

Review Essay

A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*

Hiding from Humanity: Disgust, Shame, and the Law.

By Martha C. Nussbaum, Princeton University Press, 2004.

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Professor Martha C. Nussbaum is an accomplished scholar in an impressive variety of fields. Drawing on her diverse academic backgrounds, Nussbaum has written extensively about emotions and their importance for law from the perspective of her primary specialty, philosophy.¹ Her book *Hiding from Humanity* criticizes the roles that two particular emotions, disgust and shame, play in the law.² Its central thesis is that, as legal actors, we should be wary of disgust and shame because indulging in those emotions allows us to hide from our humanity—

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1. See, e.g., MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

2. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 13 (2004) [hereinafter *HIDING FROM HUMANITY*].

both our humanity in the general sense and also those specific features of our humanity that are most animalistic: our vulnerability and mortality.³ In 2004, the Association of American Publishers awarded *Hiding from Humanity* its Professional and Scholarly Publishing Award for Law.⁴ Many have praised it,⁵ while others have been more critical.⁶ In light of the broad range of fields that Nussbaum draws upon in *Hiding from Humanity*, the book has predictably spawned much interesting discussion and commentary by law professors,⁷ literary scholars,⁸ philosophers,⁹ political scientists,¹⁰ and the media.¹¹

Our unique contribution to this lively discourse surrounding *Hiding from Humanity* is an analysis of Nussbaum's argument from the perspective of recent advances in research about emotions, happiness, and well-being made by economists,¹² legal academics,¹³ negotiation scholars,¹⁴ neuroscientists,¹⁵ and

3. See *id.* at 14–15.

4. Press Release, Ass'n of Am. Publishers, Inc., Association of American Publishers Honors Outstanding Achievements in Professional and Scholarly Publishing (Feb. 8, 2005), http://www.pspcentral.org/awards/winners_2004.doc.

5. See, e.g., Princeton Univ. Press, Additional Reviews and/or Endorsements for Nussbaum, M.C.: *Hiding from Humanity: Disgust, Shame, and the Law*, <http://www.pupress.princeton.edu/quotes/q7697.html> (last visited Mar. 4, 2006).

6. See, e.g., David Benatar, *Book Review – Hiding from Humanity*, LIFEWATCH, Sept. 9, 2004 (book review), http://www.lifewatch-eap.com/poc/view_doc.php?id=2321&type=book&cn=216.

7. See, e.g., James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698 (2005) (book review).

8. See, e.g., Peter Brooks, *Hiding from Humanity*, 8 GREEN BAG 2D 207 (2005) (book review).

9. See, e.g., John Kekes, Book Review, 114 MIND 439 (2005).

10. See, e.g., Stefanie A. Lindquist, Book Review, 14 LAW & POL. BOOK REV. 708 (2004), <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/nussbaum904.htm>.

11. See, e.g., Princeton Univ. Press, Nussbaum, M.C.: *Hiding from Humanity: Disgust, Shame, and the Law*, <http://www.pupress.princeton.edu/titles/7697.html> (last visited Mar. 4, 2006).

12. See, e.g., ECONOMICS AND HAPPINESS: FRAMING THE ANALYSIS (Luigino Bruni & Pier Luigi Porta eds., 2006); BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING (2002); HAPPINESS IN ECONOMICS (Richard A. Easterlin ed., 2002); RICHARD LAYARD, HAPPINESS: LESSONS FROM A NEW SCIENCE (2005); Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LITERATURE 402 (2002).

13. See, e.g., Thomas D. Griffith, *Progressive Taxation and Happiness*, 45 B.C. L. REV. 1363, 1368–70 (2004); Marjorie E. Kornhauser, *Educating Ourselves Towards a Progressive (and Happier) Tax: A Commentary on Griffith's*

psychologists.¹⁶ We share Nussbaum's interest in how affect, emotions, and moods influence decision making,¹⁷ decision avoidance,¹⁸ and judgment.¹⁹ One of us has analyzed psychological game-theoretic models to examine the role of guilt in upholding social norms and organizational cultures;²⁰ parental choices regarding reproductive genetic technologies;²¹ fiduciary duties and trust in corporate and securities law;²² and the influence of shame on bargaining over property rights²³ and compliance with international environmental law.²⁴ The other has analyzed how to predict and normatively evaluate the inaction of individuals presented with opportunities that could benefit them, and with opportunities to help alleviate great human suffering, such as genocide and poverty.²⁵

Progressive Taxation and Happiness, 45 B.C. L. REV. 1399 (2004); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 28 LAW & HUMAN BEHAV. (forthcoming 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=726864; Diane M. Ring, *Why Happiness?: A Commentary on Griffith's Progressive Taxation and Happiness*, 45 B.C. L. REV. 1413, 1415–16 (2004).

14. See, e.g., Daniel L. Shapiro, *A Negotiator's Guide to Emotion: Four 'Laws' to Effective Practice*, DISP. RESOL. MAG., Winter 2001, at 3.

15. See, e.g., COGNITIVE NEUROSCIENCE OF EMOTION (Richard D. Lane & Lynn Nadel eds., 2002).

16. See, e.g., JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS* (2006).

17. See Peter H. Huang, *Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors*, 13 SUP. CT. ECON. REV. 99 (2005).

18. See Christopher J. Anderson, *The Psychology of Doing Nothing: Forms of Decision Avoidance Result from Reason and Emotion*, 129 PSYCHOL. BULL. 139 (2003).

19. See Peter H. Huang, *Regulating Irrational Exuberance and Anxiety in Securities Markets*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 501 (Francesco Parisi & Vernon Smith eds., 2005).

20. See Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390 (1994).

21. See Peter H. Huang, *Herd Behavior in Designer Genes*, 34 WAKE FOREST L. REV. 639 (1999).

22. See Peter H. Huang, *Trust, Guilt, and Securities Regulation*, 151 U. PA. L. REV. 1059 (2003).

23. See Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000).

24. See Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. S237 (2002).

25. See Christopher J. Anderson, *The Functions of Emotion in Decision Making and Decision Avoidance*, in DO EMOTIONS HELP OR HURT DECISION MAKING? (Roy Baumeister et al. eds., forthcoming 2006); Anderson, *supra* note 18.

We concur with many of Nussbaum's conclusions and find much to admire in her scholarship and in *Hiding from Humanity* in particular. Yet even though Nussbaum drew from many disciplines in *Hiding from Humanity*, she left other potentially fertile fields, such as neuroscience, untouched. In addition, despite the book's recent publication date, a number of subsequent developments have occurred in affective, cognitive, and social neuroscience;²⁶ dispute resolution;²⁷ economics;²⁸ affective psychology;²⁹ and positive psychology.³⁰ These developments have not gone unnoticed by other academics. For example, two negotiation scholars, Professor Roger Fisher, who is known for coauthoring a landmark book about negotiation,³¹ and Professor Daniel Shapiro, who is associate director of the Harvard Negotiation Project,³² recently observed that "strong emotions serve a useful function. You do not want to ignore emotions and lose their energy and information."³³ Other examples of advances in recent scholarly understanding about emotions that are relevant to Nussbaum's thesis are experimental studies using functional magnetic resonance imaging (fMRI) to examine the neural bases of decision making and moral judgment, including many by her cousin, Joshua Greene.³⁴ Cognitive neuroscientist Elizabeth Phelps and social

26. See, e.g., SOCIAL NEUROSCIENCE: KEY READINGS (John T. Cacioppo & Gary G. Berntson eds., 2005); THE COGNITIVE NEUROSCIENCES (Michael S. Gazzaniga ed., 3d ed. 2004); SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE (forthcoming Summer 2006) (featuring research that uses neuroscience techniques to understand the social and emotional aspects of the human mind and human behavior).

