

JOHN DEIGH

THE POLITICS OF DISGUST AND SHAME

(Received and accepted 30 August 2006)

ABSTRACT. This is a critical study of Martha Nussbaum's *Hiding from Humanity*. Central to Nussbaum's book are arguments against society's or the state's using disgust and shame to forward the aims of the criminal law. Patrick Devlin's appeal to the common man's disgust to determine what acts of customary morality should be made criminal is an example of how society might use disgust to forward the aims of the criminal law. The use of so-called shaming penalties as alternative sanctions to imprisonment is an example of how society might use shame for this purpose. I argue that despite Nussbaum's own view to the contrary, her arguments against such uses of disgust and shame are best understood as criticisms of programs of conservative political philosophy like Devlin's and not of the emotions themselves.

KEY WORDS: conservative, Patrick Devlin, Disgust, Martha Nussbaum, Paul Rozin, shame

I

Upheavals of Thought,¹ Martha Nussbaum's landmark book in moral psychology, opened with a powerful exposition of a general theory of the emotions. The theory, which descends from the ideas of the Greek and Roman Stoics, identifies emotions with judgments of a specific sort. Its core principle is to attribute to every emotion cognitive content, namely, the content of the judgment with which the theory identifies the emotion. In this way the study of emotions becomes, in large part, the study of how emotions acquire their content and how its transmission determines the actions that spring from them. It is, in other words, the study of certain cognitive states and how those states, in conjunction with other cognitive states, constitute the thought processes by which intelligent beings conduct their lives.

¹ Cambridge: Cambridge University Press, 2001.

Such a study is remote from the way emotions are often studied in experimental psychology and neuroscience. The positivism of these disciplines demands that emotions be defined by empirically measurable indicators, and consequently orthodox work in them, by virtue of the protocols of the science, omits content from the very understanding of the phenomena they study. Cognitive content, needless to say, is not a measurable indicator. Physiological arousal of the kind that characterizes violent emotional reactions is, and as a result, because it is the most salient, quantifiable manifestation of emotions, the study of emotions in these sciences becomes the study of what causes such arousal and what parts of the brain explain its character. It is decidedly not a study of emotions as cognitive states. It does not regard them as ingredients in the production of intelligent conduct. Indeed, because physiological arousal tends to impede and disrupt thinking, the study encourages the time-worn view of emotions as episodes in the mind that are hostile to clear thinking and sound judgment. Someone whose idea of emotions matched this way of conceiving of them would have trouble comprehending how emotions gave meaning to simple human actions much less the workings and products of complex institutions like law and politics. By contrast, someone armed with the understanding of emotions that Nussbaum's theory supplies can easily see how emotions contribute to intelligent conduct and comprehend the work they do in shaping society's customs and institutions. Her theory equips one with ideas that not only yield understanding of the rich emotional ingredients in intelligent thought and action but also support trenchant critical study of the extent to which society's institutions are the work of human emotion.

Hiding from Humanity,² Nussbaum's new book in legal and political theory, is just such a study. Its chief object is law, particularly criminal law, in modern liberal democracies. Chapter 1, drawn from the pioneering law review article Nussbaum co-authored with Dan Kahan,³ shows how an understanding of emotions of the kind Nussbaum's theory supplies, a cognitivist understanding, is deeply embedded in Anglo-American criminal law. Nussbaum points out how a cognitivist understanding is implicit in legal doctrines that concern the workings of various

² Princeton: Princeton University Press, 2004.

³ Dan Kahan and Martha Nussbaum, "Two Conceptions of Emotion in Criminal Law," *Columbia Law Review* 96 (1996), pp. 269–374.

emotions – fear and anger, in particular – in many of the violent actions the criminal law regulates. Similarly, she describes how other emotions – compassion, in particular – have important roles in operations of the criminal law, such as sentencing, and how making sense of these roles requires a cognitivist understanding of the emotions that have them. The subsequent chapters, 2 through 7, concentrate on the emotions of disgust and shame. In these chapters, Nussbaum considers how the criminal law should treat the workings of these emotions in the actions it regulates and whether either emotion should have an important role in the criminal law's operations. Nussbaum sees both disgust and shame as having had a pernicious influence on the law as it pertains to the regulation of sexual conduct, reproductive decisions, family life, and the relations between the sexes. And she sees them as having the same influence in legal regimes that reinforce the social stigmatization of minorities and other disadvantaged groups. Her main thesis is that laws catering to these emotions, are, with rare exception, inimical to the liberal ideal of a democratic society in which the law recognizes and respects equally the humanity of all members. Disgust and shame, she argues, are emotions to which certain conservative programs appeal, specifically those promoting the preservation of existing hierarchies within society. But it is not just these programs that Nussbaum sees as threatening this liberal ideal through the promotion of laws that cater to disgust and shame. Progressive programs too threaten it when they call for enforcing through such laws the egalitarian values of a democratic community. For such enforcement, Nussbaum argues, unavoidably demeans and humiliates those on whom the laws impose burdens, and such treatment of people is inconsistent with this ideal.

Her argument demonstrates the power of social criticism that focuses on the workings of emotion in law and politics. In this essay I will examine the degree to which her critique of disgust and shame is successful. I believe there is good reason why conservative political theory would be friendlier to political and legal uses of disgust and shame in maintaining social order, and accordingly I will explore and assess a conservative defense of disgust and shame against Nussbaum's critique. To do so will require, first, setting out the general theory of emotions from which Nussbaum's critique of disgust and shame issues and then presenting the accounts of disgust and shame that Nussbaum develops out of this theory.

II

The theory, as I said, follows the one put forth by the ancient Stoics. Its chief idea, like that of its forerunner, is that emotions are evaluative judgments of a specific sort. Nussbaum, however, departs from the classical Stoic theory in two related ways. First, she modifies the Stoic conception of such judgments by broadening it so that it covers the emotions of nonhuman animals and human infants (or as I will say, beasts and babies). The ancient Stoics denied that beasts and babies were capable of emotions, for they conceived of the judgments they identified with emotions as affirmations of propositions and they denied that beasts and babies had the linguistic capacities necessary for propositional thought. Consequently, if you are drawn to the Stoic theory but believe that animals other than humans experience emotions or that humans before the age of toddling experience them, you must either modify the Stoic conception of judgment or attribute linguistic abilities to beasts and babies. Nussbaum does the former.

Second, Nussbaum makes essential to our understanding of emotions their developmental histories beginning in infancy. Emotions, as she puts it, have a narrative structure in virtue of these histories. The classical Stoic theory ignored this structure, and as a result it offers at best an inadequate understanding of its subject. The deficiency consists in treating emotions as if their cognitive content were independent of their root causes and conditions. When scientific psychology was largely a taxonomic enterprise, such treatment was standard. But since Sigmund Freud's work on infantile sexuality, it has been largely abandoned. Freud, by tracing the emotional problems of his patients back to formative events in their early childhood gave explanatory depth to the understanding of emotions that the taxonomic psychology of his time could not supply. And Nussbaum, who incorporates ideas of Freud's disciples into her theory, does the same by attributing narrative structure to emotions. Her version of the Stoic theory thus has explanatory depth that its classical statement lacks. And because the attribution of narrative structure requires an understanding of emotions as states to which babies as well grown human beings are susceptible, we can see her modification of the ancient Stoic's conception of evaluative judgment as having a twofold purpose. It not only saves the theory from being anachronistic, but also makes possible the introduction of the idea of an emotion's having narrative structure.

How, then, on Nussbaum's theory, is this narrative structure to be understood? The answer follows from the sort of judgment with which the theory identifies every emotion. Nussbaum characterizes this sort of judgment as eudaimonistic. What she means by a eudaimonistic judgment is an evaluative judgment that one makes relative to one's ends and interests. It is a judgment, that is, that something is good or bad because it serves or frustrates one's ends and interests. For example, I might think it is good that a department meeting was cancelled because cancellation serves my interest in having more time to work on an urgent piece of business. Coincidentally, a colleague might think it is bad that the meeting was cancelled because the cancellation frustrates her interest in having the department act on an item she had put on the agenda. These judgments would then constitute opposing emotions, according to the Stoic theory, namely my pleasure and my colleague's displeasure at the same state of affairs. But though the emotions oppose each other, the evaluative judgments they consist in are not contradictory, since each is made relative to a different set of ends and interests. They are judgments of what is good or bad for the person making them and not judgments of what is good or bad absolutely. They are therefore conceived of as interested rather than disinterested judgments, for they are conditioned on the interest the person invests in the people and things that favorably or adversely affect his or her well-being. Accordingly, the history of one's investment and withdrawal of interest in such people and things, going back to infancy, defines the narrative structure of one's emotions.

