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**Martha C. Nussbaum: Hiding from Humanity**

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# Introduction

## **I. Shame and Disgust: Confusion in Practice and Theory**

A California judge orders a man convicted of larceny to wear a shirt stating, "I am on felony probation for theft." In Florida, convicted drunk drivers are required to display bumper stickers reading "Convicted D.U.I." Similar stickers have been authorized in other states, including Texas and Iowa.<sup>1</sup> Penalties like these, involving public shaming of the offender, are becoming increasingly common as alternatives to fines and imprisonment.

Jamie Bérubé was born with Down syndrome. As a result of changes enacted under the Individuals with Disabilities Education Act, he has an Individualized Education Plan that provides for him to be "mainstreamed" in a regular public school classroom, albeit with a monitor. The teacher and monitor work to ensure that Jamie need not live as a shamed and stigmatized person, and his condition need no longer be the object of humiliation.<sup>2</sup> Stephen Carr, a drifter lurking in the woods near the Appalachian Trail, saw two lesbian women making love in their campsite. He shot them, killing one and seriously wounding the other. At trial, charged with first-degree

murder, he argued for mitigation to manslaughter on the grounds that his disgust at their lesbian lovemaking had produced a reaction of overwhelming disgust and revulsion that led to the crime.<sup>3</sup>

In a 1973 opinion that still defines the law of obscenity, Chief Justice Warren Burger wrote that the obscene must be defined in a manner that includes reference to the disgust and revulsion that the works in question would inspire in “the average person, applying contemporary community standards.” To make the connection to disgust even clearer, Justice Burger added a learned footnote about the etymology of the term from Latin *caenum*, “filth,” and cited dictionary definitions defining obscenity in terms of disgust (as will be discussed in chapter 3).<sup>4</sup>

Shame and disgust are prominent in the law, as they are in our daily lives. How do, and how should, they figure in law’s formulation and administration? Even in this small sampling of cases, the role of the two emotions seems complicated and hard to pin down. Shaming penalties encourage the stigmatization of offenders, asking us to view them as shameful. At the same time, current trends in our treatment of the disabled, typified by the case of Jamie Bérubé, discourage persistent habits of stigmatization and shaming, in the name of human dignity and individuality. Other previously excluded groups, such as gays and lesbians, have also fought against social stigmatization with some success.

Of course there is no obvious contradiction between these two trends, because it is consistent to hold that the disabled are blameless, and therefore should not be shamed, while criminals should be. It is also consistent to hold that those who commit consensual sexual acts, however controversial, should not be stigmatized, while those who harm others should be. But there may yet be a deeper tension between support for punishments that humiliate and the general concern for human dignity that lies behind the extension of stigma-free status to formerly marginalized groups—and, in general, between the view that law should shame malefactors and the view that law should protect citizens from insults to their dignity.

Disgust, too, functions in complicated ways. It serves, sometimes, as the primary or even sole reason for making some acts illegal. Thus,

the disgust of the reader or viewer is one primary aspect of the definition of obscene materials under current obscenity laws. Similar arguments have been used to support the illegality of homosexual relations between consenting adults: they should be illegal, it is alleged, because the “average man” feels disgust when he thinks about them. It is used to justify the criminalization of necrophilia; it has been proposed as a reason for banning human cloning. And disgust has also been taken to be an aggravating factor in acts already illegal on other grounds: the disgust of judge or jury at a murder may put the defendant into a class of especially heinous offenders. On the other hand, disgust also plays a role in mitigating culpability. Although Stephen Carr did not succeed in his attempt to win a reduction on the ground of his disgust, and was convicted of first-degree murder, other offenders have succeeded in winning mitigation with a similar defense.<sup>5</sup>

Again, there appears to be no real inconsistency here, since the disgust of an observer is obviously distinct from the disgust of a perpetrator. It seems consistent to hold that citizens should be shielded by law from what disgusts them, and yet that overwhelming disgust might serve as a mitigating factor in the case of a violent act. Nonetheless, the cases still leave us in some confusion about what the role of disgust really is, and why it should play the role that it does.