27. See, e.g., LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR (3d ed. 2005).

28. See, e.g., Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355 (2005); Daniel McFadden, The New Science of Pleasure: Consumer Behavior and the Measurement of Well-Being, Frisch Lecture at the Econometric Society World Congress, London (Aug. 20, 2005), <http://emlab.berkeley.edu/wp/mcfadden0105/ScienceofPleasure.pdf>.

29. See, e.g., THE CONSTRUCTION OF PREFERENCE (Sarah Lichtenstein & Paul Slovic eds., forthcoming Aug. 2006).

30. See, e.g., Shelly L. Gable & Jonathan Haidt, *What (and Why) Is Positive Psychology?*, 9 REV. GEN. PSYCHOL. 103 (2005).

31. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

32. PON: Harvard Negotiation Project, <http://www.pon.harvard.edu/research/projects/hnp.php3> (last visited Mar. 4, 2006).

33. ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 149 (2005).

34. See, e.g., Joshua D. Greene et al., *An fMRI Investigation of Emotional*

psychologist Mahzarin Banaji have used fMRI to link people's brain activity to the way they evaluate racial groups.³⁵ Other studies provide fMRI evidence that social exclusion activates the same brain regions as feeling physical sensations of pain.³⁶ Our contribution is to reassess Nussbaum's arguments in light of these research developments.

Our analysis of *Hiding from Humanity* is organized as follows. We first provide an overview of the interactions of emotions, psychology, and laws. Next, we analyze the roles that revulsion can and should play in law. We then examine the roles that saving and losing "face" can and should play in law. Our fourth section speculates about the constructive role that positive and negative emotions may play in law, to respond to Nussbaum's argument that two negative emotions, disgust and shame, threaten to disrupt the functioning of the legal system. Finally, our conclusion offers ideas for future research based on the foundation suggested by *Hiding from Humanity*.

I. PSYCHOLOGY, EMOTIONS, AND THE LAW

A number of scholars from such diverse fields and perspectives as anthropology,³⁷ economics,³⁸ history,³⁹ neuroscience,⁴⁰

Engagement in Moral Judgment, 293 SCIENCE 2105 (2001); Joshua Greene, *Cognitive Neuroscience and the Structure of the Moral Mind*, in THE INNATE MIND 338 (Peter Carruthers et al. eds., 2005); Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y B 1775 (2004); Joshua Greene & Jonathan Haidt, *How (and Where) Does Moral Judgment Work?*, 6 TRENDS COGNITIVE SCI. 517 (2002).

35. See Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activity*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000).

36. See Naomi I. Eisenberger et al., *Does Rejection Hurt? An fMRI Study of Social Exclusion*, 302 SCIENCE 290, 292 (2003); Naomi I. Eisenberger & Matthew D. Lieberman, *Why It Hurts to Be Left Out: The Neurocognitive Overlap Between Physical and Social Pain*, in THE SOCIAL OUTCAST: OSTRACISM, SOCIAL EXCLUSION, REJECTION, AND BULLYING 109, 123 (Kipling D. Williams et al. eds., 2005); Matthew D. Lieberman & Naomi I. Eisenberger, *A Pain by Any Other Name (Rejection, Exclusion, Ostracism) Still Hurts the Same: The Role of Dorsal Anterior Cingulate in Social and Physical Pain*, in SOCIAL NEUROSCIENCE: PEOPLE THINKING ABOUT PEOPLE 167, 181–82 (John T. Cacioppo et al. eds., 2006).

37. See, e.g., *BIOCULTURAL APPROACHES TO THE EMOTIONS* (Alexander Laban Hinton ed., 1999).

38. See, e.g., Edward L. Glaeser, *Psychology and the Market*, 94 AM. ECON. REV. 408 (2004).

39. See, e.g., LLOYD DEMAUSE, *THE EMOTIONAL LIFE OF NATIONS* (2002).

40. See, e.g., *WHO NEEDS EMOTIONS?: THE BRAIN MEETS THE ROBOT*

philosophy,⁴¹ psychology,⁴² and sociology,⁴³ are (re)discovering emotions. American psychology, for example, largely avoided the use of certain emotions as constructs for much of the twentieth century⁴⁴ while under the influence of the philosophy of positivism.⁴⁵ Since then, mental constructs have emerged within cognitive science,⁴⁶ paving the way for the study of emotions. Emotions promise to play an important role in twenty-first century psychology; the American Psychological Association has founded a new journal⁴⁷ dedicated to the study of emotion, other new journals specializing in emotion-related articles have emerged,⁴⁸ and we have noticed a trend towards established psychology journals publishing more articles about emotions.

Many legal scholars have also turned their attention to the roles that emotions can play in formulating legal thought, practice, and principles.⁴⁹ One example of such scholarship is *Hid-*

(Jean-Marc Fellous & Michael A. Arbib eds., 2005).

41. See, e.g., THINKING ABOUT FEELING: CONTEMPORARY PHILOSOPHERS ON EMOTIONS (Robert C. Solomon ed., 2004).

42. See, e.g., K.T. STRONGMAN, THE PSYCHOLOGY OF EMOTION: FROM EVERYDAY LIFE TO THEORY (5th ed. 2003).

43. See, e.g., JONATHAN H. TURNER & JAN E. STETS, THE SOCIOLOGY OF EMOTIONS (2005).

44. See, e.g., Bunmi O. Olatunji & Craig N. Sawchuk, *Disgust: Characteristic Features, Social Manifestations, and Clinical Implications*, 24 J. SOC. & CLINICAL PSYCHOL. 932, 933, 934 fig.1 (2005) (reporting results of a general literature search for the terms “anger,” “disgust,” and “fear” in the PsychInfo reference database from 1960 through 2003). There are few citations referencing any of the terms through 1964; then fear shows a linear increase in references through the present, anger follows with a parallel linear increase beginning in 1981, and disgust shows a relatively miniscule increase starting in the late 1990s). *Id.*

45. See, e.g., AUGUSTE COMTE, INTRODUCTION TO POSITIVE PHILOSOPHY (Frederick Ferré ed., Paul Descours & H. Gordon Jones trans., revised by Frederick Ferré, 1970) (1905).

46. See generally HOWARD GARDNER, THE MIND’S NEW SCIENCE (1985) (providing a history of the cognitive revolution).

47. EMOTION.

48. See, e.g., COGNITION & EMOTION; COGNITIVE, AFFECTIVE, & BEHAV. NEUROSCIENCE.

49. See, e.g., THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602 (2002); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test With Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1 (2005); Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT’L REV. L. & ECON. 31 (1992); Laura Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699 (1995); Jules Lobel & George

ing from *Humanity*, which takes as its foundation a number of hypothesized connections between emotion and law.⁵⁰ On the surface, psychology—the origin of much research on emotion—and law appear to be rather different fields. For the empirical psychologist, however, the law can be seen as a domain of human behavior, albeit a complex one in terms of the number and variety of actors and motivations that influence behaviors and outcomes. The trend in recognizing this connection between the fields is evidenced by notable works in psychology that treat legal actors, such as jurors, as the focus of empirical analysis.⁵¹ To legal scholars and philosophers such as Nussbaum, psychological analysis represents an avenue for scrutinizing the basis of law and for questioning our assumptions about the origins and functions of law.

