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INTRODUCTION

Having forgotten to pay the water bill, and parched by noontime summer heat, a young man seizes the only source of refreshment to be found in his refrigerator: an old carton of milk. Opening the carton unleashes an unpleasant odor. Fighting the cue to retch, he notes the milk’s expiration date was weeks ago. He nevertheless concludes any risk of drinking it is outweighed by the urgency of his thirst. With steely resolve, the bachelor furrows his brow and lifts the flimsy box to his lips, draining its viscous contents in an heroic quaff. After an eerie (but brief) gastrointestinal calm, he begins to vomit uncontrollably. Later that day, he is hospitalized.

Meanwhile, a nursing home patient living in a persistent, near-vegetative mental state has been raped. The defendant has refused a plea bargain, and his criminal trial will soon be underway. The following colloquy took place during voir dire between the prosecutor and Juror Five:

PROSECUTOR: Is there any reason you cannot sit as an impartial juror in this case, in which the defendant is charged with first degree rape?
JUROR: No.
PROSECUTOR: Do you understand that the State must show beyond a reasonable doubt that the defendant is guilty as charged?
JUROR: Yes.
PROSECUTOR: Do you approve of people who have intercourse with animals?
JUROR: No.
PROSECUTOR: How about sex with human corpses?
JUROR: Well, that’s different. Animals cannot consent to
the act, and that’s what makes it wrong. But a dead body is just a pile of molecules, so sex with a corpse doesn’t hurt anybody.

Hearing this, the prosecutor sighed with disgust, and notified the trial judge that he would be exercising a peremptory challenge, striking Juror Five.

If Juror Five is a minority, an appellate judge may be faced with the task of reviewing the peremptory challenge as racially discriminatory and the prosecutor’s line of questioning as a mere pretext for a race-neutral reason to strike the juror. She might ultimately consider whether the forces influencing the prosecutor’s response to Juror Five are the same forces at work in the bachelor’s mind and senses, and whether they should have been allowed to affect the legal outcome. Likewise, scholars have asked whether these forces may properly inform the law of a society committed to a liberal respect for pluralism. While such “forces” arguably are more complex than any single label can convey, I shall call them disgust. May disgust, then, function on some level as a normative influence operating to shield persons from what is revolting, and even delimiting a perimeter beyond which otherwise harmless, self-regarding conduct becomes legally regulable?

Professor Martha Craven Nussbaum answers these questions in the negative. In *Hiding from Humanity* and subsequent pronouncements on the topic, she has offered a meandering commentary against the legal relevance of disgust, her arguments hung loosely upon a psychoanalytical and empirical claim that disgust fuels hierarchical stigma and discrimination in the law and thereby dehumanizes us. Writing prior to Nussbaum, Dr. Leon

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Kass defended something akin to disgust, maintaining that our “repugnance” response is undergirded by a wisdom that cautions against even incremental encroachments on our unique dignity as humans. Kass’s disapproval of inroads on our “given human nature” have earned him broad criticism.3

In Part I of this Article, I probe both Nussbaum’s and Kass’s positions regarding the nature of disgust, observing how these arguments fit with their authors’ respective notions of respect for persons. I delve more critically into Nussbaum’s arguments in Part II, identifying key inconsistencies and suggesting that much of her “original” analysis is dangerously irrelevant, distracting us from its real-world implications. Having accounted for these analyses, I suggest in Part III that if law cannot be based on disgust, society may find itself with no way to combat practices which have dehumanizing effects.

In essence, I argue that respect for human dignity may be honored in our system of laws by reference to the lesson learned

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3 Ibid (emphasis added); see, e.g., Posting of Damon Linker to New Republic Blog, http://blogs.tnr.com/tnr/blogs/linker/archive/2009/04/02/x.aspx (April 2, 2009, 22:18 EST) (“[A]s any number of people have argued against Kass, the ‘yuck’ response is an extremely weak basis on which to build an argument about [human] nature because the things that disgust human beings change so much over time, and because such responses are so often wrapped up with ignorance and prejudice.”). Nussbaum herself paints Kass’s argument as “nothing more than superficial rationalization” and a “startling and novel theological position” that is unlikely “to persuade someone who does not accept that particular religious teleology.” Nussbaum, supra note 1, at 81, 82. Given this anti-Kassian current, my contentions in this Article are directed at Nussbaum’s account, which—in spite of what I shall identify as its inconsistencies and dubious relevance—has been received rather warmly. See, e.g., Stefanie A. Lindquist, Book Review, 14 Law & Politics Book Rev. 708, 710 (2004) (hailing “Nussbaum’s exceptionally thorough evaluation of shame, disgust and the law” as “a remarkably wide ranging and nuanced treatise”); John Wilson, “You Stink, Therefore I Am: Philosophers Ponder the Meaning of Disgust,” Boston Globe, May 2, 2004, http://www.boston.com/news/globe/ideas/articles/2004/05/02/you_stink_therefore_i_am (describing the anti-disgust arguments advanced by Nussbaum as “characteristically lucid”).

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from the bachelor's nausea and similar reactions of disgust or repugnance. The political result envisioned by Nussbaum would actually frustrate her own stated objectives, precipitating human indignity and (inevitably) promoting mutual avoidance. Rather than mandating a state of sordid separatism and nominal equality, a Kassian appreciation for disgust would provide us with extrapital reasons to cherish human dignity as well as incentives to cultivate mutual respect and constructive social compassion.

I. A PRIMITIVE SHRINKING—OR WISDOM?

I now address the Nussbaumian and Kassian presentations of disgust. My objective is not to peel the entire phenomenological onion surrounding this emotion. Rather, I will identify and then

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4 Compare William O. Krohn & Samuel J. Crumbine, Graded Lessons in Physiology and Hygiene 42 (1919) (warning, even some fifty years after the advent of pasteurization, that “[i]t is unsafe to drink milk which is the least bit sour”), with Marlene Zuk, Riddled with Life: Friendly Worms, Ladybug Sex, and the Parasites that Make Us Who We Are 229 (2007) (reporting an increase in women’s perception of what is disgusting during pregnancy, measuring their disgust-based responses to “potentially disgusting situations, like being about to drink spoiled milk”).

5 Cf. Nussbaum, supra note 1, at 105.

6 For some of that discussion, see William Ian Miller, The Anatomy of Disgust (1997), upon whom Nussbaum has relied heavily in making her psychological and social-stigma arguments, though she finds fault with some of his conclusions. Cf. Michael Hauskeller, “Moral Disgust,” 13 Ethical Perspectives 571 (2006) (investigating our responses to various outrages, and arguing that there is such a thing as “moral” disgust distinct from the nausea-type disgust, and that the former can be relied upon); Robert Weisberg, “Norms and Criminal Law, and the Norms of Criminal Law Scholarship.” 93 J. Crim. L. & Criminology 467, 575–87 (2003) (outlining responses to Miller’s book made by Dan M. Kahan in “The Anatomy of Disgust in Criminal Law,” 96 Mich. L. Rev. 1621 (1998), in which he argues that even the liberal cause advances by utilizing “good” disgust against those who promote illiberal values—an argument distinct from my own); Kathryn Abrams, Colloquium, “‘Fighting Fire with Fire’: Rethinking the role of Disgust in Hate Crimes,” 90 Cal. L. Rev. 1423 (2002) (criticizing Kahan's arguments in terms eerily similar to those used by Nussbaum—without reference—roughly two years later). But it is beyond the purposes of this Article to regurgitate the vast body of scholarship on disgust. What is important here is to understand the portrayal of disgust in the competing (yet in some senses compatible) accounts of Kass and Nussbaum, and then to see (more particularly) that Nussbaum's respect for equal dignity is not well-served by her arguments.
work from Nussbaum's description of disgust as an "emotion." And because both Nussbaum and Kass have hung their hats (in different ways) on notions of human dignity, this discussion will identify their competing conceptions of what such dignity actually is, and of what it means to be human.

Nussbaum, claiming the auspices of political liberalism, describes mankind as simply a human animal, whose dignity stems from his capacities and whose disgust is a panicked response to reminders of his own animality, leading him to oppress others. Kass appears to recognize that simply being human is hierarchic, and that disgust plays a part in conforming man to the image of God. So against what is essentially Nussbaum's obeisance to animality as chief among "psychological foundations of liberalism," I will describe elements of Kass's discourse on the wisdom of repugnance and on his conception of human nature.

7 See Nussbaum, supra note 1, at 36, 70. Again, I decline here to rehash the multitude of observations on disgust offered by the "cognitive sciences" not because it is inconvenient to do so, but because those observations are not relevant. For is not some faulty conclusion regarding the "cognitive content" of disgust (as Nussbaum describes it) that fuels my objections to her argument qua argument, but rather, the pockmarked nature of her attack on this universal emotion's role in law and liberty—an attack hostile to Nussbaum's own goals, as I will argue in Part III.


9 See Charlie Rose: A Conversation About Bioethics with Leon R. Kass (PBS television broadcast July 1, 2003), available at http://www.charlierose.com/view/interview/1904 ("There's nothing that I know as a scientist that requires me not to follow and somehow trust [the Genesis] account for what that account has to show us; [and] the most important thing in that is that 'being' is somehow hierarchic; that man is higher than the son; that man is somehow the most Godlike of beings—because he somehow participates in freedom and reason and concern and judgment, like the story says the Creator does.").

