The Passions of Law

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Chapter Two

The Progressive Appropriation of Disgust

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1

Disgust is regarded as a paradigmatically *illiberal* sentiment. Mercy, because of its perception of individuals' vulnerability to forces outside their control, is unambiguously congenial to liberal values such as dignity and autonomy. Indignation and fear are at least potentially redeemable in liberal terms because they take as their objects external harms or threats to the person. Even guilt (if not shame) is thought to have a place in a liberal jurisprudence to the extent that individuals are educated to experience it when they interfere (or contemplate interfering) with the rights of others. But disgust, which embodies only our aversions to alien values and ways of life, is thought to furnish no legitimate ground for coercion in a state dedicated to liberal principles. Indeed, to date, the most important accounts of disgust in law are to be found in socially conservative defenses of public morals offenses and in liberal critiques of the same.[1]

I am unsatisfied with this alignment. My aim in this essay is to redeem disgust in the eyes of those who value equality, solidarity, and other progressive values. It would certainly be a mistake—a horrible one—to accept the guidance of disgust uncritically. But it would be just as big an error to discount it in all contexts. There are indeed situations in which properly directed disgust is indispensable to a morally accurate perception of what's at stake in the law. Even more important, disavowing even properly directed disgust cedes the powerful rhetorical capital of that sentiment to political reactionaries, who'll happily make use of *improperly* directed disgust to entrench illiberal regimes.

2

The conception of disgust that I mean to defend is the one identified by William Miller in his masterful book, *The Anatomy of Disgust*.[2] For Miller, disgust is not an instinctive and unthinking aversion but rather a thought-pervaded evaluative sentiment (pp. 7–9). It embodies the appraisal that its object is low and contaminating, and the judgment that we must insulate ourselves from it lest it compromise our own status (pp. 8–9). Disgust, according to Miller, gets its distinctive content from hierarchic social norms, which are themselves reinforced by our feelings and expressions of disgust (pp. 18, 50, 80, 194, 217).

Although Miller himself doesn't address criminal law in any detail, I believe his book supplies a critical remedy to the inattention that criminal law theorists have shown this sensibility. That's the nerve of an essay published elsewhere, in which I use Miller's account to illuminate the influence of disgust across a wide array of institutions and doctrines—from capital punishment, to shaming penalties, to hate crimes, to voluntary manslaughter.[3]

In this essay, however, I will focus on only two of Miller's claims, which I believe vindicate the normative value of disgust in criminal law.[4] The first can be called *the moral indispensability thesis*. According to Miller, disgust is an indispensable member of our moral vocabulary. "It signals seriousness, commitment, indisputability, presentness, and reality" (p. 180); "it marks out moral matters for which we can have no compromise" (p. 196), "harms that sicken us in the telling, things for which there could be no plausible claim of right" (p. 36). No other moral sentiment is up to the task of condemning such singular abominations as "rape, child abuse, torture, genocide, predatory murder and maiming"; bare indignation, for example, is too self-centered, too obsessed with "setting the balance right" for perceived slights to one's own person, to motivate the impassioned desire to punish such wrongs even when visited upon strangers (pp. 36, 186, 195). Indeed, we cannot "put cruelty first among vices," writes Miller drawing on Judith Shklar,[5] unless we treat properly directed disgust as one of our virtues (p. 202).

The second claim can be called *the conservation thesis*. Although the objects of disgust vary across places and times, *all* societies inevitably make use of disgust to inform their judgments of high and low, worthy and unworthy. This is so not only for aristocratic regimes, in which distinctions of class are uncontested, but also for egalitarian democratic ones, which are "based less on mutual respect for persons than on a ready

availability of certain styles of contempt to the low that once were the prerogatives of the high" (p. 21).

The conservation of disgust across distinct and evolving modes of social organization explains why groups that are low in status seek to appropriate rather than annihilate the idiom of disgust, and why disgust, rather than disappearing, becomes a salient focal point for political contention within socially fluid, pluralistic societies. "In the hurly-burly of anxious competition for status," different groups aggressively market their favored conceptions of disgust "either to maintain rank already achieved, to test whether it ha[s] been achieved, or to challenge for its acquisition" (p. 217).

We see this dynamic at work in critiques of "hierarchies based on race, ethnicity, gender, physical and mental handicap, sexual orientation" and the like, movements that are at least as concerned with securing "changes in the emotional economy" as they are with securing "equal rights" (p. 235). To whose sensibilities should the law defer—the heterosexual soldiers who are disgusted by the idea of sharing barracks with gays or opponents of the gay-soldier ban who are disgusted by homophobia?[6] With whom should we be disgusted—the National Endowment for the Arts for funding sacrilegious art or conservative congressmen for proposing to screen NEA grant applications for offensiveness?[7] The question is never whether a society should organize itself around emphatic ideas of high and low, worthy and worthless, but only what the content of those animating hierarchies will be.

