of conclusions enriches the political and academic debate. I hope that an ongoing conversation between Case and me will clarify the issues further and will contribute to the intellectual vitality of an area of academic discourse that could all too quickly degenerate into pious self-congratulation. So I am grateful to Case for her searching critique. Here I shall be able to address, all too briefly, only three issues: the role of “political liberalism” in my argument; my use of an analogy between sex and religion, which Case disputes; and the role I see for moral sentiments in ensuring the stability of good political principles.

⁸⁰ On the Reform tradition, see Martha C. Nussbaum, *Judaism and the Love of Reason*, in PHILOSOPHY, FEMINISM, FAITH (Marya Bower & Ruth Groenhout eds., 2003).

⁸¹ Jakobsen, *supra* note 15, at 142.

⁸² See FRONTIERS OF JUSTICE, *supra* note 6, chs. 1–2.

⁸³ Mary Anne Case, *A Lot To Ask: Review Essay of Martha Nussbaum’s From Disgust to Humanity: Sexual Orientation and Constitutional Law*, 19 COLUM. J. GENDER & L. 89 (2010).

First, let me say that it was never part of my claim that *all* opposition to same-sex relations is grounded in disgust. Nor did I claim to offer a fully comprehensive overview of sexual orientation and the constitution. I was urged by my series editor Geof Stone to come up with a distinctive perspective and a particular grouping of the salient materials, and I agree with Case that a more complete treatment would have to address *Boy Scouts of America v. Dale*⁸⁴ and other First Amendment cases, as Case has so ably done. Schools are another issue that would need to be addressed in a more comprehensive treatment. My claim was, instead, that quite a lot of the opposition to same-sex conduct and the people who engage in it is grounded in disgust, and quite a lot more than initially appears to be the case. (In the published version of the book I add citations to some recent experimental research that confirms this linkage.) People often put forward an argument that appears to be about some quite different thing, but, when we examine it, we find that its credentials are so flimsy, and it is applied in such capricious and inconsistent ways, that it's a good bet that something else lies beneath. This something else sometimes surfaces, as in the campaign for Amendment 2, but efforts at concealment are usually made, as I point out. So my project involves both tracking explicit appeals to disgust and also reconstructing arguments to show that they are only anything like valid if one should supply tacit premises involving ideas of disgust and stigma.

But to go further we must turn to my position on "political liberalism." As I have said in Section III, my overall normative political view, articulated in books such as *Woman and Human Development*, *Frontiers of Justice*, and *Hiding From Humanity*, is a form of what is known as "political liberalism," namely, the view that political principles in a pluralistic society ought to be based on no single comprehensive religious or secular doctrine, but, instead, on materials that may over time become the object of an "overlapping consensus" among holders of the major comprehensive doctrines. For example, an idea of human equality, or human dignity, or equal respect for persons, could be a part of such a political consensus, but the idea of the immortal soul could not. So believers in the soul will agree to respect the political principle of equal human dignity, and will then further interpret that idea in terms of their own comprehensive religious doctrine. Atheists will interpret it differently, in terms of their own doctrine, whether Kantian or Aristotelian or whatever. This general view of how political principles ought to be framed is a kind of generalization, one might say, of an anti-Establishment principle: the idea is

⁸⁴ 530 U.S. 640 (2000).

that it is disrespectful and subordinating to ask people to live in accordance with a political conception that states that they are an out-group and another preferred group the in-group. (I explore this idea with regard to the Religion Clauses of the First Amendment in *Liberty of Conscience*.⁸⁵) I don't claim that this norm has ever completely prevailed in U.S. Constitutional law, but I believe that it often does prevail and that it ought to prevail.