If we turn to the theoretical literature, our sense of perplexity only grows, because there is considerable debate about whether shame and disgust ought to play the roles they currently play. Furthermore, both supporters and opponents of these roles use a variety of distinct arguments that are not always mutually consistent. Thus, shaming penalties are frequently defended as valuable expressions of social norms by political theorists whose general position might be described as communitarian, in the sense that it favors a robust role for strong and relatively homogeneous social norms in public policy. Both Dan M. Kahan, the leading advocate of such penalties, and general social critics such as Christopher Lasch and Amitai Etzioni have defended the revival of shaming on the grounds that society has lost its communitarian moorings by losing a shared sense of shame at bad practices. Shame penalties, they argue, would promote a revival of our community’s common moral sense. Etzioni memorably

suggests that society would improve if young drug dealers, caught in a first offense, were “sent home with their heads shaved and without their pants.”<sup>6</sup> In a similar vein, though without even requiring an offense, William F. Buckley, Jr., suggested in 1986 that gay men with AIDS should be tattooed as such on their buttocks.<sup>7</sup> On the other hand, another influential defender of public shaming, John Braithwaite, insists that the goal of such punishments ought to be not stigmatization or humiliation, but the reintegration of offenders into the community. Is Braithwaite taking a different view about the same thing, or is he talking about a very different set of legal practices?

Nor do opponents of shaming penalties agree about what the best rationale for opposition is. Some hold that the penalties are inappropriate because of their assault on human dignity.<sup>8</sup> Others hold instead that the problem with such penalties is that they constitute a form of mob justice, and are for that reason inherently unreliable and uncontrollable.<sup>9</sup>

The theoretical debate about shaming penalties becomes all the more difficult to figure out when we consider the theoretical basis for a wide range of legal practices that currently protect citizens from shame: laws protecting personal privacy, for example, and the new laws promoting a dignified education for disabled children. Typically, these practices are defended on liberal grounds, with appeal to the idea, typical of classical liberalism, that each individual citizen deserves a life with as much dignity and self-respect as can be provided, taking into account the fair claims of others.<sup>10</sup> Are these ideas inconsistent with the use of shame in punishment, as some theorists believe? Or is the tension between shaming and classical-liberal norms merely apparent?<sup>11</sup>

Disgust is equally perplexing in theory. The appeal to disgust in law has its most famous defense in Lord Devlin’s *The Enforcement of Morals*, an influential work of conservative political thought. Lord Devlin argues that the disgust of average members of society (the “man on the Clapham omnibus”) gives us a strong reason to make an act illegal, even if it causes no harm to others. This is so, he claims, because society cannot protect itself without making law in response to its members’ responses of disgust, and every society has

the right so to preserve itself. (I shall analyze his views in detail in chapter 2.) More recently, legal theorist William Miller, while apparently disagreeing with Devlin about some concrete policy matters, supports his general line, arguing that a society's hatred of vice and impropriety necessarily involves disgust, and cannot be sustained without it.<sup>12</sup> But a significant role for disgust has also been supported from a viewpoint that is, while communitarian, nonetheless self-described as "progressive." In his article "The Progressive Appropriation of Disgust," Dan M. Kahan argues that a liberal society, concerned with the eradication of cruelty, needs to build law on the basis of disgust. Kahan's aim, he announces, is "to redeem disgust in the eyes of those who value equality, solidarity, and other progressive values."<sup>13</sup> We should not cede the "powerful rhetorical capital of that sentiment to political reactionaries" just because prominent defenders of disgust have often used it to defend conclusions that appear reactionary from a liberal perspective.

## II. Law without the Emotions?

One possible reaction to this confused situation is to say that emotions are irrational anyway, and it is always a mistake to take much account of them in constructing legal rules. There is a popular commonplace to the effect 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*. This commonplace, or something like it, has been endorsed by some liberal legal thinkers, responding to the appeals to emotion that I have just been discussing.<sup>14</sup> Let us call it the "No-Emotion" proposal. If we take such a general line, we seem to cut through the theoretical and practical debates—although it is not terribly clear what the result of so doing will be for many well-entrenched practices.

This shortcut is a mistake, however. First of all, law without appeals to emotion is virtually unthinkable. As chapter 1 will argue, the law ubiquitously takes account of people's emotional states. The state of mind of a criminal is a very important factor in most parts of criminal law. The state of mind of a victim (of rape, blackmail, et cetera)

is also often relevant in determining whether an offense occurred, and, if so, of what magnitude. More deeply, it is hard to understand the rationale for many of our legal practices unless we do take emotions into account. Without appeal to a roughly shared conception of what violations are outrageous, what losses give rise to a profound grief, what vulnerable human beings have reason to fear—it is very hard to understand why we devote the attention we do, in law, to certain types of harm and damage. Aristotle once said that if we imagine the Greek gods as depicted in legend—all-powerful, all-seeing creatures who need no food and whose bodies never suffer damage—we will see that law would have no point in their lives. What need would they have, he said, for making contracts, paying back deposits, and so on? We might add, what need would they have for laws against murder, assault, and rape? We humans need law precisely because we are vulnerable to harm and damage in many ways.