Together, the moral indispensability thesis and the conservation thesis suggest we shouldn't reject the guidance of disgust wholesale. If Miller is right that properly directed disgust is essential to perceiving cruelty, then attempting to banish it risks making the law morally blind. Likewise, if the conservation thesis is right—if disgust inevitably perseveres as social norms change—then opposing it will be both futile and self-defeating. We won't make any genuine progress in extirpating it; indeed, by disclaiming disgust, we'll only be denying ourselves a resource to fight those who, with no embarrassment, are willing to use it to advance illiberal causes. These are the arguments that I'll now develop.

3

Start with the moral indispensability thesis. It's tempting to seek support for this claim in the capital cases applying the "outrageously or wantonly vile, horrible, or inhuman" standard,[8] which says, in effect, that capital sen-

tencers (typically juries) should trust their own disgust sensibilities to identify which murderers deserve to die. These cases involve tales that "sicken us in the telling" (p. 36).[9] They are the stories of men who gang rape an eleven-year-old girl in the woods, poke sharp sticks through her vagina into her abdominal cavity, and then smash her skull with a brick, while she begs for her life;[10] who cut out the vocal cords of a witness to a crime and then amputate his feet and hands with an electric saw;[11] who leave the scene of a terrifying nighttime burglary with the eighty-year-old victim dying in prayer, a knife protruding from her eye socket.[12] (As Miller observes—in a much more prosaic context—it is impossible to write of disgusting things without becoming disgusting oneself [p. 5]). These cases graphically bear out Miller's contention that we cannot "put cruelty first among vices" without counting properly directed disgust as a virtue (p. 202): it is not enough to become angry when one hears of these atrocities; one must want to retch.

Nevertheless, I don't want to lay all my emphasis on the "horribly-vile" standard. For one thing, condemnation in such cases is overdetermined: wholly apart from whether they revolt us, killers who mutilate and torture, who savor the suffering and degradation of their victims, warrant severe punishment for purposes of deterrence and incapacitation. What's more, for many—myself included—the lessons that such cases can teach us seem clouded by the morally problematic status of the death penalty itself.

What we need to test the indispensability thesis, then, is a noncapital case in which disgust seems both necessary and sufficient to remark the cruelty of an offender's behavior. For this consider the request of Dennis Beldotti.[13]

Beldotti committed murder to gratify his sadistic sexual appetites. His female victim, strangled and stuffed into trash bags, was found in the bathroom of his home. Bruises and cuts covered her body. Her nipples had been sliced off. Incisions rimmed her pubic area. From Beldotti's bedroom, the police recovered numerous nude photographs of the victim: some of these had belonged to the victim and her husband and had apparently been stolen by Beldotti from the victim's home; others of these snapshots had been taken by Beldotti himself, after the victim's death, and showed dildos penetrating her vagina and anus.[14] Based on these and other facts, the jury found that Beldotti's crime reflected "extreme atrocity and cruelty," a factor justifying life imprisonment without parole.[15]

Massachusetts law provides that at the conclusion of criminal proceedings the property seized and used in evidence should be dealt with in a manner consistent with "the public interest."[16] Beldotti requested that the

state return certain items of his to his representatives outside prison. These included "four dildos"; "bondage paraphernalia"; "one plastic encased photo of the victim"; "female undergarments"; "one broken 'Glad Heavy Weight Trashbag' box"—presumably the one containing the bags he used to wrap his victim; "twenty-four magazines depicting naked pubescent and prepubescent girls and boys"; and scores of pornographic tapes and magazines "bearing such titles as 'Tamed & Tortured,' 'Tit & Body Torture,' and 'Tortured Ladies.'" The state opposed Beldotti's request on the ground that surrendering these items "would justifiably spark outrage, disgust, and incredulity on the part of the general public."[17] "The overwhelming public interest here," the state's attorney argued, "is that [the requested materials] be thrown in the trash can where they belong. . . . This has nothing to do with free expression. It has to do with the degradation of a young woman by a depraved individual."[18]

The Massachusetts Court of Appeals agreed. "Although property may not be forfeited simply because it is offensive or repugnant," the court observed,

> we see a connection between the property that Beldotti seeks to have returned to him and the crime he committed. The murder for which Beldotti is serving his life-term was particularly gruesome; he photographed the victim's naked torso after inserting dildos into her vagina and anus and after sexually mutilating her body. The items that Beldotti seeks to have returned to him can be seen as being directly related to those acts, as having influenced his behavior, or as being relevant to an understanding of the psychological or physical circumstances under which the crime was committed.

"In these circumstances," the court concluded, "to return the property would be so offensive to basic concepts of decency treasured in a civilized society, that it would undermine the confidence that the public has a right to expect in the criminal justice system."[19]

My guess is that this decision will strike nearly everyone as indisputably correct. What I want to argue is that there is in fact no viable basis for that intuition other than the one the court gave—namely, the disgustingness of Beldotti's request.