10 Nussbaum, supra note 1, at 16.
A. Nussbaum: Disgust as a Stigmatizing and Irrational Shrinking from Contamination

Martha Nussbaum devotes much of her discussion in *Hiding from Humanity* to “evaluat[ing] people’s emotions and judg[ing] that some are based on a more reasonable appraisal of important goods than others.”11 One key facet of her case against disgust is an argument that the “evaluative beliefs” underlying it are “irrational or unreasonable,” and that therefore it should be rejected as a basis for law because it is “groundless, based on . . . bad thinking.”12 So Nussbaum first attempts to establish that disgust is “problematic in principal.”13 In the process, she argues that disgust is problematic in practice.14

In developing her account of the evaluative beliefs inherent in disgust, Nussbaum observes that “appeals to emotion are prominent in the law” (presumably, American law).15 Some of these appeals have been held essential to justice, like those made to the compassion of jurors during the penalty phase in a capital case.16 Sometimes even the emotional response of the criminal defendant himself—such as his anger upon learning of the gross molestation of his child—may reduce his act of murder to manslaughter.17 These emotions are recognized as having been “reasonable” under the circumstances,

11 Ibid. at 56; see also ibid. at 34 (“[A]ppraisals of evaluative beliefs are central to the roles played by emotion in the law.”).
12 Ibid. at 33 (internal quotation marks omitted).
13 Ibid. at 107 (emphasis added).
14 E.g., ibid. at 122; See also Wilson, supra note 3 (observing that “[Nussbaum] wants to draw attention to the way in which disgust has often gone hand-in-hand with prejudice,” and stating that “[i]n this connection her argument has an immediate practical application to the law”). Ultimately, however, the relationship between Nussbaum’s principle and practical emphases is not so simple as this bifurcated description would suggest.
15 Nussbaum, supra note 1, at 21.
16 See ibid. at 69. North Carolina’s former death penalty statute, for example, was held unconstitutional because it did not allow defendants to “appeal to the compassion of the jury” by presenting their life story during sentencing. Ibid. (discussing Woodson v. North Carolina 428 U.S. 280, 303 (1976)).
17 See ibid. at 102.
though not necessarily “rational.” Nussbaum points out that, generally speaking, giving emotions a place in law is in keeping with her view of political liberalism, which resembles that of John Rawls. Anger, for instance, can be explained without reference to any particular religious or ontological view that falls outside the overlapping social consensus. She has since explained, “If my child has been murdered and I am angry at that, I can persuade you that you should share those reasons; if you do, you will come to share my outrage.”

On the other hand, Nussbaum posits that “certain emotions are especially likely to be repositories of . . . unreasonableness.” Such emotions reflect views that are in conflict with the social consensus because they are not “based upon reasons that can be publicly shared.” Surely in certain cases, even anger might not have been a reasonable response, and in those cases it would not justify mitigation. But Nussbaum maintains that there are certain whole categories of emotions—not just instances of the response they produce—that may never be reasonable, regardless of the facts or beliefs by which they are triggered. Because of this, she is skeptical of legal practices that are “too deferential to prevailing norms in emotion.” She asks, “What norms of reasonableness in emotion are the right ones to build into the law, both expressing and nourishing appropriate emotions in its citizens?” By “appropriate,” of course, she means accordant with political liberal values.

18 See ibid. at 33, 68
19 See ibid. at 57 (confronting the “imagined liberal objection” to her view of “the role of emotions in the law”).
20 See ibid. at 153.
21 See ibid. at 61 (agreeing with Rawls’ conception of core liberal values).
22 Sanchez, supra note 8 (emphasis added).
23 Hiding from Humanity, supra note 1, at 36 (emphasis added).
24 Ibid. at 75 (distinguishing “indignation” as based on reasons that are publicly shared).
25 Ibid. at 69–70.
26 Ibid. at 69.
27 Ibid. at 36–37.
28 Ibid. at 16 (emphasis added).
29 Cf. Sanchez, supra note 8 (“[A]nyone who cherishes the key democratic values of
Her answer here involves an evaluation of the cognitions these emotions embody and a determination of "how reliable they are likely to be given their specific subject matter and their typical process of formation."30 "[T]he specific cognitive content of disgust," she argues, "makes it of dubious reliability . . . , especially in the life of the law."31

Rejecting the idea of emotions being "unthinking forces,"32 Nussbaum looks to psychological research in unearthing these cognitions.33 According to psychoanalytic psychologists, the primary objects of our disgust include feces, decaying corpses, rotting foods, and the like.34 Nussbaum has characterized our disgust for these nauseating substances as a useful heuristic that "very likely played a valuable role in our evolutionary heritage," steering us away from real danger.35 (Recall our example of the spoiled milk.)

equality and liberty should be deeply suspicious of the appeal to [certain] emotions in the context of law and public policy."

30 ibid at 74 (emphasis added).
31 Ibid. But as we will see, the purpose for which law might errantly "rely" on an emotion is not entirely clear. One reviewer explained that "[b]ecause disgust may often be linked to . . . ‘group-based thinking’ through the emotion’s social construction, Nussbaum finds it particularly unreliable as a guide for the legal regulation of human action." Lindquist, supra note 3, at 709. Yet as I shall point out infra, simply calling disgust an unreliable guide for regulating behavior does not explain anything, without more. At the heart of Nussbaum’s "unreliability attack" is her poorly vetted conviction that disgust makes for laws which run afoul of Mill’s harm principle. If she is justifying her psychologically informed conclusion about disgust’s unreliability based on appeal to the harm principle, of what freestanding value is her argument?
32 Nussbaum, supra note 1, at 24–28; See also ibid. at 37 ("[E]motions are not mindless surges of affect, but, instead, intelligent responses that are attuned both to events in the world and to the person’s important values and goals.").
33 See ibid. at 87–89.
34 See ibid. at 83, 97.
35 See ibid. at 121; Sanchez, supra note 8 ("Even today, when we have many [other] ways of finding out about danger, the sense of disgust is a useful heuristic."); "On Point: Disgust, Shame and the Law" (NPR broadcast May 11, 2004) [hereinafter NPR Interview], available at http://www.onpointradio.org/shows/2004/05/disgust-shame-and-the-law (interviewing Martha Craven Nussbaum and clarifying Hiding from Humanity’s account of disgust). Accord Alexandra W. Logue, The Psychology of Eating and Drinking 47 (3d ed. 2004) (stating that “[o]ur bodies have evolved in such a way that any substance must pass several tests before we judge it acceptable and ingest it” and that “[t]he senses of taste and smell
grounds, Nussbaum approves certain nuisance laws as properly
cognizant of a disgust reaction to such primary objects as noxious
factory pollutants and hog-farm odors.36

But even the heuristic form of disgust appears suspect, says
Nussbaum, because we continue to be repulsed by gross-seeming
things even if we know with certainty that they are not harmful.37
Indeed, Nussbaum’s preferred mantra is that disgust expresses our
“refusal to be too much mixed up with something that of course
really is a part of us—our animality and decay.”38 She concludes that
“disgust embodies a shrinking from contamination that is associated
with the human desire to be nonanimal.”39 This shrinking from
contamination, says Nussbaum, is a “projection-reaction” in which
we project our disgust for the primary objects onto other objects
when they likewise remind us of our animal propensity to become

The problem with these projective disgust reactions to
Nussbaum is that they “are irrational... both because they embody
an aspiration to be a kind of being that one is not, and because, in
the process of pursuing that aspiration, [disgusted persons] target
others for gross harms.”40 In support of this, Nussbaum cites as
examples various practices which she claims are motivated by
“our interest in policing the boundary between ourselves and
nonhuman animals”—presumably, projection-reactions to “our own

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36 See Nussbaum, supra note 1, at 158-60.
37 See ibid. at 88.
38 NPR Interview, supra note 35.
39 Nussbaum, supra note 1, at 74 (emphasis added); see also Sanchez, supra note 8
(explaining that the projective—as opposed to heuristic—form of disgust is that “in which
we deem certain groups of people disgusting and assimilate them to feces, corpses, and
disgusting animals”).
40 Nussbaum, supra note 1, at 75; see also NPR Interview, supra note 35.
41 Nussbaum, supra note 1, at 74 (emphasis added). Note also that Nussbaum is quite
careful to explain that she draws this conclusion—namely, that disgust is irrational—only after
having developed her account of the cognitions the emotion embodies. See ibid. Emotions
can only be evaluated based on the “appraisals” they contain. Ibid. at 33–34, 37.
These include instances of discrimination against the mentally and physically handicapped, persecution of Jews, and “American discrimination against homosexuals.”

With respect to the latter, Nussbaum gleefully reports that “campaign literature on behalf of Colorado’s Amendment Two (the law that denied local communities the right to make non-discrimination laws for sexual orientation, overturned in Romer v. Evans) said that gay men eat feces and drink raw blood.” With respect to the Jews’ plight, Nussbaum cites anti-Semitic propaganda in Europe and its portrayal of Jews as “disgustingly soft and porous” and “sticky, womanlike in [their] oozy sliminess.” Finally, she also characterizes discrimination against the mentally and physically handicapped as a projection-reaction, suggesting that encountering someone with mental infirmity, or seeing “a person with a stump instead of a limb,” reminds us of our vulnerable, mortal character.