But the idea of vulnerability is closely connected to the idea of emotion.<sup>15</sup> Emotions are responses to these areas of vulnerability, responses in which we register the damages we have suffered, might suffer, or luckily have failed to suffer. To see this, let us imagine beings who are really invulnerable to suffering, totally self-sufficient. (The Olympian gods aren't quite like this, insofar as they love their mortal children and have quarrels and jealousies among themselves that give rise to many types of mental and physical suffering.) Such beings would have no reason to fear, because nothing that could happen to them would be really bad. They would have no reasons for anger, because none of the damages other people could do to them would be a truly significant damage, touching on matters of profound importance. They would have no reasons for grief, because, being self-sufficient, they would not love anything outside themselves, at least not with the needy human type of love that gives rise to profound loss and depression. Envy and jealousy would similarly be absent from their lives.

The Greek and Roman Stoic philosophers draw on this idea when they ask us all to become such self-sufficient people, insofar as we can, extirpating the emotions from our lives. They argue plausibly that human beings can achieve something like the imagined invulnerable condition if they simply refuse to value anything outside

of that which they control—their own will, their capacity for moral choice.<sup>16</sup> By shifting our attachments and what we consider valuable, we also shift the emotions we are liable to experience. Although few of us would fully share the Stoic project of withdrawing our attachments from the world, considering that project is a good way of measuring the large role that attachments to insecure aspects of our world—other people, the material goods we need, social and political conditions—play in our emotional life. It also helps us, correspondingly, to measure the large role that emotions such as fear, grief, and anger play in mapping the trajectory of human lives, the lives of vulnerable animals in a world of significant events that we do not fully control. If we leave out all the emotional responses that connect us to this world of what the Stoics called “external goods,” we leave out a great part of our humanity, and a part that lies at the heart of explaining why we have civil and criminal laws, and what shape they take. (In other words, we can see why and how our vulnerability entails emotion by seeing how the denial of emotion entails a denial of that vulnerability.)

As Rousseau argues in the passage from *Emile* that I have quoted as an epigraph to this book, our insecurity is inseparable from our sociability, and both from our propensity to emotional attachment; if we think of ourselves as like the self-sufficient gods, we fail to understand the ties that join us to our fellow humans. Nor is that lack of understanding innocent. It engenders a harmful perversion of the social, as people who believe themselves above the vicissitudes of life treat other people in ways that inflict, through hierarchy, miseries that they culpably fail to comprehend. Rousseau asks, “Why are kings without pity for their subjects? It is because they count on never being human beings.” Emotions of compassion, grief, fear, and anger are in that sense essential and valuable reminders of our common humanity.

Such emotions typically play two distinct but related roles in the law. On the one hand, these emotions, imagined as those of the public, may figure in the justification for making certain sorts of acts illegal. Thus, any good account of why offenses against person and property are universally subject to legal regulation is likely to invoke the reasonable fear that citizens have of these offenses, the anger

with which a reasonable person views them, and/or the sympathy with which they view such violations when they happen to others. (Typical is Mill's account of the foundations of legal constraint, in chapter 5 of *Utilitarianism*, which traces the "sentiment of justice" to "the impulse of self-defence, and the feeling of sympathy.")

