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Abstract	Would a just society or government absolutely refrain from shaming or humiliating any of its members? "No," says this essay. It describes morally acceptable uses of shame, stigma and disgust as tools of social control in a decent (just) society. These uses involve criminal law, tort law, and informal social norms. The standard of moral acceptability proposed for determining the line is a version of perfectionistic prioritarian consequentialism. From this standpoint, criticism is developed against Martha Nussbaum's view that to respect the dignity of each person, society absolutely must refrain from certain ways of shaming and humiliating its members and rendering them objects of communal disgust.	
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RICHARD J. ARNESON

3 SHAME, STIGMA, AND DISGUST IN THE DECENT SOCIETY

4

5

(Received ■; accepted in revised form 10 September 2006)


6 ABSTRACT. Would a just society or government absolutely refrain from shaming  
7 or humiliating any of its members? "No," says this essay. It describes morally  
8 acceptable uses of shame, stigma and disgust as tools of social control in a decent  
9 (just) society. These uses involve criminal law, tort law, and informal social norms.  
10 The standard of moral acceptability proposed for determining the line is a version of  
11 perfectionistic prioritarian consequentialism. From this standpoint, criticism is  
12 developed against Martha Nussbaum's view that to respect the dignity of each  
13 person, society absolutely must refrain from certain ways of shaming and humili-  
14 ating its members and rendering them objects of communal disgust.

15 KEY WORDS: absolutism, consequentialism, disgust, J.S. Mill, Martha Nussbaum,  
16 priority, shame, stigma

18 Among the obvious injustices perpetrated by morally indecent  
19 societies, the deliberate humiliation of disfavored groups looms  
20 large.<sup>1</sup> Those treated unjustly are not merely denied advantages to  
21 which they are entitled under ideal moral principles; they are often  
22 treated with contempt and their noses are rubbed in the dirt.  
23 Institutions and practices are arranged to reinforce the belief in  
24 higher caste and lower caste people alike that the members of the  
25 lower caste are lower quality beings, not fully human, and thus  
26 appropriate objects of the bad treatment imposed on them. Being  
27 placed on the low rung of a social hierarchy in many actual human  
28 societies, one finds oneself regarded as a disgusting and contemptible  
29 being by those perched on higher rungs, by others at one's social  
30 level, and perhaps, as a final indignity, by oneself.

31 These grim stylized social facts stimulate the ideal of a decent  
32 society in which all persons are treated with respect and dignity and  
33 no one suffers humiliation. A scaled-down version of this ideal

<sup>1</sup> I thank an anonymous referee for this journal for comments on a first draft of this essay.

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34 requires that at least in public life, all of us acting collectively through  
 35 the government or some similar agent of society refrain from  
 36 inflicting shame and humiliation on anyone for any reason.<sup>2</sup>

37 For anyone who has ever suffered shame, humiliation, and  
 38 marginal social status, the attraction of a society that refrains from  
 39 shaming and humiliating will be palpable. Nonetheless, like most  
 40 high-minded ideals, this one merits rejection. Shame, humiliation,  
 41 and disgust are negative states of mind that can be deployed as tools  
 42 to induce desired behavior. Tools can be used for good or bad  
 43 purposes. A society that is oriented toward inducing genuinely  
 44 desirable behavior in its members faces a difficult task, since we  
 45 humans are disposed to exhibit all sorts of behavior, good, bad, and  
 46 ugly. Shame, humiliation, and disgust are powerful motivators, and  
 47 can be harnessed to good purposes. A society that strives to be just  
 48 cannot afford to dispense with powerful tools that can help get the  
 49 job done. In this essay the phrase *the decent society* denotes a society  
 50 that is at least minimally or tolerably just, and it is an open question,  
 51 not settled by definition, whether or not the institutions of the decent  
 52 society humiliate anyone.

53 To focus on the concerns of this essay, I shall help myself to a  
 54 particular substantive account of justice. The account is a cousin of  
 55 John Stuart Mill's perfectionist utilitarianism.<sup>3</sup> This doctrine is a  
 56 version of maximizing consequentialism. Institutions and practices  
 57 should be set, and individual actions chosen, to maximize moral  
 58 value. Moral value is constituted entirely by benefits to individual  
 59 human persons (and other animals, for simplicity I leave aside  
 60 complications that arise in balancing the interests of humans and  
 61 other animals). The moral value of obtaining a benefit (avoiding a  
 62 loss) for as person is (1) greater, the larger the well-being gain that  
 63 accrues to the person, (2) greater, the worse in absolute terms the  
 64 person's lifetime well-being would be, absent this benefit, and (3)  
 65 greater, the less the person is responsible in virtue of her morally  
 66 innocent exercise of voluntary choice for being in the predicament of  
 67 facing low lifetime well-being (or greater, the more the person is  
 68 responsible in virtue of her morally innocent exercise of voluntary  
 69 choice for being in the desirable position of facing high lifetime

<sup>2</sup> See Avishai Margalit, *The Decent Society* (Cambridge: Harvard University Press, 1996). I disagree with the author's normative conclusions but am indebted to his excellent analyses.

<sup>3</sup> John Stuart Mill, *Utilitarianism*, in *Collected Works*, Volume 10, J. M. Robson (ed.), (Toronto: University of Toronto Press, 1977).



70 well-being). This form of consequentialism deviates from utilitarian-  
 71 ism by catering to responsibility as intrinsically morally important  
 72 and by giving priority to achieving gains for people, the worse off  
 73 they would otherwise be.<sup>4</sup> Well-being is understood in perfectionist or  
 74 objective-list terms. A person's life goes better for her, the more it is  
 75 the case that her life contains the entries on a full list of the  
 76 attainments that are genuinely valuable. In broad terms the items on  
 77 the list, we suppose, are friendship and love, successful family ties,  
 78 cultural, scientific, and athletic achievement, pleasure and the absence  
 79 of pain, meaningful work, and systematic knowledge.

80 Most of what I want to say as to why the institutions and practices  
 81 of a decent society will utilize shame, stigma, and disgust will not be  
 82 hostage to the plausibility of the particular doctrine of justice I invoke.  
 83 Instead what is at work is a generic consequentialism.<sup>5</sup> By bringing it  
 84 about that members of society are fearful of being shamed and averse  
 85 to stigma and disgust, and by attaching these sentiments to appropriate  
 86 social standards, the society produces just consequences to a  
 87 greater extent than would otherwise be possible. The relevant point is  
 88 simply that a society that seeks a reasonable level of conformity to the  
 89 standards it reveres should not work with one hand tied behind its  
 90 back by eschewing the use of powerful human motivations.

91 The particular egalitarian and perfectionist doctrine as to what  
 92 constitutes good consequences that I yoke to generic consequential-  
 93 ism does bear on the plausibility of the claim that the outcomes that  
 94 will be valued will under modern circumstances fit our considered  
 95 convictions about what policies and actions are morally acceptable.

96 This essay briefly sketches some uses for shame, disgust, and  
 97 stigma in the decent society. I then consider an opposed view  
 98 articulated in recent important work by Martha Nussbaum.<sup>6</sup>

#### 99 1. SHAME AND THE EGALITARIAN ETHOS

100 Shame in the decent society serves as a mechanism of enforcement of  
 101 legal norms and also of informal social norms. Take the latter first.  
 102 Discussion of the former is postponed to Section 5.

<sup>4</sup> On prioritarianism, see Derek Parfit, *Equality or Priority?* (Department of Philosophy: University of Kansas, 1995).

<sup>5</sup> For a qualification of this claim see the text linked to footnote 17.

<sup>6</sup> Martha C. Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004).



103 Consider the egalitarian ethos that G. A. Cohen has argued should  
 104 be internalized by the members of a Rawlsian just society (one  
 105 committed to the difference principle) and should guide each individual  
 106 member in the conduct of her life, especially her economic activity.<sup>7</sup> An  
 107 egalitarian ethos is a social norm that prizes social equality and  
 108 restrains already better off members of society from using their  
 109 personal advantages as leverage to maximal personal advantage when  
 110 doing so is costly to worse off members of society. For example,  
 111 suppose that Jane is a medical doctor and that practicing her chosen  
 112 specialty full-time is agreeable to her and more economically produc-  
 113 tive than anything else she might do. Jane's current salary is high, but in  
 114 concert with other physicians she could bargain to increase her salary to  
 115 triple its present amount. In a society with a functioning egalitarian  
 116 ethos, the Janes of the world are inhibited from holding out for the  
 117 higher salary by social pressure that people in her social circle would  
 118 apply to her by way of disapproval if she behaves economically in ways  
 119 that look greedy, and also by an inner feeling that greed is inappropriate  
 120 and greedy behavior unseemly. Since the Rawlsian difference principle  
 121 is an extreme version of the prioritarian doctrine, we can suppose that  
 122 prioritarian justice will prize an egalitarian ethos of the sort Cohen  
 123 claims the Rawlsian should embrace.