What other rationale could there be? The idea that possession of such items would undermine Beldotti's "rehabilitation" makes no sense, insofar as he was serving a term of life without parole. Perhaps inmates shouldn't be allowed to possess such materials, all of which could cause disruption inside a prison, and some of which could actually be used to torture other prisoners. But Beldotti sought to have the materials released only to his rep-

resentatives outside prison; whether Beldotti himself could take possession of the items, the court recognized, was a separate issue that would have been addressed in the first instance by prison administrators.[20]

It might be thought that no one—in or out of prison—should be allowed to possess legally obscene materials. But preventing the consumption of obscenity would hardly be a disgust-neutral ground for the decision. What's more, as the court recognized, the mere possession of seized magazines and tapes, as opposed to the distribution of them, would not have violated state law.[21]

Forfeiture of the property might be defended as a punitive measure aimed at promoting general deterrence. But deterrence doesn't explain why Beldotti should be made to forfeit *these* particular articles rather than some others. Assume that imposition of a fine of a certain size could deter as effectively as the forfeiture of Beldotti's dildos and trash bags, his picture of the victim, and his "Tit & Body Torture" magazines and tapes. Would it then be acceptable—morally—to let Beldotti have his toys after all in exchange for a payment of that amount? If the answer is no, deterrence can't be the reason why. What grounds do we have, anyway, for thinking that the forfeiture of Beldotti's property adds *any* marginal deterrence to that achieved by sentencing him to life imprisonment without parole? If our confidence in the intuition that *Beldotti* was correctly decided outstrips our access to the empirics that would substantiate the deterrent benefits of forfeiture of his property, then something else besides deterrence explains the intuition.

That something *is* disgust. As the court recognized, the items Beldotti wanted bore the unmistakable aura of his crime. Bureaucratically processing his request—treating it as if it were no more remarkable than a claim for a stolen wallet or an impounded automobile—would have trivialized the unfathomable cruelty of his deeds. Indeed, because the atrocity of his crime consisted largely in the satisfaction he took in defiling his victim, restoring these items to his control, and thereby facilitating even his vicarious (for now) enjoyment of them, would have allowed Beldotti, as the state argued, to continue degrading her after death. By connecting the denial of Beldotti's request to "public confidence" in the law, moreover, the court recognized that enabling Beldotti to satisfy his tastes would inevitably have made the *state itself* complicit in his depravity. The *only* way to avoid being tainted by his request was to throw Beldotti's misogynistic magazines and his trash bags and his dildos and his kiddy porn "in the trash can where they belong"—rhetorically, if not literally.

I don't mean to exaggerate the significance of this analysis. Obviously, showing the indispensability of disgust to the result in one case doesn't prove Miller's claim that disgust is essential to our perception of, and opposition to, cruelty. But I do see *Beldotti* as an appropriate challenge to put to those who might advocate a disgust-free conception of criminal law. In effect, it turns the questions with which I started this section completely around: What besides disgust (and "just so" stories) can really explain the perception that granting his request would be wrong?[22] And if nothing else does, what could possibly justify committing ourselves to a regime that quiets so urgent a moral instinct?[23]

4

So far I've been arguing, consistently with the moral indispensability thesis, that there will indeed be circumstances in which disgust is essential to accurate moral perception. I now want to take up the significance of the conservation thesis, which, again, holds that disgust inevitably persists, notwithstanding shifts in social norms.

The progressive opponents of what I would regard as improperly directed disgust in law have in fact taken the lesson of the conservation thesis to heart. In the face of racist and homophobic violence, for example, they haven't been content to argue for mere tolerance; instead they have fought disgust fire with disgust fire. Supporters of hate-crime legislation want the public to understand not just that the "hate" killers are wrong to be disgusted by their victims, but that they themselves are "twisted," "warped," "sick," and "disgusting," and as a result properly despised as outsiders.[24] Severe punishment is the idiom that the criminal law uses to get that message across. Indeed, advocates for gays, women, African Americans, Jews, and others perceive severe punishments as *conferring* the high status that violence against them seeks to deny—which is exactly why political contention surrounding hate crimes is so intense.[25]

Consider here another disgust-crime story. To show a friend how easy it would be to get away with killing, Gunner Lindberg, a self-proclaimed white supremacist, picked out Vietnamese-American Thien Minh Ly from a crowd of roller skaters at a high school playground and stabbed him some fifty times in the body and neck.[26] Writing later to a cousin, Lindberg boasted of "kill[ing] a Jap a while ago."