Nussbaum, drawing on the works of several child psychologists, schematizes this history for both normal and abnormal emotional development in early childhood. She then uses the complex schemes she constructs to exhibit various general patterns of narrative structure that emotions can have. The schematization is more or less the same in both *Upheavals of Thought* and *Hiding from Humanity*. In brief and with omission of many complexities and variations, the schematic history she constructs goes as follows. Humans are born needy and their primitive needs explain their initial investments of interest in objects in their environment. Accordingly, their earliest emotions concern the objects that they see as important to the satisfaction of the desires to which these needs give rise. Delight and distress, excitement and fear, happiness and sadness, are the first emotions of human life. Subsequently, as the child acquires an increasingly distinct sense of itself as a unified

being separate from other beings, it comes to feel love toward those who provide the objects that satisfy its desires, but it comes also to feel anger at them when they act to thwart those desires and to control its behavior contrary to its inclinations. At first, the child does not realize that the targets of its anger are the same as the objects of its love. But in time it does, and at this point its emotional life becomes acutely conflicted. It seeks a way out of this conflict by moderating its demands and learning to accept postponement of their satisfaction. This resolution does not come easily, however, and much growth in and transformation of the child's emotional capacities takes place in the process. In the end, the child reaches a compromise with the world, so to speak, that represents a fair balance of its needs against those of the significant figures in its life on whom it depends for nourishment and protection and of those others, typically siblings, with whom it shares this dependency. It acquires, as a result, a rudimentary sense of fairness and, in virtue of this acquisition, capacities for distinctively moral emotions. These too fall within the Stoic theory. For the child, in acquiring a sense of fairness acquires a primitive view of the world as structured by a moral order on which its well-being depends, and accordingly, it invests a strong interest in preserving this order. This interest anchors the evaluative judgments with which the Stoic theory identifies these emotions and so explains them as eudaimonistic.

III

Nussbaum's accounts of disgust and shame nicely exemplify the fertility of the Stoic theory she advances. She identifies disgust with a judgment about contamination. "The ideational content of disgust," she writes, "is that the self will become base or contaminated by ingestion of the substance that is viewed as offensive."⁴ To be disgusted by something, then, is to find it offensive and to judge that ingestion of it would contaminate one. A child becomes susceptible to disgust, Nussbaum argues, when its parents begin to teach it about such contaminants.

Disgust appears not to be present in infants during the first three years of life. Infants reject bitter tastes from birth, making the gaping facial expression that is

⁴ Nussbaum, *Hiding from Humanity*, p. 88.

later characteristic of disgust. But at this point disgust has not broken off from mere distaste; nor has danger even appeared on the scene. The danger category seems to emerge in the first few years of life, and full blown disgust is present only from around four years of age onward.⁵

Thus, for Nussbaum, disgust is not an instinctive or primitive emotion. It is not among the emotions the experience of which occurs early and naturally in infancy or the susceptibility to which humans share with other animals. While its precursor, mere distaste, may be primitive in this sense, one should not identify mere distaste with disgust if the judgments the two emotions consist in are different. And from the passage just quoted it is plain that Nussbaum thinks they are. It is plain, that is, that she thinks the judgment mere distaste consists in concerns the offensiveness of an object without the more specific idea of its being contaminating. A child, then, comes to have this more specific idea and thus develops susceptibility to disgust through instruction about what things it must not come in contact with, and in particular must not ingest, to remain free of the taint or rot that contact would bring.

Disgust, in Nussbaum's view, is therefore unlike fear, say, which is a paradigmatic primitive emotion. Fear, on her theory, is identified with a judgment concerning danger, and children have the capacity for making such judgments long before they receive instruction about what things are dangerous. They begin, that is, with an innate sense of danger, which operates in their earliest fears. Later they receive instruction about what things are dangerous and, as a result, come to judge some things dangerous that they previously did not regard as dangerous and stop regarding as dangerous things that had previously frightened them. Hence, the range of objects toward which they experience fear changes. The sort of judgment Nussbaum identifies with disgust, by contrast, can only be made once the child receives instruction about contamination. Children, in other words, have no innate sense of contamination on Nussbaum's view, and they can make the sort of judgment disgust consists in only after they have acquired the relevant notion. Consequently, while Nussbaum allows that susceptibility to the emotion may be an inherited trait, what would be inherited in that event are the mechanisms by which the emotion manifests itself and not any sensitivity to features in the world that elicits it. Such sensitivity, rather, is the product of parental and social teaching.

⁵ Nussbaum, *Hiding from Humanity*, p. 94.

Nussbaum further characterizes the judgment of contamination that she identifies with disgust as being a reminder of one's vulnerability to decay. It is a reminder, that is, of one's having an animal body whose integrity is liable over time to weaken, degenerate and ultimately collapse. This characterization of the judgment reflects the influence on her account of Paul Rozin's experimental work on disgust.⁶ Rozin and his colleagues reached a similar conclusion about disgust's having as its focus one's animal nature and the liability to decay that it entails. The basis for this conclusion is somewhat obscure, but one possibility is that themes of animality and decay are somehow supposed to emerge from a survey of the common objects of disgust: human and animal excrement, other products of bodily functions like phlegm, semen, and pus, various animals such as slugs, salamanders, cockroaches and other insects, decomposing corpses, and regurgitated food. Disgust then, on this view, is an emotion the susceptibility to which signals a "problematic relationship with our own animality."⁷ Nussbaum has some reservations about the view as Rozin articulates it, and accordingly she revises it in a way that brings it more into line with her general account. So revised the view is that the concern with contamination that the judgment disgust consists in implies is a concern with one's own mortality and particularly with the decay of one's body due to its animal nature. The view, even given Nussbaum's helpful revision, does not strike me as especially compelling. Some insects, such as potato bugs, predictably provoke disgust. Others such as caterpillars do not. Neither, however, seems to be a greater contaminant than the other, and I cannot see that the thought of ingesting either is more of a reminder of our vulnerability to decay due to our animal nature than the thought of ingesting the other. I will return to this point in the next section.

Shame, in contrast to disgust, on Nussbaum's account, is experienced by infants early in their lives. Nussbaum identifies shame with a judgment of inadequacy or failure. "[S]hame involves the realization that one is weak and inadequate in some way in which one expects oneself to be adequate."⁸ Infants, she believes, acquire a sense

⁶ See Paul Rozin and April E. Fallon, "A Perspective on Disgust" *Psychological Review* 94 (1987), pp. 23–41; Paul Rozin, J. Haidt and C. R. McCauley, "Disgust," in M. Lewis and J. M. Haviland-Jones (eds.), *Handbook of Emotions*, 2nd Edition (New York: Guilford Press, 2000), pp. 637–653.

⁷ Nussbaum, *Hiding from Humanity*, p. 89.

⁸ Nussbaum, *Hiding from Humanity*, p. 183.

of their own inadequacy and so a susceptibility to shame soon after they enter the world. For they come into the world from an environment, their mother's womb, in which all their needs have been met, and consequently they have no sense of their being utterly dependent on external providers. Even after birth they are the focus of attention and care, and from the experience of being catered to, they come to an exaggerated sense of themselves as all-important and all-powerful part of what goes into their coming to see themselves as distinct, finite beings, then, is their experiencing occasions when their needs go unmet and they are powerless to do anything about it. The frustration, anger and despair they feel on these occasions induce in them a strong sense of themselves as dependent and helpless, a sense that is directly at odds with their prior condition of self-satisfaction to which they still cling as the ideal that is their due. And now recognizing their weakness and inadequacy, they experience a kind of shame, which Nussbaum calls "primitive shame."⁹ This primitive shame precedes any parental teaching of standards and ideals that the infant is expected live up to. It precedes as well the incorporation into the personality of ideal traits to which the child aspires. Both developments serve to enlarge the range of inadequacies and failures over which a person feels shame, and in doing so they further entrench the child's liability to primitive shame and promote its manifestation in an array of activities and endeavors beyond those in infancy that triggered the emotion.

To overcome this liability, Nussbaum argues, one must acquire ideals whose fulfillment requires seeing oneself as less important and less central to what matters in life. As she puts it, people must acquire ideals whose fulfillment opposes the primary narcissism manifested in primitive shame if shame is to become a constructive emotion in social life. The ideals she has in mind are, for example, ones that orient a person toward promotion of the common good in his community and toward regard for other human beings as his equals. In this respect, shame differs from disgust, for a sense of shame that the attachment to such ideals creates will be an important element in the kind of personality that befits liberal democratic institutions. The experience of such shame will, consequently, serve to reaffirm that attachment at times when one realizes that one has failed to measure up to those ideals, and in this way it has a constructive place in liberal democracy. Disgust, by contrast,

⁹ Nussbaum, *Hiding from Humanity*, pp. 183–184.

in Nussbaum's view, has no constructive place in liberal democracy. It is not, in any case, a constructive emotion and susceptibility to it therefore does not serve to maintain fidelity to the ideals of liberal democracy.

