

Book Review

Martha C. Nussbaum
Hiding from Humanity: Disgust, Shame and the Law
Princeton: Princeton University Press, 2004

Reviewed by Howard A. Doughty

Martha Nussbaum's award-winning book focuses on "hate crimes." It was originally published in 2004, and has recently been released in a paperback edition. Named the best professional/scholarly book in law by the Association of American Publishers, it deserves careful attention by anyone concerned with the question of whether, and in what way, crimes should be defined by the motives of the perpetrators and the identity of their victims.

Recent innovations in the criminal law in a variety of western democracies have made over such crimes as assault into more serious offenses when the victim's race, ethnicity, religion, gender, gender orientation, and so on form part of the motive for the transgression. As well, in some countries, hate "speech" (notably "Holocaust denial" in Germany) has become a criminal offense in itself, whether or not the verbal or written utterances in question have been implicated in a subsequent wrongdoing, or have demonstrably led to some physical act of aggression.

Similarly significant changes in the law rarely raise the sort of dilemmas that these so-called "hate laws" do for people of diverse political opinions. The conundrum faced by liberals, for instance, is to decide whether support for the principle of free speech or the encouragement of the rights of undefended minorities should prevail. To criminalize expressions of opinion, however heinous, goes against the fundamental right of free expression embodied in many liberal democratic constitutions; in the alternative, the desire to erase prejudice, discrimination and bigotry of all sorts is also a fundamental "value" in many of these same liberal democracies.

In taking on this deeply controversial issue, Martha Nussbaum, one of the pre-eminent North American philosophers in the field of law and public policy, has accepted a remarkable challenge, and she is clearly up to the task.

Nussbaum's main theme involves the assertion that we must be very careful about allowing an emotional empathy for the victims of racist, sexist and similar abuses to dominate our thinking about the law. After all, there is no shortage of "reactionaries" who would be pleased to outlaw or at least to censor sexually explicit films, books and paintings and who can rely as easily upon their own sense of disgust about the representation of human body parts and behavior as "progressives" do upon their outrage at, for instance, "gay-bashing." So, there is little to be gained from a contest about whose convictions are more authentic and whose fury is more righteous, those who are angry at intolerance or those whose religious or moral convictions are challenged by internet pornography or Mapplethorpe sculptures such as "Piss-Christ".

Nussbaum insists upon approaching the subject from a different perspective than mere indignation at what seem to be not merely technical violations of a criminal code but also manifestations of a profound immorality. Righteous anger, revulsion and loathing, she insists, cannot sensibly be the source of laws seeking to curb “hatred,” for they are instances of hatred themselves; they are made of the same stuff. The irrational lust for “racial purity” is not very different from the absurd vision of political purity. As opponents of *hubris* and of hallucinations of human perfection since the ancient Greeks have told us, laws that strive to impose moral absolutism from any perspective commonly achieve its opposite. As Alberta Camus famously pointed out, “politics is not religion or, if it is, it is nothing but the Inquisition.”

Although she exchanges repugnance for rationality, Nussbaum does not go so far as to say that the motives that lead to “hate crimes” should be ignored. People, by and large, are people and it is futile to ignore human sensibilities completely. Nonetheless, laws that take into account a perpetrator’s assault on someone or the vandalism of some property because of the some characteristic of the victim cannot, in her view, be dismissed merely as efforts to criminalize unpopular opinions and expressions. There is, she thinks, a reasonable basis upon which to convert both utterances into offenses and acts of certain sorts into more serious crimes than the offenses themselves might otherwise warrant. To accomplish this transformation, she appeals to the fact that “the law already expresses a commitment to protecting vulnerable citizens and to penalizing especially severely those who prey upon the vulnerable.” On this view, hate crimes statutes are consistent with our legal heritage and do little more than recommend more severe sentences for those who commit assault or homicide on people who are located in a somewhat expanded inventory of vulnerability.

She adds that “hate crimes” should be judged on another dimension. If a person commits a “random” crime in which the peculiar characteristics of the victim have nothing to do with the motive for the crime itself, the implications for others who share the qualities of the victim are nil. A pickpocket who steals the property of a Muslim or a Californian is not thereby encouraging attacks on Muslims or Californians, but is simply thieving a wallet; however, crimes that are directed at Muslims (or lesbians, or aboriginals, or Californians I suppose), send a “message” to the target population. Its pertinent effect is to increase alienation and intensify fear. It may also embolden likeminded individuals to perform similar criminal acts.

The distinction is subtle and not necessarily convincing. Unrepentant advocates of libertarian traditions will persist in interpreting all restrictions on free speech as objectionable. They will, with some justification, argue that outlawing expression against one group is an invitation to outlaw expression against any group. They will hearken back to instances such as the iconic 1977 American Civil Liberties Union’s defense of a Ku Klux Klan march in Skokie, Illinois, and the claim that only when we defend the freedom of even the most disreputable in our society will the liberties of all citizens be genuinely protected. Was it not Hitler himself who proclaimed: “There shall be no freedom for the enemies of freedom”?

Nussbaum, of course, does not deny that there is a valid distinction among hateful ideas and both hate speech (which encourages people to perform criminal actions based on those ideas) and, of course, the performance of hate-related actions. She argues, however, that the “cognitive content” of wanting some person or group to be harmed is a personal opinion, and that is quite different from encouraging actions meant to put that opinion into practice. Likewise, the public expression of that opinion is also a step removed from actually performing the offending act. The first is a private matter. The second may qualify as hate speech. The third may be a hate crime. The distinctions among the three must, however, be recognized, and each must be treated differently (with the first presumably deserving of no state sanction whatever).

Thus, Nussbaum writes that the “perpetrator of a hate crime has, in addition to his political opinions, a criminal intent, a specific type of hate-based *mens rea*, intrinsically directed toward conduct, that goes well beyond the content of the protected opinions expressed in [a] pamphlet. What is being penalized is a specific type of criminal intent, not just a specific type of opinion. Using similar reasoning,” she adds, “the U.S. Supreme Court has upheld enhanced penalties for hate crimes.”

For me (and I confess to remaining unconvinced by Nussbaum’s powerful and often brilliantly argued position), the distinction between hate “speech” and hate “crimes” remains problematic. An inveterate foe of “political correctness,” I am consequently reluctant to criminalize even the most despicable speech—if only on the self-interested ground that I harbor a number of opinions that, I suspect, fall slightly outside the realm of the socially acceptable. Accordingly, I am unwilling to encourage any penalty for thinking and saying anything that others might deem shameful, subversive or shocking. I am, however, quite prepared to accept Nussbaum’s argument about vulnerability and to subject perpetrators to more severe penalties for actual crimes committed against people because of their “demographics.” An assault, for example, against a defenseless child (or a Jew or a Jamaican if those characteristics prompted the crime) is, I think, a worse offense than an assault upon an able adult. All other things being equal, there is a case for stating that “targeted” crimes should be punished more severely within the range of sentences permitted by law. Whether they should be different crimes is another matter.

About the Author

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