On the other hand, such emotions figure, as well, in the account of what is legally relevant about a criminal's state of mind, which, of course, has many other nonemotional elements (such as negligence, premeditation, intention). A prominent way in which emotions figure in assessing an offender's mental state, and the one that will concern me, both in discussing anger and fear in chapter 1 and in the later discussion of disgust, is as a mitigating factor: a putatively criminal offense may be judged less heinous, or not even a crime at all, if it is committed under certain "emotional circumstances." If, for example, a killer's anger is deemed to be that of a "reasonable man" encountering a serious provocation, the level of his culpability may be judged lower. It is easy to see that this role for emotions in the law is closely related to the more general role in justifying legal norms that I have just described. It is precisely because anger at certain violations is understood to be reasonable that we both have laws against these violations and mitigate the culpability of those who lash out when provoked by one of them. It is precisely because one of the main points of law is to protect us against death and bodily injury (because the fear of these is reasonable) that killing in self-defense, in circumstances of reasonable fear, is not a crime, and that committing a crime under duress may mitigate fault. Disgust has similarly been invoked in a two-sided way: as the emotion of a public, justifying the illegality of certain acts, and as the emotion of a putative offender, allegedly mitigating fault. Here, too, the two roles are closely linked: it is precisely because a certain type of disgust is judged so reasonable that it can be the basis for criminalizing certain sorts of acts and that its presence in the mind of an alleged criminal might be thought to mitigate fault.

A valiant attempt to defend an antiemotion program in law has been made by some scholars in the Utilitarian tradition. These scholars have indeed tried to imagine a pure emotion-free system of law, by substituting considerations of deterrence for consideration of the

offender's state of mind. In penalizing a given case of homicide, for example, we are to think only of how our penalties will affect the likely future behavior of this offender and other possible offenders.<sup>17</sup> We do not consider the offender's state of mind (including his emotions), or whether that state mitigates culpability. Such a view (which, note, does away with much more than appeals to emotion, since it also removes appeals to intention and other mental states) seems problematic in many ways, not least on grounds of fairness. A person who lashes out because her child has just been murdered seems importantly unlike a person who commits premeditated murder; the intrinsic quality of her act seems very different. The pure deterrence view—whether or not it leads to the same conclusion about this person's punishment (as it might, by saying that such impulsive killings cannot be deterred by heavy punishments)—does not seem to capture this intrinsic difference. Similarly, the idea that only deterrence is relevant to distinguishing between inadvertent and deliberate acts, or between negligent and fully premeditated acts, seems problematic on grounds of fairness even if the proposed results might end up looking relatively similar.

A larger problem with such views, however, is that they really do not fulfill their promise. They dispense with emotion in one place, in judging the state of mind of the offender; but they leave it in another and more fundamental place, in explaining why criminal sanctions exist at all. (Thus Mill, Utilitarian though he is, still feels the need to explain the foundations of the law in terms of emotion.) The deterrent role for punishment cannot be explained without some account of why certain acts are bad. Such an explanation is bound to refer to human vulnerability and our interest in flourishing. But then we are already dealing with and evaluating emotions. If a certain offense is a serious assault on human life or flourishing, that very judgment entails that it is to be feared, and that it is an appropriate target of anger. As I shall argue at greater length in chapter 1, the very content of such emotions includes such evaluative judgments, and it would seem, as well, that one cannot consistently have such evaluative judgments without having the corresponding emotions. (Can one judge that death is importantly bad for one, and yet not fear death? I believe not, however much one may think one is above mere

fear.) Thus, the Utilitarian-deterrence version of the antiemotion view does not really take us away from appealing to emotions; it just denies the appeal to emotion in one area, that of the criminal's state of mind. And this denial then appears peculiar and unfair: for if we judge that it is reasonable to fear death, so much so that we use that as a reason in justifying laws against homicide, then why shouldn't the reasonableness of a person's fear be relevant in assessing the putatively criminal act that he or she performs?

Such considerations suggest that a system of law that did not include a substantial normative role for certain sorts of emotions, and for norms of reasonableness in emotion, would be difficult to conceive; at the very least it would be utterly unlike current known systems of law. That, then, is a first problem with the antiemotion proposal. Moreover, the proposal, which brands all emotions as "irrational," is both unclear and unconvincing. "Irrational" is a slippery word. It may mean "devoid of thought," as when we say (perhaps wrongly) that a fish, or a human infant, is "irrational." In that sense, as chapter 1 will argue, it is quite unconvincing to suggest that all emotions are "irrational." Indeed, they are very much bound up with thought, including thoughts about what matters most to us in the world. If we imagine a living creature that is truly without thought, let us say a shellfish, we cannot plausibly ascribe to that creature grief, and fear, and anger. Our own emotions incorporate thoughts, sometimes very complicated, about people and things we care about.<sup>18</sup> Grief, for example, is hardly just a tug in the gut—its wrenching character cannot be explained without bringing in the thoughts we have about the person who has been lost, and who has been, let us say, a vital daily presence in our life. Similarly, the emotions that are most frequently invoked in the law, for example anger and fear, are obviously thought-laden. If I yield to a blackmailer out of fear, that fear is not just an electric impulse jolting through me: its painful character comes from the thoughts it contains about the damage I may sustain. If I attack a person who has just raped my child, my anger, again, is not just a mindless impulse. It involves a thought about the terrible damage my child has just suffered, and the wrongfulness of the offender's act. So if Dworkin's proposal is to neglect

emotions because they are impulses without thought, that proposal is quite implausible.