This difference between the two emotions complicates somewhat Nussbaum's critique of their place in the criminal law. Since she allows that shame, when constructive, is an emotion whose cultivation can have social benefits, she cannot hold of it, as she does of disgust, that it is, across-the-board, a dangerous emotion for society to enlist. Disgust, in her view, is inherently problematic as an emotion society might cultivate to help maintain its customs and institutions or advance its ideals. It is, she says, "a deeply and an inherently self-deceptive emotion" that invites one to deny one's vulnerability as an animal and, in the service of that denial, to target those less privileged than one, especially the weak and the marginal, as objects of disgust.¹⁰ In other words, it invites treatment of the weak and the marginal as undeserving of equal respect and concern and is, therefore, an enemy of the ideals of liberal democracy. But because shame, on Nussbaum's account, is only sometimes a threat to these ideals, she must distinguish its destructive instances from its constructive ones. She does this by explaining how the emotion, by virtue of its origins in the primary narcissism of primitive shame, can be like disgust in being self-deceptive and in leading to abusing those less privileged than one. It does so by encouraging people to aspire to being 'normal,' a fictitious state the felt achievement of which gives them a sense of safety and comfort, and consequently to look for ways of distinguishing themselves from others whose differences they can then regard as marks of deviance or abnormality.¹¹ Hence, shame is destructive of the ideals of liberal democracy when it is elicited in the service of enforcing standards that represent what it is to be "normal" and thus stigmatizing those who depart from these standards.

¹⁰ Nussbaum, *Hiding from Humanity*, p. 206. See also p. 102. Nussbaum further declares, "So powerful is the desire to cordon ourselves off from our animality that we often don't stop at feces, cockroaches, and slimy animals. We need a group of humans to bound ourselves against, who will come to exemplify the boundary line between the truly human and the basely animal" (Nussbaum, *Hiding from Humanity*, p. 107).

¹¹ See Nussbaum, *Hiding from Humanity*, pp. 218–219.

IV

What political programs would treat either disgust or shame as an emotion to which the criminal law should cater? In the case of disgust, Nussbaum identifies several thinkers who believe that the emotion has an important role in determining the kinds of conduct the criminal law should prohibit. They are Leon Kass, Patrick Devlin, William Miller, and Kahan. I will concentrate exclusively on Devlin's views. They are by far the best known and most influential. Devlin's case for the legal enforcement of morality is generally thought to be the most serious challenge to John Stuart Mill's argument against such enforcement in *On Liberty* since James Fitzjames Stephen's¹² famous attack on it. Both Devlin's and Stephen's criticisms fall within the tradition of British conservative thought that Edmund Burke's *Reflections on the Revolution in France* began, and one can, with the help of Devlin's criticisms, see how the political program of this tradition supports the idea that disgust has an important role in determining what kinds of conduct society should tolerate and what kinds it should criminalize. To understand this role, however, it will be necessary first to revisit Nussbaum's account of the emotion and then to offer an alternative.

Let us return, then, to the reservations I had about Nussbaum's characterization of the judgment that she identifies with disgust. These did not concern her general characterization of this judgment as a judgment about contamination. Rather they concern her specific characterization of the judgment as a reminder of one's mortality and vulnerability to decay in virtue of one's having an animal body. Nussbaum, as I mentioned, relies on the work of Rozin in putting forth this specific characterization.¹³ Prior to this work, there had been, in experimental psychology, only an occasional study or two focusing on disgust. There were also studies of it as part of the more general program of studying the emotions that comes out of Charles Darwin's work, but these did not go significantly beyond Darwin's own observations. Rozin's research, which he has conducted with various colleagues over the past quarter century, represents then the first sustained study of the emotion within this field. Rozin (et al.), under the influence of his predecessors, defines disgust narrowly as a

¹² James Fitzjames Stephen, *Liberty, Equality, Fraternity and Three Brief Essays* (Chicago: The University of Chicago Press, 1991).

¹³ See Rozin and Fallon, "A Perspective on Disgust."

“food related” emotion. It is revulsion at the prospect of ingesting a contaminating object. While he acknowledges that this definition is “circumscribed” and does not cover instances of disgust that fall within more traditional definitions, he nonetheless believes it captures “the core and origins of the emotion.” He finds support for this belief in the etymology of “disgust,” in the emotion’s characteristic facial expression, the closing of the nostrils and the opening of the mouth, and in its most characteristic feeling, nausea. Rozin further narrows his subject by distinguishing disgust from distaste, a distinction that, as we noted earlier, Nussbaum accepts. It is these two restrictions, the definition of disgust as food related and the distinction between distaste and disgust, that jointly enable Rozin to make a seemingly plausible case for the thesis that disgust concerns the problematic relationship we have to our animal nature.

Briefly, Rozin’s case is this.¹⁴ There is a tendency in human psychology to regard what one eats as affecting one’s very nature. The tendency is reflected in the slogan “We are what we eat.” Disgust, as Rozin defines it, is an emotion of food rejection, and hence it serves to protect one from eating things whose ingestion one regards as changing one’s nature for the worse. The objects of such disgust, in other words, are regarded as contaminants, and the contamination they threaten is regarded as debasing. These objects are either animals, their parts, or their waste. Indeed, there are relatively few animals, as compared with plants, that human beings are willing to eat, and to eat even these, the animals must be prepared in ways that disguise their origins. They must be cut up into pieces, for instance, or mixed with other foods as in stews and casseroles. Plants, by contrast, are frequently eaten without such preparation. This, along with the great number of plants human beings are willing to eat, implies that human beings are unconcerned about having their nature affected by eating plants, whereas their disgust at eating most

¹⁴ Rozin and Fallon, “A Perspective on Disgust.” In a later article, Rozin acknowledges other aspects of human life besides eating and food in which disgust operates to protect people from things they judge to be contaminants. And as a result he gives a different argument for his thesis that disgust concerns the problematic relationship we have to our animal nature. This later argument amounts to his making a sweeping generalization that anything that is a reminder of our animal nature can provoke disgust. But this generalization, Nussbaum herself observes, is hopeless. Human athleticism, she points out, may remind us of our animal nature, but it does not provoke disgust. One could say the same thing about sleep [See Paul Rozin, J. Haidt, and C. R. McCauley, “Disgust” in M. Lewis and J. M. Havland Jones (eds.), *Handbook of Emotions*, 2nd Edition (New York: Guilford Press, 2002), pp. 637–653].

animals, animal parts, and animal waste implies, to the contrary, that they are concerned about the effect on their nature of eating animals. The explanation, it is safe to surmise, is that humans are animals who, because they generally regard themselves as not only superior to all other animals but different from them in kind, are anxious about being animals. Hence, disgust, as a food-related emotion, signifies our problematic relationship with our animal nature.

One might naturally object to this argument that it ignores the disgust that many people, especially small children, feel at the prospect of eating certain vegetables like broccoli. Such disgust is obviously food related, yet it has no bearing on our animal nature. Rozin, though, anticipates such objections. He relies on his distinction between distaste and disgust to answer them. Thus, Rozin maintains, while the involuntary facial movements expressing the revulsion that children, say, experience when they are made to eat some vegetable they detest are the same as the involuntary facial expressions characteristic of disgust, these children are directly responding to the bitter taste of the vegetable. They are not responding to the thought of the vegetable as a contaminant. In other words, if one identifies disgust with a certain judgment – if the emotion must have a certain ideational content, to use Rozin's expression – then the revulsion children experience on eating vegetables they detest, or at the prospect of eating them, is not disgust but rather mere distaste.

Rozin's case, however, even on its own terms, is unpersuasive. A common object of disgust is spoiled or rotten food, including rotten fruits and vegetables. Someone who is revulsed by a pear that has turned into a heap of mold or a rotten tomato that he finds at the back of his refrigerator is no less responding to the thought of contamination than someone who feels disgust at thoroughly moldy cheese or rotten meat. Yet there is no reason to think his revulsion at the pear or tomato signifies a concern with his animal nature.

This observation may alone be sufficient to refute Rozin's case. Yet the real problem with his case is that its terms are too limiting. Potato bugs, as I mentioned earlier, predictably excite disgust. Caterpillars do not. The reason, however, is found in their appearance. Potato bugs are hideous. Looking at them makes one's flesh crawl. Caterpillars, by comparison, are not particularly repellent to look at. Some, in fact, are attractive. Plainly, if what explains why one type of insect excites disgust and another does not is the difference in their visual appearance, that one is extremely ugly and

the other is not, then the disgust that the ugly insect excites is not food related and therefore cannot be interpreted, as Rozin does, as signaling our problematic relationship with our animal nature.