> I walked right up to him and he was scared. I looked at him and said, "Oh, I thought I knew you," and he got happy that he wasn't gonna get jumped, then I hit him. I stabbed him in the side about seven or eight times. He rolled over a little, so I stabbed his back 18 or 19 times. Then he lay flat and I slit . . . his throat on his jugular vein.[27]

For this crime, Lindberg (who wore a Dallas Cowboys football jersey every day at trial to mark that team's Super Bowl victory on the day of the attack)[28] earned the distinction of becoming the first offender sentenced to death under a California law authorizing capital punishment for racially motivated killings.[29] Civil rights advocates—including some who ordinarily oppose the death penalty—hailed the sentence on the ground that it appropriately remarked society's *disgust* for Lindberg and his deed. "It was an incredibly disgusting tale of torture and mutilation," the chairman of the Orange County Human Relations Commission noted in support of the sentence. "There's no question this is a sick act of a really troubled mind."[30]

As the conservation thesis predicts, then, those committed to using criminal law to raise the status of historically subordinated groups have not disavowed disgust but, rather, have sought to appropriate and redirect it against their opponents.[31] The liberal antidisgust position says that they are making a mistake to do that, that they should instead avail themselves of theories and styles of argument that are themselves free of disgust and hence free of that sentiment's sad historical association with unjust hierarchy.[32]

The insights of liberalism do indeed give us just as much reason to be wary of disgust—indeed, of all emotions[33]—in criminal law. The moral worth of emotional insight is never any better than the moral value of social norms and meanings that construct it. Nevertheless, drawing on the conservation thesis, I want to suggest that renouncing the guidance of disgust in criminal law altogether would in fact defeat, rather than advance, liberal ends.

The strongest version of this argument objects on principle to the perceived opposition between liberalism and hierarchy. It's true that liberal regimes renounce (at least in theory) rankings of a particular sort—such as those based on race, gender, and class—but they haven't renounced all perceptions of high and low, noble and base, worthy and unworthy. Even egalitarians hold pedophiles and sadists in low esteem, for example, not just because such persons threaten physical harm but because their values reveal them to be despicable. Indeed, as Miller points out, those who seek to raise the status of historically subordinated groups seek to reshape our "emotional economy" so that we'll come to see racists, sexists, and homophobes,

among others, as debased in exactly the same way (p. 235). On this account, the proper course for liberalism is not to obliterate disgust but to reform its objects so that we come to value what is *genuinely* high and to despise what is *genuinely* low.

The criminal law has traditionally been seen as performing a "moral educative" function of this sort.[34] Punishment is thought to discourage criminality not only by raising the "price" of such misconduct but also by instilling aversions to it.[35] It's no surprise that legal moralizing of this sort has been, and continues to be, an instrument for entrenching reactionary regimes. But it can just as well furnish a weapon for attacking them.[36] Erecting a liberal counterregime of disgust, I've tried to show, is exactly the aim behind "hate crime" laws, which seek to make the proponents of illiberal species of hierarchy the object of our revulsion.

This is, as I've indicated, the *strongest* response to the liberal critique of disgust in criminal law; I want to lay more emphasis, however, on a weaker and more pragmatic rejoinder. This position views liberal opposition to disgust not as defective in principle but as self-deluding and self-defeating in practice.

To begin, the liberal opposition to disgust risks lulling progressives into a state of rhetorical vulnerability. After all, reactionaries will be completely unmoved by principled arguments against disgust because reactionaries are, by hypothesis, the group least inclined to show respect to their fellow citizens. Consequently, if progressives disclaim disgust in their public rhetoric, they will more often than not be restraining themselves unilaterally, allowing their adversaries exclusive access to this rich species of expressive capital.[37] To put this point in more concrete and partisan terms, if we give up on enhanced penalties for gay bashing, *they* will still insist on the Defense of Marriage Act.[38] Under these circumstances, forgoing disgust in the name of progressive values is not principled; it's just naïve.

In addition, styles of criminal law theorizing that purport to dispense with disgust do nothing in reality to mute its influence. They merely *disguise* it, and in so doing prolong the life of outmoded and illiberal norms in the law.

The dominant forms of criminal law theory both have liberal antecedents. *Voluntarism*, which derives from Kantian moral philosophy, treats punishment as justified if, and to the extent that, the offender's behavior stems from choice.[39] *Consequentialism*, which derives from utilitarian theory, views punishment as warranted if, and to the extent that, visiting suffering on the offender promotes desired states of affairs.[40] Consis-

tent with the liberal bias against public moralizing, neither theory assigns intrinsic normative significance to the valuations that construct disgust or any other emotional sensibility.[41]

Neither theory, however, has succeeded in banishing such evaluations from the law. Voluntarism seeks to mute the influence of disgust sensibilities by making excuses depend not on the quality of offenders' emotional evaluations but, rather, on the destructive effect of emotions (or "impulses") on offenders' choice capacities; its focus is not on who is too virtuous but on who is too sick to be punished. Yet juries are notoriously resistant to excusing mentally unbalanced offenders who commit heinous crimes, no matter how obvious the origins of such behavior in pathology:[42] "[t]he muddle-headed reformers who seek to make crime a matter of illness rather than culpable intention," Miller writes, "fail to realize that we do not cease blaming just because someone is sick" (p. 203). At the same time, if we insist that decision makers speak in a mechanistic rather than an evaluative idiom, then we can expect them to describe as "sick" the offenders who are too virtuous to be held accountable for their crimes. Hence, the historic use of the "irresistible impulse" conception of insanity as a vehicle for excusing all manner of virtuous outlaws, from the cuckold to the battered woman.[43] And if their disgust sensibilities tell decision makers that a particular offender, such as the homophobe, deserves solicitude, we can expect them to see him as excusably "sick," too, a lesson taught to us in the selective receptivity of the law to the "homosexual panic" defense to charges of murdering gay men.[44]