“Irrational,” however, can also be defined in terms of thought that is *bad thought* in some normative sense. Thus, the person who says that two plus two is five, even after repeated teaching, is irrational, because he thinks badly. So, too, in a different way, we typically hold that racism is irrational, based on beliefs that are false and ungrounded. Perhaps, then, we can reformulate Dworkin’s proposal as the proposal that emotions are always irrational in the sense that they embody defective thought, thought that should never guide us in important matters.

The Greek Stoics had such a view. Because they held that all emotions involve high evaluation of aspects of the world that we do not fully control, and because they thought that such evaluations are always mistaken, they did hold that emotions were normatively irrational as a class. A person who thinks well will have none of them. But, as I have already said, that is a view that few people have ever found plausible. More important for our purposes, it is not a view on which a system of law could plausibly be based. Law has the function of protecting us in areas of significant vulnerability. It makes no sense to have criminal laws if rape, murder, kidnapping, and property crime are not really damages, as a strict Stoic would require us to believe. So the Stoic reason for holding that all emotions are irrational is not available to any thinker who wants to defend a legal system that is at all like the systems we know. What law might be for godlike Stoics is a question of some theoretical interest; it is irrelevant, however, to thought about the criminal and civil law of a real contemporary nation.

We can bring this out by thinking, once again, about some cases of emotion that our legal system has typically found reasonable. Anger at an assault—either on oneself or on a family member—is often treated as paradigmatic of what a “reasonable man” would feel. So, too, is fear for one’s life or reputation or well-being. These doctrines internal to criminal law will be further investigated in chapter 1. More globally, the whole structure of criminal law might be said to imply a picture of what we have reason to be angry at, what we have

reason to fear. The law of homicide itself might be said to express reasonable citizens' outrage at homicide, just as the law of rape responds to the reasonable fear of rape and expresses outrage at rapes that take place. The very fact of the law is a statement that these attitudes are indeed reasonable.

Of course many particular instances of anger or fear may indeed be irrational in the normative sense. They may be based on false information, as when someone gets angry at X in the belief that X has assaulted her child, but no such crime has occurred (or someone else did it). They may also be irrational because they are based upon false values, as would be the case if someone reacted with overwhelming anger to a minor insult. (Aristotle's example of this is anger at people who forget one's name.) The law needs to take a stand on what really is a significant damage, what a reasonable person would and would not find a ground for anger. As we shall see, the law does so in many ways. But such judgments are typically particularistic. They do not say, "All anger and fear are irrational." They say, "This instance of anger is not the anger of a reasonable person," "This instance of fear is ill-grounded." So they take place against the background of a shared judgment that emotions are sometimes reasonable, in the normative sense. In other words, these emotions are justified by what has happened, against the background of reasonable views about what matters. As I shall argue, judgments of reasonableness in the law are normative judgments, using a hypothetical image of the "reasonable man." Not surprisingly, these images are responsive to existing social norms. And yet they may also play a more dynamic role, by either shoring up faltering norms or calling them into question. Law, then, does not just describe existing emotional norms; it is itself normative, playing a dynamic and educational role.

If, however, we cannot imagine a system of law that does not frequently advert to the emotions, and that does not, furthermore, treat at least some of them as reasonable, then we seem to be back where we started. We cannot cut our way through the confusion surrounding shame and disgust by simply discarding all legal analysis framed in terms of emotion, and we thus seem to have no way, as yet, of sorting through the theoretical and practical debate.