Of course, Rozin could declare that the emotion in this example is distaste and not disgust, since the emotion seems to be a direct response to the potato bug's visual appearance and does not seem to include a judgment that the bug is contaminating. But there are too many such examples of disgust excited by the sensory properties of its object to be plausibly put into a separate category, distaste, that is distinct from disgust. At some point, doing so becomes merely the act of subdividing experiences of disgust into those that are direct responses to their object's sensory properties and those that include a judgment that their object is contaminating. In other words, denying that the former are instances of disgust becomes *ad hoc*. Surely, hideousness alone is sufficient to excite disgust, a fact that the makers of horror movies understand very well.¹⁵

Indeed, the description of the response as making one's flesh crawl should remind us that the characteristic physical symptoms of disgust are not confined to the facial expressions that Rozin invokes to justify his conception of disgust as a food related emotion. Disgust is commonly aroused when one comes into contact with slimy things or when creeping animals, like insects, amphibians or small reptiles, crawl on one's body. Prolonged contact with something slimy or the discovery of a creeper crawling on one produces shivers and perhaps the violent reaction of shaking or brushing off the offending creature. Such behavior expresses disgust without any suggestion that the object of the emotion is being rejected as food. Nor must the object even be an animal. Disgust at having to wade barefooted through a swamp whose bottom is covered with muck or to swim in a pond whose surface is covered with scum lacks an animal object. The swamp bottom's muck or the pond's scum excites disgust, it would seem, apart from any concern about one's animal nature.

Finally, a further problem for Rozin's case is that immoral conduct often provokes disgust. This fact is of course central to Devlin's account of how to determine what conduct society should not tolerate. And although Devlin's account chiefly concerns conduct that transgresses traditional Christian limits on acceptable sexual

¹⁵ Horror is a combination of fear and disgust; see Noël Carroll, *Beyond Aesthetics: Philosophical Essays* (Cambridge: Cambridge University Press, 2001), pp. 235–254.

practices, sexual transgression is not the only kind of immoral conduct that provokes disgust. Obviously, if it were, then disgust felt in response to immoral conduct would not be problematic for Rozin's case, since human sexuality is one of the chief foci of our anxieties about our animal nature. But disgust is also felt in response to moral corruption that has nothing to do with our sexuality or the other typical foci of the anxieties about our animal nature that we tend to suppress through moral customs. Corrupt public officials and the political practices that offer those officials opportunities for achieving riches or greater power through deceit and fraud are, for example, common objects of disgust. "Disgusting" is a common epithet used to describe them. And it is also common to describe such officials metaphorically as bad apples or sewer rats whose behavior is filthy and stinks. Similar responses are no doubt frequent within private organizations whose leaders are discovered to have acted corruptly. Rozin, in one of his later collaborations, concedes this point about "sleazy politicians," and he acknowledges that his thesis that disgust concerns the problematic relationship we have with our animal nature does not extend to moral disgust, as he calls it. What he fails to appreciate, though, is the implication the point has for the viability of this thesis.¹⁶

V

Rozin's failure to make a convincing case for his thesis means that we need to consider an alternative to Nussbaum's account of disgust. We need, that is, to consider an account that is neither tied to Rozin's thesis nor focused on food rejection as the core theme in disgust. Elsewhere I have sketched such an alternative in the course of arguing for seeing some emotions, including disgust, as having two forms,

¹⁶ See Rozin, Haidt, and McCauley, "Disgust." Thus Rozin and his co-authors speculate that such disgust is a response to immoral conduct that is seen as "inhuman and revolting," such as betrayal of friends or cold blooded killing, rather than springing from normal human motives as, they suppose, is the case with bank robbery. From this speculation, they infer, "This kind of disgust may represent a more abstract set of concerns about the human-animal distinction ..." (pp. 643–644). But such speculation is further evidence of Rozin's original mistake of thinking that the concept of disgust is at its core that of a food-related emotion. There is nothing abnormal about the motives of corrupt officials. Taking a bribe and robbing a bank are just two different ways of criminally enriching oneself.

which I call “primitive” and “tutored.” The primitive forms are direct responses to certain objects in virtue of their sensory properties. The subject’s discernment of these properties, when he experiences a primitive emotion, supplies the emotion’s cognitive content and determines its object. The tutored forms of these emotions develop out of their primitive forms through socialization. Specifically, children are taught, with respect to each primitive emotion, what things are the appropriate objects of that emotion and what things are not, and in the course of this teaching they acquire evaluative concepts that enlarge their understanding of the world and alter the range of things to which they respond with that emotion. In general, then, as a result of this teaching, children become liable to experience emotions whose cognitive content consists in evaluative thoughts formed through the application of these concepts to the world. They become liable, in other words, to tutored forms of emotions that, prior to the acquisition of these concepts, were felt exclusively in response to objects by virtue of those objects’ sensory properties.

Consider, for example, fear. In its primitive form, it is an emotion whose objects are defined by those sensory properties that make something scary. Children are then taught the concept of danger and to feel fear at what they recognize as dangerous. This teaching enlarges their understanding of the world by, among other things, bringing them to see that certain innocent-looking things can in fact harm them if they are not careful. Teaching children about danger thus gives them new objects of fear, and accordingly they become liable to the tutored form of the emotion. At the same time, the teaching may make them less prone to fear scary things that they have learned are not dangerous. Indeed, as they become more familiar with those things and confident that they will not harm them, these things may cease to be scary. Consequently, the range of objects to which they are liable to fear in its primitive form is reduced.

A parallel account of disgust is also possible. On this account, disgust is initially an emotion whose objects are defined by those sensory properties that make something foul. These are certain smells, tastes, sights, and tactile feelings that offend the senses. Children are then taught the concept of sickness and to feel disgust at things the ingestion of which or contact with which will make them sick. Presumably, then, the reason disgust focuses on what ought to be rejected as food is that small children are prone to eat things that will make them sick and therefore need to be taught to avoid such things and to eject them quickly if they are taken into their mouths.

But things that make one sick if eaten are not the only things small children must learn to avoid and to remove quickly if they come into contact with them. They must also learn to avoid what is unclean or carries disease, for prolonged contact with these things may also cause one to become sick. Consequently, water or soil infested with decayed matter, rats, flies, the corpses of animals, squalid conditions, and so forth become objects of disgust apart from their foul smell or slimy texture or the possibility of their being eaten. Generally, then, teaching children about what causes sickness gives them new objects of disgust, and accordingly they become liable to the tutored form of the emotion. At the same time, the teaching may help them become less disgusted at things whose properties offend their senses but that are not otherwise causes of sickness. After all, eventually many of us come to enjoy eating raw oysters.

The teaching through which children come to be capable of tutored disgust may initially consist chiefly in their acquiring a narrow concept of sickness, one that applies only to physical conditions. At some point, however, children either learn to apply the concept more broadly to cover unsound moral conditions and so come to understand depravity as a kind of sickness, or they acquire the concept of depravity from their teachers' comparing unsound moral conditions to sickness. They learn, that is, to distinguish between what is wholesome and what is depraved, and these notions are either understood as falling within those of health and sickness or acquired as their analogues in the mental and moral sphere. In either case, depravity and its sources become objects of disgust. Accordingly, children are taught to avoid actions and places that will corrupt their minds and character and to avoid as well people association with whom will have a similar effect. What Rozin calls "moral disgust" is thus a tutored form of disgust that is continuous with or a development out of the tutored form the capacity for which children develop through their acquiring the concept of sickness and their learning to avoid things that are sickening.

The objects of such disgust, moreover, are not restricted to actions, places or people who would corrupt one if one did not avoid them. They also include actions, places and people with whom one has no direct involvement or contact and involvement or contact with whom would not necessarily corrupt one even if one did. Rozin's example of "sleazy" politicians illustrates this point. A politician's corrupt actions may disgust one even if one is incorruptible. For it is enough that one regard oneself as somehow

tainted by the politician's actions. The taint is a kind of moral contamination that is due to one's being associated in some way with this politician, and it is not unusual for people to regard themselves as tainted by the corrupt actions of others as long as there is some affiliation between them. Indeed, it is a well-known phenomenon of group psychology.

Specifically, if one belongs to a group and identifies strongly with it, one will be liable to feel certain emotions in response to the actions of other members, regardless of whether one bears any responsibility for those actions. The pride people take in the achievements of their countrymen, solely in view of their being the achievements of their countrymen – an important scientific discovery, say, an international award for literary work, victory in the Olympic games, etc., is a familiar example. So too people can be ashamed of their countrymen's actions, despite having no responsibility for them, when those actions bring disgrace upon their country. War crimes, for example, are typically a source of shame not only for the soldiers who commit them and the military and political leaders who may be responsible for their commission but also generally for the citizens of the country whose soldiers committed them. United States citizens who traveled in Europe after the publication of news and photographs of U.S. soldiers' torturing Iraqi prisoners at Abu Ghraib prison and who were engaged by their hosts in conversation about the policies that led to such conduct know this feeling well. The feeling, moreover, would be palpable, notwithstanding their own opposition to those policies or the war in which they were implemented.