Common in these examples is a result Nussbaum does not like: the treatment of groups or people as unequal, which runs contrary to the liberal ideals of “human dignity and the equal worth of persons.” For “[b]y classifying a person as a cripple, a mongoloid idiot, [or] a homosexual, we deny both the humanity we share with the person and the person’s individuality.” Accordingly, Nussbaum declares that disgust can be “antithetical to the values of a liberal society” because it manifests in “the subordination of both individuals and groups based on features of their way of life.” For Nussbaum, “the desired condition is one of interdependence, rather than control

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42 See ibid. at 89.
44 See Nussbaum, supra note 1, at 81–82.
45 Sanchez, supra note 8.
46 Ibid.; see also Nussbaum, supra note 1, at 151, 256, 264–66.
47 Ibid. at 108.
48 Ibid. at 93.
49 See ibid. at 338.
50 Ibid. at 221 (internal quotation marks omitted).
51 Ibid. at 321.
and self-sufficiency,"52 and projective disgust is fundamentally an attempt to control what comes near us.53

And so, attributing these “grossevils” to the social implementation of disgust (the interwoven “practical” component of her argument to which I alluded earlier54), Nussbaum concludes that this problematic emotion should be made irrelevant, legally speaking, regardless of the context.55 Whether mitigating or aggravating a crime, informing the contours of pornography and obscenity laws, or making a practice illegal, “disgust is an utter red herring, . . . occluding the salient issues of harm;” and we should distrust it “as a device we employ to deny our own capacities for evil.”56 Nussbaum has even rejected what she calls the “moralized” form of disgust (where society can share the reasons for calling certain conduct disgusting), saying that “it is frequently a screen for the more primitive kind of disgust” and, even when it is not, it is “ultimately an unproductive social attitude.”57 She distinguishes moral disgust, of course, from indignation.58 And in difficult cases such as bestiality and necrophilia (as well as others that I shall address), Nussbaum maintains that disgust is not necessary or useful as a guide in regulating the questionable conduct, because that conduct is better judged on the basis of the harm it causes.59 According to her,

[w]here law is concerned, it is especially important that a pluralistic democratic society protect itself against [disgust-based] projection-reactions, which have been

53 See NPR Interview, supra note 35.
54 Recall text accompanying supra note 14.
55 See Nussbaum, supra note 1, at 75.
56 Ibid. at 75
57 Sanchez supra note 8; see also Nussbaum, supra note 1, at 103–06.
58 See ibid.
59 See Lindquist, supra note 3, at 709 (reading Nussbaum as arguing that even “where disgust may certainly arise over . . . father-daughter incest, eating human flesh, or having sex with animals, Mill’s principle against causing harm to others already exists to justify the legal prohibition of such acts”).
at the root of gross evils throughout history, prominently including misogyny, anti-Semitism, and loathing of homosexuals. Thus while the law may rightly admit the relevance of indignation as a moral response appropriate to good citizens and based upon reasons that can be publicly shared, it will do well to cast disgust onto the garbage heap where it would like to cast so many of us.\textsuperscript{60}

But what is not clear is whether disgust would cast \textit{humanity} onto this "garbage heap," or whether it would simply dispose of certain aspects and accoutrements of human existence which rightfully \textit{belong} in the wastebasket. Indeed, I argue—along with Kass, in a sense—that disgust may serve a role in cleansing humanity of trash that can reasonably be discarded, even in a pluralistic society. Stripping the law of its ability to recognize disgust allows societal garbage to pile up to such an extent that human dignity itself is unrecognizably besmirched, and the human experience waylaid by the ever-worsening stench of commonality issuing from the exhaust pipe of individual liberty. But I am getting ahead of myself.

Before moving on, it is important to understand the basics of Nussbaum's thoughts on the nature of human beings and the meaning of human dignity. As one reviewer correctly observed, "Nussbaum's argument is not simply about the law, but about a whole conception of human society and what it means to be human."\textsuperscript{61} \textit{Hiding from Humanity} makes unceasing reference to "human dignity," yet it gives the term no definition. One writer has described Nussbaum's view of dignity as a sort of relativism "focus[ing] on developed quality-of-life capabilities without an acknowledgment of . . . the unique dignity of the human being."\textsuperscript{62} This characterization, I believe, is quite accurate.

\textsuperscript{60} Nussbaum, supra note 1, at 75.

\textsuperscript{61} Wilson, supra note 3.

"[F]ull and equal human dignity," says Nussbaum in an essay commissioned by the President's Council on Bioethics, "is possessed by [anyone] who has . . . basic capabilities for major human life-activities." In her view, the word "human" throughout that sentence is interchangeable with any other species, because dignity amounts to an animal's capacity to engage in its characteristic behaviors. Dignity is simply grounded "in a varied set of capacities that are all elements in the life of a type of animal being." This conception, she freely admits, "would not accord equal human dignity to a person in a persistent vegetative state, or an anencephalic child, since it would appear that there is no striving there, no reaching out for functioning." Nussbaum thus defines any species—human or otherwise—according to its developed capabilities, presenting the dignity of a human (for example) as an acquired quality, not an inherited one.

In Nussbaum's view, respect for human dignity simply means "creating conditions favorable for development and choice." For this reason, it is not a violation of human dignity to pull the plug on a vegetative human being—one who cannot choose or develop his capabilities. Yet she believes her conception of dignity will nevertheless militate against social hierarchies which "inhibit the characteristic functioning of the dignified human being." We will see that, in contrast, Kass would seem to recognize "being" itself as innately hierarchic.

Nussbaum purports "to recognize that the world contains many distinct varieties of dignity, some human and some belonging to other

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64 See ibid. at 357–59.
65 Ibid. at 365.
66 Ibid. at 363.
67 See Schaub, supra note 62, at 385.
68 Nussbaum 2008, supra note 63, at 359.
69 Ibid.
70 See language quoted supra note 9.
species."71 But her discussion of emotions in *Hiding from Humanity* suggests that she views human beings as just another species:

> [M]ost contemporary researchers, and many in the ancient world, . . . hold that some *nonhuman animals* have emotions, at least some types. . . . Many animals probably have [fear, anger, grief, and compassion]. . . . There is compelling evidence that the ascription of a wide range of emotions is essential to explaining animal behavior.72

When it comes to disgust, Nussbaum does *not* see the emotion as a uniquely “human” response at all. She allows for no metaphysical understanding of the human being, or of human dignity (citing the demands of pluralism).73 Thus, my dignity as a human is merely something possessed by any animal: an existence characterized by the pursuits and capabilities of my species. Aside from creating laws which give me a variety of political entitlements, respecting my dignity means simply letting me do my thing—however disgusting that may be—and maintaining a perceived pluralistic equilibrium.

**B. Kass: Disgust as a Defender of Human Dignity**

Against Nussbaum’s picture of disgust, and of humanity and its dignity, we now compare (more briefly) the account of these matters given by bioethicist and University of Chicago professor Dr. Leon Kass. Some seven years before Nussbaum wrote *Hiding from Humanity*, Kass wrote an essay called *The Wisdom of Repugnance*, which focused on the ethics of human cloning.74 Yet his comments in this brief work have been read and applied in a more general sense, and are among several “pro-disgust” positions Nussbaum attempts to discredit.75

71 Nussbaum 2008, supra note 63, at 365.
72 Nussbaum, supra note 1, at 25 (emphasis added).
73 Nussbaum 2008, supra note 63, at 352.
74 Kass, supra note 2.
75 See, e.g., Nussbaum, supra note 1, at 79–82.
While he does not use the term "disgust" in his paper, Kass uses similar words to convey emotions involving some of the same "cognitions" Nussbaum attributes to disgust. These words include: repulsion, repugnance, revulsion, and even horror.76 Besides human cloning, the hypotheticals Kass lists as capable of evoking such emotions include: "father-daughter incest (even with consent), or having sex with animals, or mutilating a corpse, or eating human flesh, or ... raping or murdering another human being . . . ."77 Kass thinks it rather impossible to "give an argument fully adequate to the horror [of these things]."78 He explains:

Revulsion is not an argument; and some of yesterday's repugnances are today calmly accepted—though, one must add, not always for the better. In crucial cases, however, repugnance is the emotional expression of deep wisdom, beyond reason's power fully to articulate it.79

A given disgust response, then, is largely inarticulable—"one of those instances about which the heart has its reasons that reason cannot entirely know."80 But Kass does not see this as weakening his case—for "[w]ould anybody's failure to give full rational justification for his or her revulsion at these [vile] practices make that revulsion ethically suspect? Not at all."81 It is as it should be that "we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear."82

Like Nussbaum, Kass would consider disgust "emotional" in nature; yet unlike her, he would distinguish it from any