Let's now turn to sexual orientation. What the norm means is that any good political principles in this area must be consistent with a fundamental norm of equal respect for persons. In *Liberty of Conscience*, I argue that this norm of equal respect entails extending wide latitude to persons to lead their lives in their own way, in accordance with their own conscience, when they are not violating the rights of others—even when one does not at all like what such people say and also do.⁸⁶ In *From Disgust to Humanity*, I extend that principle to sex, an area of fundamental self-definition for many if not most individuals (as is religion).⁸⁷ Moreover, as is the case with religion, any good principles in this area must be principles that can be argued for and accepted without using the materials of one's own religious doctrine, since to argue in a sectarian way would suggest that the listener had to convert in order to accept the argument, an unacceptable demand in a pluralistic society. Of course someone may really believe that the reason to support a social welfare program is that God has commanded us to do so, but such a person will have to find some other way of arguing to her fellow citizens in a pluralistic society, if the argument is to show sufficient respect for them as free and equal persons.

What does all this mean for the issue of sexual orientation? First that any overt appeal to ideas of stigma and taint must be rejected as inappropriate, since our society is built upon an idea of equal respect for persons. Just as ideas of racial stigma and taint were (normatively) inadmissible in debates over miscegenation, so too they are inadmissible in debates over sodomy laws, or same-sex marriage. Second, arguments cannot rest on features of one's own particular comprehensive doctrine that are metaphysical or in other ways sectarian and could not be the object of an overlapping consensus among reasonable citizens holding different religious and secular views of human life.

⁸⁵ See generally *LIBERTY OF CONSCIENCE*, *supra* note 31, ch. 4.

⁸⁶ *Id.*

⁸⁷ See generally *FROM DISGUST TO HUMANITY*, *supra* note 32.

A brief parenthesis at this point. Case wonders why I spend no time in the current book on the arguments of Robert George and John Finnis.⁸⁸ There are three reasons. One is that I discussed them at great length (partly in co-authorship with Sir Kenneth Dover) in an article in the *Virginia Law Review* in 1994,⁸⁹ and I have no new observations to add. Second, their arguments are transparently unsuitable for a pluralistic society, if one sees the normative project in anything like my way. They use sectarian Catholic notions throughout, such as “two-in-one union,” and, although they assert that these ideas are grounded in natural law, they do nothing much to make them persuasive to anyone who does not already hold their own particular view of Roman Catholic natural law doctrine. Even a modern natural law thinker such as Catholic philosopher Paul Weithman has found them puzzling and deeply unsatisfactory.⁹⁰ Weithman finds that he can cast them in the form of a valid argument only by supplying a premise that is clearly false. Moreover, Weithman’s is a generous reading of Finnis, for he begins by conceding a premise that Dover and I hold to be clearly false, and that most Americans would not accept either, namely that it is always morally wrong to use one’s own body as a source of pleasure.⁹¹ The third reason why I did not pay much attention to their arguments is that they are so sectarian that they have virtually no influence in the American public debate. Finnis and George condemn in similar terms all forms of non-procreative sexuality, from masturbation to contracepted sex within marriage, and most Americans simply have no problem with contraception. In *From Disgust to Humanity*, I mention the odd event during the bench trial of *Romer* when George offered testimony that a landlord could reasonably refuse to rent an apartment to a man of whom he believed that that man would be likely to masturbate in the apartment.⁹² I think it is safe to say that for most Americans (landlords, perhaps, in particular), such utterances are comic and do not conduce to giving the utterers serious

⁸⁸ Case, *supra* note 83, at 118.

⁸⁹ See 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 *Platonic Love*], app. iv., at 1641–51. Kenneth Dover was my co-author of Appendix Four, which is entitled Dover and Nussbaum Respond to Finnis.

⁹⁰ Paul Weithman, *Natural Law, Morality, and Sexual Complementarity*, in SEX, PREFERENCE, AND FAMILY 227–46 (David M. Estlund & Martha C. Nussbaum eds., 1997).

⁹¹ *Platonic Love*, *supra* note 89, app. iv. Finnis does not confine the point to sexual pleasure: thus Dover and I use such counterexamples as going for a swim and stroking a cat.