Nussbaum is most compelling when she contends that our system of law cannot be understood without some reference to emotions, which indicate what is important to those persons the law should protect.⁵² Nussbaum portrays emotions and vulnerability as fundamentally intertwined, and interprets laws as defenses against human vulnerability to a wide variety of harms.⁵³ This portrayal of emotion is more helpful than competing interpretations that focus on debatable elements that only apply to some emotions in some contexts.⁵⁴ Nussbaum convincingly portrays vulnerability as a necessary condition for

Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 CHI.-KENT L. REV. 1045 (2005); Toni Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); Toni M. Massaro, *Show (Some) Emotions*, in THE PASSIONS OF LAW, *supra*, at 80; Toni Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988); Samuel Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001).

50. See HIDING FROM HUMANITY, *supra* note 2, at 5–12.

51. See, e.g., VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (2001); REID HASTIE, INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (1994).

52. See HIDING FROM HUMANITY, *supra* note 2, at 5–6.

53. *Id.* at 6–7.

54. See, e.g., NICO H. FRIJDA, THE EMOTIONS 69–71 (1987) (providing an often-cited definition of emotions as states of “action readiness”). *But see* Anderson, *supra* note 18, at 162 (pointing out that decision conflict and emotions such as regret often lead to inaction and passivity).

emotion,⁵⁵ and thus provides a strong case for seeing the legal field, which provides protection from, and recourse for, breached vulnerabilities, as being intimately tied to the human experience of emotion.

Nussbaum argues that the emotions of those deciding cases and making the law impact the law by acting as a variable on the perceived seriousness or wrongness of an offense, and more importantly, by influencing which acts a society deems necessary to curtail, outlaw, or punish.⁵⁶ Nussbaum's arguments, valuable as they are, strike an odd chord with the rest of *Hiding from Humanity*. Whereas this part of her argument gives strong reasons for both the descriptive and normative relevance of emotion to the law, the remainder of *Hiding from Humanity* is devoted to criticizing two specific emotions, disgust and shame, for their perceived role in law.⁵⁷ There may be reasons why some emotions are relevant while others are not. For example, Nussbaum hypothesizes that the cognitive content of disgust does not include beliefs about harm. Cognitive content involving experienced harms are, in her view, necessary for pertinence to the law, whereas emotions experienced in the absence of real harm are not appropriate for consideration in a legal forum.⁵⁸

While the relevance of some emotions but not others is debatable, it nonetheless seems odd to begin by discussing the relevance of emotion to law when constructing an argument for the irrelevance of two emotions to law. For this reason we have chosen specifically to highlight some positive, constructive interfaces between law and emotion in our fourth section after we analyze the main theme of *Hiding from Humanity*, which is the role that revulsion and saving face can and should play in our legal system.

II. REVULSION AND DISGUST

Nussbaum states that "[d]isgust appears to be an especially visceral emotion" and cites psychologist Paul Rozin's

55. See HIDING FROM HUMANITY, *supra* note 2, at 6–7.

56. *Id.* at 19–56.

57. *Id.* at 71–350.

58. See E-mail from Martha Nussbaum, Ernst Freund Distinguished Service Professor of Law and Ethics, University of Chicago Law School, to Peter Huang, Member, Institute for Advanced Study, School of Social Science, and Harold E. Kohn Chair Professor of Law, James E. Beasley School of Law, Temple University (Nov. 14, 2005, 13:21 CST) (on file with authors).

definition of disgust as involving revulsion at its core.⁵⁹ Nussbaum finds disgust “unworthy of guiding public action” and “a dangerous social sentiment.”⁶⁰ Does this mean it can never be proper to impose legal sanctions on the basis of revulsion or disgust? Should laws, and those involved in making and interpreting them, ever consider revulsion or disgust?

A. THE RESEARCH

One theoretical approach predicts, and experimental evidence confirms, that once certain emotions are triggered in a particular situation, those emotions will continue to change risk estimates and behavior toward risk in situations unrelated to the original triggering context.⁶¹ In particular, anger, once it is triggered in a specific situation, will evoke more optimistic risk estimates and more risk-seeking behavior in other unrelated situations; fear causes the opposite pair of effects.⁶² Similarly, a recent experimental study demonstrated that disgust induced by irrelevant, prior situations will carry over to normatively unrelated decisions and reduce how much buyers are willing to pay for an item and how much sellers are willing to accept for that same item.⁶³

Experimentally-induced disgust has also been shown to persist beyond initial eliciting situations and to powerfully impact subsequent cognition and behavior. One recent and highly relevant experimental study provides the first demonstration that augmenting disgust carries over to moral judgments.⁶⁴ This research suggests that individuals and lawmakers will find it challenging to contain disgust and that existing law might reflect such a struggle.

59. HIDING FROM HUMANITY, *supra* note 2, at 87.

60. *Id.* at 171.

61. See, e.g., Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward A Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473, 476–80 (2000) (presenting an appraisal-tendency theory of emotions).

62. See Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCHOL. SCI. 144, 144 (2003) (presenting supporting experimental evidence); Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146, 146 (2001) (same).

63. See Jennifer S. Lerner et al., *Heart Strings and Purse Strings: Carry-over Effects of Emotions on Economic Decisions*, 15 PSYCHOL. SCI. 337, 340 (2004).

64. See Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCHOL. SCI. 780 (2005).

B. THE VALUE OF DISGUST TO THE LAW

Hiding from Humanity takes the strong position that disgust is never constructive in law, and in those cases where it might seem to be useful, indignation is actually the appropriate, constructive emotion.⁶⁵ Nussbaum reviews a variety of actors with varying ideological perspectives that support the role of disgust in legal decision making.⁶⁶ Not surprisingly, several of these positions are conservative. Lord Patrick Devlin suggests that society has a rightful desire for self-preservation, and monitoring and responding to its constituency's disgust is central to that preservation.⁶⁷ Another position, held by the former chairman of the President's Council on Bioethics, Professor Leon R. Kass,⁶⁸ sees an ambiguous "wisdom" in disgust that transcends reason.⁶⁹ These positions are difficult to agree with, since the first, or both taken together, are a recipe for constructing a closed society.⁷⁰ However, liberals and progressives have also discussed the value of disgust. For example, criminal law professor Dan M. Kahan argues that disgust is a useful tool for steadfast and potent condemnations of cruelty, such as transgressions of human rights.⁷¹

Arguments in favor of disgust's role in legal decision making must be analyzed carefully, for rejection of them is at the heart of *Hiding from Humanity's* argument. Nussbaum portrays each of these arguments as fundamentally different, save for their agreement that disgust is relevant to law as more than a nuisance harm⁷² to individuals.⁷³ We suggest they have more in common: for one, condemning cruelty is arguably part of the "wisdom" of disgust and one of the defining values a society through its shared notions of disgust may seek to promote. To the extent that an individual shares the values of her society,

65. See HIDING FROM HUMANITY, *supra* note 2, at 75. Nussbaum defines "indignation" as anger triggered by unfairness. *Id.*

66. *Id.* at 75–87.

67. See PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1959).

68. See The President's Council on Bioethics: Leon R. Kass, M.D., <http://www.bioethics.gov/about/kass.html> (last visited Mar. 4, 2006).

69. HIDING FROM HUMANITY, *supra* note 2, at 79.

70. Although *Hiding from Humanity* portrays this as a conservative argument, it can and has been used across the political spectrum. See, e.g., Richard M. Ebeling, *Political Correctness and the Closed Society*, FREEDOM DAILY, Jun. 1992, available at <http://www.fff.org/freedom/0692b.asp>.