76 Kass, supra note 2.
77 Ibid.
78 Ibid. (emphasis added). Note that Nussbaum thinks an adequate argument is possible, as she tries to demonstrate why these behaviors cause harm to a nonconsenting other and can thus be dealt and regulated with under Mill's harm principal (making disgust unnecessary). See Nussbaum, supra note 1, at 80-81. But she is clearly wrong, as I will point out later.
79 Kass, supra note 2.
80 Ibid.
81 Ibid.
82 Ibid.
psychoanalytically deduced series of cognitions. Moreover, disgust according to Kass can—and should—be “moralized” in a way Nussbaum is unwilling to recognize as valid.\(^3\) To him, repugnance it is not fueled by a subconscious fear of becoming more human than we wish to be. Instead, the inverse is true, and the deep wisdom in our disgust warns that we stand to become less human if we do not heed it. Kass’s own words make the point quite well:

Reugnance . . . revolts against the excesses of human willfulness, warning us not to transgress what is unspeakably profound. Indeed, in this age in which everything is held to be permissible so long as it is freely done, in which our given human nature no longer commands respect, in which our bodies are regarded as mere instruments of our autonomous rational wills, repugnance may be the only voice left that speaks up to defend the central core of our humanity.\(^4\)

As it becomes more and more unwise for us to trust human dignity to the vagaries of culture, our repugnance (or disgust) with the world around us may continue to provide a check that brings us unpleasantly to full attention, making us mindful that the exercise of a reckless and glorified autonomy threatens the integrity of our human nature.\(^5\) For a culture—even (or perhaps especially) one proclaiming the political liberal ideas that are sacrosanct to Nussbaum—may increasingly aim to achieve “major alteration, indeed, a major violation, of our given nature.”\(^6\)

We might already stop and say that with a stroke of genius, Kass’s very brief discussion in The Wisdom of Repugnance illuminates one of the key weaknesses in Nussbaum’s attack on disgust in light

\(^3\) See sources cited supra note 57.

\(^4\) Kass, supra note 2 (emphasis added).

\(^5\) See ibid.; cf. Nussbaum, supra note 1, at 82 (“[I]n Kass’s view the culture itself is corrupt, and we turn to disgust precisely because we cannot trust the culture.”).

\(^6\) Kass, supra note 2 (emphasis added) (explaining that cloning of humans would work such an alteration).
of her capabilities-based view of human dignity: if a society can somehow convince itself that a particular group of people does not manifest a “reaching out for functioning” in the way or to the extent society prefers, a political liberalism which hangs its hat on “equal respect for persons” may comfortably treat that group as something less than a “person.” But we need not stop there, as Kass seems to respond directly to Nussbaumian notions of human dignity in a later essay to the President’s Council on Bioethics (of which he was formerly Chairman):

For partisans of the “equal dignity of human being,” . . . the ground of our dignity lies in the humanly specific potentialities of the human species, but this basic dignity is not dignity in full, [and] is not the realized dignity of fine human activity. Questions again arise regarding the dignity of those members of our species who have lost or who have never attained these capacities, as well as those who use them badly or wickedly. The horizontal ground of the egalitarian dignity of human being appears to be shifting in the direction of the vertical scale of being (more and less) actually and actively human.

Here and elsewhere in his essay, Kass rejects what is essentially Nussbaum’s view of the person as “human animal” and as being deserving of equal dignity. Fundamentally, he would distinguish “between the basic dignity of having freedom and the greater dignity of using it well.” It would seem his concern is not so much that her view varies with his in a metaphysical sense (which it does), but that it is insufficient to safeguard full human dignity and true equality.

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87 Nussbaum 2008, supra note 63, at 359.
88 Nussbaum, supra note 1, at 338 (emphasis added) (stating with undue confidence that “[w]e have found fault with disgust . . . simply by thinking about human dignity and the equal worth of persons”).
90 Ibid. at 312.
91 See ibid.; ibid. at 329 (“The fullest dignity of the god-like animal is realized in its
To Kass, “equality can be grounded only in the equal *humanity* of each human being,” not in vague and unsubstantiated proclamations about an unconditional equality of dignity. And this dignity of being *human* is “the dignity of human flourishing, the dignity of living well.”

Because of this view of dignity as flourishing, Kass can candidly observe that “our taboos against incest, bestiality, and cannibalism, as well as our condemnations of prostitution, drug addiction, and self-mutilation—having little to do with defending liberty and equality—all seek to defend human dignity against (voluntary) acts of *self*-degradation.” Nussbaum no doubt views this conception as illiberal and paternalistic. To her, “respecting human dignity requires...permitting adults to make a full range of choices, including *unhealthy* ones.” (Thus, for example, she favors decriminalizing drug use—except in competitive sports, bizarrely enough.) But a respect for only this basic sort of dignity does not support the notion of the “inviolability” of human life which is so central to a political conception aimed to furnish society with important goods.

In an earlier writing, Kass confessed that “[a]lthough the term ‘human dignity’ has a lofty ring, its content is quite difficult to define. . . . Yet all are struggling to reveal that elusive core of our

acknowledgement and celebration of the divine.”).

92 Kass 2008, supra note 89, at 323.
93 Ibid. at 306.
94 Ibid. at 298.
95 See Nussbaum, supra note 1, at 343.
96 Nussbaum 2008, supra note 63, at 372 (emphasis added). I cannot resist quipping here that a Scriptural perspective on Nussbaum’s theses might challenge her “hands-off” brand of respect for persons, assuming paternalism is, in her view, no more suitable for animals than for men: we use “[a] whip for the horse, [and] a bridle for the ass,” so why not use “a rod for the fool’s back”? Proverbs 26:3. Indeed, “[h]e that spareth his rod hateth his son: but he that loveth him chasteneth him betimes.” Proverbs 13:24 (emphasis added). Thus we might say that if Nussbaum really had compassion or love for the prospective members of her political liberal world, she might cease to mistake abandonment of persons for respect for persons.
98 See ibid. at 355.
humanity, those special qualities that make us more than beasts yet less than gods." Human life, after all, "is more to be respected than animal life," because "man is said to be god-like." Kass draws heavily from the Book of Genesis in describing his philosophy of the person in terms of his having been made "in the image of God;" and he finds it important that the Divine "is concerned with the goodness or perfection of things." But humanity did not know what was "good" until it tasted of the tree of the knowledge of good and evil. And tasting of the tree was a decision prompted by this line: "ye shall be as gods." Adam and Eve instead found themselves naked—but they quickly sought to transcend this state as well, sewing fig leaves. The metaphor could continue in more detail, but it suffices to note that, as Kass so methodically observes, it appears that from the very beginning, human beings were defined by "the search for wisdom, and a reaching for the eternal and divine." Kass thus concludes that at the "elusive core of our humanity" may lie the very thing Nussbaum deems an irrational disgust-cognition: aspiration. This transcendental aspiration is "the mother of all aspects of the dignity of being human."

"In sum," says Kass, "the human being has special dignity because he shares in the godlike powers of reason, freedom, judgment, and moral concern, and, as a result, lives a life freighted with moral self-consciousness—a life above and beyond what other animals are capable of." Finally, then, we may make this most crucial observation: for Kass, while disgust is not a primitive hiding from one's humanity, it is easily (to paraphrase Nussbaum)

100 Kass 2008, supra note 89, at 323–24 (emphasis added).
101 Ibid. at 324 (emphasis added).
102 Ibid. at 328.
103 Genesis 3:1–5.
104 Kass 2008, supra note 89, at 328.
105 Compare text accompanying supra note 41, with Kass 2008, supra note 89, at 328.
106 Ibid. at 328.
107 Ibid. at 325.
an embodiment of our aspiration to be something greater or more excellent than what we currently are; a striving to attain God-likeness that, while sometimes resembling a hiding (viz., our fig leaves), is absolutely and undeniably part of our human nature. And because of this, "it is beneath our human dignity to be indifferent" to those things by which we are disgusted.\(^\text{108}\)

II. ADDRESSING ERROR AND IRRELEVANCE

Ultimately, what Nussbaum says about disgust is true of her own position: it is problematic both in principle and in practice. In this part of the discussion, I shall show that the Nussbaumian assault on disgust is defective in its arguments—that is, it is defective in principle—because these arguments either defeat themselves, or they cannot be justified except by reference to Mill’s utilitarian harm principle (which Nussbaum reads as holding that “a necessary condition of the legal restriction of conduct is that it be harmful to nonconsenting others”).\(^\text{109}\)

As we have seen, Nussbaum provides essentially two objections to the role of disgust in the law: (1) it is “irrational,” and (2) it has a tendency to construct social hierarchies. The first of these objections is both flawed and inconsistent with Nussbaum’s own analysis, and is made largely irrelevant, in any event, by its dependence on

\(^{108}\) Ibid. at 298 (warning that “[a]s we become more and more immersed in a world of biotechnology, we increasingly sense that we neglect human dignity at our peril, especially in light of gathering powers to intervene in human bodies and minds in ways that will affect our very humanity, likely threatening things that everyone, whatever their view of human dignity, holds dear”).