With regard to disgust, the phenomenon manifests itself in shared revulsion at actions and people who betray the beliefs, norms and ideals of a group to which its subjects belong and with which they strongly identify. When people who belong to a group thereby share beliefs, norms and ideals, when they subscribe to the same faith and support the same practices, then members who break faith with them or subvert their practices, have, if only symbolically, weakened the group. They have compromised, as it were, the group's integrity, and such compromises of integrity are seen as corruption and even defilement. Politicians in a representative democracy who abuse the public's trust by trading votes for personal gain subvert the democracy in which they serve. Athletes who cheat to gain an edge on their competition damage the integrity of the sports in which they compete. The corruption, in either case, makes them objects of disgust on the part of the members of the relevant community, fellow

citizens in the case of the corrupt politicians, teammates and opponents, their assistants and fans, in the case of the corrupt athletes. For corruption sullies the values and ideals for which the group stands, and the judgment of being tainted in consequence gives rise to disgust at the offending actions and the offenders who did them.

VI

When Devlin appeals to the disgust of the common man, in making his case for the legal enforcement of morality, he takes the emotion to be an expression of common sense moral judgment. The common man, as Devlin likes to think of him, is “the man in the jury box,” a representative of the community whose judgment, when it accords with that of like-minded jurors, expresses the moral judgment of society. So the common man’s disgust at cruel or licentious actions is thus understood, on Devlin’s view, to express moral disapproval that decent people share. Furthermore, Devlin characterizes the moral judgment the emotion expresses as one of common sense in order to distinguish it from a judgment that issues from reason, for in Devlin’s view the morality that the criminal law may enforce is the morality of common sense and not the morality of rationalist philosophy. It is not, as it were, the one true morality that philosophers and theologians have propounded as a set of universal principles discoverable, through the exercise of reason and reflection, by any rational being. It is rather the morality that is commonly recognized in the society and embedded in the dominant practices and traditions, principally religious, to which that society adheres. Consequently, different societies may have different common moralities, which is to say, the common sense morality of one society may differ from that of another in virtue of the difference in the practices and traditions to which the society adheres. The actions the disapproval of which is registered through disgust are thus offenses against the moral beliefs, norms and ideals that the members of the society share.

Devlin’s chief interest is of course British society. He was concerned with the principal recommendations in the report of the Committee on Homosexual Offenses and Prostitution, which the British government set up in 1954 to study whether the criminal law as regards homosexual acts and prostitution needed reform. Those recommendations were to reform the law so that homosexual acts

between consenting adults, if not engaged in publicly, were no longer criminal offenses and to resist calls for reforming the law so as to make prostitution a criminal offense. The committee based these recommendations on much the same general argument that Mill had advanced in *On Liberty* against the enforcement by society of morality. The argument in a nutshell is that the purposes of the criminal law are restricted to maintaining peace within society and insuring that people treat each other decently. They do not, in other words, extend to preventing immorality as such or promoting moral virtue for its own sake. What goes on between consenting adults in private is therefore beyond the scope of the criminal law. It is this argument that Devlin opposes and criticizes. He believes it fails to take account of the vital importance to a society of a common morality, which is to say, shared moral beliefs, norms and ideals. Society, he maintains, could not exist without these shared beliefs, norms and ideals. They are among the “invisible bonds” that hold people together. Hence, Devlin argues, society must be prepared to defend its common morality and to use the criminal law, in particular, to enforce that morality when disobedience to it threatens to weaken the bonds it partly constitutes. For a society that fails to defend its shared beliefs, norms and ideals will tend to disintegrate and its members to “drift apart.”

The disgust of the common man enters Devlin’s argument at the point where he asks how legislators should determine which kinds of immoral conduct society would be justified in making criminal. Not every kind, Devlin concedes, should be regulated by the criminal law. There are kinds that society can tolerate, in the interest of individual liberty, without seriously jeopardizing its cohesion, and that interest should in all such cases outweigh society’s interest in promoting moral conduct. The limits of society’s tolerance, Devlin believes, are reached when the conduct provokes not merely displeasure on the part of the majority in society but disgust. And the basis of this disgust, moreover, must be the immorality of the action. Disgust that does not have immorality as its object, disgust that is typically aroused just by the sight of other people’s genitalia, say, or their engagement in sexual acts, does not imply moral disapproval and thus should not be confused with the disgust that Devlin regards as the proper indicator of conduct society should not tolerate. After all, even the most liberal-minded person might naturally feel some disgust at the nudity in Fellini’s *Satyricon* without his thinking the

film should be banned or that only the nudity of the young and the healthy should be tolerated.

Plainly, then, the understanding of disgust that Devlin incorporates into his position is that of an emotion decent people have toward immorality without regard to whether the immorality that disgusts them has any directly corrupting influence on them. What they experience, according to the account of such disgust given in the last section, is a shared revulsion at actions and individuals who betray the beliefs, norms and ideals of a group to which they belong and with which they strongly identify. The account of the last section therefore supports Devlin's appeal to disgust, for it makes clear why the kind of conservative opposition to Mill's argument that Devlin's position exemplifies would use the disgust of decent people toward immorality as an indicator of conduct the society would be justified in suppressing. On that kind of conservatism, a well-functioning society is essential to human well-being, and to function well, a society requires a high degree of solidarity among its members.¹⁷ Conversely, lowering the degree of solidarity in the society jeopardizes the members' well-being. Such solidarity consists, at least in part, in agreement among the members on boundaries to conduct and on persons and things (which typically include symbols or representatives of the society itself) whose worth is inviolable and to which honor must be paid. The agreement represents the social unity that is understood to be essential to the members' well-being, and as such it serves as a norm deviation from which loyal members will see as threatening the society's integrity. Consequently, disgust will have the kind of role in the legal and moral enforcement of that norm that Devlin assigned it.

Of course, conservative thinking of this stripe is no more than dogmatism without at least some explanation of the connection it draws between solidarity among the members of a society and their well-being. It must give some support for its theses that a society functions well only if it achieves a high degree of solidarity and that reducing the degree of solidarity in a society will jeopardize its members' well-being. These theses are the distinctive tenets of conservative thought, like Devlin's, that takes limiting individual liberty and promoting social inequality as sometimes necessary for

¹⁷ Devlin did not hold this thesis but rather maintained the stronger, ontological thesis that society's very existence depends on there being a high degree of solidarity among its members. It was this ontological thesis effectively attacked in H. L. A. Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963).

the sake of maintaining or strengthening social unity. For it is the mark of such conservatism to oppose liberal and democratic programs of legal and social reform on the grounds that such reform will weaken and even destroy bonds among the members of society, and these theses underpin that opposition. The explanation lies in a conception of society that significantly differs from those of its opponents.

On this conception, human society is a natural phenomenon. It develops from primitive groups of human beings through a process of civilization. However one individuates the different societies that result from this process – the different societies, for instance, that Western civilization comprises, they are to be conceived of genealogically. All of them, that is, are to be understood as the branches of a family tree (just as the connections among Indo-European languages are commonly understood as branches of a tree whose trunk is their proto-language). The members of each society are members either by birth or by privileged admission, and the sense of belonging is a deep fact of social psychology. Those who belong by birth have been initiated from an early age into the society's traditions, and their social selves consist in large part in the habits of thought, feeling and action that they acquire through that initiation. Those who belong by privileged admission are expected to assimilate to some degree and consequently face significant social pressure to acquire the same habits. The society's members are thus both products and keepers of its traditions. They are products in that initiation or assimilation into the traditions, when successful, determines in large part their personality and behavior. They are keepers in that their fidelity to these traditions is necessary to sustain them. And this symbiosis between the society's members and its traditions is the basis of the connection conservative thinkers like Devlin draw between social solidarity and human well-being.

Above all, according to these thinkers, the members of a society are not to be thought of as independent contractors (or their descendants) who have come together for mutual advantage through cooperation. They are inheritors of the practices and institutions that make social cooperation possible, to be sure, but not in a sense that gives them dominion over those practices and institutions. The liberal conception of society as a voluntary association of people who as individuals are free and equal and who as a collective have authority to determine the terms of their social life is thus anathema to such conservative thought. Society may be understood as a partnership

among its members, but it is, in Burke's words, "a partnership in all science; ... in all art; ... in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who are dead, and those who are to be born."¹⁸ To think of it instead as a corporation organized to promote the personal ends of the partners who are its current owners and who as such can at any time revisit the terms of the agreement that binds them together is to invite the kind of social malaise that results from people's losing their moorings and drifting apart.