⁹² See FROM DISGUST TO HUMANITY, *supra* note 32, ch. 4.

political influence. I think a lot of academic ink is spilled over George and Finnis only because they do make arguments, which many people in the area do not.

Back, then, to our subject. What I try to do in the section of Chapter Five of my book on arguments against same-sex marriage is to ask which arguments, among those currently being used, are genuinely public arguments, arguments that can pass the no-conversion test: *i.e.* any citizen, whatever her religion or non-religion, could in principle be persuaded by the argument, if it's a good one, without converting to the proponent's religion. Many arguments do not pass this test. Of the arguments that don't pass, I do not conclude that they are all motivated by disgust. I conclude, instead, that they give good reasons for a member of that religion to avoid same-sex marriage, but not reasons to make it illegal for all in a pluralistic society. Other arguments (for example, the argument that children do better in homes with one mother and one father) have the form of a public argument and are not sectarian, but they do not withstand rational scrutiny on the facts—where child welfare is defined in a religiously neutral manner. Of such arguments, I think it's worth asking why people continue to believe and utter them, even though the facts stare them in the face. Perhaps some other set of motives might be at work. The third sort of argument alludes relatively directly to an idea of stigma and taint: the argument that the legalization of same-sex marriage "degrades" heterosexual marriage. I try to find some other meaning for "degrades" that can make this into a comprehensible argument, but I just don't succeed: I think it has to mean "taints," "contaminates." Here, then, disgust shows its face pretty openly.

So that is the way I argue in Chapter Five of my book.⁹³ The next step, in pursuing a dialogue between Case and me, would be to examine each of the arguments offered against same-sex marriage to see whether I am right or wrong about them. Nothing rules out that there might be some new excellent argument cast in terms acceptable to political liberalism that could withstand critique: but then, let's see that argument.

Case takes issue with the analogy I suggest between law and religion, saying that in the case of religion people were worried only about belief, not conduct, whereas in the case of sexual orientation they are worried about conduct.⁹⁴ Both of us, I am sure, can agree that conduct that is in Mill's sense "other-regarding," involving the rights of others, is rightly scrutinized by law, so what we're talking about is "self-regarding" conduct,

⁹³ See FROM DISGUST TO HUMANITY, *supra* note 32, ch. 5.

⁹⁴ Case, *supra* note 83, at 111.

conduct implicating only consenting agents. My argument was that with sexual choices, as with religious choices, we're dealing with an area that many people view as deeply definitive of selfhood, and expressive of identity. The argument in both cases is that respect for persons dictates that we ought to protect a wide sphere in which people make their own choices, whether we like the way they use this freedom or not. Respect is for persons, not acts, but respect for persons entails protection of a sphere of liberty of action. So my argument is in fact not about belief at all, it is about conduct in both cases: not that all people ought to respect the conduct, but that, respecting the people as their equals, they should give them (indeed protect for them) space to pursue the conduct, so long as it does not impinge on the legitimate rights of others. Case thinks religious conduct never worried people, because they all behaved similarly, they only believed differently.⁹⁵ I am afraid history does not support this claim. From the very beginning of colonial disputes, conduct was also at issue: Roger Williams's religiously inspired refusal to take a loyalty oath; his strange association with the Indians and his zealous defense (again, grounded in conscience) of their property rights; the refusal of Jews to perform required public functions on the Sabbath; the refusal of Quakers and Mennonites to perform mandatory military service. I detail all of these cases, and many more, in *Liberty of Conscience*, arguing (by looking at the early drafts of the Religion Clauses) that it was no accident that the word "exercise" was used in the Constitutional text.⁹⁶

Later on, the new immigrant groups who caused upheaval were those, above all, whose *conduct* seemed disturbing to the majority (as I describe in my chapter "Fearing Strangers"⁹⁷): Mormons practicing polygamy (an example Case acknowledges);⁹⁸ Jehovah's Witnesses refusing to salute the flag and say the Pledge of Allegiance; Roman Catholics' insistence on separate schools. The limits of modern free exercise law are always found in these uncomfortable places, and my book goes into this in considerable detail. So, I think the analogy holds, and what it means is that religion and sex are special in a sense, special in that they involve a fundamental expression of the self (in at least the view of many), part of which frequently consists in acts that may make others feel

⁹⁵ *Id.* at 113, 116–20.