The same story can be told about consequentialism. It attempts to suppress evaluative appraisals by connecting excuse to the relative dangerousness of an impassioned or impulsive offender.[45] But which impassioned offenders juries and judges see as dangerous necessarily depends on which victims they see as valuable enough to be protected from harm: cuckolds/battered women aren't all that dangerous, unless one happens to be a paramour/tyrannical man.[46] And if disgust sensibilities tell the decision maker that homosexuals are worth little, then that decision maker will predictably see the killing of one as a "one-time tragedy," committed by an otherwise normal person who the decision maker can be "confident . . . w[ill] not kill again."[47]

In short, the criminal law theories associated with modern liberalism don't genuinely purge the law of disgust. They only push disgust down below the surface of law, where its influence is harder to detect.

And *that's* bad. It should be clear that there's no way to guarantee that

decision makers will be guided by liberal rather than illiberal disgust sensibilities.[48] But their sensibilities are likely to deviate least from the moral ideal when the evaluations they embody are most fully exposed to view. The prospect of publicly owning up to reliance on anachronistic or illiberal disgust sensibilities can itself shame decision makers into deciding on some other basis. Even more important, when we force decision makers to be open about the normative commitments that underlie their disgust sensibilities, members of the public are fully apprised of what those commitments are. This outcome facilitates the kind of self-conscious competition between liberal and illiberal conceptions of disgust, and between disgust and other moral sentiments, that is the key to making disgust a progressive rather than a reactionary force.

To illustrate, consider a case that Nussbaum and I have written about before. It involves a Texas judge who leniently sentenced a man convicted of killing two men for sport in a gay-bashing crime. "I put prostitutes and gays at about the same level," the judge explained, "and I'd be hard put to give somebody life for killing a prostitute."[49]

The judge's sentence and his remarks were outrageous—indeed, *disgusting*. And they *provoked* public disgust. The judge was formally censured for his remarks, and thereafter defeated in an election in which the support of women and gays for the judge's opponent turned out to be decisive.[50] In the wake of this and other incidents, moreover, the Texas (!) legislature enacted a hate crimes statute that expressly enhances the penalty for crimes motivated by bias against any group.[51] Had the judge cloaked *his* disgust in the rhetoric of voluntarism or consequentialism, it's very unlikely that his decision would have furnished so salient a focal point for rooting out the illiberal sensibilities that the judge's decision embodied.

5

To the two claims I've been discussing—the moral-indispensability and conservation theses—we can now add a third: *the self-delusion thesis*. The kind of hierarchic rankings characteristic of disgust are too durable to be driven from the scene by the morally antiseptic idiom of liberalism. Those who believe otherwise are fooling themselves. If we let them fool us, those who oppose brutal and indefensible hierarchies in law risk becoming their unwitting defenders.

NOTES

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1. This was how the famous Hart-Devlin debate unfolded. *See* H. L. A. Hart, Law, Liberty and Morality (1963); Patrick Devlin, The Enforcement of Morals (1965). An engaging liberal critique of disgust can also be found in Harlon L. Dalton, *"Disgust" and Punishment*, 96 Yale L.J. 881 (1987) (book review).

2. *See* William Ian Miller, The Anatomy of Disgust (1997). I include page citations to Miller's book in textual parentheticals.

3. *See* Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 Mich. L. Rev. 1621 (1998).

4. Toni Massaro properly warns against "cit[ing] the fact of . . . disgust [in criminal law] as evidence of its moral authority." Show Some Emotions at p. 94; *cf.* Kahan, *supra* note 3, at 1648 ("My aim so far has been to show that disgust does in fact play a central role in criminal law. But nothing I've said implies, necessarily, that this role is morally justified. Indeed, seeing how much consequence the law invests in our disgust sensibilities should make us more intent, not less, on determining whether the law's confidence in that sentiment is warranted."). I agree with her too that the social norms that construct our emotional life aren't *normative* for law; they are susceptible of, and demand, independent moral evaluation. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 630 (1996) ("The expressive dimension of punishment helps to describe how deep-seated sensibilities inform a society's institutional choices. But nothing in that phenomenon commits us to accept uncritically either the sensibilities or the institutions that happen to satisfy them."). My only goal here is to show that the foundation of disgust, shame, and related sensibilities in social norms doesn't disqualify them from being pressed into the service of a progressive political agenda. For an extended account of how social criticism can in fact take aim at certain norms at the same time that it appeals to the authority of others, see Michael Walzer, Interpretation and Social Criticism (1987).