124 An individual's net social productivity depends on the type of job  
 125 she performs in given economic circumstances as well as on how hard  
 126 and effectively she works at her actual job and on her pay and other  
 127 benefits derived from the job. To advance the prioritarian aim, an  
 128 egalitarian ethos must direct the individual toward occupations in  
 129 which she can do the most good over the long run. A talented  
 130 engineer who chooses the career of poet and works hard at versifying  
 131 without demanding high pay might be making only a marginal social  
 132 contribution whereas if she were an engineer her social contribution  
 133 would be enormous. So we should conceive of the egalitarian ethos as  
 134 including a component that urges the individual to choose her career  
 135 with an eye to the good she can do for humanity in that career. The  
 136 ethos also includes the norm that talented and well off people should  
 137 not bargain aggressively in the market by holding out for the  
 138 maximum pay and benefits they can leverage their bargaining  
 139 advantages to obtain. So construed, the norm influences people's

<sup>7</sup> G. A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Cambridge: Harvard University Press, 2000), chapters 8 and 9. The Rawlsian principles of justice are elaborated in John Rawls, *A Theory of Justice*, Revised Edition (Cambridge: Harvard University Press, 1999).



140 behavior when competition is imperfect and they have bargaining  
 141 power, and also influences the desires that shape their market choices  
 142 and hence affects the equilibrium outcome when markets are fully  
 143 competitive. The egalitarian ethos might broadly be described as a  
 144 disposition against greedy self-seeking. This disposition presses the  
 145 individual toward nongreedy behavior and towards acts that punish  
 146 perceived excessive greed in others.<sup>8</sup>

147 I envisage social norms such as the egalitarian ethos as being  
 148 instilled mainly through education and socialization reinforced by the  
 149 exemplary behavior of significant others and by gossip and other  
 150 informal mechanisms of social sanction. The state's role involves  
 151 education and socialization and sometimes more. Although the  
 152 causal processes by which social norms are introduced and sustained  
 153 are not well understood, I assume it is possible sometimes to some  
 154 degree for deliberate concerted human action to change social norms.  
 155 In the U.S., there is now a reasonably effective social norm that  
 156 dictates that backpackers and hikers in wilderness areas should pack  
 157 out their trash. Forty years ago, no such norm was operative. In this  
 158 case, the setting of rules in government-maintained backwoods areas  
 159 helped to trigger the widespread internalization of the associated  
 160 norm. In other cases recognized leaders can start the process by  
 161 which a social norm develops.

162 Notice that social norms are coarse-grained instruments. Their  
 163 operation introduces inequities and anomalies. The burdens of  
 164 sustaining social norms fall disproportionately on the conscientious,  
 165 who are more likely than others to engage in the costly behavior of  
 166 sanctioning offenders. Moreover, a major enforcement mechanism of  
 167 a social norm is the internal pang of conscience; and the conscientious  
 168 are more strongly disposed than others to feel these pangs on  
 169 appropriate occasions. The enforcement of an informal norm is bound  
 170 to be sporadic and uneven; equally bad violations of the norm will  
 171 attract unequal penalties. A prioritarian consequentialist is troubled

<sup>8</sup> J. S. Mill, *On Liberty*, in *Collected Works*, Volume 18, J. M. Robson, (ed.), (Toronto: University of Toronto Press, 1977), Chapter 4, Paragraph 17, J. S. Mill emphasizes possible negative consequences of the prevalence in society of an egalitarian ethos somewhat like the one I am describing. He recoils from the social norm and declares it hostile to individual liberty. He has a point, but it is not dispositive of the issue. We are dealing with the distribution of real freedom across people and not simply with its maximization. I note that a prioritarian will resolve tradeoff issues such as the one that here exercises Mill and reach results that differ from those straight utilitarian calculation would recommend.





172 by these inequities, but only to a point: the question is always whether  
 173 feasible changes and modulations of existing effective social norms  
 174 would improve the degree to which the prioritarian aim is attained.

175 A critical reader might wonder what this discussion has to do with  
 176 the uses for shame and stigma in the just society. Social norms are  
 177 sustained by people's dispositions to compliance, but perhaps we can  
 178 instill this disposition without engaging shame. In response, we  
 179 should first clarify the notion of *shame*. Gabriele Taylor notes that  
 180 the person feeling shame "thinks of himself as being seen through the  
 181 eyes of another."<sup>9</sup> This audience might be actual or imagined. The  
 182 person feeling shame regards himself as being judged negatively by  
 183 this audience according to some standard of value that is either  
 184 accepted by the person feeling shame or at any rate accepted in the  
 185 relevant community.<sup>10</sup> Being perceived by others as failing to meet  
 186 this standard, one's social standing is threatened or lowered. The  
 187 standard of value that one fails to meet need not be a rule that one's  
 188 conduct flouts. Various features of one's person such as physical  
 189 appearance may fall below the standard. In a slogan, this account of  
 190 shame holds that "Shame is the emotion that a person experiences  
 191 when she believes that she has been disgraced in the eyes of persons  
 192 whom she respects."<sup>11</sup>

<sup>9</sup> Gabriele Taylor, *Pride, Shame, and Guilt* (Oxford: Oxford University Press, 1985), p. 57.

<sup>10</sup> Taylor qualifies her account. According to her, an audience, real or imagined, is not required for shame. What is required is a shift in the point of view of the person who experiences shame. An aspect of oneself that had passed without notice is then regarded from a detached critical perspective, with which one identifies. One then believes oneself to be "defective and degraded" (Taylor, *Pride, Shame, and Guilt*, p. 66). The detached critical perspective can appear at a higher-order viewpoint. An individual might imagine people applauding what she is doing, note that these people are approving what should arouse condemnation or contempt, and then experience shame. One as it were imagines a critic regarding with disapproval the inappropriate praising and identifies with the criticism of oneself. Bernard Williams denies that the identification with a critical standpoint has to be an ingredient in shame. He suggests that shame can be occasioned by the awareness of an actual or imagined gaze on the agent that is perceived to put the agent at a disadvantage or involve a loss of power [See Bernard Williams, *Shame and Necessity* (Berkeley: University of California Press, 1993), pp. 220–221].

<sup>11</sup> Dan M. Kahan, "What Do Alternative Sanctions Mean?" *University of Chicago Law Review* 63 (1996), pp. 591–653. Again, the issue discussed in the previous footnote arises. One might hold that to experience shame, it is not necessary that one respect the persons in whose eyes one is disgraced. One might instead fear them, or suppose that their negative appraisal of oneself will be widely shared.



193 At some point in my childhood, our family car was an old Buick  
 194 that ran poorly. Lacking ready cash, my father hung onto the car. On  
 195 family outings, when the car halted at a stop sign, it would stall, and  
 196 my brother and I would hunker down low in the back seat to keep  
 197 from being seen by friends and acquaintances. I was acutely ashamed  
 198 to be a child of parents who had to pinch pennies and could not  
 199 afford to replace in a timely manner a car in obvious bad repair.

200 I recount this story to make two points about shame and stigma  
 201 (detectable marks of shame). One is that although shame always  
 202 involves a loss of standing in a social hierarchy, these losses can vary  
 203 in significance, and some can be trivial, as in this example of ordinary  
 204 shame. Being shamed, one does not always suffer a threat to one's  
 205 membership in the human community or basic human dignity. Even  
 206 when loss of social standing generates significant real costs, as when  
 207 others become less willing to accept one as a partner in mutually  
 208 profitable enterprises, these costs need not approach the level of  
 209 consignment to subhuman status. Some shaming is horrific. Recall  
 210 the examples of mobs taunting black men about to be lynched in the  
 211 U.S. South, or concentration camp guards torturing despised  
 212 inmates. But ordinary shaming is not horrific.

213 The second point to notice about the example is that what is  
 214 morally untoward in the case is the badness of the snobbish social  
 215 standard to which shame is here harnessed. If what had really  
 216 occurred is that some of my family members had behaved with  
 217 incivility toward people viewed as social inferiors and I had cringed in  
 218 shame, my response would have been appropriate. It would have  
 219 been good if my parents could have weaned me away from my social  
 220 snobbery (they did in fact rebuke me), but it would have been  
 221 misguided for them to have focused on the disposition to experience  
 222 shame as itself undesirable. It is good to be disposed to be ashamed  
 223 by perceiving in oneself traits that are genuinely shameful.

224 The disposition to feel shame can be utilized to induce desired  
 225 behavior in oneself or others. One might still regard shame as inferior  
 226 to other negative social emotions for this purpose. For example, for  
 227 all that I have claimed so far, it might be the case that guilt always  
 228 trumps shame in the sense of being a better tool for encouraging  
 229 people to behave as we think they ought to behave.

230 If we think of guilt as focusing on the commission of an act that  
 231 violates a rule or law, we can see shame as focusing on traits or the  
 232 entire person. Shame also can be triggered by aspects of oneself not  
 233 within one's power to control; here also there may be a contrast with



234 guilt. Guilt is also thought to lead the person feeling guilt to focus  
 235 attention on the victims of the wrongful acts done rather than on the  
 236 nature of the self that has done these acts.