⁹⁶ See *LIBERTY OF CONSCIENCE*, *supra* note 31, ch. 4.

⁹⁷ *Id.*, ch. 5.

⁹⁸ Case, *supra* note 83, at 113.

uncomfortable. Respect for *persons*, not *acts*, dictates protection of space for *acts* that make others uncomfortable, so long as they do not interfere with established rights. Thus the difficult cases for my view are cases such as public nudity, public masturbation, etc., where there is what I call a “direct offense,” rather than a purely “constructive” injury (i.e. one occasioned by merely imagining what is going on), and in which it is unclear whether we ought to say that the rights of nonconsenting others are violated.⁹⁹

Case’s largest challenge to me concerns the role of the moral sentiments in a public culture. She thinks I demand too much: a sentiment akin to love, rather than a grudging “live and let live.”¹⁰⁰ It is of course clear that I do not make a complete argument for my position on the moral sentiments in *From Disgust to Humanity*. That argument unfolds in the final chapter of *Frontiers of Justice* and in several recent articles that are beachheads for a book in progress on precisely this topic.¹⁰¹ Let me summarize my current position. Like John Rawls, I am concerned with the stability of good political institutions, and, like Rawls, I believe that good institutions will not be stable if they are supported by attitudes of merely grudging acceptance. So a just society needs to think about how to engender more supportive attitudes. This is all the more true of the society I envisage, because it makes greater demands on people than Rawls’s society, in some ways, and eschews the classic contractarian idea of mutual advantage as a basis for political society.¹⁰² Rawls believes that the relevant type of sentiment will be highly abstract and principle-based: a love of just institutions and their justice. Similar views have been expressed by Jürgen

⁹⁹ See HIDING FROM HUMANITY, *supra* note 19, ch. 3.

¹⁰⁰ Case, *supra* note 83, at at 133–34..

¹⁰¹ For a discussion, see generally FRONTIERS OF JUSTICE, *supra* note 6; Martha C. Nussbaum, *Toward a Globally Sensitive Patriotism*, 137 DÆDALUS 78, 78–93 (2008); Martha C. Nussbaum, *Radical Evil in the Lockean State: The Neglect of the Political Emotions*, 3 J. MORAL PHIL. 159 (2006). A longer version can also be found in Martha C. Nussbaum, *Radical Evil in Liberal Democracies: The Neglect of the Political Emotions*, in DEMOCRACY AND THE NEW RELIGIOUS PLURALISM 171 (Thomas Banchoff ed., 2007), and in a forthcoming volume of essays on the emotions edited by John Deigh and in memory of Robert Solomon, to be published by Oxford University Press. A fuller treatment of this issue can also be found in my forthcoming book, MARTHA C. NUSSBAUM, CAPABILITIES AND COMPASSION (forthcoming 2011).

¹⁰² These concepts are explained in FRONTIERS OF JUSTICE, *supra* note 6.

Habermas, describing what he calls “constitutional patriotism.”¹⁰³ I argue, against those two very rationalistic philosophers, that such cold sentiments are insufficient to sustain the bonds of political society: something much more genuinely emotional, and quasi-erotic, something like a real passionate love of the nation and its people, must be involved.

