



Hiding from Humanity

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DISGUST, SHAME, AND THE LAW

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THE STORY IS TOLD of a platoon of GIs who came upon a barn on a Norman farm, shortly after the D-Day invasion, and encountered a disgusting stench. They assumed the barn was full of rotting enemy corpses. So they blew it up. It turned out that it contained piles of Pont l'Évêque cheese. From which it may be inferred that one man's dégoût is another's gustatory delight. Disgust is not only a matter of substances but of ideas about their origin and power to contaminate.

Freud in *Civilization and its Discontents* suggested that both disgust and shame derive from the moment humankind first stood erect, exposing the genitals, thus creating scenarios of arousal and hiding, and downgrading smell in favor of sight. Smell remains a powerful sexual sensation, yet one generally repressed in the rest of public, civilized life. This creates something of a problem for those who can never make peace with the

fact that, as an anonymous Church Father put it, "inter urinas et faeces nascimur": we are born between urine and feces. Sex and disgust remain close companions for some, and sexual intimacy may for others give pleasure in overcoming the "normal" barriers of shame.

Disgust and shame are problematic emotions that often appear to want to repudiate our basic, body-based humanity, Martha Nussbaum claims in this ambitious and timely book. She argues that we should be suspicious of their social uses, and particularly their deployment in the law. Nussbaum is by no means in favor of purging the law of all reference to emotion: she in fact makes an eloquent case for why this cannot and should not be done. For all its intent to be rational, unbiased, impartial, the law needs to recognize that it deals with powerful human emotions – anger, fear, retribution, among the foremost. But there are some emotions

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– Nussbaum mentions jealousy as well as shame and disgust – that appear to offer an unreliable guide to human behavior, to risk calling up mere prejudice and social stigma instead of valid distinctions. For instance, should a man who shot two lesbians be allowed to seek mitigation because, he claimed, he was disgusted by their lovemaking?

Nussbaum is worried about a recent renewal of interest in shaming punishments: making someone convicted of drunk driving sport a license plate marked “Convicted D.U.I.,” publishing the names of a prostitute’s clients in the newspaper, forcing other offenders to wear tee shirts proclaiming their crime. The attraction of such penalties is evident: they cost less than imprisonment (which now runs upwards of \$30,000 per prisoner per year, assuming you can even find a place for the petty offender in our overflowing prisons), and they fit the crime in emotionally satisfying ways. “Expressive punishment,” as it is sometimes called, revives the tradition of Dante’s “contrappasso”: punishment symbolically, poetically matched to the crime. Originally favored by social conservatives, expressive punishment in the 1990s began to attract as well some more liberal legal thinkers, as an alternative to a penal system in disarray.

But, argues Nussbaum, such punishments smack too much of humiliation and ostracism. Whatever good they may arguably do those punished by them, they may bring out the worst in the punishers, and in society itself. Shame punishments come uncomfortably close to lynch law, the social horde empowered by the State to mete out retaliatory justice. They smack too much of those symbolic tortures imposed on Old Regime criminals, including branding and bodily mutilation. Michel Foucault – strangely, never mentioned by Nussbaum – has chronicled society’s evolution toward a “carceral regime”

that largely hides punishment from the public eye. Such hiding no doubt derives from a complex, multivalent process of shame – shame for the punished, shame on the part of the punishers. It’s not clear what we would gain from lifting that particular veil.

Shame seems a relatively understandable notion, though we may well disagree about when it is warranted and when simply an effect of surplus repression that we should shed, like layers of Victorian petticoats. Disgust seems to me more complex. Norbert Elias argued in his classic *The Civilizing Process* that the progress of civilization is largely a matter of lowering the threshold of disgust. The standards of cleanliness and inodorousness, for instance, advance over time. Manuals for Renaissance courtiers teach that it is no longer acceptable to belch or fart loudly at table. The privy is to be preferred to the palace staircase at Versailles, once commonly used as a urinal. The bathroom, essential in Roman times but then in long eclipse, made stunning advances in the nineteenth and twentieth centuries.

But precisely because “civilization” on this model means cleaning up and hiding away aspects of human animality, Nussbaum finds it is subject to suspicion. Not only does the advance of civilization create its discontents because of the degree of “instinctual renunciation” it requires (says Freud), it also may create classifications and distinctions that make certain social groups or actors disgusting and undesirable. Nussbaum argues that disgust embodies “magical ideas of contamination, and impossible aspirations to purity, immortality, and nonanimality, that are just not in line with human life as we know it.” (14) Disgust can too easily lead to illiberal social discriminations and classifications that stigmatize individuals and groups, and thus distract us from the real issues of political change and social betterment.

Nussbaum cites with approval the Supreme Court's decision in *Lawrence v. Texas* – the case that invalidated Texas' anti-sodomy law – but doesn't mention Justice Antonin Scalia's dissent, protesting against "eliminating the moral opprobrium that has traditionally attached to homosexual conduct." Scalia conjured up the specter of legislation permitting same-sex marriage. Though unfortunately it went to press before the Supreme Judicial Court of Massachusetts made Scalia's specter a reality, Nussbaum's book nonetheless is pertinent to the issue. She forcefully suggests that the panic reaction of some to the idea of gay marriage, and the very concept of a "Defense of Marriage Act" (which Congress has given us) or a constitutional ban on same-sex marriage (which

President Bush wishes us to have), evoke a kind of primitive fear of contamination and contagion, as if unions between men and women would be magically degraded by gay sex taking place in a marriage bed.

Nussbaum places herself proudly in a liberal tradition anchored by John Stuart Mill, who held that a necessary condition of the legal restriction of conduct is that it be harmful to nonconsenting others. To Mill, she adds John Rawls' Kantian principle of the inviolability of the individual. But she would supplement this philosophical tradition with Walt Whitman, singer of the body in its polymorphous desires: "Behold me where I pass, hear my voice, approach,/Touch me, touch the palm of your hand to my body as I pass,/Be not afraid of my body." (320) *JB*