237 But nothing so far suggests there is anything untoward or suspect  
 238 about training people in the decent society to experience shame as  
 239 well as or instead of guilt when there is failure to comply with  
 240 important and justified social norms. Failing to conform to the  
 241 egalitarian ethos, the appropriate reproach may be, “how could I  
 242 have allowed myself to become such a greedy and selfish person”  
 243 rather than – or in addition to – “what an evil deed I have done.” One  
 244 should also note that the victims of a social norm violation might be a  
 245 diffuse group none of whom is significantly harmed, so focus on  
 246 “what I have done to these victims” may be less motivating toward  
 247 compliance than “what a low-grade individual I have shown myself  
 248 to be.” Also, shame at aspects of oneself beyond one’s power to  
 249 control can play a useful role in inducing compliance with justified  
 250 social norms. Such shame might lead one to redouble one’s efforts to  
 251 do better in other areas of social life where one’s performance can be  
 252 improved by voluntary effort. Perceiving or knowing about the sad  
 253 fate of another person writhing in shame for faults that she cannot  
 254 voluntarily control can induce one to avert a similar fate for oneself  
 255 or those one cares about. In these and other ways reproach directed  
 256 at what is beyond one’s power to control can improve the future for  
 257 self and others. Shame can be an effective instrument to induce  
 258 compliance with social norms and standards, and if the norms and  
 259 standards are morally justified, the imposition of shame can be  
 260 morally justified all things considered.

261 The threat of hard determinism generates an additional reason to  
 262 favor the use of shame to induce conformity to requirements of  
 263 justice. On some views, feeling bad about what one has done cannot  
 264 qualify as guilt unless one believes one was free not to choose the  
 265 doing of the act that elicits guilt. Moreover, according to hard  
 266 determinism, all human choices are caused events, and no one is ever  
 267 free to choose anything other than what is actually chosen. Given full  
 268 disclosure of relevant facts, no one could ever rationally hold the  
 269 belief that one was free to choose that is a necessary constituent of  
 270 guilt. I can feel appalled at my own morally wrong behavior, but  
 271 must acknowledge that I was not free to do otherwise, so cannot feel  
 272 guilty at what I have done.

273 But shame is not limited by any such free-to-choose requirement. I  
 274 can rationally feel deeply ashamed that I have done significantly



275 morally wrong acts, given full disclosure of relevant facts in a world  
 276 in which all human choices are caused events and I was not free to  
 277 have done otherwise than the vicious acts I actually performed. If  
 278 society seeks to train its members to experience only emotions it is not  
 279 irrational to feel, society refrains from seeking to bring it about that  
 280 its members are disposed to feel guilt in response to their misdeeds,  
 281 given hard determinism (To clarify: I am not here arguing in favor of  
 282 hard determinism, merely noting that if it is true, that provides  
 283 another reason to endorse the use of shaming mechanisms to induce  
 284 desirable behavior).

285 I do not claim that a just society eschews the use of irrational guilt  
 286 to induce conformity to moral requirements. It can be rational to  
 287 induce people to experience irrational guilt, since doing so can  
 288 increase the extent to which justice is fulfilled. But other things being  
 289 equal, it is better to achieve conformity to justice requirements by  
 290 means that do not bring it about that people are avoidably irrational.  
 291 It is better, other things being equal, that people experience only  
 292 emotions that make sense rather than emotions that well-informed  
 293 rational persons would never feel. The just society should then prefer  
 294 to use shame rather than guilt as a means of inducing conformity to  
 295 justified rules, in a world in which human choices are caused events  
 296 and no soft determinist strategy for rescuing moral responsibility in  
 297 this predicament can succeed.

298 For another example of a plausible norm that might be  
 299 appropriately enforced as a social norm without being enforced by  
 300 the law, consider Bad Samaritanism.<sup>12</sup> A Bad Samaritan refrains  
 301 from providing emergency aid to victims in distress when he can  
 302 render lifesaving or health-saving aid at low cost and small risk to  
 303 himself. Perhaps some types of Bad Samaritanism should be legally  
 304 prohibited; perhaps this would not be wise. Inducing compliance with  
 305 a norm of Minimally Decent Samaritanism through informal social  
 306 norm pressure might be the most effective policy. Again, the bad  
 307 feeling about oneself induced by failure to comply with a social norm  
 308 against Bad Samaritanism might appropriately focus on the bad  
 309 traits that have become entwined in one's personality rather than on  
 310 the specific act that triggers social disapproval. The remorseful  
 311 attempt to alter these traits might do good in a variety of ways not

<sup>12</sup> Nussbaum discusses a proposal by Amitai Etzioni to deal with Bad Samaritanism by a social norm rather than criminal law requirement in Nussbaum, *Hiding From Humanity*, pp. 245–246. She is unsympathetic to the idea, but mainly finds it too sketchy and incomplete to be assessable.



312 directly connected to Bad Samaritanism at all (suppose one realizes it  
 313 is extremely unlikely that one will ever face an emergency rescue  
 314 situation again in one's life but that the bad traits revealed by one's  
 315 behavior on this occasion can be corrected with significant improve-  
 316 ment in one's behavior towards other people generally).

## 317 2. SHAME AND DISGUST REACTIONS AND CRIMINAL PROHIBITION

318 In her fascinating book *Hiding from Humanity: Shame, Disgust, and*  
 319 *the Law*, Martha Nussbaum offers many insights about the relation-  
 320 ship between emotion and law.<sup>13</sup> Her central thesis, however, is  
 321 puzzling. She concentrates on two roles that emotions can play in  
 322 shaping law. Emotions can “figure in the justification for making  
 323 certain sorts of acts legal,” and can also serve as mitigating factors  
 324 when present in the mind of an agent who has committed an act the  
 325 law forbids. With respect to these two roles, she singles out shame  
 326 and disgust for special suspicion. “My general thesis will be that  
 327 shame and disgust are different from anger and fear, in the sense that  
 328 they are especially likely to be normatively distorted, and thus  
 329 unreliable as guides to public practice, because of features of their  
 330 specific internal structure,” she writes. Disgust, unlike anger, is  
 331 typically unreasonable, so disgust “should never be the primary basis  
 332 for rendering an act criminal, and should not play either an  
 333 aggravating or mitigating role in the criminal law where it currently  
 334 does so.”<sup>14</sup> She connects this thesis with an account of the political  
 335 philosophy of liberalism and with opposition to Patrick Devlin's  
 336 “legal moralistic” claim that the fact that a type of conduct is  
 337 regarded with revulsion and disgust by the ordinary member of  
 338 society is good evidence that the type of conduct should be legally  
 339 forbidden.<sup>15</sup> The story about shame is more complex, but broadly  
 340 similar. Shame can be reasonable and dispositions to experience  
 341 shame can do good. But following psychoanalytic theorizing she  
 342 identifies a type of shame, “primitive shame,” that we all experience

<sup>13</sup> In particular, I applaud her suggestions about how it would be desirable for modern societies to follow the lead of Walt Whitman and liberate its members from disabling shame regarding sexuality and the human body.

<sup>14</sup> Nussbaum, *Hiding From Humanity*. The first quote in this paragraph is at p. 7, the second at p. 13, the third at p. 14.

<sup>15</sup> See Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).



343 and that is pathological in its effects and that tends to arise whenever  
 344 shame is experienced and that is hard to disentangle from benign  
 345 shame. Hence “shame is likely to be normatively unreliable in public  
 346 life.” Moreover, “a liberal society has particular reasons to inhibit  
 347 shame and to protect its citizens from shaming.”<sup>16</sup>

348 What is puzzling here is the attempt to distinguish types of  
 349 emotion as reliable and unreliable and to suppose that shame and  
 350 disgust should be prevented from shaping the content of legal rules  
 351 and the criminal justice system whereas other emotions are fit to play  
 352 this role.

353 I hold no brief for the claim that the mere fact that a person or  
 354 even a great many persons in a society find a type of conduct  
 355 repulsive, disgusting, or shameful is reason to enforce a legal  
 356 prohibition against such conduct. Behavior can be regarded by many  
 357 people as repulsive, disgusting, or shameful without being in the  
 358 slightest degree wrongfully harmful to others or violating their moral  
 359 rights or failing to show them the due regard and concern that each  
 360 member of society should show every other member. But by the very  
 361 same token the mere fact that a great many persons in a society fear a  
 362 certain type of conduct or became angry or indignant when the  
 363 conduct is directed at them or occurs in their vicinity is by itself no  
 364 reason to enforce a legal prohibition against such conduct. Conduct  
 365 that elicits fear and anger and indignation can still be perfectly  
 366 morally innocent conduct that ought to be protected by law. The fact  
 367 that a certain type of conduct tends to elicit any adverse emotional  
 368 response is in and of itself not a ground for criminal prohibition. So  
 369 Nussbaum’s attempt to single out the emotions of shame and disgust  
 370 as unreliable indicators as to where the boundary between legally  
 371 protected and legally prohibited behavior should be drawn is  
 372 puzzling.

373 Of course, the emotional reactions of a morally well-trained and  
 374 virtuous person will tend to be responsive to whether conduct by  
 375 others is innocent or morally wrongful and if wrongful, to what  
 376 degree. These responses will be relevant to, though not dispositive of,  
 377 the issue, whether conduct of this sort should be criminalized. But  
 378 this holds of the virtuous person’s shame and disgust reactions just as  
 379 it holds of her disposition to feel anger, love, horror, and other  
 380 emotional states.

<sup>16</sup> Nussbaum, *Hiding From Humanity*, p. 15.