5. *See* Judith Shklar, Ordinary Vices (1984).

6. *Compare* Eric Schmitt, *Pentagon Chief Warns Clinton On Gay Policy*, N.Y. Times, Jan. 25, 1993, at A1, col. 3 ("The Joint Chiefs of Staff, headed by Gen. Colin L. Powell, contend that repealing the ban would wreck morale and discipline, undermine recruiting, [and] force devoutly religious service members to resign.") *with* 139 Cong. Rec. H9656 (Nov. 15, 1993) (remarks of Rep. Woolsey) (deriding policy as "offensive" and "appall[ing]"); Suzanne E. Kenney, Letter to Editor, San Fran. Chronicle, Jan. 28, 1993, at A18 ("As a card-carrying feminist, hypersensitive to all forms of discrimination, I am appalled and disgusted by this latest wave of hetero-hypocrisy.").

7. *Compare* Amei Wallach, *The Funding Fight*, Newsday, Sept. 5, 1989, § II, at 4

(reporting controversy surrounding NEA funding of "Piss Christ," a crucifix submerged in artist's urine) *with* Valerie Richardson, *Helms' Photo in Urine at NEA-Funded Show*, Sept. 12, 1989, Wash. Times, at A1 (reporting controversy surrounding NEA funding of "Piss Helms," a urine-submerged photograph of Sen. Jesse Helms, the sponsor of legislation to ban funding of disgusting art).

8. *See, e.g.*, Ga. Code Ann. § 17-10-30(b)(7); 18 U.S.C. § 3592(b)(6) ("especially heinous, cruel, or depraved"). *See generally* Paul J. Heald, *Medea and the Un-Man: Literary Guidance in the Determination of Heinousness Under* Maynard v. Cartwright, 73 Tex. L. Rev. 571 (1995); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—the Standardless Standard*, 64 N.C. L. Rev. 941 (1986).

9. Such cases are gruesomely catalogued in Thomas M. Fleming, *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance that Murder Was Heinous, Cruel, Depraved or the Like—Post-Gregg Cases*, 63 A.L.R.4th 478 (1988).

10. *See* State v. Brogdon, 457 So. 2d 616, 621–22, 631 (La. 1984).

11. *See* Battle v. Armontrout, 814 F. Supp. 1412, 1416–17 (E.D.Mo.1993), aff'd, 19 F.3d 1547 (8th Cir.1994).

12. *See* Cavanaugh v. State, 729 P.2d 481 (Nev. 1986).

13. *See* Beldotti v. Commonwealth, 669 N.E.2d 222 (Mass. Ct. App. 1996).

14. *Id.* at 224.

15. *See* Mass. Gen. L. Ann. ch. 265 §§ 1–2; Ray Richard, *Beldotti convicted in Needham murder*, Boston Globe, Jan. 26, 1989, at 17.

16. Mass. Gen. L. Ann. ch. 276, § 3.

17. 669 N.E.2d at 225.

18. Patricia Nealon, *X-Rated Materials Held by Court Sought*, Boston Globe, Apr. 2, 1992, at 21 (quoting district attorney).

19. 669 N.E.2d at 225.

20. *See id.* at 224.

21. *See id.*

22. Nussbaum nominates indignation or outrage as an alternative explanation for *Beldotti*. "The most natural way to view the state's refusal is as a retributive quid pro quo: you took a woman's life with these sex toys, so to punish you we're going to refuse you the things that give you sexual pleasure." "*Secret Sewers of Vice*": *Disgust, Bodies, and the Law*, p. 53. This interpretation, she contends, furnishes not only a superior normative justification for the result but also a more accurate description of it: "[The court and the state's attorney] react with 'incredulity' because they assume that Beldotti is not a monster, but a sane human being, and must know that his request is outrageous. Were they thinking of him as like a slug or a heap of vomit, they would not be so outraged by the request, they would just see it as lunatic pathology." *Id.* at 54. This is unpersuasive. What makes denial of Beldotti's request seem so imperative isn't that we would otherwise be at a loss for ways to get our retributive in-

tentions across; denying him a television set or a nightlight or any other creature comfort—not to mention denying him his liberty for the rest of his life—expresses retributive condemnation quite clearly. Outrage, by itself, doesn't uniquely determine any particular set of deprivations, even if it commits us to imposing deprivations of some sort. The reason Beldotti must be denied the sex toys and photographs and magazines in particular is that our allowing him to have possession of those items would make us complicit in his continuing enjoyment of a distinctly *repulsive species of pleasure*—namely, the defilement and degradation of his victim and her loved ones. Revulsion toward alien and depraved values, intense condemnation of cruelty, and the anxiety to avoid becoming implicated in the same are all native to Miller's conception of disgust as an evaluative sentiment. Nor is there any tension between disgust as an evaluative sentiment and the *intelligibility* of Beldotti's request. In suggesting that we must be experiencing something other than disgust whenever we can understand *why* we are revolted, Nussbaum assumes, inconsistently with her own understanding of emotions, that disgust must be noncognitive.