71. See HIDING FROM HUMANITY, *supra* note 2, at 84.

72. That is, based on an unpleasant mental or physiological experience.

73. HIDING FROM HUMANITY, *supra* note 2, at 85–87.

that individual will arguably welcome any emotion that would promote goals associated with those values, and underpin legal decisions that support those values. Thus, although people of varying political affiliations might define cruelty differently, they all might agree that certain cruel acts are disgusting; a shared disgust with those acts is a potentially relevant indicator that the acts should be abolished.

The core of *Hiding from Humanity*'s normative argument against basing law on disgust is twofold: (1) we cannot trust disgust to carry innate wisdom or any meaningful correlation to what is really harmful,⁷⁴ and (2) disgust prompts turning away from a stimulus or issue rather than constructively handling it.⁷⁵ Nussbaum convincingly wins the first point by citing a great deal of psychological research that shows how disgust can be transferred to irrelevant objects or persons in a process called "psychological contamination."⁷⁶ Through this process, noncontaminated, nonharmful persons come to be seen as disgusting by their similarity to, contact with, or manipulative association with a primary disgusting object. While these people cause no harm, a society can come to see them as dangerous, and in the process, the disgust-seer can become a real source of harm in response to an imagined source of harm. This is a compelling argument, and Nussbaum gives many historical and current examples of the process, including the subordination of women⁷⁷ and Jewish persons.⁷⁸ However, this argument alone is insufficient to convince the reader that it is necessary to purge disgust from legal and social thinking. We draw a different conclusion from the same information, which is that before disgust can be potentially useful, it must be actively managed. Determinations of what is found disgusting and why must be made.

Nussbaum's second argument is that because disgust is rooted in fear of contamination, it motivates the disgusted person to get away from what is disgusting as soon as possible.⁷⁹ Although Nussbaum places a great deal of emphasis on social disgust, disgust's primary content is toward nonhuman objects,

74. *Id.* at 91–93.

75. *Id.* at 105.

76. *Id.* at 93–96.

77. *Id.* at 117–20.

78. *Id.* at 108–14.

79. *Id.* at 87.

which is also relevant to the law.⁸⁰ People respond to disgust by distancing themselves from the object. In Nussbaum's view, this "out of sight, out of mind" reflex undermines the ability to productively use disgust in fighting for progressive causes such as human rights. This is an oversimplification, and at least in some cases, personal experience discredits this. For example, disgusting images from the genocide in Rwanda motivate some to turn away from the information and avoid learning more about it, which in turn prevents them from actively working to prevent future crimes against humanity. For others, the images are seared into the memory, and they are thereby motivated to support the prevention of such crimes.⁸¹ This second response might also be seen as "turning away" from what is disgusting, but it entails a different kind of turning away that requires seeing one's own inaction and passive bystanding⁸² as complicit in producing the disgusting image.

Distancing can have the positive effect of causing one to separate from a group of perpetrators with which one is complicit. Distancing is also productive when the disgust is in relation to risky, nonhuman sources of disgust, such as animal or other carriers of viruses or disease. Where people have a tendency to be attracted to something that spreads disease, disgust could be used to motivate legislation. For instance, the AIDS virus can be spread through dirty IV needles re-used by illegal IV drug users. The drug users do not have sufficient disgust with the dirty needle to overcome their attraction to drugs, and it is illegal to supply clean needles to these persons. People should find it disgusting that a person is forced to use a dirty IV needle when a clean one could be provided, thereby reducing the AIDS virus transmission risk. Distancing oneself from the disgust of this image could mean not thinking or caring about endangered drug users, or it could prompt action to address the barriers the law has erected between the clean needle and the drug user. *Hiding from Humanity* does not consider the multi-

80. See Paul Rozin & April E. Fallon, *A Perspective on Disgust*, 94 PSYCHOL. REV. 23, 27-29 (1987).

81. See, e.g., Paul Slovic, *Mass Murder: Why Do We Ignore It?* (Nov. 14, 2005) (unpublished slides presented as part of the speech, Paul Slovic, Address at the Society for Judgment and Decision Making (Nov. 14, 2005), on file with authors) (proposing that people ignore genocide in part because available information fails to convey meaningful affect and emotions).

82. See generally ERVIN STAUB, *THE PSYCHOLOGY OF GOOD AND EVIL: WHY CHILDREN, ADULTS, AND GROUPS HELP AND HARM OTHERS* (2003) (discussing the sources of and responses to good and evil acts).

ple forms of “turning away,” and thus may underestimate the usefulness of disgust. More behavioral research is required to understand the possible responses to disgust and the personal and contextual factors that determine them before a definitive stance is taken on Nussbaum’s argument.

C. ELIMINATING DISGUST FROM THE LAW

Given disgust’s status as a basic human emotion,⁸³ it is unlikely that it could ever be completely extirpated from society. The question that remains, and the position Nussbaum advocates,⁸⁴ is whether disgust can be eliminated from legal decision making.

The presence of shared notions of disgust in a society will continually put pressure on legislators, jurors, lawyers, and judges to incorporate those notions into law. In our view, for the antidisgust in law position to become successful, a society would have to become “disgusted with disgust,” which is to view it as an emotion too contaminated to be considered in important decisions. Society would need to be persuaded that disgust is a fundamentally damaging emotion and that it promotes vulnerability instead of preventing it. This change requires a broad—perhaps impossibly broad—social consensus. While becoming “disgusted with disgust” might seem to be a contradictory notion, *Hiding from Humanity* takes a first step toward persuading society to that position by illustrating several unpleasant uses of disgust in the law that many will likely find reprehensible, such as the subordination and extermination of Jews during World War II.⁸⁵ Relating “disgust with disgust” to larger segments of the population is a worthwhile challenge that, if Nussbaum and her readers are serious about their position, we should soon see attempts to tackle.

It will, however, be difficult to convince society that it should feel “disgust with disgust.” As humans, “we are all built with a pair of related emotions—disgust and elevation [P]eople, or cultures, seem predisposed (though not preordained) to interpret their social worlds in terms of a vertical dimension in which divinity, virtue, and physical purity are up,

83. See Rozin & Fallon, *supra* note 80, at 23.

84. See *HIDING FROM HUMANITY*, *supra* note 2, at 75. *But cf. id.* at 120–22 (suggesting that a disgust-free society may not be an ideal norm given disgust’s value and beneficial role in certain aspects of life and thought).

85. See *id.* at 108–14.

and bestiality, vice, and physical pollution are down.”⁸⁶ Research by psychology professor Jonathan Haidt and his colleagues provides evidence across contexts and cultures that human beings find it easy to link together divinity, morality, and physical purity.⁸⁷ Thus, it can be quite natural for people to be convinced that they should feel disgust, even if that disgust is based upon phantom or unjustified associations. It might be possible to convince people that they *should* experience disgust about disgust. But a far more difficult endeavor would be to convince people to actually *feel* disgust about disgust. This difficulty relates to the fact that disgust, like many emotions, is usually automatic and unconscious.⁸⁸ Nussbaum does not address this feature of the emotion.

One of the reasons why *Hiding from Humanity* takes such a strong line on disgust is that Nussbaum views disgust as an inherently hierarchical emotion.⁸⁹ However, it might better be thought of as inherently categorical. For disgust to be hierarchical, one must see social disgust as the core of disgust, which it is not; social disgust is a relatively late-occurring generalization of disgust. Because disgust categorizes the world into contaminated and uncontaminated objects and persons, it motivates actors to avoid potentially contaminated objects and persons. This in turn creates a sort of hierarchy when applied to persons if one conflates avoidance with low status, which is not completely correct.⁹⁰ Even if one were to grant that disgust

86. Jonathan Haidt & Sara Algoe, *Moral Amplification and the Emotions that Attach Us to Saints and Demons*, in HANDBOOK OF EXPERIMENTAL EXISTENTIAL PSYCHOLOGY 322, 329 (Jeff Greenberg et al. eds., 2004).