381 Much the same holds true of the issue, what emotional factors, if  
 382 any, should serve as mitigating or aggravating the severity of a given  
 383 criminal offense. Suppose it is the case that many people in a given  
 384 society have a visceral disposition to react with disgust and revulsion  
 385 to the idea of men having sex with men, or would be ashamed to  
 386 think of themselves participating in gay sexual activity. I entirely  
 387 agree with Nussbaum that such reactions of disgust and shame  
 388 should not be exculpatory if what is at issue is a murder carried out in  
 389 retaliation against one who has made a homosexual sexual advance  
 390 or carried out against people engaged in same-sex sexual activity in  
 391 the vicinity of the perpetrator. But the grounds for this judgment do  
 392 not stem from a conviction that shame and disgust are generally  
 393 unreliable emotions prone to distortion. The fact that a man becomes  
 394 angry and indignant when he receives an offer to engage in sex with  
 395 another man should not be exculpatory if he proceeds to assault,  
 396 maim, or kill the person who has tendered the offensive offer.  
 397 Nothing particular about the emotions of shame and disgust drives  
 398 this judgment – that being subject to unwanted homosexual advances  
 399 does not even slightly excuse a murder in retaliation.

### 400 3. SHAME AND DISGUST AS TOOLS OF SOCIAL CONTROL

401 Nussbaum considers another possible role for shame and disgust in  
 402 the law and social policy. Society might employ shame and disgust as  
 403 tools of social control. Let us suppose the decent society has arrived  
 404 at a list of various types of conduct that should be subject to criminal  
 405 prohibition, or render one liable to tort liability, or that should not  
 406 trigger a response by the legal system but that should cause one to  
 407 incur informal social sanctions linked to violations of social norms.  
 408 We have legal and social norms specifying that we ought to refrain  
 409 from certain sorts of conduct. Besides external sanctions such as the  
 410 gallows and prison bars and fines attaching to some forms of  
 411 conduct, a decent society will set in place psychological mechanisms  
 412 that will induce compliance by members of society to these (justified,  
 413 we are assuming) norms. One mechanism is conscience. We train  
 414 children to accept the norms and treat them as normative in  
 415 regulating their own conduct. Acceptance of norms includes becom-  
 416 ing disposed to feel guilty if one transgresses them and becoming  
 417 disposed to react adversely to others who transgress in ways that  
 418 impose costs on them, informal punishment for transgression.

419 So perhaps the person with a well-trained conscience in a decent  
 420 society who has embraced the right norms will be disposed to  
 421 experience shame if she violates the norms herself and to respond  
 422 to others who violate the norms in ways that are likely to lead them to  
 423 experience shame at being the sorts of persons their violations reveal  
 424 them to be. Moreover, perhaps the person with a well-trained  
 425 conscience in a decent society who has embraced the right norms will  
 426 be disposed to find at least some egregious violations of fundamental  
 427 norms disgusting whether committed by self or others.

428 Nussbaum argues against the view that shame and disgust would  
 429 be enlisted in the service of legal and social norm enforcement in the  
 430 decent society as just described. She tends to concentrate on a further  
 431 possibility, namely, that a society might adjust its criminal justice  
 432 system so that some criminal punishments are explicitly designed to  
 433 be punishments that shame and humiliate the offender. Should we  
 434 revert to the Puritan practice of placing offenders in the stocks and  
 435 inviting the community to disparage them? Nussbaum argues that we  
 436 should not do so.

437 Let us first examine the broader issue. One might hold that a  
 438 liberal should seek to design the criminal justice system and the  
 439 educational and socialization programs that support it so that only  
 440 the emotions of guilt and indignation, attaching to particular  
 441 wrongful acts, rather than shame, tainting the entire person and  
 442 her sense of basic moral worth, are brought to bear when people are  
 443 faced with actual or prospective violations of law. Hate the sin but  
 444 love the sinner is a motto for a decent society, surely for a decent  
 445 society that strives to satisfy liberal and egalitarian principles. So one  
 446 might hold.

447 But shame and humiliation need not brand offenders as perma-  
 448 nently defective people. Suppose that in a wave of nostalgia for the  
 449 racist bad old days of the U.S. I participate with others in lynching  
 450 some black men in order to terrify the black community. I am  
 451 convicted of murder and other felonies and given an appropriately  
 452 severe prison sentence. The criminal justice system, speaking on  
 453 behalf of society, condemns my conduct in convicting me of these  
 454 heinous crimes. It seems to me that in these circumstances, the very  
 455 act of convicting an individual for this sort of crime expresses  
 456 condemnation and seeks to shame the condemned person. The  
 457 severity of the punishment that is appropriate depends not just on the  
 458 quality of the particular act committed but on the character and  
 459 quality of person revealed in the act, as registered, for example, in the





460 judgment that the condemned person is a danger to society and likely  
 461 to act in ways that seriously trample on the fundamental rights of  
 462 other persons if left free on the streets. The condemnation that society  
 463 aims at the individual and which the condemned individual should  
 464 internalize attaches to the character of the person and not merely to  
 465 the wrongness of the individual act. The decent society by convicting  
 466 me of such a heinous crime condemns my character and seeks to  
 467 induce me to experience shame. This is true in virtue of the general  
 468 features of the system of criminal law. It would remain true even if  
 469 society eschewed the aim of crafting punishments deliberately to  
 470 make them shaming and humiliating (this raises the narrow issue we  
 471 have set aside for now).

472 A society that condemns the person and not just the act the person  
 473 has committed need not be engaged in a process that brands anyone  
 474 as necessarily permanently and irredeemably bad and beyond the  
 475 moral pale. The message “You should be deeply ashamed for  
 476 allowing yourself to become the sort of person who could commit this  
 477 heinous act and so poses a danger to the community” is fully  
 478 compatible with the message “our criminal justice system will do  
 479 what it can to enlist your cooperation in rehabilitating your character  
 480 and punishing you in such a way that you emerge from punishment  
 481 more firmly disposed to virtue and away from vice than you are  
 482 now.”

483 Nonetheless we should admit that the spoiled identity that is a  
 484 consequence of being convicted of a serious crime (unless under  
 485 special circumstances that render the act morally justifiable or  
 486 arguably justifiable) will not always be fixed despite efforts at  
 487 rehabilitation and in some cases will predictably not be fixable. If the  
 488 state convicts an accused person of a capital offense and imposes the  
 489 death penalty for this crime, the message conveyed to the convicted  
 490 offender can hardly be “We intend to rehabilitate you and reintegrate  
 491 you into society.” There is a genuine difference of principle here  
 492 between the consequentialist liberal and Nussbaum, if I am reading  
 493 her position correctly. She suggests that there is a line that society  
 494 absolutely must not cross. A just society treats all its citizens with  
 495 respect for their dignity and worth. This requires among other things  
 496 that society should confine its criminal punishment practices to those  
 497 that leave the sense of dignity of all punished individuals intact. The  
 498 just society does not through the agency of the state act toward a  
 499 person, no matter what bad acts she may have done, in a way that  
 500 conveys the message that she is a being of lesser basic human worth



501 than others. A just society does not engage in criminal justice  
502 practices that humiliate anyone convicted of an offense.

503 Here a clarification is necessary: The disagreement between  
504 Nussbaum and her critic need not involve the issue of consequen-  
505 tialism versus nonconsequentialism. The issue is really absolutism  
506 versus nonabsolutism.<sup>17</sup> Suppose you are a nonconsequentialist  
507 intuitionist of the W. D. Ross variety.<sup>18</sup> You believe that people  
508 ought to keep their promises, tell the truth, and so on sometimes even  
509 when fulfilling those duties does not bring about the best conse-  
510 quences obtainable in the circumstances. Suppose you accept “Don’t  
511 inflict shame and humiliation on anyone” as one moral duty or *prima*  
512 *facie* obligation. However, if you also accept a significant duty of  
513 beneficence, and allow that no duty is absolutely binding in all  
514 circumstances all things considered, you accept that sometimes, when  
515 the consequences of not inflicting shame and humiliation would be  
516 sufficiently drastic, you morally ought all things considered to do the  
517 inflicting. Nussbaum is opposed to the Rossian intuitionist position  
518 just described as well as to the consequentialist, since either is  
519 unwilling to say that the decent society refrains from inflicting shame  
520 and humiliation on any person come what may.

521 Another reason for accepting that consequentialism versus non-  
522 consequentialism is not exactly the right framework for understand-  
523 ing Nussbaum’s position and the objections to it starts with the  
524 observation that one could be a consequentialist and virtually agree  
525 with Nussbaum that the state should never ever inflict shame and  
526 humiliation on any person. One would take this line if one held that  
527 the harm of being shamed and humiliated is lexically worse than any  
528 other harms there are. Hence the policy that brings about best  
529 consequences would on this view never involve inflicting shame and  
530 humiliation on any person except in the exceptional case in which an  
531 agent faces a decision problem in which any act she might choose  
532 including doing nothing would result in the infliction of shame and

<sup>17</sup> An absolutist moral rule prescribes an exceptionless agent-relative duty. An absolute rule against lying prescribes that one ought never to lie, period. Such a rule holds unconditionally. According to a weaker construal of absolutism, an absolutist rule prescribes an agent-relative duty to which one ought always to comply whatever the consequences. (An absolutist who holds that, for example, one ought never to kill the innocent, whatever the consequences, but who allows that it would be right to kill the innocent if God commanded such an act, would be an absolutist in the weaker sense.)