### III. Two Problematic Emotions

A much more promising way of proceeding—the way I shall be following in this book—is that of looking much more closely at the type of emotion in question, asking about its structure, its thought-content, and its likely role in the economy of human life. This is what judges and juries implicitly do all the time with anger and fear. They have an implicit picture of anger as a response to a damage, and of fear as a response to imagined bad possibilities. They then use this picture in evaluating the specific cases of anger and fear put before them. There is reason to think that making these pictures more explicit, raising public awareness about what is actually in question, can help sort through at least some difficulties. For example, the traditional law of self-defense has been effectively challenged by battered women, who use an explicit account of fear in order to illustrate their claim that one may act out of self-defense even when not lethally menaced at that very moment (say, when the woman's batterer is asleep).

Similarly, looking closer at disgust and shame, and offering a more explicit analysis of their thought-content, their genesis, and the variety of roles they play in our social life will, I believe, help us greatly in deciding what we want to say about the controversies concerning the roles they play in law. That is the project that I shall undertake in this book. During the past fifty years there has been a great deal of good work on these two emotions, not only in philosophy, but also, empirically, both in cognitive psychology and in the clinical treatment of patients by empirically minded psychoanalysts. (I shall in general bring experimental psychology and clinical psychoanalytical accounts together, and shall rely on psychoanalytic accounts where they are consistent with other empirical data and offer valuable insights.) My analyses will draw on this recent scientific and humanistic work, though ultimately I shall be proposing a philosophical analysis of my own, with strong links to the empirical literature.

My general thesis will be that shame and disgust are different from anger and fear, in the sense that they are especially likely to be normatively distorted, and thus unreliable as guides to public practice, because of features of their specific internal structure. Anger is a

reasonable *type* of emotion to have, in a world where it is reasonable to care deeply about things that can be damaged by others. The question about any given instance of anger must then be, are the facts correct and are the values balanced? On the other hand, one could argue that jealousy is always suspect, always normatively problematic as a basis for public policy (however inevitable or even at times appropriate in life) because it is likely to be based on the idea that one is entitled to control the acts of another person, an idea reinforced by centuries of thought that have represented women as men's property. Both its general cognitive content and its specific history in Western societies make it a dubious emotion to invoke, either in justifying criminal regulation of conduct (adultery, for example) or in mitigating blame for a criminal act (the murder of a spouse's lover, for example). This is the sort of case I shall be making about disgust, and, with much qualification, about shame.

Disgust, I shall argue, is very different from anger, in that its thought-content is typically unreasonable, embodying magical ideas of contamination, and impossible aspirations to purity, immortality, and nonanimality, that are just not in line with human life as we know it. That does not mean that disgust did not play a valuable role in our evolution; very likely it did. Nor does it mean that it does not play a useful function in our current daily lives; very likely it does. Perhaps even the function of hiding from us problematic aspects of our humanity is useful; perhaps we cannot easily live with too much vivid awareness of the fact that we are made of sticky and oozy substances that will all too soon decay. I shall argue, however, that a clear understanding of disgust's thought-content should make us skeptical about relying on it as a basis for law. That skepticism should grow greatly as we see how disgust has been used throughout history to exclude and marginalize groups or people who come to embody the dominant group's fear and loathing of its own animality and mortality.

I shall ultimately take a very strong line against disgust, arguing that it should never be the primary basis for rendering an act criminal, and should not play either an aggravating or a mitigating role in the criminal law where it currently does so. The valuable role for disgust in the law, it seems to me, is confined to areas such as nuisance

law and zoning where it seems legitimate to allow offense, not just harm, to play a guiding role.

Shame is much more complicated, in two ways. First, it arrives on the scene earlier in human life. It is relatively easy to do experimental research on disgust because children acquire it after they acquire at least some linguistic capacity. Shame probably arrives earlier, so in order to study it, and to describe its relation to guilt and other relatives, we must construct hypotheses about the mental lives of preverbal infants. Fortunately, we need not do so in a vacuum. There is by now a rich experimental literature on infancy that has formed a valuable partnership with clinical psychoanalysis of both children and adults, and this literature helps us to construct a convincing, if complicated, story of the development of shame out of the infantile demand for control over all the important aspects of its world.