\(^{109}\) Nussbaum, supra note 1, at 64; see also John Stuart Mill, On Liberty 168 (Longmans & Co. 1869) (“[T]he individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself.”); ibid at 175 (“[P]urely self-regarding misconduct cannot properly be meddled with in the way of prevention or punishment.”). In Part III, infra, I shall argue that Nussbaum’s position is bad “in practice” too, because (among other things) it does not further the social goals she announces; for when put into play, her arguments serve to frustrate the only justification for liberty that might distinguish her argument from Mill’s harm principle and make it relevant: the importance of human dignity and mutual respect.
the second objection—which, sure enough, Nussbaum attempts to strengthen by reference to the first. The second objection is also suspect, argumentatively speaking, and in any event cannot be distinguished meaningfully from the “harm principle” pioneered by John Stuart Mill.

A. The Irrationality Attack

Nussbaum has attacked both the physiological-response (or heuristic) form of disgust and the projective form of disgust as being irrational and unreasonable. But she spends far more time blasting the latter form. Recall that her argument in this respect revolves around the substance of her psychoanalytic findings, which lead her to make the claim that disgust is “an aspiration to be a kind of being that one is not” (and of course, that this aspiration is irrational).110 Disgust to Nussbaum is “an inherently self-deceptive emotion, whose function . . . is above all to conceal from us, on a daily basis, facts about ourselves that are difficult to face.”111 Kass, meanwhile, sees this sort of aspiration as a key human pursuit—one upon which the dignity of being human depends.112 “Human aspiration depends absolutely on our being creatures of need and finitude, and hence of longings and attachments. Pure reason and pure mind have no aspiration; the rational animal aspires in large part because he is an animal.”113

Deciphering these claims requires recalling what “kind of being” Nussbaum thinks we are, as well as what these “facts about ourselves” are. As I have pointed out, Nussbaum’s view on human beings is hard to distinguish from her view on animals. Particularly, she extends to animals the same form of dignity she advocates for humans.114 The “kind of being” I am is simply mortal, and animal.

110 Ibid. at 74.
111 Ibid. at 206.
113 Ibid. at 326.
114 See sources cited supra notes 60–110.
I share with "nonhuman animals" the production of waste products, bodily fluids, vomit, and other filth, as well as the propensity to become a corpse. There is no such thing as the human nature—there is only the human species.

But even viewing the human being in this way, it is far from clear that his desire to avoid or suppress certain facts, or even his aspiration to transcend these surly dictates of humanity, should be deemed "irrational" in the strict sense—or especially (as Nussbaum says) "in the normative sense." And even if it is irrational, such an observation hardly proves relevant to Nussbaum's goal of removing disgust from the law. Her "irrationality attack" is therefore suspect for at least three reasons: (1) it is logically flawed; (2) even if logically sound, it is inconsistent with other of Nussbaum's conclusions about the role of emotions in law; and (3) whether logical or not, it proves itself irrelevant to the question of disgust's appropriateness for law in liberal society.

1. Disputing Rationality

In arguing that even the sometimes-useful heuristic disgust is nevertheless irrational, Nussbaum cites with amusement how we are disgusted by the thought of ingesting certain objects even when told that they cannot harm us or even make contact with our bodies. She reports, for example, that (according to researchers) people will refuse to swallow a cockroach that is completely sealed.

115 See Nussbaum, supra note 1, at 87–90; NPR Interview, supra note 35.
116 The phrase "dictates of humanity" (which I have used pejoratively) was used in the positive sense by Reverend Jonathan Ward in a speech calling for the abolition of slavery. See Jonathan Ward, American Slavery, and the Means of its Abolition 7 (Perkins & Marvin 1840). It was also used in the prosecution of Nazis for war crimes. See Judgment of the International Military Tribunal for the Trial of German Major War Criminals 45 (His Majesty's Stationery Office, London 1951) ("Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity.").
117 Nussbaum, supra note 1, at 74.
in an indigestible capsule. Similarly, test subjects refuse to drink a beverage which has been stirred with an old flyswatter, despite the fact that it is completely sterilized.

But is it really irrational to react to these sorts of things with disgust even where the “utility” of the heuristic has been disproved in that particular circumstance? Nussbaum seems to think so. She seems to argue that reason tells us there is no point in being afraid of something that cannot harm us, despite its resembling things which do pose some danger. But assuming this is true, experience suggests that even where something is deemed non-dangerous by scientists (or by logicians for the purposes of obscure hypotheticals), it may nevertheless present some risk of contamination and therefore a reason to be disgusted.

What if the encapsulated cockroach comes “un-sealed” somewhere between my throat and my colon? What if the flyswatter was not cleansed of a microbe that (unbeknownst to science) is immune to the usual sterilization process? And, to use a more banal example, what if the condom breaks? Finally, suppose our bachelor, after being released from hospitalization, later opens a brand new container of milk which he knows is not expired and which has been properly processed and stored. Can we call him irrational if (when he begins to taste it) a subtle odor reminds him of his earlier experience with the spoiled milk, and he refuses to drink another drop?

It seems clear that even if our fear of contamination in these situations is based on a very, very small probability of an undesired event occurring, our disgust response cannot be described as “irrational.” Instead, it seems guided by prudence. Now the

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118 See ibid. at 88; NPR Interview, supra note 35.
119 See ibid.
120 The bachelor vignette appears in the introduction to this Article.
121 For Aristotle, this prudence—practical wisdom—is deeply concerned with things about which it is possible to deliberate. See Aristotle, *Nicomachean Ethics* 161 (Robert Williams trans., Longmans & Co. 1st ed. 1891) (bk. 6). Indeed, it is one of the parts of the rational soul. Ibid. at 169. The man of practical wisdom, “by the use of his reason, hits upon that
question is, does this prudence cease when disgust becomes *projective*, as opposed to merely a physiological revulsion to an immediate stimulus? Nussbaum’s position is that our projection-reactions are irrational attempts to hide from our vulnerability by controlling or stigmatizing those people who somehow remind us of our own disgusting qualities. But leaving aside the question of whether this violates the dignity of the stigmatized, are attempts to regulate their self-regarding conduct always projection-reactions or unreasonable physiological shrinkings?

Consider the example of eating human flesh. 122 Suppose I know that my next door neighbors routinely purchase unclaimed and unidentified bodies from the local morgue, which they then take home and roast outside in their barbecue pit—a feast for the entire family. If the odors that come floating over the backyard fence smell exactly like those of a routine hamburger cookout, is it irrational for me to wish that my neighbors would discontinue that practice? “Why, nuisance law would cover this!” Nussbaum might say. Yet does nuisance law prevent one from grilling a burger on the back porch? What is there to differentiate between the pleasantness of the good old fashioned American grilling experience and the horrors of the more sinister practice other than my knowledge of what is going on next door—and the disgust it creates? I might reasonably feel it necessary, then, to petition my government to outlaw such cannibalism.

Certainly Nussbaum would be correct to conclude that I am trying to police the boundary between myself and gruesome confrontations with the mortality of humanity. 123 But is it irrational for me to want

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122 See Kass, supra note 2.
123 Nussbaum, supra note 1, at 89.
to do so? Nussbaum’s analysis is that disgust, regardless of the form in which it manifests, represents an irrational “loathing of our animality.” Kass, on the other hand, might respond that our repugnance need not be rational in order to be recognized as sound, and that we should even be “suspicious of those who think that they can rationalize away our horror.” Thus, the proper course for an advocate of disgust may be to concede that the disgust response is not something for which we can give “full rational justification.”

I therefore do so, and now move on to the next point.

2. Internal Inconsistencies

Let us assume that it is irrational to feel disgust in any case. Does irrationality alone make disgust—or any emotion—an unsuitable candidate for legal relevance? A useful example in illustrating the inconsistency of Nussbaum’s claim here is that of the appeal to compassion in the law; namely, the compassion of jurors weighing the death penalty in a sentencing context. Jurors’ compassions cannot be said to be based on rational beliefs, and Nussbaum does not attempt to suggest otherwise. For once the defendant’s guilt is established, why should “reason” compel a merciful outcome instead of the death penalty? It does not. A sentencing jury may be swayed in its decision by, for example, its understanding of the harshness of a murderer’s treatment by his own parents, developing a feeling of compassion for an offender who has had a “horrible life.”

124 Ibid. at 89.
125 Kass, supra note 2.
126 Ibid.
127 See Nussbaum, supra note 1, at 69.
But the horrors of the murderer’s life story do not serve as a reason to suppose that he will not continue to act homicidally if given a short sentence instead of a long one, or a life sentence instead of death. Nussbaum blasts disgust as an effort to deceive ourselves about the truth of our frailty. The compassion emotion may in many cases be “self-deceptive,” as jurors allow themselves to ignore facts about humanity “that are difficult to face” (such as mankind’s ability to commit brutal and sadistic murders), thus deceiving themselves into downplaying the culpability of the convicted defendant. Our compassion in the death sentence context may very well embody a desire to transcend our animal propensity for vengeful behavior, or an aspiration to ignore our animal cowardice. Yet Nussbaum speaks approvingly of appeals to compassion. She suggests that good liberals are entitled to make value judgments about emotions in law, notwithstanding the fact that those emotions may lack rational bases. Because she has evaluated compassion without bothering to appraise the beliefs on which that “legally relevant” emotion are based, her focus on the irrationality of disgust is confusingly inconsistent and (as we will next discuss) ultimately irrelevant.

instead-of-execution.html (telling how the jury was influenced by testimony of the defendant’s siblings, who “described sadistic beatings [the defendant] received from their mother almost from the day he was born”).

