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Does shame have a future?

by [Roger Kimball](#)

On Professor Martha Nussbaum's polemic against shame and disgust & why these emotions "are accomplices, not impediments, to that attack on hubris."

No society can do without intolerance, indignation, and disgust.

—Patrick Devlin, *The Enforcement of Morals*

[A] liberal society has particular reasons to inhibit shame and protect its citizens from shaming.

—Martha C. Nussbaum, *Hiding from Humanity*

I heard thy voice in the garden, and I was afraid, because I was naked; and I hid myself.

—Genesis, 3:10

In Masaccio's great fresco depicting the expulsion of Adam and Eve from the Garden of Eden (ca. 1426), the Angel of the Lord hovers, sword in hand, above and behind the First Couple. Adam strides forward, naked, his face buried in his hands. Eve, however, a look of wailing misery on her upturned face, covers her breasts and privates as she walks. She is ashamed of her nakedness and strives to conceal it.

I thought of Masaccio when I stumbled upon Martha Nussbaum's essay "Danger to Human Dignity: The Revival of Disgust and Shame in the Law," which appeared last month in *The Chronicle of Higher Education*. How Nussbaum would disapprove of Eve!, I thought. For Martha Nussbaum—a classicist who is currently the Ernst Freund Distinguished Service Professor of Law and Ethics in the Philosophy Department, Law School, and Divinity School at the University of Chicago—does not approve of shame. She is not too keen about disgust, either. Both emotions, she thinks, impede "the moral progress of society." And here we have Eve, ashamed of her body, modestly shielding her sex from view: how very unprogressive.

"Danger to Human Dignity" is an oddly vertiginous work, as is the new book from which it is drawn, *Hiding from Humanity: Disgust, Shame, and the Law*.^[1] (It is appropriate that the book should feature on its cover a fleshy, unpleasant nude by Otto Dix: how different it is—morally as well as aesthetically—from Masaccio's Eve!) Professor Nussbaum begins "Danger to Human Dignity" with the following show-stopper: "The law, most of us would agree, should be society's protection against prejudice." Really? I thought "most of us would agree" that the law ought to be society's protection against *crime*. But perhaps Professor Nussbaum thinks that prejudice is itself a crime—though surely not *all* prejudice. Edmund Burke said that prejudice "renders a man's virtue his habit." He meant that if we have a predisposition—a prejudice—toward the right things, they more easily become second nature. Surely Professor Nussbaum would not wish the law to protect us from that sort of prejudice. And it must be said that she herself is clearly prejudiced against

anything she labels “conservative.” I doubt that she believes that the law should be society’s protection against prejudice directed at conservatives.

Well, let’s leave prejudice to one side. The ostensible burden of both these works, the essay and the book, is to warn readers about the “remarkable revival” of shame and disgust in our society, especially as they impinge upon the law. Now when I read that, I thought “Nussbaum, on top of everything else, must be a student of Stephen Potter.” For anyone as intelligent as she could not really believe that shame and disgust are enjoying a renaissance in our culture. She must be employing a variation of a gambit Potter describes in his book *Lifemanship*, “Going One Better.” It works like this. First you find out the quality for which an author is most famous, then you blame him for not having enough of it. An example from *Lifemanship*: “The one thing that was lacking, of course, from D. H. Lawrence’s novels, was the consciousness of sexual relationship, the male and female element in life.” Look around at our society: flip on the television; saunter down to your local newsstand; visit a local theater or museum; inspect the nose rings, the tongue or eyebrow or nipple studs that are so popular with the young and not-so-young today. One thing indisputably missing in our society is anything like a traditional sense of shame or disgust. So how clever of Professor Nussbaum to devote an entire book to the malignant presence of something that has all but disappeared.