<sup>18</sup> W. D. Ross, *The Right and The Good* (Oxford: Oxford University Press, 1930).

533 humiliation on someone. In that case one should do whatever results  
 534 in least infliction of shame and humiliation no matter what other evils  
 535 are attached to that shame-and-humiliation-minimizing option. The  
 536 problem with the consequentialist position as described is that it  
 537 drastically inflates the badness of the infliction of shame and  
 538 humiliation on a person by comparison with all of the other bads  
 539 and evils that actions might bring about or allow.

540 The infliction of stigma by criminal punishment is done by the  
 541 state, not merely allowed to occur. Hence a nonconsequentialist  
 542 morality that is responsive to the distinction between doing and  
 543 allowing might hold that in a just society the state may properly allow  
 544 stigma-imposing social processes to occur in private life that it would  
 545 be wrong for the state to perpetrate itself. A further issue concerns the  
 546 permissibility of the intention that is attributed to the state (or to  
 547 individual voters whose will establishes state policy). Some may hold  
 548 that it is sometimes permissible to be involved in bringing about a  
 549 state of affairs as a foreseen but unintended consequence of what one  
 550 does or allows when it would be wrong to bring about that same  
 551 effect as intended. One might then stake out a position between  
 552 Nussbaum's version of Rawlsian liberalism and consequentialist  
 553 liberalism. This nonconsequentialist doctrine holds that it is always  
 554 wrong for the state to intend to bring it about that any person loses  
 555 human dignity and self-respect. But it may be acceptable for the state  
 556 to condemn a person who has been found guilty of a crime and  
 557 impose criminal punishment even though it is a foreseen but  
 558 unintended consequence that the individual will suffer loss of dignity  
 559 and self-respect.

560 It may be that Nussbaum herself is an adherent of what I am  
 561 calling the midway position. She stresses the symbolic meaning of  
 562 state action, the message that a given state action conveys. She might  
 563 hold that the state must never act in a way that conveys the message,  
 564 or would be interpreted by a reasonable person as conveying the  
 565 message, that a particular individual is not a full human person of  
 566 dignity and worth. It would be compatible with this position to allow  
 567 that the state might justifiably impose the condemnation of criminal  
 568 punishment on a person in a way that as a foreseen but unintended  
 569 consequence will cause the person herself or other members of her  
 570 community subjectively to cease to regard her as a full human person  
 571 of dignity and worth.

572 Nussbaum stresses her commitment to a Rawlsian political  
 573 liberalism, which tells us to refrain from using state power in ways



574 that could be rejected by reasonable people.<sup>19</sup> A Rawlsian just society  
 575 acknowledges that reasonable citizens in a modern society that  
 576 protects civil liberties will adhere to a wide variety of conflicting  
 577 comprehensive conceptions of the good and the right. The Rawlsian  
 578 just society does not impose on people in ways that are only  
 579 justifiable from the perspective of some particular comprehensive  
 580 conceptions, which some citizens will reasonably reject.

581 What follows from this? So far as I can see, whether one is for or  
 582 against Rawlsian political liberalism as just described is irrelevant to  
 583 the issue, whether one should be for or against using the criminal  
 584 justice apparatus to heap shame and stigma on those convicted of  
 585 serious crimes, or whether one should be for or against training  
 586 citizens to be disposed to feel deeply ashamed if they commit serious  
 587 (immoral) crimes and to regard with some aversion others who  
 588 perpetrate such crimes. Acceptance of the Rawlsian legitimacy ideal  
 589 commits one not to use state power to advance controversial norms,  
 590 those reasonable people can reject. This commitment leaves it entirely  
 591 open whether the impositions on people using state power to promote  
 592 uncontroversial norms should or should not use shame (and disgust)  
 593 as helps to enforcement.

594 Nussbaum links Rawlsian political liberalism to another nexus of  
 595 ideas centered around an Immanuel Kant versus Mill theme. The  
 596 dignity of the person, equal respect for each individual, the  
 597 inviolability of the person, and the imperative of treating each  
 598 person as an end are invoked to support a political stance that  
 599 prohibits establishing institutions that shame or humiliate anyone.<sup>20</sup>  
 600 Section 6 of this essay comments on this theme.

601 Let us revisit the assumption – already queried in this essay – that  
 602 a decent society in modern times can operate a criminal justice system  
 603 that entirely eschews shaming. This assumption may be false.  
 604 Suppose one is convicted of a felony, and it is agreed the felony in  
 605 this case is a serious violation of the moral rights of other people. I

<sup>19</sup> John Rawls, *Political Liberalism*, Second edition (New York: Columbia University Press, 1996).

<sup>20</sup> Thomas E. Hill, Jr. interprets Kant's humanity formula as absolutely forbidding treating people with degrading contempt that denies their status as rational agents. Applied to issues of punishment and the social response to evildoers, the doctrine, writes Hill, holds "that criminals must be treated with respect as human beings, not humiliated or manipulated like animals" [See Thomas E. Hill, Jr., *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca: Cornell University Press, 1992), Essays 2, 9, and 10. The quoted passage is at p. 210].



606 would argue that a decent society trains its members to be disposed to  
 607 feel deeply ashamed at violating the rights of others in this way, and  
 608 the conviction and sentencing in a court of law involves an official  
 609 public condemnation of one's conduct, which should trigger further  
 610 shame. The criminal conviction and the imposition of the sentence  
 611 themselves constitute a stigma, a visible mark of reproach. This  
 612 stigma marks the convicted felon to the end of his days. An  
 613 appropriate response on the part of the convicted felon is guilt at the  
 614 harm he has done to others and also shame at the person he has  
 615 become. There is conceptual room here to argue that the state action  
 616 might only involve the intention to pronounce guilt and condemn the  
 617 behavior and punish the offender for what he has done. The state's  
 618 intention need not extend to the shame accompaniments. But this is a  
 619 thin distinction, like the one invoked when one notes that when one  
 620 needs to use dynamite to force the removal of the body of the person  
 621 stuck in the only available exit from danger, one intends only the  
 622 movement of the person's body and not its shredding to bits causing  
 623 her immediate death.

624 Another possible divide between those who do and do not regard  
 625 human dignity as negotiable is the line separating those who regard  
 626 one's status as a person of equal basic worth as that possessed by  
 627 every other person as forfeitable. The commission of a sufficiently  
 628 heinous crime forfeits some of this dignity status, and sufficient  
 629 criminality can forfeit all of it. John Locke suggests this view when he  
 630 asserts that a person set on murderous predatory activity towards  
 631 others may be killed as a wild beast.<sup>21</sup> Since virtually everyone will  
 632 allow that some rights such as rights to liberty of movement may be  
 633 forfeited at least for a time by commission of wrongs, the line in the  
 634 sand is drawn between those who assert and those who deny that  
 635 some basic rights to dignified treatment that befits the status of  
 636 rational agent may not be forfeited. Some might say that rights not to  
 637 be subjected to cruel and unusual punishment, rights not to be grossly  
 638 insulted and humiliated, rights not to be subjected to the death  
 639 penalty, rights not to be deprived of liberty on paternalistic grounds,  
 640 or some subset of these rights are the inalienable birthright of every  
 641 adult rational agent.

<sup>21</sup> John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing, 1980), p. 11 (Section #11). Originally published 1690.



## 4. PRIMITIVE AND PRODUCTIVE SHAME

643 At some points in her arguments Nussbaum asserts that state action  
 644 that humiliates citizens in the attempt to achieve some good end will  
 645 be counterproductive.<sup>22</sup> A criminal justice system that aims to  
 646 rehabilitate the criminal and reintegrate her into society will reduce  
 647 crime more effectively than harsh communal condemnation. This is  
 648 not Nussbaum's only ground for rejecting state shaming. She holds  
 649 such practices are wrong in themselves, and always to be avoided,  
 650 whatever the consequences. The argument that such practices are  
 651 anyway counterproductive is an added consideration.

652 This added consideration as Nussbaum develops it is of interest in its  
 653 own right. She draws on neo-Freudian psychological theorizing to  
 654 investigate the nature of shame. She finds that infantile narcissism and  
 655 the struggle to control it are crucial in the development of the individual  
 656 from child to adult. In all of us, even the most mature, infantile  
 657 narcissism always threatens to overwhelm our view of self and others  
 658 and lead to antisocial, self-aggrandizing acts. An infantile sense of  
 659 power and entitlement is always threatened by a dim perception that  
 660 one is weak and dependent, and this according to Nussbaum is the  
 661 origin of primitive shame, a wild emotion that is likely to break out of  
 662 control and trigger harmful stigmatizing and shaming of marginal  
 663 groups and outliers and those who are seen as not normal. I confess to  
 664 empirical doubts about the picture of our mental make-up that  
 665 Nussbaum paints in interesting ways, but for purposes of this essay,  
 666 there is no need to challenge her evidence. Let us accept for the sake of  
 667 the argument that Nussbaum is right about human psychological  
 668 development and about the permanent disruptive threat of primitive  
 669 shame. I still do not see why the use of shaming is ruled out as a  
 670 candidate method of social control. Nussbaum does not see primitive  
 671 shame as all there is. She describes a constructive form of shame that  
 672 has benign uses in social life. So given that infantile narcissism and  
 673 primitive shame are potent forces threatening the bonds of decent  
 674 community, why not see shaming mechanisms in criminal justice as  
 675 possible useful means of inhibiting infantile narcissism and primitive  
 676 shame and as encouraging constructive shame in individuals?  
 677 Nussbaum points to instances in which social-control-by-shame  
 678 practices are taken over by people moved by primitive shame and the  
 679 shame practices then lead to witch hunts, pogroms, lynchings, and the

<sup>22</sup> Nussbaum, *Hiding From Humanity*, pp. 234–237.