87. See HAIDT, *supra* note 16, at 181–212; Jonathan Haidt et al., *Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?*, 65 J. PERSONALITY & SOC. PSYCHOL. 613 (1993); Jonathan Haidt et al., *Body, Psyche, and Culture: The Relationship Between Disgust and Morality*, 9 PSYCHOL. & DEVELOPING SOCIETIES 107 (1997); Jonathan Haidt, *Elevation and the Positive Psychology of Morality*, in FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED 275 (Corey L. M. Keyes & Jonathan Haidt eds., 2003); Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191 (2001); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

88. See, e.g., TIMOTHY D. WILSON, STRANGERS TO OURSELVES 117–35 (2002).

89. See E-Mail from Martha Nussbaum to Peter Huang, *supra* note 58.

90. In most species, dominant individuals are the most avoided. See Joseph Henrich & Francisco J. Gil-White, *The Evolution of Prestige: Freely Conferred Deference as a Mechanism for Enhancing the Benefits of Cultural Transmission*, 22 EVOLUTION & HUMAN BEHAV. 165, 166–69 (2001).

is inherently hierarchical, for most citizens this would not be viewed as a problematic element of its role in law. This is because most societies' concept of complete morality includes a concern for preserving respect for a hierarchy and displaying behaviors that are appropriate to one's place in a hierarchy.⁹¹

Social psychologist, Susan Fiske, has constructed a stereotype content model of emotional prejudices, including contempt or disgust.⁹² Fiske's research suggests that disgust and other emotional prejudicial reactions are immediate and not necessarily conscious.⁹³ Fiske's recent neuroscientific research utilizing fMRI techniques finds that categorizing people to be interchangeable members of some outgroup promotes one response in an almond-shaped brain region known as the amygdala, which is associated with vigilance and alarm, and another response in a different brain region known as the insula, which is characteristic of disgust or arousal, depending on social context.⁹⁴ Utilizing methods of cognitive and social neuroscience, Fiske's research shows that emotional prejudices, including disgust, are not inevitable, but depend on one's cognitive and social goals.⁹⁵ In other words, even though disgust is not necessarily conscious, it is not inevitable because it depends on a person's thoughts and social motivations.

Fiske has conducted research that demonstrates not only how and why emotional prejudice can occur, but also how and why particular social contexts can discourage prejudice.⁹⁶ Fiske's research finds that people easily categorize others, es-

91. See Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Emotions and Intuitions Related to Ingroup, Hierarchy, and Purity*, 19 SOC. JUST. RES. (forthcoming 2006).

92. See Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878 (2002).

93. See Jamie Chamberlin, *What's Behind Prejudice?*, MONITOR ON PSYCHOL., Oct. 2004, at 34.

94. See Susan T. Fiske et al., *Why Ordinary People Torture Enemy Prisoners*, 306 SCIENCE 1482, 1482 (2004).

95. See, e.g., Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56, 102 (2005). See generally Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOL. 181, 183 (2005) (reviewing developing literature applying neuroscientific tools in examining social psychological responses to race).

96. See SUSAN T. FISKE, *SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY* (2004); Susan T. Fiske, *What We Know Now About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 123 (2002).

pecially based upon observable indices such as their age, gender, and race.⁹⁷ Individuals require motivation to get past such categorization in order to learn about others.⁹⁸ Fiske's laboratory studies demonstrate that depending on another individual or being a team member with someone motivates us to get past our stereotyping.⁹⁹ Another experimental study by Fiske demonstrates that competition sometimes causes individuation, because each person is motivated to learn how others act.¹⁰⁰

Thus, Fiske's research suggests that antidiscrimination laws can mitigate prejudice by creating social contexts that foster cooperation, which in turn leads to individuation, rather than stereotypical attitudes of disgust. Fiske's research also suggests that affirmative action in higher education and employment might combat discrimination, but only insofar as it places individuals on a common team, rather than in competition with each other for grades, promotions, and other positional goods.¹⁰¹

III. SAVING FACE AND LOSING IT

Nussbaum takes great care in differentiating shame from disgust, guilt, depression, embarrassment, humiliation, and rage.¹⁰² As Nussbaum points out, shame is revealed in one's face by blushing.¹⁰³ A famous sociologist who is well-known for analyzing human interaction, Erving Goffman, utilized the notion of "face" to explain how Americans manage their public image and social presentations.¹⁰⁴ Nussbaum argues in *Hiding*

97. See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 2d ed. 1998).

98. See Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 122 (2004).

99. See Susan T. Fiske, *Interdependence and the Reduction of Prejudice*, in REDUCING PREJUDICE AND DISCRIMINATION 115 (Stuart Oskamp ed., 2000).

100. See Janet B. Ruscher & Susan T. Fiske, *Interpersonal Competition Can Cause Individuating Processes*, 58 J. PERSONALITY & SOC. PSYCHOL. 832, 837 (1990).

101. For a discussion on the economic, epidemiological, public health, and sociological impacts of competition, see ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS 146–58 (1999); MICHAEL MARMOT, THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY 92–95 (2004).

102. See HIDING FROM HUMANITY, *supra* note 2, at 203–11.

103. *Id.* at 173–74.

104. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF

from *Humanity* that shame is an improper, inappropriate, and unreliable basis for law, especially with respect to punishment in criminal law.¹⁰⁵

A. CULTURAL AND DEMOGRAPHIC VARIATION IN THE EXPERIENCE OF SHAME

Some people can feel shame in unintended and undesired ways, even from noncriminal regulations. For example, Professors George Loewenstein and Ted O'Donoghue observed that while food labeling has clear nutritional information benefits, such disclosures can foster a guilt-ridden, neurotic, shameful, and psychologically unhealthy perspective towards eating.¹⁰⁶ However, feelings of shame related to obesity vary not only across individuals, but also across cultures. Two economists from the Brookings Institution, Carol Graham and Andrew Felton, recently identified a statistically negative relationship between obesity and self-reported happiness in the U.S., but a positive correlation between obesity and self-reported happiness in Russia.¹⁰⁷ Nussbaum's criticisms about disgust and shame in law are directed at cultures generally, and address "widespread social attitudes, influential in many times and places . . . [that] are currently enjoying renewed attention in contemporary American culture."¹⁰⁸

Recent empirical, experimental, and field work by anthropologists,¹⁰⁹ psychologists,¹¹⁰ and others has found many ways in which the experience and use of emotions in daily life and social institutions varies across cultures. There is also recent

SPOILED IDENTITY (1968); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); Erving Goffman, *Embarrassment and Social Organization*, 62 AM. J. SOC. 264 (1956); Erving Goffman, *On Face-Work: An Analysis of Ritual Elements in Social Interaction*, 18 PSYCHIATRY 213 (1955).

105. See HIDING FROM HUMANITY, *supra* note 2, at 13–16.

106. See George Loewenstein & Ted O'Donoghue, "We Can Do This the Easy Way or the Hard Way": *Negative Emotions, Self-Regulation, and the Law*, 73 U. CHI. L. REV. (forthcoming Winter 2006).

107. See Carol Graham & Andrew Felton, *Variance in Obesity Across Cohorts and Countries: A Norms Based Explanation Using Happiness Surveys* (The Brookings Inst. Ctr. on Soc. and Econ. Dynamics, Working Paper No. 42, 2005), available at http://www.brookings.edu/es/dynamics/papers/CSSED_wp42.pdf.