VII

Nussbaum, in one of the most compelling parts of her critique of disgust, explains the emotion's role in the social subordination of people who belong to religious and ethnic minorities or who lack the privileges that those who control the society's wealth and power have. Anti-Semitism and misogyny are her chief examples. Regarding the former, she describes how Jews were depicted in medieval representations so as to evoke disgust and how similar but more extreme depictions by notorious nineteenth and twentieth century German anti-Semites were used to promote an ideal of Aryan masculinity from which the German people were supposed to draw inspiration and strength. Thus, she writes,

The stock image of the Jew, in anti-Semitic propaganda from the Middle Ages on, was that of a being disgustingly soft and porous, receptive of fluid and sticky, womanlike in its oozy sliminess. In the nineteenth and twentieth centuries such images were widespread and further elaborated, as the Jew came to be seen as a foul parasite inside the clean body of the German male self.¹⁹

And she goes on to describe how Jews were caricatured as having grotesque physical features, which were identified as distinctively Jewish – Jewish noses, Jewish feet, Jewish skin – and which were then used to represent Jews as more animal than human. [I]t was because there was a need to associate Jews ... with stereotypes of the animal, thus distancing them from the dominant group, that

¹⁸ Edmund Burke, *Reflections on the Revolution in France*, J. G. A Pocock (ed.) (Indianapolis: Hackett Publishing Company 1987), p. 85.

¹⁹ Nussbaum, *Hiding from Humanity*, p. 108.

they were represented and talked about in such a way that they came to be found disgusting.²⁰ Misogyny too, Nussbaum observes, has been expressed in different cultures and at different times in depictions of women meant to evoke disgust. These depictions, she argues, typically manifest a reaction formation to female sexuality and to the threat to male domination that female sexuality represents. "One may find," Nussbaum writes, "variants on these themes in more or less all societies, as women become vehicles for the expression of male loathing of the physical and the potentially decaying."²¹ Women, Nussbaum argues, because of bodily functions that define them as child bearers, are seen in these misogynistic depictions to be closer to nature and so to our animality than men, and men's need to deny their vulnerability as animals to infirmity, disease and death has made these functions and women as their site the objects of disgust.

Nussbaum intends these examples as corroboration of her thesis about disgust's being a reminder of our animal nature and the vulnerability to decay it entails. As such, they anticipate her later criticism of the U.S. judiciary's Devlin-like appeals to the disgust of the common man in determining the limits of the law's tolerance of pornographic materials and to Devlin's own appeals to such disgust in his defense of the law's prohibition of homosexual sodomy. Yet on the analysis of disgust I have given, the disgust Nussbaum describes in these examples is not the kind that concerns Devlin. Anti-Semites, after all, regard Jews as people from whom they must keep their distance lest they become polluted by contact with them. And misogynists either regard women similarly or regard their intimate relations with them as a form of depravity that only the good of reproduction can redeem. The disgust of anti-Semites and misogynists, in other words, is not disgust of the kind that implies moral disapproval apart from personal concern about being corrupted by contact with the objects of the emotion. Consequently, the force of her later criticism comes into question.

At the same time, it is clear that Nussbaum is right to find in Devlin's appeal to disgust support for the emotion's role in the subordination of religious and ethnic groups and of people who lack privileges that those in control of a society's wealth and power have. Indeed, her examples of anti-Semitic and misogynistic disgust, while

²⁰ Nussbaum, *Hiding from Humanity*, p. 111.

²¹ Nussbaum, *Hiding from Humanity*, p. 113.

not of the kind of disgust that concerns Devlin, nonetheless call attention to an important aspect of that kind. For they highlight the role disgust can have in creating and sustaining solidarity within a group. And if the disgust that concerns Devlin has a similar role in creating and sustaining social solidarity, then it too is open to criticism in those cases in which the solidarity it helps to create and sustain derives from shared beliefs, norms and ideals of a supremacist ideology.

Nor is it difficult to see how it could have this similar role. In these examples disgust works to unite the members of a group through common hatred and contempt of outsiders or people regarded as inferior. The dynamic is as familiar as it is pervasive in modern life. Ethnic divisions in a pluralistic society (or across a small continent) are a common source of such groups. But even if we leave aside such ancestral divisions we still find human beings, beginning with grade school and summer camp, forming gangs and cliques and coteries whose unity is strengthened by the members' seeing themselves as different from others and superior to at least some of them. Later in life similar divisions appear in exclusive clubs, secret or elite societies, and gated or otherwise closed neighborhoods. When some such division characterizes a whole society or large sections of it and when it becomes entrenched in that society's traditions, then disgust of the kind to which Devlin appeals serves to reinforce the subordination that the division represents and therefore the inferior status within the society that the members of the subordinate group have.

One might of course still question whether disgust in such cases is the same as the disgust to which Devlin appeals. For Devlin appeals to the disgust of the common man, "the man in the jury box," and the common man need not be a member of any dominant group within the society. The disgust of the common man, it might therefore seem, must be different from the disgust of those who belong to a dominant group regardless of whether or not the latter includes concern with being corrupted by direct contact with members of the subordinate group. The common man's disgust, on this thought, must be neutral with regard to the customs of any of society's subgroups and likewise neutral with regard to physical features or the characteristic conduct of any of their members. And so one might conclude that the disgust to which Devlin appeals is not implicated in the oppression of subordinate groups.

But this line of reasoning is specious. The common man's disgust in Devlin's theory is not necessarily neutral, and in a society in which division between a dominant group and a subordinate one is entrenched in the society's traditions, it is bound to figure in the general social attitudes that maintain the dominance. This is because the members of a society, barring cultural isolation from the society's traditions, will internalize the beliefs, norms and ideals that constitute those traditions. Hence, in a society in which division between a dominant group and a subordinate group is entrenched in the society's traditions, disgust that members of the dominant groups feel at the conduct or physical features of the members of subordinate groups will not be limited to those who belong to a dominant group. It will also be part of the psychology of many who belong to subordinate groups. W. E. B. DuBois's description of the double consciousness that African Americans, forty years freed from bondage and subject to a system of apartheid, experienced illustrates this point tellingly. It is, DuBois wrote, "[the] sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity."²² Having constantly to face the dominant culture's prejudice against one's looks, one's manners, and indeed one's very being, one is brought, DuBois declared, to the "inevitable self-questioning and self-disparagement and lowering of ideals which ever accompany repression and breed in an atmosphere of contempt and hate."²³ Devlin's common man, if he lives in such a society, will naturally express the social attitudes, including disgust, that castes and other oppressive hierarchical relations create, not only in the members of the higher orders toward those of the lower orders but also in those of lower orders toward themselves.

Nussbaum's objections to Devlin's appeal to the common man's disgust follows from her general critique of the emotion. Because on her account the emotion, when its objects are people or their actions, consists in judgments that invite regard for those people as less than human, one promotes dehumanizing and abusive treatment of some of them when one argues for the society's enlisting disgust in the service of maintaining the customs and traditions

²² W. E. B. DuBois, *The Souls of Black Folk* (New York: New American Library, 1969), p. 45.

²³ DuBois, *The Souls of Black Folk*, p. 51.

that bind its members. And Devlin's appeal is no exception. On the alternative account of disgust that I have proposed, by contrast, the emotion, when its objects are people or their actions, does not necessarily invite such treatment of those people, for the judgments in which it consists do not always serve as a reminder of our animal nature and vulnerability to decay. They are sometimes judgments about corruption that threatens the integrity of a group with which one identifies by betraying the group's shared beliefs, norms and ideals. And if those beliefs, norms and ideals are integral to just social institutions and humane moral practices, then the emotion has a salutary role in removing threats to those institutions and practices. A clear example is public disgust at widespread graft by elected officials, enriching themselves at the expense of those whom they are sworn to serve, when it leads to tightening laws and rules governing the relations between those officials and private parties and the gifts and favors that the latter can give to or do for the former.

Thus, replacing Nussbaum's account of disgust with the one I have proposed, we should conclude that the proper target of her criticism of Devlin's appeal to disgust is not the emotion *per se* but the conservative political thought that lies behind the appeal. It is, in particular, the premium that such thought gives to social solidarity and the corresponding calculation it accepts, a calculation that allows vast numbers of people in a society to suffer the indignities and cruelties of subordination and second-class status and to live lives of crippling self-doubt and self-loathing so as to preserve the social order. And while we need not suppose that there is no limit to the amount of oppression and misery that conservative thinking of this stripe would allow in the interest of maintaining the practices and traditions that bind the members of a society together, it is certain to be significantly greater than that which political thinking whose calculus gives greater weight to considerations of equality and individual liberty than to those of social solidarity. At bottom what matters to conservative thinkers like Devlin is not the quality of the individual lives of the members of a society but the orderly functioning of the whole. And it is this set of values that Nussbaum, in her objections to Devlin and, I suspect, in the views of the other conservative thinkers whose appeals to disgust she discusses, so eloquently opposes.