23. The answer, according to Nussbaum, is the need to avoid a sense of estrangement from the objects of our disgust. To indulge disgust toward the perpetrators of the Holocaust, she maintains, is to see them as "unique disgusting monsters. We are nothing like this. . . . By contrast, when we see Nazis depicted without disgust, as human beings who share common characteristics with us . . . this . . . warn[s] us that we might well have done the same under comparable circumstances." *"Secret Sewers of Vice": Disgust, Bodies, and the Law*, at 51. I find this analysis puzzling. If the argument is that treating Nazis as "disgusting monsters"—as "evil [that] is outside, alien"—is somehow unfair to the Nazis, then I think Nussbaum suffers from an excessive degree of empathy, one that risks denying us the affective resources necessary to *perceive* just how abominable the Nazis' behavior really was. If the argument is the consequentialist one that we might somehow repeat the Nazis' abominations if we indulge our disgust toward them, then I think Nussbaum is guilty of wildly implausible speculation. Why wouldn't a society be *less* likely to engage in genocide if it taught its members to detest those who have perpetrated such atrocities? Why wouldn't a society be *more* likely to turn to genocide if it dedicated itself to making its members see their ultimate moral kinship with the Nazis—to making them see that, after all, "we might well have done the same under comparable circumstances"?! *See generally* Kenworthey Bilz, *Not All Sweetness and Light: The Moral Exclusionary Model in Law and Literature* (unpublished manuscript, Nov. 1997) (arguing that the literary method of appraisal generates morally satisfactory results only when it elicits selective empathy).

24. *See, e.g.*, James Brooke, *Crowd in Denver Rallies Against Skinhead Violence*, N.Y. Times, Nov. 26, 1997, at A20 (reporting speech of Denver mayor: "They [white supremacist 'skinheads'] are not part of Denver's culture. They are not part of Denver's vision. They are not wanted here."); Roger Buckwalter, *Hate Remains a Poison in Society*, Jupiter Courier (Jupiter, Fla.), Sept. 11, 1996, at A4 (describing swastika

graffiti: "This disgusting act by a mental and moral midget . . . was just more evidence—as if any more was needed—that hate continues to infest this free society. . . ."); *Hundreds Mourn Victim of Skinhead, 19, in Denver*, L.A. Times, at A16 (quoting mayor at funeral of hate crime victim: "It's intolerable that something like that happens. It's disgusting to me personally that it happened in our city."); *Neo-Nazis Still Here* (editorial), Seattle Times, Mar. 25, 1997, at B4 (denouncing "[t]he disgusting celebration marking Hitler's birthday that's usually held by [local] neo-Nazis"); John Nichols, *"Time to Stand Up and Be Counted" to Protest the Klan*, Capital Times (Madison, Wis.), Aug. 22, 1995, at 8A (reporting local woman's decision to display pink triangle "to signal disgust with the Klan's homophobia"); *President Starts Anti-Hate Campaign*, Chicago Tribune, June 8, 1997, at 7 (""Voicing disgust over violent bigotry, President Clinton on Saturday ordered a Justice Department review of laws against hate crimes and said he will convene a White House conference on the problem next fall.") Ryan R. Sanderson, Letter to the Editor, Baltimore Sun, July 24, 1997, at 14A (reacting to comment that gay man deserved to be shot: "This is the sickest belief I can imagine.").

25. *See* George P. Fletcher, With Justice for Some 2–4 (1995); Jean Hampton, *The Retributive Idea*, in Jeffrie G. Murphy & Jean Hampton, Forgiveness and Mercy 140–42 (1988); James B. Jacobs & Kimberley Potter, Hate Crimes: Criminal Law and Identity Politics 66–78 (1998); *see also* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1393–94,1425 (1988) (describing willingness to execute murderers of African Americans as measure of African American status).

26. *See* Thao Hua, *Murderer Had Troubled Youth, Psychologist Says*, L.A. Times, Oct. 7, at B1.

27. Greg Hernandez, *O.C. Jury Votes Death for Hate Crime Murder*, Oct. 10, 1997, L.A. Times, at A1.

28. *See id.*

29. *See* Cal. Penal Code § 190.2(a)(16); *Supremacist Sentenced To Death For Hate Crime*, L.A. Times, Dec., 13, 1997, at A1.

30. Hernandez, *supra* note 27.

31. This is a well-remarked tactic of social reform movements. *See* Joseph R. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement 206 (2d 1986); Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 Cal. L. Rev. 54, 56–57, 73 (1968).