Professor Nussbaum is particularly exercised by the sentences, handed down by various courts, which involve some public declaration of the perpetrator’s wrongdoing. A child molester, for example, is required to post a sign on his property warning children to stay away. Another chap, convicted of larceny, is required to wear a shirt with the advice: “I am on felony probation for theft.” A drunk driver is made to sport a bumper sticker advertising the fact of his infraction to other motorists.

Professor Nussbaum approvingly quotes a spokesman from the American Civil Liberties Union who angrily objects to such punishments: “Gratuitous humiliation of the individual serves no social purpose at all ... [a]nd there’s been no research to suggest it’s been effective in reducing crime.” To which one might reply that the humiliation was not “gratuitous” but, on the contrary, was meted out in response to a criminal violation. And as for the “research,” it doesn’t take much to tell you that, having been duly put on notice, the neighbors of that convicted child molester will keep a wary eye out for him, thus reducing the chance of a repeat performance. Likewise, the shopkeeper who spies the banner-wearing thief enter his store is sure to watch the till, once again reducing the chance that the crime will be repeated.

But Professor Nussbaum doesn’t confine herself to mere pragmatic issues, such as whether a given policy in fact reduces crime. Her objection is more fundamental. “Shaming penalties,” she notes, “encourage the stigmatization of offenders, asking us to view them as shameful.” Er, yes: they would have that effect, wouldn’t they? *Hiding from Humanity* is full of such near tautologies. You do something bad, something, in fact, that is shameful. The legal punishment calls attention to your bad, your shameful, action, partly in order to encourage you to reflect on your fault, partly to alert others to it. Is that a bad thing?

Professor Nussbaum brandishes the verb “stigmatize” early and often in this book. She doesn’t approve of stigmatizing people. Originally, a stigma was a mark burned into the skin of a criminal or slave. It has acquired an additional meaning: “A mark or token of infamy, disgrace, or reproach,” as my dictionary puts it. Professor Nussbaum several times raises the specter of unfairly stigmatizing innocent people or groups of people. She quotes A. Hitler on the Jews, for example. As you’d expect, he said some very unpleasant things that were definitely intended to stigmatize the Jewish people. But how about Joe, the convicted child molester, who moves in next door? A thoughtful judge has ordered him to post a sign on his front lawn advertising his crime. That sign is indeed “A mark or token of infamy, disgrace, or reproach,” and you can bet that it’s one for which the mothers

in the neighborhood are grateful. Which brings us to something that gets lost in Professor Nussbaum's discussion: the distinction between unfairly stigmatizing an innocent person or group of people and stigmatizing someone or some group because they deserve a mark or token of infamy, disgrace, or reproach. *Of course* one wishes to avoid the former. Does that mean that we should in principle forswear the latter?

In any event, Professor Nussbaum has a deeper objection to penalties that shame a criminal. She thinks that calling attention to Joe's penchant for sexually molesting little girls or boys is incompatible with the ideals of "human dignity and the equal worth of persons." That's another phrase Professor Nussbaum deploys regularly. She tells us, toward the beginning of her book, that her guiding motivation is to "construct a public myth of equal humanity, to substitute for other pernicious myths that have long guided us." That sounds nice. Why not toss out all those "pernicious myths" that have guided humanity until fifteen minutes ago and sign on to the one that says "human dignity" and "equality"?

Professor Nussbaum speaks of the "equal worth of persons." What do you suppose she means? In America, all citizens are meant to enjoy equality before the law. The figure of justice is often portrayed blindfolded because the scales she carries are meant to operate dispassionately, without the ballast of interest or parti-pris. That is one sort of equality. Then there is what the philosopher Harvey Mansfield called "the self-evident half-truth that all men are created equal." It's only a half-truth because, except for the special case of our status as legal actors, nothing could be more obvious than the gross inequality of men. As the journalist William Henry put it in his book *In Defense of Elitism* (1994),

the simple fact [is] that some people are better than others—smarter, harder working, more learned, more productive, harder to replace. Some ideas are better than others, some values more enduring, some works of art more universal. Some cultures, though we dare not say it, are more accomplished than others and therefore more worthy of study.