VIII

Nussbaum's criticisms of programs that give shame a place in the criminal law focus first on the use of shame-inducing sanctions as punishment for certain criminal offenses. The imposition of such sanctions, Nussbaum observes, has been favored recently by judges and academic commentators who regard them as effective ways of both communicating society's intolerance of these crimes and deterring their perpetrators and others from repeating or committing the same offenses. Of course, even standard forms of punishment, like incarceration, are likely to induce shame in those on whom they are imposed, but their inducing shame is typically a byproduct of their imposition rather than an intended effect. Sanctions designed to induce shame, by contrast, are meant to make the offender an object of public attention on account of his offense and so to invite public disdain and contempt. They are modern day equivalents of putting criminals in stocks or making misbehaving children sit in corners wearing dunce caps. Common examples are drunk drivers who are made to drive for a fixed period of time with a license plate that advertises their crime, customers of prostitutes whose names are published in local newspapers as having been convicted of unlawful solicitation of sex, shoplifters who are required to stand outside the shops from which they stole holding signs that say "I stole," and other thieves who are required to wear shirts that identify them as pickpockets, purse snatchers, embezzlers, etc. The appeal of these sanctions is economic: they create unpleasant circumstances for an offender that appear to serve the normal expressive and deterrent purposes of punishment at a cost to the state that is far less than the cost of incarcerating the offender.

Nussbaum sees in these sanctions the same social pathology that occurs when public officials use the criminal law to degrade people whose "crimes" consist mostly in conduct that offends conventional sensibilities or violates conventional norms defining personal space. In these cases, Nussbaum notes, the processes of the criminal law are used first to alienate those convicted of these crimes from society and then to brand them and the groups or types to which they belong as deviant and a danger to public health or safety. Typically when public officials undertake campaigns to clean up the streets or rid neighborhoods of bad elements, they target groups or types of people whom they identify as troublemakers and undesirables, and they use arrest, trial, criminal conviction, and punishment to vilify the

members of these groups or types. Despised and feared minorities are especially vulnerable to such treatment. But vagrants and pan handlers are also natural targets. One may think, in this regard, of Rudolph Guliani's campaign in the 1990's to remove "squeegee men" from New York City streets or the efforts of municipalities generally to remove the homeless from their sidewalks, parks, and plazas. Nussbaum traces the pathology in these cases to the reaction formation that she earlier explained as the product of primitive shame. Like the reaction formation disgust produces, this one too creates a disposition to aggress against people whom one can treat as inferior to oneself. Primitive shame, because it consists in a deep seated sense of one's own weakness and inadequacy, produces anxiety about one's own worth relief from which comes from seeing others as having less worth. And treating them as inferior reinforces one's perception of them as inferior. Hence, acts that deliberately and systematically denigrate others, especially when they are undertaken for a "moral" cause, are symptomatic of this pathology. They signify, in Nussbaum's words, a fragile ego that finds affirmation of its own precarious sense of worth in the humiliation and dehumanization of others.

Similarly, then, Nussbaum argues, there is reason to think that sanctions designed to induce shame, because they are commonly used publicly to humiliate those on whom they are imposed, often manifest the same pathology. Indeed, part of their appeal, at least to their leading academic supporters, is their capacity to humiliate those on whom they are imposed.²⁴ For this feature, their supporters maintain, makes them more fitting, as alternatives to incarceration, than fines and community service. The argument, in short, is this. One of the principal purposes of punishment is the censure of the offender for his offense, and sanctions designed to induce shame fulfill this purpose more successfully than either fines or community service.²⁵ They do so because in humiliating the offender they not only effectively convey society's reprehension of his offense but also its scorn for him. Fines, by contrast, can too easily be regarded as fees the state charges for committing the offense, and community service is an even less reliable

²⁴ See Dan Kahan, "What Do Alternative Sanctions Mean?" *University of Chicago Law Review* 63 (1996), pp. 591–653; and Amitai Etzioni, *The Monochrome Society* (Princeton: Princeton University Press, 2001), pp. 37–47.

²⁵ Kahan emphasizes this point in "What Do Alternative Sanctions Mean?" For discussion of the expressive purpose of punishment, see Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), pp. 95–118.

vehicle of censure, since it can be regarded positively as an opportunity to do something good for the community. Thus the very feature to which the supporters of these sanctions appeal in recommending them over other alternatives to incarceration makes them a kind of sanction that would also, on Nussbaum's developmental hypothesis, better feed the need that comes from primitive shame to aggress against people whom one can treat as inferior. Consequently, to promote the use of these sanctions as suitable alternatives to incarceration is to invite the abusive treatment of convicted criminals toward which this need impels. And in a system of criminal justice that is already hard-pressed to recognize the humanity of many of those who fall into its clutches, the adoption of these sanctions would therefore tend more to aggravate this problem than diminish it.

Nussbaum cites the potential for abuse that sanctions designed to induce shame have to support her general thesis about the dangers to a just society of enlisting shame in the service of the criminal law. She makes other objections to these sanctions as well, but none of the drawbacks she attributes to the sanctions in making these objections is due to the workings of shame in either those who receive or those who mete out the sanctions. That is, neither the emotion itself nor behavior it can excite is the object of Nussbaum's criticisms in these objections. So her case against enlisting shame to forward the aims of the criminal law turns on her account of the emotion as, in its primitive form, the source of hostile and derogatory conduct toward those who are easily treated as low. The use of sanctions designed to induce shame incites in the officials responsible for imposing such sanctions and in the public generally this primitive shame, to which we are all liable, and abuse of those convicted of criminal offenses is then a predictable outcome. The case, therefore, is like Nussbaum's case against the law's catering to disgust. Both emotions are sources of persecutory conduct toward the weaker and less privileged members of society by the stronger and more privileged, and the criminal law ought not to encourage such conduct.

It is curious that Nussbaum's case against the criminal law's catering to shame does not depend on there being anything bad about the shame that the sanctions in fact induce in those on whom they are imposed. To be sure, Nussbaum criticizes the sanctions for having the capacity to humiliate those on whom they are imposed, but as she

observes, a person can be publicly humiliated without experiencing shame.²⁶ So the emotion the sanctions are ostensibly designed to induce is not itself an object of this criticism. This suggests that we look into shame when it is induced in criminal offenders by imposing such sanctions to see why some political theories might favor sanctions designed to induce it. What we will find is that some political theories do favor these sanctions – and indeed the use of shame generally to forward the aims of the criminal law, that these theories include conservative theories, like Devlin's, that place a premium on social solidarity, and that support for using shame to forward the aims of the criminal law makes sense from these theories' perspective. Accordingly, we may conclude that, like her case against the use of disgust in the criminal law, the proper target of Nussbaum's case against practices in the criminal law that cater to shame is not the emotion itself but such theories as Devlin's that support these practices.

We need not look far to see why theories like Devlin's would support the use in the criminal law of sanctions designed to induce shame. As I noted earlier, when one belongs to a group and identifies strongly with it, there will be certain characteristically self-regarding emotions to which one is liable whose objects in some instances are the actions of other members of the group (or conditions in which they have fallen), actions (or conditions) for which one is not in the least responsible. Shame and pride are among these emotions. A measure, then, of a group's solidarity is how liable its members, on average, are to experience these emotions vicariously in response to each other's actions. This is a measure of solidarity, for it indicates how strongly the members identify with the group, and the strength of their identification corresponds to how strongly they have internalized the norms and ideals to which they, as members of the group, expect each other to conform.²⁷ It represents, in other words, the extent to which the group is united by shared moral beliefs, norms and ideals.

We can now give a general characterization of the experiences of shame the use of which to forward the aims of the criminal law

²⁶ Nussbaum, *Hiding from Humanity*, pp. 203–204.