Nussbaum, supra note 1, at 206; see also text accompanying supra note 111.

See 10 James Hastings et al., Encyclopaedia of Religion and Ethics 750 (1919) (“The feeling of settled resentment and consequent . . . lust . . . for revenge . . . is found to some extent in some of the higher animals, which have been known to devise and execute apparently carefully thought out plans of revenge.”); Robert R. Britt & Jeanna Bryner, “Animal Instincts: Main Street Seeks Revenge on Wall Street,” LiveScience.com (Oct. 2, 2008), http://www.livescience.com/culture/081002-bailout-package.html (citing studies showing that chimps and other primates “are known to seek revenge against relatives of an attacker,” and describing similar behaviors in other species).

See, e.g., Charles J. Chaput, Justice, Mercy and Capital Punishment, http://www.usccb.org/prolife/programs/rip/Chaput05web.pdf (last visited April 13, 2009) (stating that “[d]ecent people understandably fear the violence in society,” but arguing that, in the context of deciding whether to give a convicted murderer the death penalty, “mercy is never the work of a coward,” and that “[i]t is always the mark of the strong”).

See, e.g., Nussbaum, supra note 1, at 69, 349.

See ibid. at 58.
3. Irrelevancy

Even though we have conceded the rationality argument for purposes of discussion, we saw how it was inconsistent for Nussbaum to attempt to evaluate the rationality of disgust, particularly when, in explaining her book, Nussbaum has stated that the “main reason” for her rejection of disgust is its tendency to construct social hierarchies.\textsuperscript{134} For what benefit is there in developing a lengthy account of the allegedly irrational underpinnings of disgust if, in the end, she is going to anchor her book to the perceived relationship between disgust and social hierarchies? Here we see that Nussbaum is as much an activist as she is a self-promoter.\textsuperscript{135} It is not cynical to assume that Hiding from Humanity—complete with its scatological assault on the disgust emotion’s rationality—will be useful for those who wish to make a convenient (albeit specious) argument, viz., that people are irrational if they have disgust for a popularized alternative lifestyle or other sort of conduct that happens to be the darling of political liberalism. And while one might generally hesitate to ascribe to an author such a sinister intent, Nussbaum’s reputation for unscrupulous activism makes it hard to give her the benefit of a doubt.\textsuperscript{136}

In any event, it seems the irrationality component of Nussbaum’s argument—standing alone—can have no relevance for the question of whether disgust is a suitable emotion upon which law may be based in a political liberal society. Nussbaum’s analysis of the cognitive content of disgust is, without more, merely a psychoanalytic characterization of a given emotion as irrational. If her book rested

\textsuperscript{134} See NPR Interview, supra note 35.

\textsuperscript{135} See Corcoran, supra note 1 ("[Nussbaum’s] hasty treatment of many arguments is boldly self-referential. Indeed, its hundreds (no exaggeration) of peremptory references to her own work make Hiding from Humanity seem like a collection of hyperlinks to her other books.").

on this argument, it would amount to a claim that law should not be informed by any unreasonable or irrational emotions—and Nussbaum herself has rejected such a position, appearing to concede that an emotion need not be based upon rational beliefs to make for good public policy or to be legally relevant. (Recall her esteem for appeals to jury compassion during sentencing.) We must proceed, therefore, to examine the other prong of Nussbaum’s attack on disgust: its role in creating discriminatory and oppressive social hierarchies.

B. The Problem of Oppressive Projections

Recall that Nussbaum seems to attempt to bolster her irrationality attack by describing several groups as the victims of disgust-based projection-reactions: homosexuals, persons with mental or physical disabilities, and Jews. Disgust for these people, she says, represents a projection of our disgust for the primary objects (“gross” things, like feces, bodily fluids, corpses, rotting meat, et cetera) onto other objects that (presumably) do not share the qualities of the primary objects. But in her undifferentiated description of these discriminatory treatments as embodying the projective form of disgust, Nussbaum applies her own analysis poorly.

Her conception of projective disgust would seem to require that, before characterizing one’s disgust in a given case as a response to a primary object or some other object, we first carefully identify what the given object itself actually is. For if I am indeed reacting to gross things, I am disgusted with primary objects, and seeking to avoid contamination from them is “irrational” only to the extent those objects actually cannot contaminate me. Post hoc criticisms of this type can have little usefulness, and are particularly feeble where there is even the slightest possibility that the primary object could contaminate me. And if it is even irrational for me to avoid those things which could contaminate me, nothing can be rational. This would be an untenable claim. (Imagine suggesting to someone that they were being irrational for refusing to consume rotted, feces-smeared, maggot-infested meat!) Thus Nussbaum must tolerate the heuristic form of disgust even

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observes, even if I am reacting to other objects, I am nevertheless doing so, subjectively or subconsciously, "in an effort to insulate [my]self yet further from contamination by the primary objects."138

Notice how Nussbaum applies (or fails to apply) these definitions to her examples. Popular opposition to homosexuality inevitably involves a disgust reaction—but of what type, and to what objects? Nussbaum concludes that supporters of Amendment 2 in Colorado saw homosexuals as a source of contamination and shrank from the thought of it.139 But does she rightfully describe this as the projective form of disgust? Only if it is a response to other, and not primary objects. So what are the objects of such disgust? The answer is not just "homosexual people," as Nussbaum claims. For instance, Amendment 2 supporters were likely cognizant of the gay male practice of anal intercourse, with its attendant imagery of feces, blood, and semen. The interplay between these primary objects is bound up in very definition of homosexuality.140 It is to those objects which Amendment 2 supporters reacted with vivid disgust—not to the homosexual person. Thus, this disgust looks more like heuristic disgust than its projective form, and should therefore be presumed rational until it is proven that its objects are not sources of contamination—something Nussbaum does not even attempt to argue.

Nussbaum describes anti-Semitism in the same way she describes anti-homosexuality (and cheapens the Jewish struggle in the process,

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138 Nussbaum, supra note 1, at 97 (emphasis added). Projective disgust therefore is not a shrinking from people, who represent the other objects, but is a continuation of a presumptively rational disgust for primary objects to which a person has reason to believe those people will expose him. Like heuristic disgust, projective disgust is only irrational to the extent the primary objects cannot contaminate us. To insist, then, that projective disgust is an "irrational" emotion is to argue that the primary objects themselves cannot contaminate us.

139 See ibid.

140 If this were not the case, homosexuality would not be a sexual orientation, but an ideology.
I believe). But Jewishness, unlike male homosexuality, does not share any definitional relation to feces or bodily fluids. Jews cannot be described as “disgusting” in the fact-specific, primary-object sense of the word simply because they are Jews. As Nussbaum acknowledges, anti-Semitic movements have projected foul images onto Jews “because there was a need to associate [them] with stereotypes of the animal, thus distancing them from the dominant group.” But this is altogether different from the impulse to avoid contamination by primary objects by denouncement of other objects. To argue contrarily is to say that there is something about Jews which can contaminate people, biologically speaking. The persecution

141 Ibid. at 111. Note carefully how Nussbaum attempts to misuse the Jewish situation as an example of harmful projection-reactions—even when (as the quoted text indicates) they were not targeted because of their contact with gross things, but were instead victimized for other reasons—largely religious and political—and subsequently “talked about in such a way that they came to be found disgusting.” See ibid. (emphasis added). The opposite is true of gay males, who by definition do have a direct and rather intimate relationship with the primary objects of our disgust. So while it is certain that Jews have been (and perhaps still are) horribly caricatured and viciously mistreated, Nussbaum conveniently neglects to reference any sources which actually substantiate her claim that Jews were described with reference to “fluid, stench, and muck.” Ibid. Nothing she cites paints Jews as having first been found disgusting in a yucky, primary-objects sense of the word, prior to becoming oppressed—and such support is necessary if her projection-reaction argument is to hold. Nussbaum at one point attempts to support her suggestion—even though she later abandons it—by quoting Otto Weininger’s analogizing of Jews to women, in which he states that “Judaism is saturated with femininity” and that women and Jews “resent . . . any attempt to require from [them] that [their] thoughts should be logical,” are “readily disposed to communism” and appear “at the opposite pole from aristocrats.” Otto Weininger, Sex & Character 149, 306, 307, 311 (G.P. Putnam’s Sons 1907), available at http://books.google.com/books?id=pbqijVGl6tsC. Perhaps at least two of these things may be said of Nussbaum (who touts herself, ironically enough, as a convert to Judaism). In any event, Weininger, who was himself a Jew, attacked his race not on the basis of its physiognomy, but largely on perceived political and moral defectiveness. See ibid.; Nussbaum, supra note 1, at 108.