Something similar can be said about "human dignity." Professor Nussbaum finds a "deep tension" between the view that "law should shame malefactors and the view that law should protect citizens from insults to their dignity." Let's leave the question of whether the law really should concern itself with "insults" to a citizen's dignity. Mightn't it be argued that by calling attention to a criminal violation of human dignity the law *reinforces* the ideal of human dignity?

In any event, all these cases concern the outer scaffolding of Professor Nussbaum's argument. The inner core of her book is part of a revisionist morality, the emotional weather of which is summed up in a section that appears towards the end of her book: "The Case Against Disgust and Shame."

As Professor Nussbaum acknowledges, shame and its more visceral cousin, disgust, are semantically amphibious emotions. They are moral as well as physical creatures, depending as much upon an idea of the good as upon physical revulsion. Shame is deeply bound up with modesty, another moral sentiment that inscribes itself in immediate physical reaction. Similarly, disgust is the body's fire alarm for the noxious, but not merely the physically noxious. As William Ian Miller puts it in his book *The Anatomy of Disgust* (1997), disgust, although inculcated in toddlerhood, is "above all ... a moral and a social sentiment." Disgust highlights the good by violently excluding its opposite. Consequently, Miller argues, "contempt and disgust have their necessary role to play in a good, but not perfect, social order." Utopia, having excluded evil, would have no call for disgust. As Miller notes, these observations are hardly new: "The entire Latin Christian discourse of sin depended on the conceptualization of sin and hell as raising excremental stenches and loathsome prospects."

Professor Nussbaum wants us to get beyond all this. She acknowledges that "the person who is

utterly shame-free is not a good friend, lover, or citizen,” but she wants to privatize shame, as it were, to disenfranchise it from any role in public life. Similarly, Professor Nussbaum acknowledges that disgust may have played “a valuable role in our evolution”—making us recoil from various toxic elements in our environment; she even admits that it may continue to be a valuable guide in daily life. But because the “thought-content” of disgust is “typically unreasonable, embodying magical ideas of contamination, and impossible aspirations to purity, immortality, and nonanimality,” disgust should “never be the primary basis for rendering an act criminal, and should not play either an aggravating or a mitigating role in the criminal law where it currently does.”

Another way of putting this is to say that Professor Nussbaum wishes completely to emancipate law from the idea of sin. From a traditional point of view, of course, the law is seen as being rooted in a moral vision, which includes a recognition of sin. As the British jurist Patrick Devlin noted in *The Enforcement of Morals* (1965), “the complete separation of crime from sin . . . would not be good for the moral law and might be disastrous for the criminal.” Why? Because without the idea of sin, moral life would be an empty calculus of pain and pleasure. “What makes a society of any sort,” Lord Devlin noted, “is a community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals.”

Sin—like disgust, like shame—is such an *irrational* idea, so hard to get hold of “theoretically.” Professor Nussbaum finds disgust “perplexing in theory”: “the theoretical literature,” she says, reveals “considerable debate about whether shame and disgust ought to play the roles they currently play” in the moral and legal economy of life. (“That’s all very well in practice,” says the economist in the old joke, “but how does it work out in theory?”) “To appeal to disgust,” Professor Nussbaum concludes, “seems to be just to say ‘I don’t like that,’ and stamp one’s foot. No reasons are advanced that would make debate about such laws a real piece of public persuasion.”

Professor Nussbaum is certainly right that feelings of disgust, like feelings of shame, are extra- if not irrational: we don’t *argue* ourselves into disgust or shame: we feel it immediately. Professor Nussbaum is deeply suspicious of those feelings. She sharply criticizes the physician-philosopher Leon Kass for advocating the “wisdom of repugnance”—the wisdom of disgust and revulsion—because our disgust might be misplaced. She is even more severe about Lord Devlin, who argued that “for the difficult choice between a number of rational conclusions the ordinary man has to rely upon a ‘feeling’ for the right answer. Reasoning will get him nowhere.”