Now of course patriotic love can lead us astray in many ways, so the next step is to try to articulate a view of how such a love might be constructed, and instilled, without incurring the dangers of fanaticism, demagoguery, and group hatred that are often part of patriotic projects. I have pursued that project (up until now) primarily through analysis of examples drawn from the history of both Indian and U.S. traditions, examining speeches and actions of Jawaharlal Nehru and Mahatma Gandhi, as well as the erotic text and music of India’s national anthem; in the U.S. case I examine speeches of Lincoln and Martin Luther King, Jr. Although Case invokes King on her side,¹⁰⁴ I think one can show quite convincingly that he skillfully engenders sentiments of hope and loving brotherhood in his audience, in a way that is utterly different from the Rawlsian and Habermasian idea.¹⁰⁵

Here, regrettably, I must leave my consideration of Case’s paper. I hope this brief confrontation suffices to show how important her questions are.

Although Elizabeth Emens did not present a paper at the Symposium, she is one of the legal thinkers on gender and identity whose work I especially admire, and she did address a question to me at the conference, so I now turn to that. Emens inquires about the social solution to the same-sex marriage problem that I proposed in the marriage chapter of the manuscript of *From Disgust to Humanity*¹⁰⁶ (very much shortened in the print version), which is the disestablishment solution, disestablishing marriage and disaggregating the bundle of benefits it currently bundles together. This solution involves getting the state out of the expressive domain and replacing state marriage with civil unions (preferably not a single bundle, but a rethought and disaggregated group of benefits)—at which point, then, religions and private organizations and associations can

¹⁰³ See my discussion of both in *Toward a Globally Sensitive Patriotism*, *supra* note 101.

¹⁰⁴ Case, *supra* note 83, at 98.

¹⁰⁵ See *Toward a Globally Sensitive Patriotism*, *supra* note 101, for my analysis of King’s “I Have a Dream” speech.

¹⁰⁶ *From DISGUST TO HUMANITY*, *supra* note 32, ch. 5.

do the marriage thing in their own ways. She asks why I take that approach. Her worry is that by going in this direction we might lose an impetus for change within the institution of marriage, which might become more gender-equal by pressure from the example of same-sex couples. If the state continues to have a role in marriage, she argues, this pressure might really have the potential to change and affect other relationships. She recalls a question she once posed to Martha Fineman, whose views are similar to mine: "Do you worry at all about closing the swimming pool just as other folks are about to jump in?"

Now of course in one way we have to worry about this issue. It would plainly be unconstitutional for a state to stop offering marriage just because it wanted to avoid including same-sex couples. That case would be similar to the cases where states in the South tried to close public swimming pools, or in one case to stop offering public education, to avoid the impact of court-ordered desegregation.¹⁰⁷ So states could not play that game. But suppose they really do undertake the serious rethinking of their packages of benefits that I (with Michael Warner) recommend: that would, I think, be constitutional, and it might well involve, in the end, getting the state out of the expressive domain. At that point, we would have to face Liz Emens's question, which is not just a question about spite-induced state policies.

The question Emens poses is important. In *From Disgust to Humanity*, I actually leave out a lot of the section of the draft that Emens and others read, just gesturing toward it, because, in the end, I was convinced by my editors that it was irrelevant—the book is about constitutional law, and these are policy issues. But I do hold those views. There are really two separate claims that I would make. One is that the state should go over from marriage to civil unions: that is, the state should get out of the expressive domain and stick to the material domain. The second claim is that even in the material domain we should radically rethink the privileges that we now bundle together, going from a bundle to a disaggregated situation. We need to consider all the benefits currently associated with the institution of marriage, asking whether they really belong together, as Michael Warner and Claudia Card have insisted.¹⁰⁸ For example, perhaps a brother and sister who live in the same house would get the certain tax privileges associated with head of household.

¹⁰⁷ I am grateful to Pam Karlan for discussion on that issue.

¹⁰⁸ See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999); CLAUDIA CARD, *LESBIAN CHOICES* (1995).