680 like. This is a salutary warning, but so far as I can see the lesson might as  
 681 well be that we should be careful in incorporating shame mechanisms in  
 682 criminal justice practices. The fact that a project can run amok does not  
 683 show that undertaking the project is a bad idea.

684 For all that Nussbaum asserts on this score, the use of what we  
 685 might call ordinary shame mechanisms to reinforce social norms  
 686 might well be likely to decrease not increase the incidence and power  
 687 of the bad primitive shame. Nussbaum's critics will add that the  
 688 criminal justice system already routinely deploys shame to deter  
 689 crime by condemning and thus shaming those convicted of crimes.

690 Put simply, her claim is that if in the decent society we train people to  
 691 feel shame when they behave with antisocial selfishness, this will increase  
 692 their tendency to create and extend and reinforce bad caste hierarchies in  
 693 the society. They will be more likely to be racist, homophobic, and likely  
 694 to be contemptuous and insulting to disabled people. I doubt that this is  
 695 really so. At least, we need evidence, which Nussbaum has not supplied,  
 696 to render the claim initially credible. In the absence of such evidence, the  
 697 pro-shame liberal should not be budged from her position by conjecture.

698 To clarify Nussbaum's opposition to the use of shame and stigma  
 699 as mechanisms of social control, let us look at the "productive kind  
 700 of shame" that she distinguishes from a "dangerous kind that either  
 701 is primitive shame or strengthens it."<sup>23</sup> Her centerpiece example of  
 702 productive instigation of shame is Barbara Ehrenreich's insistence  
 703 that Americans should feel shame about the stingy treatment we  
 704 accord to working poor people.<sup>24</sup> She asserts that this attempt to  
 705 trigger shame invokes morally sound norms. Also, the quality of the  
 706 shame that is being triggered is not narcissistic but rather reinforces  
 707 "a sense of common human vulnerability, a sense of the inclusion of  
 708 all human beings in the community, and related ideas of interdepen-  
 709 dence and moral responsibility." So far as I can see this is another  
 710 way of saying this attempt to make people feel shame is done in the  
 711 service of moral norms of which Nussbaum approves. She adds that  
 712 to be unobjectionable, the invitation to experience shame must  
 713 (besides being in the service of sound norms) be "noninsulting,  
 714 nonhumiliating, and noncoercive."<sup>25</sup> So perhaps Nussbaum's claim is  
 715 that coercive imposition of shame always triggers the primitive shame

<sup>23</sup> Nussbaum, *Hiding From Humanity*, p. 212.

<sup>24</sup> Barbara Ehrenreich, *Nickel and Dimed: On (Not) Getting By in America* (New York: Metropolitan Books, 2001); cited after Nussbaum, *Hiding From Humanity*, p. 241.

<sup>25</sup> Nussbaum, *Hiding From Humanity*, pp. 213–214.



716 that we must at all costs do nothing to encourage. Another position  
717 she might hold is that coercive imposition of shaming violates a  
718 moral right possessed by each person not to be so treated.

719 A noncoercive invitation is presumably an appeal to rational  
720 faculties: an attempt to argue that one ought to feel shame about  
721 some aspect of oneself. A rhetorical appeal that eschews attempt at  
722 argument would then qualify as coercive. Even more coercive would  
723 be subjecting an individual to an event, such as conviction of crime or  
724 imprisonment, that is expected at least to some degree to induce  
725 shame whatever the individual's reasoned response to the event.

726 No doubt it is often useful and agreeable to invite rather than  
727 coerce shame. But I do not see why this is a condition that must be  
728 satisfied if shame inducement is to be acceptable all things considered.  
729 If professors are treating their students improperly, these offenders  
730 may be immune to appeals to rational argument, but vulnerable to  
731 rhetorical insult, e.g., having their conduct likened to that of Nazi  
732 prison guards. It would be better if the wayward professors were  
733 susceptible to rational argument, but in the indicated circumstances,  
734 the rhetorical insult may be the best way forward.

735 The same goes for the insistence on an absolute bar against insult  
736 and humiliation. Even if Nussbaum's speculation is correct that any  
737 inducement of shame runs the risk of triggering an inflamed antisocial  
738 emotion in the shamed (or shaming) person, the risk may still be  
739 worth taking. The benefits of inducing shame in particular circum-  
740 stances may outweigh their costs as assessed according to the morally  
741 best standards for ranking outcomes.

742 Nussbaum presumably intends to appeal not to expected conse-  
743 quences but to a right possessed by each person not to be humiliated.  
744 But even granting the existence of such a right, we might still hold  
745 that it should give way when the consequences of upholding it would  
746 be excessively bad. Also, to be even remotely plausible, the claimed  
747 right would have to be specified so it protects individuals against  
748 insult and humiliation rising above some threshold of harshness. For  
749 example, Avishai Margalit, who proposes that a decent society is one  
750 whose institutions do not humiliate people and that decency takes  
751 strict lexical priority over moral demands of justice, identifies  
752 humiliation with "treating humans as nonhuman," rejecting humans  
753 from the family of man, and "acts intended to lead to lack of control  
754 or to highlight one's lack of control."<sup>26</sup> The paradigm case of

<sup>26</sup> Margalit, *The Decent Society*, p. 146.



755 humiliation as he conceives it would be Hitlerian prison guards  
756 treating Jewish prisoners as if they were animals fit for slaughter.

757 One issue then is whether there could ever be circumstances in  
758 which impressing on a person that she is regarded as a nonperson  
759 who may be treated as a thing or animal that lacks all rights could  
760 ever be justified. The consequentialist will of course insist that the  
761 answer in principle is affirmative; this could be justified provided the  
762 consequences of refusing to perform such an act would be worse than  
763 the consequences of performing it. But it is important to notice that  
764 this is not the issue that is presented by shaming punishments and  
765 more broadly by the utilization of shame in criminal justice  
766 proceedings and social norm enforcement. Here the message con-  
767 veyed is not that the person being shamed is a nonperson who lacks  
768 fundamental human rights and worth. The message is rather that this  
769 person is subpar in important ways that should affect her standing in  
770 the community, temporally or permanently. "You are not a member  
771 in good standing of democratic community" is not equivalent to "you  
772 are not a full human person." The former is an earned and forfeitable  
773 status; the latter, we can agree, is not.

774

## 5. SHAMING PENALTIES

775 Turn now to Nussbaum's discussion of the infliction of shaming  
776 penalties on convicted offenders against criminal laws. A shaming  
777 penalty is deliberately crafted to induce shame (or to heighten shame  
778 if all criminal justice convictions are shame inducing to some degree).  
779 A shaming penalty may involve governmental publicizing of the fact  
780 of conviction. Another type of shaming penalty involves enforced  
781 public self-reproach. A polluting firm might be required to take out  
782 advertisements in major media that apologize for wrongful acts that  
783 have done damage to the community. Another type of shaming  
784 penalty involves being forced to perform acts widely regarded as  
785 humiliating such as kneeling down and cleaning public latrines by  
786 hand.

787 The attraction of such penalties is that if properly designed they  
788 seem to offer the prospect of deliberately inflicting suffering on the  
789 convicted offender, deterring him from future offenses and others  
790 from doing the same, and accomplishing these standard punishment  
791 functions at low cost by comparison with alternative feasible modes  
792 of punishment. There is also a suggestion that well designed shaming



793 penalties might succeed in deterring crime at lesser total cost to  
794 offenders than alternative punishments.<sup>27</sup>

795 Nussbaum proposes five arguments against shaming penalties for  
796 criminal law violations. Two of these arguments are relevant here.  
797 The main argument is that “shame penalties humiliate; and thus  
798 constitute an offense against human dignity.”<sup>28</sup> I have already  
799 indicated some responses to this argument.

800 In the circumstances in which shame penalties according to me are  
801 defensible, self-respect and human dignity (or something equally  
802 morally valuable) will be at stake on both sides of the argument. The  
803 consideration Nussbaum invokes as decisive will not then settle the  
804 issue. Consider an example she discusses, the shaming penalty for  
805 drunk driving that consists in requiring the convicted offender to  
806 display for some period of time a “DUI” message on his car license  
807 plate indicating that he has been convicted of driving under the  
808 influence of alcohol. Nussbaum might be saying that the imposition  
809 of such a penalty involves the state’s conveying a message that it is  
810 never allowed to convey – a message antithetical to human dignity.  
811 She might be saying that the imposition of such a penalty inflicts a  
812 cruel punishment, a type of harm that the state is never morally at  
813 liberty to inflict.