A good conservative, Lord Devlin was a minimalist when it came to the law’s province. “In any new matter of morals,” he argued, “the law should be slow to act.” Advocating “toleration of the maximum individual freedom that is consistent with the integrity of society,” he noted that “the law is concerned with the minimum and not with the maximum”: “the criminal law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave.” At the same time, Lord Devlin recognized that “not everything is to be tolerated. No society can do without intolerance, indignation, and disgust.”

Every moral judgement, unless it claims a divine source, is simply a feeling that no right-minded man could behave in any other way without admitting he was wrong. It is the power of common sense and not the power of reason that is behind the judgements of society.

Professor Nussbaum is very impatient with the “power of common sense.” It is so often insufficiently enlightened, insufficiently progressive, insufficiently in agreement with the opinions of people like Martha Nussbaum. Lord Devlin appealed to the moral feeling of the ordinary man, “the man in the Clapham omnibus.” Professor Nussbaum doubts “whether the disgust of the ‘average’ man would ever be a reliable test for what might be legally regulable.”

So maybe many of the things that the inherited moral wisdom of millennia have taught us to find disgusting—and to which society has responded with various legal prohibitions—need to be reevaluated? What do you think? Take necrophilia. Professor Nussbaum finds this a thorny problem. Who, after all, is harmed in the transaction? Professor Nussbaum wonders “whether necrophilia ought, in fact, to be illegal.” She acknowledges that there is “something unpleasant” about a person who rapes a corpse, but it is “unclear” to her whether such conduct should be “criminal.” Possibly, since a corpse is generally the property of its family, there should be “some criminal penalties” where “property violations” are involved, but otherwise not.

Professor Nussbaum describes her intellectual-political pedigree as “less Millian than Whitmanesque.” That may be right. I think, for example, of “Song of Myself,” which has many Nussbaumian touches. Nussbaum: “[W]e wash our bodies, seek privacy for urination and defecation, cleanse ourselves of offending odors with toothbrush and mouthwash, sniff our armpits when nobody is looking, check in the mirror to make sure that no conspicuous snot is caught in our nose-hairs.” Whitman: “The scent of these arm-pits is aroma finer than prayer,/ This head is more than churches or bibles or creeds./ ... I dote on myself ... there is that lot of me, and all so luscious ...”

But if there is a lot of Whitman blowing through Professor Nussbaum’s book, there is also a good deal of Mill. I am thinking especially of the Mill of *On Liberty*, the Mill who advocated “new and original experiments in living” and argued that the *sole* justification society had for interfering with an individual “in the way of compulsion and control”—whether by “physical force in the form of legal penalties or the moral coercion of public opinion”—was “self-protection.” If the individual is not harming others, then (says Mill) we have to leave him alone: “His own good, either physical or moral, is not a sufficient warrant” for interference. Mill’s libertarian doctrine is our modern gospel. Professor Nussbaum is part of a large choir singing its praises.

But the popularity of Mill’s doctrine says nothing about its cogency. As James Fitzjames Stephen pointed out in *Liberty, Equality, Fraternity* (1873), Mill’s teaching would “condemn every existing system of morals.”

Strenuously preach and rigorously practise the doctrine that our neighbor’s private character is nothing to us, and the number of unfavorable judgments formed, and therefore the number of inconveniences inflicted by them can be reduced as much as we please, and the province of liberty can be enlarged in corresponding ratio. Does any reasonable man wish for this? Could anyone desire gross licentiousness, monstrous extravagance, ridiculous vanity, or the like, to be unnoticed, or, being known, to inflict no inconveniences which can possibly be avoided?

As Stephen dryly observes, “the custom of looking upon certain courses of conduct with aversion is the essence of morality.” But it is part of Professor Nussbaum’s brief—as, in a way, it was of Mill’s—to encourage us to dispense with moral aversion, of which shame and disgust are prominent allotropes.