In the end, what I think is particularly important is the rethinking and the disaggregation. We are saddled with this history, which is the legacy of patriarchal institutions, and it has bundled all kinds of heterogeneous things together for reasons having to do with that bad history. And we ought to at least ask ourselves is this wise, is this really how we want to assign privileges—to say married or not married, all or nothing, you get this package or nothing. But I think it is highly unlikely that our society is really going to engage in this rethinking, maybe around the margins and thinking about immigration and one or two other things. But in the end, I think it probably won't happen. And so that's where I think the fallback position would be the civil union bundle—although, as I said, it would have to be done in a way that made it clear that the motive was not spite directed against same-sex couples. Now we have to face Emens's question: have we lost something that could prove valuable in pushing our nation toward sex equality?

Now getting the state out of the expressive domain, first of all, does not mean that the expressive domain goes away. It exists. People would still get married. And they would get married not just in churches and synagogues and mosques: most of the weddings I've gone to recently are totally secular. They are performed by Justices of the Peace or some other duly constituted secular person, and the vows are written by the people. So since that's happening now anyway, I think it would happen even more and perhaps in a more organized way if the state was no longer in the marriage business. There would be groups of people who would get together to create various forms of marriage ritual. Some states already recognize this by giving anyone who wants to perform a marriage the right to perform one marriage a year. Massachusetts is an example of that.

I think, in other words, that all of the resonance associated with marriage and its potential to change norms would not go away if the state only performed civil unions—because I don't see Americans becoming suddenly indifferent to ritual and symbolism. Recently, when I spoke about the same topic at Princeton, a woman, a very fine philosopher from Iceland, said, "Well you know, no one even thinks about marriage as part of the life's story in Iceland. It's just not a big deal. And so they don't understand why Americans attach so much importance to it." It happens that in Iceland they have found a different route to a more gender-equal structure, so Emens's question does not come up for them. But in America, where people are so interested in ceremony, ritual, and celebration, I think the emotional power of those symbols will endure, even if the state is no longer involved. And what might be good about getting the state out of it is we get rid of this

profound ambiguity that now exists about whether or not the state is celebrating or sanctifying the people it chooses to marry.

Now I think what's wrong with that idea of the state's function, is, first of all, that thinking of marriage as conferring sanctity, a quasi-religious idea, is bound to lead to what you get, namely the worry that people are being forced to approve of same-sex couples and that their religious conscience is being violated. So all that argument is going to go away if marriage no longer has the expressive side. But I also think, as it stands, the current position of the state is totally incoherent and ridiculous because, actually, is the state blessing or sanctifying Britney Spears by allowing her to get married to somebody on a whim and stay married for less than seventy-two hours? Well no one thinks that really. Is the state blessing people when it allows my friend in Massachusetts to marry two of his friends? Well, it seems implausible. There's a very interesting debate on this point between Charles Fried and Josh Cohen on Bloggingheads TV.¹⁰⁹ Fried kept pressing his point that we can't allow same-sex marriage because we can't make people bless or approve of something their conscience tells them not to do. And Josh said, "Marriage doesn't mean anything. I just married two people, and it has nothing to do with blessing, because all I have to do is fill out a form."¹¹⁰ So I think the status quo is incoherent as practice, but it does, then, give rise to this question that Charles asked and that everyone is asking; the very involvement of the state in something that sort of looks like sanctification just seems to put pressure on people in ways that deeply upset them. But I don't think the expressive domain requires the state. I think it requires people to learn from each other and to look at each other and to just learn different ways of doing things.

But I also think that if gender roles are really going to be changed, it is going to be less from observing same-sex couples who do things differently than from having employers put in place different workplace practices that do not mandate twenty-hour workdays for young lawyers. It is going to come from giving incentives through leave policies; for instance, you only get parental leave if you share in certain ways. And so there are lots of structural features related to people's incentives that are going to be crucial for both straight and same-sex couples if really this change is going to be meaningful.

¹⁰⁹ Conversation between Joshua Cohen, Martha Sutton Weeks Professor of Ethics in Society, Stanford University & Charles Fried, Beneficial Professor of Law, Harvard Law School, A Stanford Liberal's Chat with a Harvard Conservative (Feb. 22, 2009), <http://bloggingheads.tv/diavlogs/9048>.

¹¹⁰ *Id.*