Shame is more complicated than disgust in another way as well: there is much more to be said about its positive role in development and social life, in connection with valuable ideals and aspirations. Thus my story about shame will ultimately be quite complex, and will involve distinguishing different varieties of shame, some more and some less reliable. I shall argue that what I shall call “primitive shame”—a shame closely connected to an infantile demand for omnipotence and the unwillingness to accept neediness—is, like disgust, a way of hiding from our humanity that is both irrational in the normative sense, embodying a wish to be a type of creature one is not, and unreliable in the practical sense, frequently bound up with narcissism and an unwillingness to recognize the rights and needs of others. Even though this sort of shame can be in many ways transcended, such favorable outcomes do not always take place. Moreover, all human beings very likely carry a good deal of primitive shame around with them, even after they in some ways transcend it. For this reason, and other reasons I shall offer, shame is likely to be normatively unreliable in public life, despite its potential for good. I shall then argue that a liberal society has particular reasons to inhibit shame and to protect its citizens from shaming.

Thus, although this book concerns two emotions and their place in law, especially criminal law, it is ultimately far broader in its concerns

and aims. The positions that it criticizes are widespread social attitudes, influential in many times and places. They are currently enjoying renewed attention in contemporary American culture. It will be my contention that these attitudes are profound threats to the existence and stability of a liberal political culture. Through criticizing them I hope to offer, as well, a partial account of attitudes that do sustain liberalism.

Thus the book is intended, ultimately, as an essay about the psychological foundations of liberalism, about the institutional and developmental conditions for the sustenance of a liberal respect for human equality. It is inspired by Rousseau's profound contention that political equality must be sustained by an emotional development that understands humanity as a condition of shared incompleteness. But its liberalism is ultimately more Millian than Rousseauian, valuing liberty as well as equality, space for human creativity as well as decent material conditions of life for all.

Rousseau and Mill both understood that just institutions, if they are to be stable, require support from the psychology of citizens. Both therefore emphasized the role of education in producing a society decently attentive to human equality. I am concerned with that educational project, and the analyses in the present book contain many suggestions for how public education in a liberal society might grapple with the problems I diagnose.<sup>19</sup> But individuals and institutions are mutually supporting. Institutions must be sustained by the good will of citizens, but they also embody and teach norms of what a good and reasonable citizen is. They are sustained by the psychology of real people, but they also embody, teach, and express a political psychology, through norms of the reasonable citizen and the proper role for law. My argument in this book, though full of implications for the educational side of the issue of equal respect, is primarily concerned with its legal and institutional aspect: what sort of public and legal culture will embody the "political psychology" appropriate to a liberal regime? What norms of reasonableness in emotion are the right ones to build into the law, both expressing and nourishing appropriate emotions in citizens?

Mill had answers to these questions, but, as chapter 7 will argue, they were not quite the right answers for a pluralistic society; they

placed too much emphasis on the creative contributions of outstanding individuals, too little on the importance of removing stigma and hierarchy wherever they occur. Thus his account of the moral foundations of the criminal law, though in my view basically correct in substance, is defective in rationale. I hope to provide at least one part of a better rationale for something like Mill's "harm principle," while at the same time offering a psychological and philosophical diagnosis of some underlying dangers endemic to any liberal society. It will emerge, I hope, that this same analysis offers us a convincing rationale for public policy in general toward traditionally stigmatized and marginalized groups. Thus its treatment of issues of sexual orientation and disability will range well beyond the criminal law to include broader questions of nondiscrimination and education law.

What I am calling for, 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; a society of citizens who admit that they are needy and vulnerable, and who discard the grandiose demands for omnipotence and completeness that have been at the heart of so much human misery, both public and private. To that extent, its spirit is less Millian than Whitmanesque: it constructs a public myth of equal humanity, to substitute for other pernicious myths that have long guided us. Such a society remains elusive because incompleteness is frightening and grandiose fictions are comforting. As a patient of Donald Winnicott's said to him (in an analysis that I shall analyze in detail in chapter 4), "The alarming thing about equality is that we are then both children, and the question is, where is father? We know where we are if one of us is the father."<sup>20</sup> It may even be that such a society is unachievable, because human beings cannot bear to live with the constant awareness of mortality and of their frail animal bodies. Some self-deception may be essential in getting us through a life in which we are soon bound for death, and in which the most essential matters are in fact beyond our control. What I am calling for is a society where such self-deceptive fictions do not rule in law and in which—at least in crafting the institutions that shape our common life together—we admit that we are all children and that in many ways we don't control the world.

This, it seems to me, is a good way to proceed in a liberal society, by which I mean one based on a recognition of the equal dignity of each individual, and the vulnerabilities inherent in a common humanity. If we cannot fully achieve such a society, we can at least look to it as a paradigm, and make sure that our laws are the laws of that society and no other.<sup>21</sup>