814 However, drunk driving kills and seriously maims innocent  
815 victims. Perhaps the contemplated shaming penalty would not  
816 effectively deter drunk driving and prevent accidents. In this case,  
817 Nussbaum and her critic will agree. Disagreement arises if the  
818 shaming penalty would be a more effective deterrent than alterna-  
819 tives. This means that foregoing the shaming penalty brings it about  
820 that some innocent people are killed or maimed, when their losses by  
821 any reasonable standard outweigh the losses suffered by those who  
822 would be harmed by the implementation of the shaming penalty.  
823 Why are not the dignity and self-respect of drunk driving victims on  
824 the line, in Nussbaum’s moral policy analysis, when the state decides  
825 whether or not to forego the shaming penalty? Suppose I am  
826 permanently rendered comatose or disabled or dead, by this state  
827 forbearance. The message that the state’s refusal to implement a  
828 shaming penalty conveys is that my loss is reasonably ignorable by

<sup>27</sup> See Dan M. Kahan, “What do Alternative Sanctions Mean?” also Dan M. Kahan and Eric A. Posner, “Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines,” *Journal of Law and Economics* 42 (1999), pp. 365–391.

<sup>28</sup> Nussbaum, *Hiding From Humanity*, p. 230.



829 the state. We do not care about the magnitude of the harm that we  
 830 are knowingly allowing by forbearing to impose a shaming penalty.  
 831 No matter how much devastation results from our policy, we know in  
 832 advance it is morally acceptable, because we absolutely must refrain  
 833 from injuring by official state act the dignity of those convicted of  
 834 drunk driving. Why is not this line of thought an assault on my  
 835 human dignity as potential drunk driving accident victim? To my  
 836 mind, the message implicit in the state policy Nussbaum recommends  
 837 is morally unacceptable and the policy of tolerance of drunk driving  
 838 deaths and maimings in the imagined circumstances is cruel.

839 A defender of Nussbaum might at this point lodge a protest.  
 840 Nothing inherent in a principled refusal to prevent drunk driving  
 841 deaths and injuries by the infliction of shaming penalties precludes  
 842 the state's taking effective actions to prevent those deaths by other  
 843 means. So Nussbaum need not assume the stance I have supposed she  
 844 is committed to taking.

845 But this just shifts the problem from one foot to the other.  
 846 Suppose that to prevent drunk driving deaths and other horrible  
 847 injuries without shaming, we would have to impose very serious  
 848 penalties on those convicted of drunk driving and devote enormous  
 849 resources to enforcement. We would have to imprison drunk drivers  
 850 for long periods, and according to Nussbaum, we ought to do so even  
 851 if every member of the class of potential drunk drivers would  
 852 reasonably vastly prefer to be shamed rather than suffer the  
 853 alternative equally effective nonshaming penalty. This seems to me  
 854 a poor way of saluting the human dignity of this class of persons. Of  
 855 course, the consideration just mentioned is not decisive. In some cases  
 856 the state should administer one type of penalty for crimes even  
 857 though the criminals would prefer an alternative equally effective  
 858 penalty, in view of the indirect moral costs that would thereby fall on  
 859 other people. Even if criminals convicted of capital offenses would  
 860 prefer slavery to execution, we should not enslave, because the  
 861 introduction of this practice into society would have bad indirect  
 862 effects on our culture and thereby on our lives over the long run. But  
 863 nothing comparable by way of harm to third parties is in the wings in  
 864 the case of state policies imposing shaming penalties on drunk  
 865 drivers.

866 An alternative tack the determined opponent of shaming cases as  
 867 offensive to human dignity might take would be to prevent drunk  
 868 driving deaths and horrible injuries by means other than draconian  
 869 criminal justice proceedings. Perhaps alternative state policies could



870 always be found, even if terribly costly policies, that would protect  
 871 the dignity of drunk drivers that would be menaced by shaming  
 872 penalties while also protecting the dignity of those whose lives would  
 873 be blighted if drunk driving were in effect tolerated. For example, we  
 874 might coercively impose counseling and rehabilitation on substance  
 875 abusers and those deemed to be at risk of substance abuse. At the  
 876 limit, we might prohibit recreational but risky drug and alcohol  
 877 consumption across the board – To my mind, this strategy of  
 878 response is no better than that considered in the previous paragraph.  
 879 We are just shifting around and tinkering with the inevitable  
 880 unacceptable and unreasonable moral costs of insistence on any  
 881 absolute prohibition along the lines of Nussbaum’s “No shaming!”  
 882 prohibition. The inevitable unacceptable costs remain.

883 My use of the drunk driving example is purely hypothetical: in  
 884 some possible circumstances, Nussbaum’s prohibition on shaming  
 885 penalties would lead to morally outrageous results. Hence we should  
 886 reject her absolutist principle for state policy. Whether shaming  
 887 penalties for drunk driving would actually produce good conse-  
 888 quences and be morally acceptable all things considered in some  
 889 jurisdiction in current circumstances would require a detailed serious  
 890 policy analysis that is beyond the scope of this essay.

891 A second consideration is that when the state uses shaming  
 892 penalties it effectively turns over the administration of criminal  
 893 justice to the mob. Penalties are inherently unstable and erratic, and  
 894 depend on the moods and tastes and fears and aversion of the public  
 895 rather than on the severity of the crime.

896 The complaint that shaming penalties turn over the administration  
 897 of justice to the mob is a powerful objection against shaming  
 898 penalties that invite members of the public to heap reproach, scorn,  
 899 and perhaps physical abuse on those being punished. The classic  
 900 punishment of this type is placing someone in the stocks in a public  
 901 square to be jeered at and pelted with garbage by anyone so inclined.  
 902 The severity of the punishment in practice depends on the appetite for  
 903 jeering and pelting of those members of the public most inclined to  
 904 these sports. This group presumably includes the most censorious and  
 905 also the most brutal and sadistic elements in the population. It does  
 906 not seem fair to let the severity of punishment inflicted vary according  
 907 to the dispositions of the members of this antisocial element who  
 908 happen to be present, since these variations can hardly be correlated  
 909 with the magnitude of the crime for which punishment is imposed.  
 910 However, if community sentiment effectively inhibits antisocial



911 members of the community from excessive abuse, even this objection  
912 is not decisive.

913 Not all shaming penalties are of the classic type. Suppose the  
914 shaming penalty consists in requiring convicted offenders personally  
915 to publicize their own crimes. One might be required to post a notice  
916 in a newspaper or other news medium, or indicate on one's car license  
917 plate that one has committed a particular type of offense. Here the  
918 harm inflicted by the shaming penalty largely stems from the  
919 disposition of community members reminded of the offense to be  
920 less willing than they otherwise would be to engage in mutually  
921 profitable partnerships and other forms of interaction with the  
922 offender. Since the more antisocial and sadistic types who might  
923 render highly variable the actual grief to the punished person that  
924 shaming penalties inflict are unlikely to be profitable partners for  
925 mutual interaction anyway, the shaming-by-publicity penalties are  
926 less likely to be erratically variable and more likely to depend for their  
927 severity on the reactions to offenders by ordinary members of the  
928 community. No doubt shaming penalties will only work acceptably if  
929 the community members are disposed to react sensibly and nonvin-  
930 dictively to offenders, but this condition can and should be met, and  
931 anyway, if it is not met, ordinary nonshaming penalties are likely to  
932 go awry as well.

933 When we aim to match the punishment to the severity of the  
934 offense that is being punished by nonshaming penalties, we content  
935 ourselves with assigning more or less of an objective deprivation –  
936 more or fewer years in prison, for example. Of course the actual harm  
937 imposed by such punishments varies erratically with many hard-  
938 to-control factors, including the character and interest of one's prison  
939 cellmates (doing prison time with Martin Luther King and Henry  
940 David Thoreau as cell mates might be highly stimulating and overall  
941 advantageous) I cannot see that shaming-by-publicity penalties, the  
942 amount of publicity required varying with the severity of the offense,  
943 are arbitrary in any morally objectionable way by comparison with  
944 fines and prison sentences, the standard nonshaming penalties that  
945 are the mainstay of criminal justice punishments.

946 6. NUSSBAUM VERSUS MILL

947 Nussbaum notes that in rejecting the idea that society's proclivities  
948 regarding shame and disgust provide any proper guidance as to what

949 actions should be discouraged by criminal prohibition, she tends to  
 950 favor the harm principle roughly as proposed by Mill in *On Liberty*.  
 951 The harm principle holds that the only appropriate reason for  
 952 restricting individuals' liberty to engage in a type of conduct is the  
 953 consideration that these acts wrongfully harm nonconsenting other  
 954 people.<sup>29</sup> Mill advances a utilitarian defense of wide individual  
 955 liberty. Nussbaum clarifies her views on the proper basis for  
 956 exercising state power by indicating what she finds objectionable in  
 957 Mill's arguments and pointing toward what she regards as better  
 958 ones.