108. HIDING FROM HUMANITY, *supra* note 2, at 16.

109. See, e.g., MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE (Herbert Gintis et al. eds., 2005).

110. See, e.g., CULTURE AND SUBJECTIVE WELL-BEING (Ed Diener & Eunkook M. Suh eds., 2000).

evidence that individuals process information differently in response to emotional advertisements, due to the motivational and cognitive changes associated with age.¹¹¹ One study proposes that anxiety explains the difference in social risk perceptions across gender and race.¹¹² This cultural and demographic heterogeneity in emotional responses means that people are likely to experience shame in legal situations in qualitatively and quantitatively different ways. A sociologist recently found that the presence and amount of shame experienced from seeking legal remedies varies across cultures, which helps explain why the ethnic Chinese and Korean in Aotearoa New Zealand make little use of antidiscrimination law as compared to Pacific Island peoples and Indians.¹¹³

Nussbaum notes that while shame varies across cultures, it also has similarities.¹¹⁴ The concept of “face” originated in Chinese thought and is a literal translation of two Chinese characters—*lien* and *mien-tzu*—which Chinese scholars differentiate analytically,¹¹⁵ but whose meanings are interchangeable in many verbal settings.¹¹⁶ People in particular contexts or situations can gain or lose face, but “[t]he mechanics of gaining face are different from those of losing it, and the two processes do not carry the same social implications.”¹¹⁷ Scholars have suggested that in Asian cultures, losing face leads to “a diminution of standing in society”¹¹⁸ and contributes to shame, which “often persists like a psychic scar.”¹¹⁹ Shame and hierarchy are thus intimately related, not just in Chinese culture, but also in

111. See Patti Williams & Aimee Drolet, *Age-Related Differences in Responses to Emotional Advertisements*, 32 J. CONSUMER RES. 343 (2005).

112. See Dan M. Kahan et al., *Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety*, 90 J. PERSONALITY & SOC. PSYCHOL. (forthcoming 2006) (proposing cultural status anxiety to explain the “white male effect”).

113. See Catherine Lane West-Newman, *Feeling for Justice? Rights, Laws, and Cultural Contexts*, 30 L. & SOC. INQUIRY 305, 323–30 (2005).

114. See HIDING FROM HUMANITY, *supra* note 2, at 185–86.

115. See Hsien Chin Hu, *The Chinese Concepts of “Face,”* 46 AM. ANTHROPOLOGIST 45 (1944).

116. See David Yau-fai Ho, *On the Concept of Face*, 81 AM. J. SOC. 867, 868 (1976).

117. West-Newman, *supra* note 113, at 327.

118. *Id.* at 328.

119. Ho, *supra* note 116, at 876 n.3.

other cultures.¹²⁰ “Because Chinese social behavior is framed in terms of mutual dependence, social face, read as social adequacy, is maintained relative to social position.”¹²¹ There are distributions in the severity and range of losing face that extend “from temporary and only in a circumscribed area of social life to permanent and irreversible” loss,¹²² which casts doubt over an individual’s “fitness as an acceptable member of society.”¹²³ These distributions of shame are not constant across cultures or over time because “judgments concerning the extent, loss, or gain of face are based on sets of criteria or standards which vary both cross-culturally and over time within a single culture.”¹²⁴

B. SHAME’S POWER AND LIMITATIONS

In Asian societies particularly, people’s relationship to “face” “exerts a mutually restrictive, even coercive, power upon each member of the social network”¹²⁵ because “the expectations of others significantly influence how individuals decide to act.”¹²⁶ In fact, “[t]he actions of one person can affect the face of another connected with her”¹²⁷ to such a degree that in traditional Chinese society “the individual’s face and the good name of his family (his *chia sheng*) were virtually inseparable.”¹²⁸ Similar notions of shame by association exist in such other Asian cultures as the Japanese,¹²⁹ Korean,¹³⁰ and Singaporean.¹³¹ Contemporary scholars report that even when Asian parents have migrated to Western nations, they still teach

120. See Whitman, *supra* note 7, at 2719–24 (arguing that law has to seriously take into account human impulses for hierarchy).

121. West-Newman, *supra* note 113, at 328.

122. *Id.*

123. Ho, *supra* note 116, at 872.

124. *Id.* at 874.

125. *Id.* at 873.

126. West-Newman, *supra* note 113, at 328.

127. *Id.*

128. Ho, *supra* note 116, at 880.

129. See, e.g., Takie Sugiyama Lebra, *The Social Mechanism of Guilt and Shame: The Japanese Case*, 44 *ANTHROPOLOGICAL Q.* 241, 251–52 (1971).

130. See, e.g., Sungeun Yang & Paul C. Rosenblatt, *Shame in Korean Families*, 32 *J. COMP. FAM. STUD.* 361, 365–66 (2001).

131. See, e.g., Rosaleen Ow & Dafna Katz, *Family Secrets and the Disclosure of Distressful Information in Chinese Families*, 80 *J. CONTEMP. HUM. SERVICES* 620, 621–22 (1999).

their children the concept and significance of face.¹³² One of us experienced parental “shame sharing” first-hand and powerfully in childhood.¹³³

Of course, shame can become dysfunctional for those people who are traumatized by shaming as youths.¹³⁴ Some parents undoubtedly rely on shaming techniques as convenient methods to discipline or raise their children.¹³⁵ Such use of shame is suboptimal,¹³⁶ both for children and society, if those children must learn in adulthood to recover from trauma inflicted by shame.¹³⁷ However, while shame can do much damage,¹³⁸ it does not follow that shame can, should, or will have no constructive role to play in human interactions. For instance, anticipating feeling ashamed can motivate some children—and even adults—to avoid certain behaviors, some of which involve causing harm to others. In other words, shame can facilitate self-control or a first-party system of social control.¹³⁹

Shame can spill over onto family members and close friends of those who are shamed. Such spillovers might produce desirable incentives for those close to a target of shame to influence a target’s behavior via familial or social pressure. Alternatively, emotional spillovers might have the negative consequence of generating shame without corresponding deterrence benefits. Indeed, intended targets of shame might come to develop immunity to shaming because people adapt generally and quickly to emotions and feelings.¹⁴⁰ For example,

132. See Sheldon X. Zhang, *Measuring Shaming in an Ethnic Context*, 35 BRIT. J. CRIMINOLOGY 248, 250, 260 (1995).

133. As a child, Huang received a parental scolding including this admonition: “You should be ashamed of your face-losing behavior in public because you’re embarrassing not only yourself, but your parents, your brothers, your grandmother, your family, Chinese people, human beings, and in fact all carbon-based life-forms.”

134. See HIDING FROM HUMANITY, *supra* note 2, at 186–89.

135. See *id.* at 189, 199.

136. *Id.* at 215.

137. See *id.* at 191–92.

138. See *id.* at 202.

139. See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 44 (1989) (defining and introducing a notion of first-party or self-control of behavior).

140. See, e.g., WILSON, *supra* note 88, at 137–58; Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 168–69 (2005) (developing legal implications of inaccurate affective forecasts); Daniel Kahneman, *Objective Happiness*, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 3, 13–14 (Daniel Kahneman et al. eds., 1999) (ana-

some criminals might develop new family and friends consisting of fellow criminals or members of a common gang, united by a shared, perverse sense of pride in their criminality and lack of morality.¹⁴¹ When this happens, shame no longer effectively deters criminal behavior.