²⁷ Identification, in the sense I am using it here, implies an emotional attachment to that with which one identifies; Sigmund Freud, *Group Psychology and the Analysis of the Ego*, in James Strachey (trans.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (London: Hogarth Press, 1953–1971), volume XVIII, pp. 105–110.

political theories like Devlin's would favor. To feel such shame, whether vicariously or directly, over an action that either deviates from the norms of a group to which one belongs or abandons its ideals is to experience a blow to the sense of worth one has by virtue of one's identity as a member of the group.²⁸ When people strongly identify with a group to which they belong, be it their family or ancestry, their community, their ethnicity, their country and so forth, their membership in that group becomes a part of their identity and a source of their sense of worth. The shame they then experience, when they act against the norms and ideals of the group, entails a painful recognition of their having acted beneath themselves, of their having betrayed an identity that is a source of their sense of worth. This complex experience thus implicitly includes an affirmation of their belonging to the group, an affirmation that may be further shown in efforts, typically expressive of shame, to cover up what is seen as shameful in what they have done. Hence, political thought that puts a premium on maintaining social solidarity would, in principle at least, favor imposing on criminal offenders sanctions designed to induce shame. Provided that the criminal offender is capable of feeling shame over his crime, such punishment, insofar as it is successful in inducing in him shame and so affirmation of his identity as a member of the society, would promote the offender's return to accepting and conforming to the social norms that he has violated. It would promote, that is, the strengthening of the "invisible bonds" that hold society together.

Why, then, do we not find the leading supporters of the law's use of sanctions designed to induce shame making arguments that appeal to these social benefits of inducing the emotion in criminal offenders?²⁹ Why does the debate between the friends and foes of

²⁸ I draw here on the account of shame in John Deigh, "Shame and Self-Esteem: A Critique," *Ethics* 93 (1983), pp. 225–245; reprinted in J. Deigh, *The Sources of Moral Agency* (Cambridge: Cambridge University Press, 1996), pp. 226–248. In speaking of a person's identity, I use a "identity" in a sense that derives from the concept of identification specified in the previous footnote. In short, a person's identity in this sense is determined by the people, groups, institutions, etc., with whom or which he identifies.

²⁹ An exception is John Braithwaite, whose theory of what he calls "reintegrative shaming" recognizes these benefits and distinguishes them from the effects of stigmatization. [See John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989) and E. Ahmed, N. Harris, J. Braithwaite and V. Braithwaite, *Shame Management Through Reintegration* (Cambridge: Cambridge University Press, 2001), Part 1].

such sanctions turn instead on other things, like how well the sanctions satisfy the expressive and deterrent aims of punishment and the extent to which the sanctions encourage abusive treatment of convicted criminals? The answer lies, I believe, in the common confusion of shame with humiliation. For each side makes its case by appealing to the sanctions' capacity to humiliate those on whom the sanctions are imposed, and this suggests that neither side sees any significant difference between humiliation and shame. It suggests that either is prone to mistake the former for the latter.³⁰ Consequently, both sides miss the features of shame that explain why a political program might promote sanctions that induce the emotion in criminal offenders.

It is necessary, therefore, to understanding the politics of shame, to appreciate how the emotion differs from humiliation. We can best see this difference by comparing the characteristic experiences of each, which is to say, experiences that are self-regarding rather than vicarious. Accordingly, what principally distinguishes characteristic feelings of shame from characteristic feelings of humiliation is the thought of oneself as having done something shameful or of being in some shameful state. For one can feel humiliated without having this thought. When one feels humiliated, as the result, say, of being treated with blatant disrespect, one feels small, weak, or helpless. Another or others have treated one cruelly or insultingly and, in doing so, conveyed their view of one as someone whose interests do not matter and who has no claim on them for decent treatment. Yet one need not think there is anything about oneself that warrants such treatment or makes one deserving of it. One need not think there is anything about oneself that makes one unworthy of the respect or esteem of those who are humiliating one or the members of the group they represent. By contrast, when one feels shame, one recognizes something about oneself that is shameful, and to recognize such a feature in oneself is to recognize something that, relative to a component of one's identity, makes one unworthy of belonging to the group identification with which (or with its archetype) yields that

³⁰ Nussbaum, to her credit, sees that the two are different and offers a distinction between them. She writes, "We may also speak of feelings of humiliation, which will be very closely related to feelings of shame but with the added idea that something has been *done* to the person who feels it" (Nussbaum, *Hiding from Humanity*, p. 204). The distinction Nussbaum draws is apt but, as I argue below, an even sharper distinction is needed to understand why certain political programs would favor sanctions designed to induce shame.

component. When we say of a tennis player, for instance, that she suffered a humiliating defeat, we do not imply that she played badly or displayed incompetence on the court. Perhaps, she did. But alternatively she could be an excellent player for her age who, despite playing her best, was unfairly matched against an older and merciless opponent. On the other hand, when we say of a player that her defeat was shameful, we imply that she played badly, that her play was unworthy of her, given her talents, or unworthy of tennis players at her level. In this simple contrast, the difference between the two emotions should be clear.

It may now appear that Nussbaum's criticisms of sanctions designed to induce shame miss their mark. For her criticisms appeal to the tendency of these sanctions publicly to humiliate those on whom they are imposed and do not deal with the shame the sanctions are designed to induce. And once the difference between shame and humiliation is made clear, then it is easy to conclude that successful criticism of these sanctions requires finding fault with them in view of the shame, and not the humiliation, they cause. Yet to conclude this would be hasty. The criticisms undoubtedly miss their mark if the sanctions are conceived of abstractly as sanctions that induce shame in those on whom they are imposed without also humiliating them. But the sanctions Nussbaum criticizes are not mere abstractions. They are sanctions that judges have recently imposed and whose imposition academic commentators have subsequently promoted. That these sanctions have the capacity to humiliate those on whom they are imposed is not in dispute. Indeed, as we have seen, both their supporters and their opponents acknowledge the importance of this feature, and in any case it would be difficult to imagine concretely sanctions used in the criminal law with the aim of inducing shame in those on whom they were imposed that did not have the capacity to humiliate their recipients. Consequently, it would be mistake to think that such sanctions, because they were designed to induce shame in those on whom they were imposed, were immune from criticisms like Nussbaum's.

Accordingly, Nussbaum's criticisms could be successful if either these sanctions, though designed to induce shame, typically failed to do so or the humiliation they caused overpowered whatever shame they typically induced. In either case, the social benefit the sanctions promise, the benefit that is, of inducing in criminal offenders affirmation of their identity as members of society and so spurring them to reconnect with the social norms and ideals against which they

have acted, will not result. Obviously, it will not result in the case in which the sanctions typically fail to induce shame. But it will also not result in the case in which humiliation overpowers whatever shame the sanctions induce. The reason is that humiliation, as Nussbaum and other critics of these sanctions have noted, tends to embitter and enrage those subjected to it and thus cause disaffection from and opposition to the norms and ideals against which they have acted.³¹ Hence, the sanctions, even if they induce shame in the criminal offenders on whom they are imposed, may nonetheless be counter-productive. Clearly, then, supposing the sanctions did not produce the social benefit they promised, Nussbaum's criticisms would be successful if her claims about the severity and consequences of the humiliation that they did produce were sound.

Is shame too volatile an emotion for our society to attempt to enlist it in the service of the criminal law? Nussbaum's argument does not show that it is. Rather it shows that the attempt itself, because it is liable to produce abusive and unjust treatment of those who are its targets, is dangerous. The attempt, Nussbaum argues, whether it is made by imposing sanctions specially designed to induce shame or by using other legal processes – criminalization, arrest, and trial, tends to stigmatize and humiliate those who are its targets, and such stigmata and humiliation represent use of the criminal law to denigrate those in society who are seen as outcasts or deviants. This danger, we can now see, is heightened when interest in enlisting shame in the service of the criminal law comes from a political program, like Devlin's, that seeks to promote social solidarity by legally enforcing the moral beliefs, norms and values it identifies as the society's common morality. For such enforcement if carried out through, say, the use of sanctions designed to induce shame is liable to produce humiliation and not shame (or humiliation that overpowers whatever shame it does induce) when the sanctions are imposed on those who belong to a subculture of the society that dissents from what is identified as its common morality and whose dissent is the object of the enforcement. It is liable to have this effect because in such cases, the sanctions will be imposed on people whose identity is typically more strongly determined by their belonging to the subculture than it is by their belonging to the society generally, and consequently the sanctions, being used to enforce some norm that is alien to these people's

³¹ See Nussbaum, *Hiding from Humanity*, p. 236, and Ahmed, et al., *Shame Management Through Reintegration*, p. 5ff.

subculture, will have a greater tendency to cause them to feel humiliated than ashamed. Nussbaum's concern about the ease with which sanctions designed to induce shame can be used to persecute vulnerable minorities and others whose ways of life depart from that of the majority or dominant culture becomes particularly apt, then, when the sanctions are supported by conservative political theories, such as Devlin's, that allow for the subordination of some groups and the curtailment of their members' liberty in the interest of promoting social solidarity. Here too, I believe, it is these theories, rather than the emotion, that is the proper object of her criticism.

*School of Law
University of Texas
Austin, TX, 78712
USA
E-mail: JDeigh@law.utexas.edu*