32. See Nussbaum, *"Secret Sewers of Vice."*

33. Obviously, disgust is not the only emotion ever to have served the cause of hierarchy. Indignation, too, is constructed by and reinforces status norms, which at different times and places—indeed, in all times and places—have been hierarchical. *See generally* Gusfield, *supra* note 31, at 112 (defining "[m]oral indignation [as] the hostile response of the norm-upholder to the norm-violator where no direct, personal advantage to the norm-upholder is at stake," and giving as ex-

amples indignation directed at homosexuals, bohemians, drug addicts, and social radicals). Indeed, the common law paradigm of righteous indignation belongs to the dishonored cuckold, who is afforded mitigation when he kills his unfaithful wife or her paramour—a legal convention clearly rooted in hierarchical gender norms. *See generally* Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 Rev. L. & Women's Studies 71 (1992); Jeremy Horder, Provocation and Responsibility (1992). Nussbaum argues, contra Miller, that indignation is capable of doing all the legitimate work that disgust does in remarking and motivating opposition to cruelty. *See* Nussbaum, *"Secret Sewers of Vice,"* at 28. But whether or not she is right about that, she is wrong to think that the "historical . . . use[] [of disgust] as a powerful weapon in social efforts to exclude certain groups and persons," id. at 15, gives us a reason to prefer indignation.

34. *See, e.g.*, John Andenaes, *General Prevention—Illusion or Reality?*, 43 J. Crim. L., Criminology, & Police Sci. 176, 179 (1952); Jean Hampton, *The Moral Education Theory of Punishment*, 13 Phil. & Pub. Affairs 208, 212 (1984).

35. *See* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as Preference-Shaping Policy*, 1990 Duke L.J. 1.

36. *See, e.g.*, Katherine Baker, *Sex, Rape, and Shame* 79 B.U. L. Rev. 663 (1999) (advocating use of shaming penalties to attack the social meaning of sex as conquest on college campuses).

37. Offering her own pragmatic argument, Toni Massaro warns of the danger that progressives who trade on disgust, shame, and related sensibilities risk inciting a reactionary backlash. See *Show (Some) Emotions*, at 99. But insofar as reactionaries are already fully aware of the power of these sensibilities, how does the progressive appropriation of them make things worse? Indeed, why should progressives refrain from invoking them in the absence of any enforceable assurance that their adversaries will do likewise? Massaro's arguments are important, and I do not claim to have fully answered them here. I attempt a more comprehensive response in Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. (forthcoming Dec. 1999).

38. *See* Pub. L. 104–199, § 2, 110 State. 2419 (1996) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

39. The most influential voluntarism account is that of H. L. A. Hart. See H. L. A. Hart, Punishment and Responsibility 46–49 (1968).

40. This is the position associated with Jeremy Bentham. *See* Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in The Utilitarian 162 (1961), and his successors, *see, e.g.*, Gary Becker, *Crime and Punishment:*

An Economic Approach, 76 J. Pol. Econ. 169 (1968); Richard Posner, *An Economic Theory of Crime*, 85 Colum. L. Rev. 1193 (1985).

41. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269, 301–5 (1996); *see also* Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 Ariz. L. Rev. 251 (1995) (discussing "voluntarist" and "welfarist" theories of criminal law).

42. Empirical evidence, for example, suggests that juries, no matter how instructed on the definition of insanity, give little weight to the condition of the defendant's psyche and focus instead on a cluster of factors relevant to the defendant's culpability. *See, e.g.*, Norman J. Finkel & Sharon F. Handel, *How Jurors Construe "Insanity,"* 13 Law & Hum. Behav. 41, 57 (1989); James R. P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 Law & Hum. Behav. 509, 521, 526 (1991).

43. *See* Kahan & Nussbaum, *supra* note 41, at 345–50.

44. See Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 Law & Sexuality 81, 96–97 (1992); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 Cal. L. Rev. 133, 167–69 (1992).

45. *See, e.g.*, Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: II*, 37 Colum. L. Rev. 1262, 1280–82 (1937).

46. *See* Kahan & Nussbaum, *supra* note 41, at 311–12.

47. *See Judge Draws Protest After Cutting Sentence of Gay Man's Killer*, N.Y. Times, Aug. 17, 1994, at A15. (reporting comments of judge explaining lenient sentence for man who hunted down and then shot between the eyes a gay who had earlier propositioned him).

48. Nor is there any way to guarantee this about any other emotion, including indignation. *See supra* note 33.

49. *See* Kahan & Nussbaum, *supra* note 41, at 364.

50. *See* Lisa Belkin, *Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. Times, Dec. 4, 1992, at B20, col. 5.

51. See Tex. Penal Code Ann. § 12.47 (West 1994); Tex. Code Crim. Proc. Ann. art. 42.014 (West Supp. 1996); see also Clay Robison, *Richards Signs Hate Crimes Bill into Law*, Houston Chronicle, June 20, 1993, State section, at 3 (noting that purpose of the legislation is to enhance "criminal offenses motivated by the victims' race, religion, ethnicity, sexual orientation or national origin").