One novel theoretical economic model of shame investigates the deterrent effects of shaming penalties.¹⁴² Its authors demonstrate an inverse relationship may exist between the rate of shaming penalties and their deterrent effects.¹⁴³ The more that people are shamed, the less effective shaming penalties become. In particular, the authors prove that increasing the size of shaming penalties does not necessarily increase, and in fact can even decrease, the deterrent effects of shaming penalties, because the stigma of those penalties decreases as more people are subjected to them.¹⁴⁴ In this model, the same is true for increasing the probability of detection or the accuracy of the judicial process.¹⁴⁵ All of these results are based upon a formal model in which the costs of searching for law-abiding commercial partners to transact with in markets and the costs of actively shunning those who have been shamed increase with the size of the (sub) population that has been shamed.¹⁴⁶

These conclusions suggest that shaming penalties have built-in limitations and can become self-destructive because extensive use of the penalties can erode their effectiveness to deter criminal acts. Hence, this theoretical model demonstrates that shame has its own limits. Any attempts to limit shame further, however, can be difficult. A recent experimental study found that social emotions like shame are necessary to prevent retaliation by those who are punished and for the viability of punishment as an effective method of enforcing social norms of cooperative behavior.¹⁴⁷

lyzing the hedonic treadmill hypothesis).

141. See HIDING FROM HUMANITY, *supra* note 2, at 273.

142. See Alon Harel & Alon Klement, The Economics of Shame: Why More Shaming May Deter Less (Aug. 24, 2005) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=789244.

143. See *id.* at 2.

144. See *id.*

145. See *id.*

146. See *id.*

147. Astrid Hopfensitz & Ernesto Reuben, *The Importance of Emotions for the Effectiveness of Social Punishment* (Univ. of Amsterdam & Tinbergen Inst., Discussion Paper TI2005-075/1, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=775524.

C. ELIMINATING SHAME FROM THE LAW

As Nussbaum correctly points out, people can misdirect shame at specific groups of people such as homosexuals and individuals with disabilities.¹⁴⁸ However, the possibility that certain members of society may choose to direct shame at those groups does not mean that they necessarily will do so. Being justifiably concerned with and upset about misdirection of shame does not mean that we can purge shame from our legal system even if we so desire.

It is as unlikely that a society will successfully implement a “shame about shame” campaign as it is that a society will successfully implement a “disgust with disgust” program. Nussbaum suggests that “shame is likely to be normatively unreliable in public life, despite its potential for good.”¹⁴⁹ Indeed, she believes “that a liberal society has particular reasons to inhibit shame and to protect its citizens from shaming.”¹⁵⁰ But it will be difficult for a society to limit shame because shame naturally attaches for most noncriminals to most acts which are deemed to be criminal.¹⁵¹ Criminality and shame are psychologically linked for most noncriminals because of social norms against criminality. Society is likely to attach greater stigma to criminal acts than noncriminal acts, such as administrative offenses, civil violations, or regulatory infractions.¹⁵² People will naturally associate different levels of stigma with differences in legal procedures, and in particular, the legally required standards of proof which attach to alternative wrongs and their associated punishments.¹⁵³

IV. POSITIVE ROLES FOR (POSITIVE) EMOTIONS
IN (LEGAL) DECISION MAKING

Emotions can play positive roles in the law. There is a large body of research about how to reliably distinguish be-

148. See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006).

149. HIDING FROM HUMANITY, *supra* note 2, at 15.

150. *Id.*

151. See Roberto Galbiati & Nuno Garoupa, Keeping Stigma out of Administrative Law: An Explanation of Consistent Beliefs (July 7, 2005) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=738403.

152. See *id.*

153. See *id.*

tween positive and negative affective states.¹⁵⁴ Examples of negative emotions are disgust and shame. Examples of positive emotions include awe¹⁵⁵ or elevation.¹⁵⁶

A. POSITIVE EMOTIONS

Positive psychology,¹⁵⁷ a recent brainchild of Professor Martin E.P. Seligman,¹⁵⁸ focuses on positive emotions in general and on human strengths and virtues in particular,¹⁵⁹ instead of the absence of diseases and illnesses. A robust finding of positive psychology is that positive emotions improve aspects of decision making generally¹⁶⁰ and have an especially pronounced effect on complex decisions.¹⁶¹ A few legal scholars

154. See DAVID WATSON, *MOOD AND TEMPERAMENT* (2000) (providing a comprehensive review and synthesis of this research and clinical literature).

155. See generally Dacher Keltner & Jonathan Haidt, *Approaching Awe, a Moral, Spiritual, and Aesthetic Emotion*, 17 *COGNITION & EMOTION* 297 (2003) (presenting a summary of awe research and a conceptual approach to awe).

156. Jonathan Haidt, *The Positive Emotion of Elevation*, *PREVENTION & TREATMENT*, Mar. 7, 2000, <http://content.apa.org/journals/pre/3/1/3c.html>.

157. See, e.g., Shelly L. Gable & Jonathan Haidt, *What (and Why) Is Positive Psychology?*, 9 *REV. GEN. PSYCHOL.* 103 (2005); Martin E.P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 *AM. PSYCHOLOGIST* 5 (2000).

158. See generally MARTIN E.P. SELIGMAN, *AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT* (2002) (describing the positive psychology movement and its practical application).

159. See, e.g., ALAN CARR, *POSITIVE PSYCHOLOGY: THE SCIENCE OF HAPPINESS AND HUMAN STRENGTHS* (2004); *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* (Christopher Peterson & Martin E.P. Seligman eds., 2004).

160. See Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions*, 56 *AM. PSYCHOLOGIST* 218, 221 (2001); Barbara L. Fredrickson, *What Good Are Positive Emotions?*, 2 *REV. GEN. PSYCHOL.* 300, 308–11 (1998); Barbara L. Fredrickson et al., *What Good Are Positive Emotions in Crises?: A Prospective Study of Resilience and Emotions Following the Terrorist Attacks on the United States on September 11th, 2001*, 84 *J. PERSONALITY & SOC. PSYCHOL.* 365, 366 (2003); Barbara L. Fredrickson, *Cultivating Positive Emotions to Optimize Health and Well-Being*, *PREVENTION & TREATMENT*, Mar. 7, 2000, <http://content.apa.org/journals/pre/3/1/1a.html>; Sonja Lyubomirsky, *On Studying Positive Emotions*, *PREVENTION & TREATMENT*, Mar. 7, 2000, <http://content.apa.org/journals/pre/3/1/5c.html>.

161. See Alice M. Isen, *An Influence of Positive Affect on Decision Making in Complex Situations: Theoretical Issues with Practical Implications*, 11 *J. CONSUMER PSYCHOL.* 75, 78–80 (2001); Alice M. Isen, *Positive Affect and Decision Making*, in *HANDBOOK OF EMOTIONS* 417, 426–27 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000); Alice M. Isen et al., *The Influence of Positive Affect on Clinical Problem Solving*, 11 *MED. DECISION MAKING*

have analyzed the roles that positive emotions such as empathy and sympathy play in law.¹⁶²

Positive psychology addresses what makes a happy and fulfilling life from a number of perspectives.¹⁶³ There is evidence from neuroscientific experiments,¹⁶⁴ positive psychology,¹⁶⁵ and psychological research,¹⁶⁶ that certain Buddhist meditative practices foster well-being. Recent experimental research focuses on interventions and techniques to increase and sustain individual happiness.¹⁶⁷ For instance, several measures of psychological and physical well-being increased markedly in two weeks for randomly assigned subjects who kept daily diaries of events they were grateful for, in comparison with randomly assigned individuals who kept diaries of hassles, neutral life events, or social comparison.¹⁶⁸ Other recent empirical research examines the health benefits derived from experiencing positive emotions.¹⁶⁹

An example of the implications that positive psychology has for lawyers comes from an article coauthored by Professor Seligman, which suggests three main reasons for lawyers' unhappiness: pessimism, high-pressure job environments with

221, 221–22 (1991).