142 To understand how errant Nussbaum’s comparison is, suppose two toddlers, A and B, are deposited on a desert island by shipwreck, and somehow manage to survive the elements alone for some twenty years before being rescued. Once these young men are on brought onto the ship, their rescuers (who were sent by the boys’ families) reveal to them that A is “Jewish.” Neither man has reason to be disgusted at this; for what does “Jewish” even mean to persons who know neither language nor history? Nothing. But suppose, during their return voyage, that B begins having homosexual intercourse with the ship’s cabin-boy.
and disparagement of Jews has been a deliberate racial and political attack that—incidentally—has made use of “disgusting” imagery. Anti-Semitism is not rightfully described as an emotional byproduct in the first place. Disgust is not what gave rise to anti-Semitism; it is merely a tool used by anti-Semites. This, of course, is an insufficient reason to blame disgust for the problem.

In contrast to these examples, consider discrimination against the mentally retarded as well as physically disabled and deformed people. Perhaps at last we have an example deserving of being described as a projection-reaction as Nussbaum defines the term. This is because the subject of the projection in such cases is not a primary object, but human beings—other objects. For example, absent some showing that being an amputee or a mentally challenged person bears a definitional relation to contamination, my desire to condemn or avoid such people may be said to embody a projection of my disgust for rotting corpses onto others in hopes of avoiding my mortality. Of course, amputees and mentally retarded people are no more definitionally related to mortality than they are statistically more likely to die in the first place.¹⁴³

We can see, then, that Nussbaum is not playing by her own rules when she rushes to describe opponents of homosexuality as

If A (who has become enamored of the young women aboard) happens to catch B in the midst of such behavior, he might react with disgust. A understands, at a minimum, that unpleasant, smelly substances issue from the rear. Perhaps his adolescent experiments with self-gratification have taught him what issues from the front. He has probably learned, at least, to protect his manhood against injury. Thus, the behavior of B—in which feces, urine, semen, and blood are mixed with phallus and rectum in an irreverent flogging of the hind parts as with a mortar and pestle—might strike A as sickening. “Jew,” in contrast, is merely a new sound to him.

¹⁴³ In my own experience, it seems the more common reaction to many disabled persons is one of awkwardness or discomfort, not disgust and avoidance. It may be that we are not sure how to engage these folks without appearing patronizing or insincere. Indeed, instead of feeling uneasy because these people “disgust” us, we may feel uncomfortable precisely because of our feelings of compassion and empathy: feelings which we do not know how to express without coming across as just “feeling sorry” for the person. Whatever our response to the presence of persons with amputated limbs or mental retardation, it certainly must be distinguished from an impulse to accuse them of being drinkers of blood and eaters of feces.
disgusted by *other* objects instead of *primary* ones; that is, labeling as gross things which are not. But even that argument assumes that the homosexual lifestyle is *not* gross, and that it is one which is completely disassociated from primary objects. And assuming Nussbaum thus fails in convincing us that to be disgusted by homosexuality is "irrational," what is wrong with incorporating that disgust into our laws?

Her answer is nothing more than an invocation of John Stuart Mill's harm principle—and not a version supplemented or improved upon by Nussbaum, but the harm principle itself. We should repeal laws against sodomy, in other words, not necessarily because such laws are irrational, but because sodomy does not harm anyone. Mill is thus Nussbaum's backup. And if the harm principle is Nussbaum's backup, it is also her downfall; for where conduct does not cause harm to a nonconsenting party, Mill would not regulate it. This is damaging for Nussbaum, because it leaves her with no argument against the legal regulation of conduct that cuts against notions of dignity but which does not cause harm. Presented with difficult cases, Nussbaum must "punt" by saying the conduct to be regulated "has a clear potential for harm."

And yet, while leaning so heavily on Mill, Nussbaum weakly tries to distinguish her arguments from his by proclaiming that her psychological arguments "make a stronger case than Mill himself made for a political principal similar to his harm principle." I have already explained how her psychological argument, which

144 See, e.g., Mill, supra note 109, at 22 ("[T]he only purpose for which power can be exercised over any member of a civilized community, against his will, is to prevent harm to others.").
145 Thus Nussbaum approvingly comments on the Supreme Court's decision to strike down anti-sodomy laws. See Nussbaum, supra note 1, at 303 (discussing Lawrence v. Texas, 539 U.S. 558 (2003)). But because the type of judicial scrutiny relied upon by the Court in that case is debatable (and is debated) as a matter of constitutional law, a description of the Lawrence opinion as holding there is no "rational basis" for laws forbidding sodomy would be a mischaracterization.
146 Ibid.
147 Ibid. at 336.
is principally aimed at painting those who are disgusted by self-regarding conduct as "irrational," fails to hold water. But it is also important to understand how Nussbaum tries to distinguish her argument from Mill’s.

Nussbaum’s distinguishing points are few, and are lame. One is a merely a brief, hair-splitting type of discussion comparing Mill’s “person-based” justification for liberty and her own similar arguments (not contained in *Hiding from Humanity*) about respect for human capabilities. As this is an inconsequential distinction, I will focus on her additional claim that Mill’s “truth-based” justification for liberty and the harm principle tends to “treat . . . individual citizens as means to the general well being.”

Mill’s truth-based justification says, for example, that even controversial and wild forms of free speech ought not be regulated if the speech does not harm someone else, because it is important that we continue to reevaluate our thinking. But Nussbaum states that “[i]f one starts from the idea that each human being has dignity and deserves respect, and that politics must be grounded in respect for the dignity of all citizens as equals, one will find that Mill has put things just the wrong way around.” The problem with a truth-seeking emphasis, she explains, is that it results in “disrespect for the idea of reasonable pluralism, and [ventures] onto a terrain where one is at high risk of showing disrespect to one’s fellow citizens.” She therefore purports to agree with Rawls, who suggested that the type of mutual respect required in a pluralistic society “requires . . . not showing up the metaphysical claims of religion as damaging, and not adopting a public conception of truth and objectivity according to which such claims are false.”

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148 See ibid. at 332.
149 Ibid. at 327 (emphasis added).
150 See ibid. at 325.
151 Ibid. at 327–28.
152 Ibid. at 329.
153 Ibid. at 330.
We quickly see the hypocrisy of this last statement. For in criticizing Kass’s portrayal of the wisdom of repugnance, Nussbaum engages in precisely the sort of “showing up” of supernatural claims she describes as an offense to mutual respect. She attempts to show that the image-of-God metaphysic—which justifies disgust and abhorrence of the corruption of the flesh—is premised on the belief that we are more than animals; a belief she explicitly scorns. And in arguing that the law should dismiss the wisdom of repugnance, Nussbaum is quite certainly doing what she accuses Mill of doing: espousing the adoption of “a public conception of truth and objectivity” that necessarily represses such beliefs, confident that they are false.

Thus, the only point of difference that would seem to make Nussbaum’s argument distinguishable from Mill’s involves a principle for which she has shown no respect. Yet she attempts to claim that her disgust arguments “avoid the difficulties” of Mill’s justifications. She states boldly: “We have found fault with disgust . . . as a basis for law simply by thinking about human dignity and the equal worth of persons.” But I do not think “we” have done any such thing.

In the course of unraveling what Nussbaum is saying about how we are to determine right and wrong as political liberals, we should recognize that her preferred methodology is philosophically at odds with itself. In pitting neo-Freudian notions against disgust, Nussbaum treads rather selfishly and intermittently—but never simultaneously—upon reason and experience. She first advances on the shoulders of empiricism (to a point) in unearthing the “thought content” of disgust; but this having done, she leaps to the shoals of reason with a rather Kantian declaration that disgust has no place in the law because it treats people as means to a political end.

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154 See ibid. at 74.
155 Ibid. at 330.
156 Ibid. at 338.
157 Ibid.
Moreover, in trumpeting this conclusion, she ignores key factual inquiries which, properly considered by Aristotle’s man of practical wisdom, would undermine it. (For example, if homosexuality were responsible for the spread of AIDS in the United States, would it be “irrational” to regulate the practice?)

Absent this incoherent chimera of psychoanalytical second-guessing and name-calling, Nussbaum’s attack on disgust is little more than a tortured application of the harm principle so prominent in John Stuart Mill’s own discussions, from which she tries desperately to distinguish her own. Ultimately, she must justify the disgust-ridden society she imagines by reference to the harm principle, though she attempts to supplement this by vague pronouncements on the values of liberal society. Thus, her several-hundred page argument about the thought content of disgust and its irrationality is little more than an irrelevant and irresponsible foray into the obsolete catacombs of legal realism. To invalidate disgust, she struggles to identify some sort of harm or lack of consent, even where neither condition is true of the conduct in question. I next illustrate how the harm principle is simply inadequate as a filter against illiberally undignified practices, and that legal recognition of disgust is required if we are to fill the gaps.

III. SLOUCHING TOWARDS INDIGNITY

Some of even the vilest deeds cannot be regulated under Mill’s harm principle, and these provide examples of how disgust is essential for protecting the dignity of being human. While many acts are suitable examples, I will discuss bestiality; an act pointed out by Kass against which there is no describable argument save that of our own revulsion to it.