One of the oddest features of *Hiding from Humanity* is Professor Nussbaum’s recurring argument that the emotions of shame and disgust encourage us to ignore or discount our mortality, our incompleteness, our animality. No doubt Professor Nussbaum has managed to embrace her own animality without the benefit of shame or disgust. But for most of us, the emotions of shame and disgust are vivid reminders of our status as imperfect creatures, fragile, animal, and therefore mortal.

This is something embodied the world over in the idea of taboo, a concept with deep connections to the ideas of shame and disgust. These are insights we arrive at not by ratiocination but by feeling. As

the philosopher Leszek Kolakowski writes, “We do not assent to our moral beliefs by admitting ‘this is true,’ but by feeling guilty if we fail to comply with them.” What we are dealing with, he points out, is not an intellectual performance but “an act of questioning one’s own status in the cosmic order, ... an anxiety following a transgression *not of a law* but of a *taboo*.” Professor Nussbaum wants us to “discard the grandiose demands for omnipotence and completeness that have been at the heart of so much human misery.” Good idea! But shame and disgust are accomplices, not impediments, to that attack on hubris.

Hiding from Humanity is not only a polemic against the emotions of shame and disgust. It is also a political position paper. Professor Nussbaum is such a ferocious opponent of shame and disgust because she is such a passionate proponent of many things that shame and disgust recoil from. It is ironical that in a book which is partly an attack on “the grandiose” Professor Nussbaum should harbor such a grandiose agenda for social change. From public nudity to poverty, the global AIDS crisis, and homosexual marriage, Professor Nussbaum has embraced the entire menu of politically correct causes. Poverty, she says, is “one of the most stigmatized life-conditions, in all societies.” Therefore it must be removed. And not just poverty: we must also supply items that are “part of the social definition of a decent living-standard,” e.g., “a personal computer.” AIDS is “a major cause of stigmatized lives.” Something must be done!

Professor Nussbaum is one of those intellectuals whose intoxication with the thought of her own virtue is equalled only by her contempt for the opinions of the ordinary people whose lives she pretends to anguish over. Even without the inducement of the arguments she advances, her conviction of moral superiority would have led her to jettison shame as an impediment to “the moral progress of society.” One saw this at work a decade ago when she was called upon to give expert testimony in *Evans v. Romer*, which challenged a state constitutional amendment in Colorado that prohibited any official body from adopting a law or policy that grants homosexuals “minority status, quota preferences, protected status or claim of discrimination.” As the philosopher John Finnis showed in an article for *Academic Questions*, Professor Nussbaum, by deliberately misrepresenting the meaning of Greek words and the work of other scholars, engaged in “wholesale abuse of her scholarly authority and attainments.” Among other things, she went back to a nineteenth-century edition of the standard Greek-English lexicon because it did not include a morally opprobrious definition of a contested Greek term. She took the trouble to white-out the name of a contributor to the later edition of the lexicon that the lawyers, unaware of her subterfuge, had supplied in the footnotes of a court document. Challenged about this, she claimed that she was simply correcting a clerical error because the earlier edition was “more reliable on authors of the classical period” than later editions. I asked a former Regius Professor of Greek about that and it took him about five minutes to stop laughing. It’s clear that Professor Nussbaum doesn’t believe it either, since it has been shown that her own work regularly relies on later editions.

It is a curious quirk of language that “shameless” entails “shameful”—that is, being without shame is something to be ashamed of. This is not, I suspect, something that much troubles the Ernst Freund Distinguished Service Professor of Law and Ethics in the Philosophy Department, Law School, and Divinity School at the University of Chicago. But the rest of us might regard a shameless life the real hiding from humanity.

Roger Kimball is Editor and Publisher of *The New Criterion* and President and Publisher of Encounter Books. His latest book is *The Fortunes of Permanence: Culture and Anarchy in an Age of Amnesia*, forthcoming from St. Augustine's Press.

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