162. See, e.g., Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863 (1988).

163. See generally WILLIAM C. COMPTON, *INTRODUCTION TO POSITIVE PSYCHOLOGY* (2005) (providing an overview of positive psychology and the role of emotions).

164. See, e.g., Marcia Barinaga, *Buddhism and Neuroscience: Studying the Well-Trained Mind*, 302 SCIENCE 44, 45–46 (2003); Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMATIC MED. 564, 569 (2003).

165. See, e.g., MARVIN LEVINE, *THE POSITIVE PSYCHOLOGY OF BUDDHISM AND YOGA: PATHS TO A MATURE HAPPINESS* (2000).

166. See, e.g., Paul Ekman et al., *Buddhist and Psychological Perspectives on Emotions and Well-Being*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 59, 60 (2005).

167. See, e.g., Sonja Lyubomirsky et al., *Pursuing Happiness: The Architecture of Sustainable Change*, 9 REV. GEN. PSYCHOL. 111 (2005).

168. See Robert A. Emmons & Michael E. McCullough, *Counting Blessings Versus Burdens: An Experimental Investigation of Gratitude and Subjective Well-Being in Daily Life*, 84 J. PERSONALITY & SOC. PSYCHOL. 377, 377, 386 (2003).

169. See, e.g., Andrew Steptoe et al., *Positive Affect and Health-Related Neuroendocrine, Cardiovascular, and Inflammatory Processes*, 102 PROC. NAT'L ACAD. SCI. U.S. 6508 (2005).

low decision latitude, and adversarial litigation being zero-sum.¹⁷⁰ Seligman proposes a number of possible ways to increase lawyers' happiness, including changing law-firm culture,¹⁷¹ engaging in "cooperative" litigation,¹⁷² and reforming legal education.¹⁷³

Another example of the way positive emotions work to shape law and public policy can be found in the economic reconsideration of paternalism, which is informed by empirical and experimental findings about happiness from neuroscience¹⁷⁴ and psychology.¹⁷⁵ Final examples of positive emotions shaping public policy are a consideration of positive emotions in populations,¹⁷⁶ and a set of new proposals and empirical methods to measure societal happiness.¹⁷⁷ King Jigme Singye Wangchuck, who by all accounts is an enlightened monarch of the Himalayan kingdom of Bhutan, decreed his country's official goal to be the pursuit of its gross national happiness, instead of gross national product.¹⁷⁸ Governments can utilize these self-reported measures of subjective well-being to evaluate how public policies affect social well-being.¹⁷⁹ Such survey data can

170. Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 39–42, 46–49 (2001); see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888–906 (1999).

171. Seligman et al., *supra* note 170, at 43–46.

172. *Id.* at 50–51.

173. *Id.* at 51–53.

174. See Colin F. Camerer, *Wanting, Liking, and Learning: Neuroscience and Paternalism*, 73 U. CHI. L. REV. (forthcoming Winter 2006) (proposing that mild forms of paternalism are justified if there is a gap between what people want and what people like).

175. See Peter H. Huang, *Happiness and Law: Hedonics, Positive Psychology, Affective Neuroscience and Paternalism* (Feb. 2006) (unpublished manuscript, on file with author).

176. See Felicia A. Huppert, *Positive Mental Health in Individuals and Populations*, in THE SCIENCE OF WELL-BEING 307 (Felicia A. Huppert et al. eds., 2005).

177. See Ed Diener, *Subjective Well-Being: The Science of Happiness and a Proposal for a National Index*, 55 AM. PSYCHOLOGIST 34 (2000); Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 SCIENCE 1776, 1777 tbl.1, 1779 fig.3 (2004); Daniel Kahneman et al., *Toward National Well-Being Accounts*, 94 AM. ECON. REV. 429 (2004).

178. Lynn Sherr, *Gross National Happiness?: Himalayan Kingdom of Bhutan Favors Contentment Over Commerce*, ABC NEWS, Nov. 11, 2005, <http://abcnews.go.com/2020/International/story?id=1296605>.

179. Daniel Kahneman & Robert Sugden, *Experienced Utility as a Standard of Policy Evaluation*, 32 ENVTL. & RESOURCE ECON. 161, 161 (2005).

also help regulators analyze the affective or emotional impacts of proposed rules.¹⁸⁰

B. NEGATIVE EMOTIONS

One can view the interplay between emotions and law through a lens or perspective different from that of positive psychology—namely through an analysis of how negative, unpleasant emotions can play beneficial roles in legal decision making. As Nussbaum observes, emotions are primary sources of meaning for most people.¹⁸¹ Nussbaum points out that some people would argue “that the law is based on reason and not passion—a view recently imputed to Aristotle in the fictional Harvard Law School classroom in the movie *Legally Blond*.”¹⁸² We feel it is sensible for people to prefer a legal system that takes their emotional sources of meaning into account. Thus, although we agree with Nussbaum that negative emotions such as disgust might easily be abused, we believe that many people would perceive a system of law that ignores disgust as being inefficient.

In a worst case scenario, in which a society provides no legitimate outlet through which people can channel their feelings of disgust, people may turn to vigilantism to punish behaviors or identities that they find to be reprehensible. What is needed—perhaps even more than a legal system that eliminates the negative role of disgust or other emotions—is a legal system that takes seriously the emotions of persons and groups, and explicitly considers the contexts in which any emotion could be considered relevant or beneficial in contributing information to a legal decision. Law does not need to eliminate every role of disgust within itself (were this possible), nor does it need to try to inculcate in a population an avoidance of disgust. Law could play the positive role of delineating the types of disgust that are relevant to the law by distinguishing between that disgust that is related to punishable wrongdoing, and those essentially mistaken, legally irrelevant targets of disgust.

180. Peter H. Huang, Beyond Cost-Benefit Analysis in Financial Regulation: Process Concerns and Emotional Impact Analysis (Feb. 2006) (unpublished manuscript, on file with author), <http://www.sss.ias.edu/publications/papers/econpaper62.pdf>; Peter H. Huang, Happiness and Cost-Benefit Analysis: Evaluating Policy Affect (Feb. 2006) (unpublished manuscript, on file with author).

181. See HIDING FROM HUMANITY, *supra* note 2, at 22, 37.

182. *Id.* at 5.

Ideally the law would have a clear and robust rationale for doing so. In this type of process, a legal system would play a role of protecting minority groups from disgust-related offenses or even disgust-related legal prejudices, without providing others the sense that they have to operate outside the legal system because it never considers their strong feelings to be relevant.

CONCLUSION

Hiding from Humanity provides a provocative and stimulating discussion by a prominent American legal philosopher of her viewpoint as to why disgust and shame can and should play minimal roles in law. However, other scholars and their disciplines also have much to contribute to a more complete and nuanced understanding of these two emotions and their normative legal status. We believe that disgust and shame are likely to remain active for some time as part of our legal system and its legal analysis. As Nussbaum states, her vision “in effect, is something that I do not expect we shall ever fully achieve: a society that acknowledges its own humanity, and neither hides us from it nor it from us.”¹⁸³ It is uncertain if we can ever achieve such a utopian society. In the meantime, ours is an exciting time for scholars of law and emotions because there remain many unanswered conceptual, empirical, experimental, and theoretical questions about how to incorporate affect, emotions, and moods into legal analysis, policy, practice, and theory.

183. *Id.* at 17.