158 See text accompanying supra notes 135–136.
159 Cf. William Butler Yeats, The Second Coming (1919) (“And what rough beast, its hour come round at last, / Slouches towards Bethlehem to be born?”).
160 See Kass, supra note 2.
Arguably, no person is “harmed” when someone decides to have sex with an animal, so the harm principle would not allow regulation of the act. Yet Nussbaum provides a rather flimsy objection to bestiality. She does not dare suggest that the practice might spread disease, because this argument is made by opponents of homosexuality, which she cherishes. Rather, she claims that the practice “inflicts tremendous pain and indignity on animals” and thus is covered by the harm principle, making disgust in the law unnecessary. Her reasoning, of course, shows just how much she thinks we are animals. But it also shows how blind she is to relevant factual possibilities; for there are glaring holes in her argument.

Suppose a man preparing to have intercourse with his pet goat first kills the goat (perhaps in order to avoid inflicting “tremendous pain and indignity”) and then has intercourse with it? In such a case, there is no harm to a nonconsenting person. We are disgusted not by his killing the goat, but by his sexual involvement with its corpse. Here, the likely response of Nussbaum is that the goat should never have been killed at all. This, of course, shows the tendency of her argument against disgust to result in the dehumanizing of human beings: for to make the harm principle work in this instance, she would need to replace the Millian term “nonconsenting other” with just “animal.” This result is corroborated by Nussbaum’s claims that animals and humans share the same sort of dignity (that is, the capacity to do what one wishes).

But what if the sex with animals is passive on the human’s part? For example, what “tremendous pain” does a male dog feel when he mounts a drugged-up prostitute as part of some bizarre bestiality pornography carnival? How does Nussbaum know what sort of pain that animal experiences? More importantly, under her definition of “dignity,” how can such an act inhibit the animal’s capability for development? It does not. It is simply an act in which the animal participates, after which he enjoys the rest of the day chasing tennis balls and chewing on shoes. Thus we may conclude that Nussbaum

161 Nussbaum, supra note 1, at 80.
is willing to treat animals to a more paternalistic articulation of
dignity; one to which she objects in her defense of the equal dignity
of human beings.

In any case, it does not appear Nussbaum can identify a harm in
bestiality that is at all relevant in a society in which the majority of
people practically worship their house pets, and yet eat their bacon
with no qualms about the “indignity” suffered by the pig when a
farmer killed it with electric shock. Society’s widespread willingness
to give animal interests lower priority is also exemplified by its
reactions to the recent “swine flu,” which have involved the wanton
killing of hogs across the globe.162 Because bestiality presents no
harm to a nonconsenting other, the harm principle will not suffice as
a grounds its legal regulation, and Nussbaum’s rejection of disgust
would therefore leave us with no way to limit the act by law.

Why is Nussbaum willing to use the law to protect animals
(perhaps even against their will) from acts she deems violative of
their dignity, while at the same time arguing that no such protection
can be tolerated when it comes to the conduct of human beings? The
answer escapes me, but surely must lie in understanding her
political and ideological objectives. Despite her assertions to the
contrary, at the heart of her philosophy cannot be a humanitarian
desire for “a condition . . . of interdependence, rather than control
and self-sufficiency.”163 Or at least this is what we must conclude
about her unless she is willing to admit that her position on disgust

162 See, e.g., Jessica Gusman, “SWINE FLU: Egypt Slaughters All Pigs to Prevent
swine-flu-egypt-slaughter_n_192741.html.
163 Nussbaum, Danger to Human Dignity, supra note 1. Indeed, were I to engage in a
psychoanalysis of my own, I might argue that her position is a product of her own drastic
responses to the efforts of others in her lives to control her. For instance, she has related
with pride how her father forbade her to bring any black children into the home, how
confused and bothered she was by this, and how it caused her to reject his authority and
com/articleDisplay.php?article_id=55. But were her motives in doing so genuine, or were
they self-serving?
is incompatible with her political goals and liberal ideals. I will explain.

The Nussbaumian result (a law without disgust) leaves our hypothetical man free to engage in sexual intercourse with a farm animal. This will have the effect of isolating him from fellow humans. For emboldened in his desires by the absence of any legal regulation, he may begin to feel that his exploits are meritorious. Indeed, what is to stop him from taking up the claim used so effectively by homosexuals, viz., that people ought not criticize him, lest they disrespect his sexual autonomy? Regardless of whether he prevails in such arguments, the practical result is that he becomes an outcast: for in the estimation of most of the people in his community, he will be seen as a weird, gross, filthy, and lewd person.

And even if the voting majority of the populace is eventually persuaded that his sexual autonomy should be respected (perhaps by allowing him to marry his goat, dead or alive), it will likely keep its distance from him. Thus, by removing disgust from the law, we cultivate not “interdependence,” but isolationism and “clannish solidarity”—the very type of “control and self-sufficiency” upon which Nussbaum frowns.164 And if society does not choose to keep its distance, choosing instead to encourage and promote his type of behavior, it is well on its way to achieving status not as a human civilization, but a veritable “society of pigs” (or goats, as the case may be).165 Conspicuously absent from that society is any genuine human compassion and love, since what matters most has come to be individual desire. Such self-centeredness, Nussbaum should realize, is incompatible with mutual respect.

The key to promoting equal dignity is not to sanction aberrant sexual preferences to the dismay of the moral majority, but to allow the wisdom inherent in the disgust of the morally neutral supermajority to carve out common ground across a variety of hard cases where “harm” is not an issue. Conceivably, even those who

164 Nussbaum, supra note 1, at 102.
165 Mill spoke of such a society in his discussion of the utilitarian pleasure conception.
practice bestiality may be disgusted by father-daughter incest, even though they cannot explain why. Would they not rather their own desires go unblessed by the law than have the spectacle of incest trotted before them? For a failure to achieve mutual respect happens not because the law criticizes certain people’s choices, but because people frown on them.

Kass’s conception of human nature informs (and confirms, I believe) the comments I have just made. For Kass, the harm in bestiality has less to do with a nonconsenting other, and more to do with the thinning of the precious membrane that protects dignity as a human being from the reckless abuses of free moral agency. One virtue of this position in the context of our example is that, even outside of any “paternalistic” responses to the practice of bestiality, the act is still disgusting. Thus, without needing to tell people that something they choose may “harm” them, a law against bestiality recognizing the wisdom of repugnance could prevent that affront to human dignity while at the same time protecting animals from the offenses Nussbaum is worried about.

Ultimately it is Kass’s position on human nature, not Nussbaum’s, which seems more likely to cultivate and encourage mutual respect. For other than saying it is “illiberal” to do otherwise, Nussbaum has given me no reason to bear actual respect for people who involve themselves in arguably disgusting practices. Kass’s arguments do provide me with reasons to respect all men as equals, and they draw not upon tortured philosophical ideals which demand a strange result, but on propositions that I can understand as a human being who thinks himself valuable in part because he thinks he has something unique to offer the world. Nussbaum merely tells me, “If you are disgusted by people’s strange choices, you are just hiding from your own animal nature.” This amounts to a command to defend only animality. On the other hand, Kass admonishes me to become a zealous defender of humanity because of the deeper (nonanimal) significance of human nature.166 This

166 This latter approach resonates more meaningfully with me. My own parents, for
serves the cause of liberals even more effectively than political liberalism itself.

This is not the rational self-interest of Rawls, but a genuine call to respect the human being out of an appreciation for what he is, not for what his capabilities are. In contrast, the secular humanist-political liberal standard of mutual respect touted by Nussbaum is a very weak guarantor of dignity, for it is one that leaves mankind to wallow in the mire of an altogether fetid freedom. A more compelling standard to adopt, and yet one that is compatible with the operation of disgust in the law, might indeed be something akin to love. Perhaps Nussbaum would decry the rather dubious cognitive content of that emotion, too.

CONCLUSION

Nussbaum’s vision of a political liberalism without disgust, like Mill’s utilitarian justifications for the protection of personal liberty (which she attempts to distinguish), casts the human being as a means to a political end. But rather than render mankind the tool of truth and progress in the process as would Mill, Nussbaum is willing—in the name of equality and mutual respect—to foist upon persons an animal dignity they may not wish to share, and thus unwittingly to promote atomism and isolationism instead of the “genuine and constructive social sympathy” she extols. In contrast, Kass’s account is informed by an uncompromised zeal for our uniquely human nature. Rather than striving to invent a society in bondage to

\[\text{example, encouraged me to treat homeless persons with compassion not because those persons are equal in the eyes of “the law,” but because they are equal as people, having been created in the image of God (though they may have fallen tragically short of the full human dignity described by Kass).}\]

\[167\] This very well-suited term is borrowed from the musings of an online poet. See Daniel Benisty, Untitled Poem (June 9, 2007), http://blogs.myspace.com/index.cfm?fuseaction=blog.view&friendId=84696060&blogId=274363605 (speaking of “a dark surprise / that love, in all its uncertainty, will cleanse you of your fetid freedom”).

\[168\] See ibid.

\[169\] Nussbaum, supra note 1, at 105.
“the dignity of all citizens as equals,” Kass is concerned with their dignity as humans. Rather than cruelly raising before mankind the spectacle of its mortality, Kass would favor a political conception equipped to defend “what is estimable and worthy and excellent about being human.” While Nussbaum’s “respect” for persons would leave them gaping as chimps at the threshold of human excellence, Kass would see them flourish.

170 Ibid. at 327 (emphasis added).
171 Kass 2008, supra note 89, at 303 (emphasis added).
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