959 Nussbaum finds two broad strategies of argument for wide  
 960 individual liberty and the harm principle in *On Liberty*. One is that  
 961 freedoms of expression, association, and experimentation promote  
 962 truth. A second is that these freedoms promote the self-development  
 963 of individuals and of the human race. Under this second heading she  
 964 sees two distinct lines of thought, a "perfectionistic" argument and a  
 965 "distributive" argument. The first line asserts that everyone must be  
 966 allowed to live as she pleases so long as she does not harm others in  
 967 order to allow the freedom needed for the genius, the person of  
 968 exceptional talent, to develop the extraordinary accomplishments  
 969 that constitute human progress. The second emphasizes that each  
 970 person needs wide freedom in order to develop her own potential.  
 971 Since people are different, no prescribed way of life fits all types, and  
 972 it takes experimentation and observation of the ways followed by  
 973 others for the individual to find her own way that suits her nature.

974 Nussbaum objects that these utilitarian arguments plausibly  
 975 support wide freedom for some people in society, those most likely  
 976 to discover truths and produce cultural achievements, but not a  
 977 regime of equal rights to wide liberty to live as one pleases. There is  
 978 no very strong reason to think that the social arrangements that  
 979 expectably maximize aggregate utility would always require equal  
 980 rights to liberty for all. Of the truth promotion argument, Nussbaum  
 981 observes, "If one starts from the idea that each human being has

<sup>29</sup> The view mentioned in the text is just one of three plausible construals of the harm principle. Another is: The only acceptable reason for restricting a person's liberty to act as she chooses is that restricting her freedom would prevent harm to (nonconsenting) others. A third is: The only acceptable reason for restricting a person's liberty to act as she chooses is that her action would cause or excessively risk causing harm to (nonconsenting) others. David Lyons defends the second construal of Mill's harm principle in *Rights, Welfare, and Mill's Moral Theory* (Oxford and New York: Oxford University Press, 1994).





982 dignity and deserves respect, and that politics must be grounded in  
 983 respect for the dignity of all citizens as equals, one will find that Mill  
 984 has put things just the wrong way round. Instead of thinking truth  
 985 good because of what it does for the self-respect and flourishing of  
 986 individuals, he subordinates individual flourishing and dignity to  
 987 truth, conceived as an abstraction.” In this spirit she endorses John  
 988 Rawls’s ringing assertion that “each person possesses an inviolability  
 989 founded on justice that even the welfare of society as a whole cannot  
 990 override.” The foundation of social policy should be the inviolability  
 991 of the person and the imperative of treating each person as an end  
 992 and equal respect for the dignity of each individual.<sup>30</sup>

993 This theme connects to Nussbaum’s position that the decent  
 994 society subjects no one to shaming indignities and protects each and  
 995 every person from social processes that single out some groups of  
 996 people in society for rejection and contempt. The imperative not to  
 997 humiliate any member of society is nonnegotiable, and a Kant-  
 998 inspired political philosophy can support this insistence on inviola-  
 999 bility whereas a utilitarian position cannot.

1000 In my view these remarks do not perspicuously state the  
 1001 disagreement between Mill and Rawls on rights, much less provide  
 1002 any grounds for favoring Rawls’s side of the argument.

1003 Mill is chided for embracing a view that fails to uphold the  
 1004 inviolability of the person. I shall suppose inviolability is to be taken  
 1005 literally: persons are inviolable in so far as they possess certain rights  
 1006 that should never be violated come what may, whatever the conse-  
 1007 quences. What rights are these? If we do not trivialize the issue by  
 1008 building in justifiable exceptions to the rule that defines rights, the idea  
 1009 that there are specifiable ways in which persons absolutely must not be  
 1010 treated has no future. There are no such ways. This is not a rights versus  
 1011 utilitarianism debate, nor a rights versus consequentialism debate.

<sup>30</sup> I am unsure how to reconcile Nussbaum’s affirmation of inviolability here with her sympathetic discussion of what she calls “Sensible Consequentialism” and “sensible deontology” in her “Comment” on Judith Jarvis Thomson’s “Goodness and Advice.” Both sensible views agree that there is no ordinary deontological duty such as the duty to refrain from telling lies that one morally ought to fulfill come what may, whatever the consequences. The sensible views Nussbaum approvingly characterizes reject inviolability [See Judith Jarvis Thomson, *Goodness and Advice*, Amy Gutmann (ed.), (Princeton: Princeton University Press, 2001), pp. 98–102. I should note that in her “Comment” Nussbaum explicitly declines to affirm consequentialism and expresses a concern that the doctrine of consequentialism may leave room for amendments and qualifications that render the doctrine purely formal, a notation in which any substantive moral position might be expressed.



1012 Suppose that for the sake of the argument we affirm a nonconsequen-  
 1013 tialist morality that affirms that each person has certain rights such as  
 1014 the right of innocent nonthreatening persons not to be deliberately  
 1015 harmed. Any such right will be overridden if the consequences for  
 1016 people, if the right is upheld in particular circumstances, are sufficiently  
 1017 bad, by comparison with the consequences for rightholders and others  
 1018 if the right is not upheld on this occasion. Otherwise we are stuck with  
 1019 the view, let justice be done even though the heavens should fall. This  
 1020 view is more counterintuitive than anything Mill asserts.

1021 Nussbaum quotes Rawls's ringing affirmation of inviolability. But  
 1022 in Rawls the inviolability of the person is interpreted in terms of  
 1023 lexical priority relations – of his principles over welfare promotion, of  
 1024 the equal liberty principle over the principle regulating social and  
 1025 economic benefits, and of the fair equality of opportunity component  
 1026 of this latter principle over the difference principle component. None  
 1027 of these lexical priority claims withstands scrutiny, I claim. This essay  
 1028 is not the place to argue this point, but one should notice that Rawls  
 1029 himself acknowledges that maximin, the core idea of the difference  
 1030 principle, is not acceptable as a general principle.<sup>31</sup> Rawls proposes  
 1031 that the cases in which maximin gives counterintuitive recommenda-  
 1032 tions are unlikely to arise for policy choices that involve the  
 1033 arrangement of the basic structure of institutions in modern  
 1034 conditions.

1035 If inviolability is implausible at the level of moral principle, that  
 1036 still leaves open the question, whether at some lower level of  
 1037 abstraction, some form of inviolability or absolute exceptionless rule  
 1038 might be a good idea. In fact *On Liberty* contains an interesting  
 1039 suggestion along this line. Mill proposes the harm principle as a guide  
 1040 for legislators and constitution-writers and social norm entrepre-  
 1041 neurs. The guide is a sort of absolute taboo – never adopt or enforce  
 1042 social rules that contravene the harm principle. Mill is plausibly  
 1043 interpreted as claiming that it would maximize aggregate utility in the  
 1044 long run to treat the harm principle as an exceptionless taboo, even  
 1045 though there surely are exceptions to it, since we are likely not very  
 1046 good at picking out the occasions on which acting against the harm

<sup>31</sup> Rawls, *A Theory of Justice*, p. For criticism of Rawls's lexical ordering of his principles, see Richard Arneson, "Rawls Versus Utilitarianism in the Light of *Political Liberalism*," in Clark Wolf and Victoria Davion, (eds.), *The Idea of a Political Liberalism: Essays on Rawls* (Lanham: Rowman and Littlefield, 2000); Richard Arneson, "Against Rawlsian Equality of Opportunity, *Philosophical Studies* 93 (1999), pp. 77–112.





1047 principle will really be utility-maximizing.<sup>32</sup> The strategy that Mill  
 1048 outlines might make sense independently of whether or not one finds  
 1049 his utilitarianism attractive. The strategy could be yoked to any  
 1050 version of consequentialism or even to a nonconsequentialism that  
 1051 recognizes a preponderance of consequences as in principle a valid  
 1052 ground for overriding rights claims. Inviolability, rejected at the level  
 1053 of fundamental moral principle, might emerge as plausible at the level  
 1054 of rules for social rule making. I do not think Mill's rehabilitation of  
 1055 inviolability actually succeeds, but his proposal is seriously debatable  
 1056 and might even be correct, whereas rights absolutism strikes me as  
 1057 hopeless.

1058 Nussbaum strikes closer to the target when she accuses Mill's  
 1059 perfectionistic utilitarianism of being unable rigorously to justify a  
 1060 regime of equal rights to liberty for each and every person rather than  
 1061 some form of hierarchy in which aristocrats or those found to have  
 1062 potential for genius by meritocratic testing are granted wide liberty  
 1063 while some subordinate group of proletarians or women or members  
 1064 of some disfavored ethnicity or supposed race are made to labor to  
 1065 enhance the best achievements of the best people. In her view, Mill's  
 1066 argument that wide liberty of action is necessary for human  
 1067 self-development decomposes into a genuinely utilitarian, and objec-  
 1068 tionable, claim that whatever maximizes aggregate (perfectionistic)  
 1069 well-being is right and a more acceptable claim that each and every  
 1070 person has an equal right to wide liberty of action according to the  
 1071 harm principle so that she has a fair opportunity for self-develop-  
 1072 ment. The more acceptable argument, according to Nussbaum, is  
 1073 probably not consistent with Mill's utilitarian commitment.

1074 Any consequentialist doctrine will support equal rights for all only  
 1075 if doing so would produce the best feasible outcome. This is  
 1076 objectionable only if we reasonably would affirm equal rights for  
 1077 all even in circumstances in which it is known that support for  
 1078 unequal rights would produce a better outcome, as assessed by the  
 1079 doctrine, all things considered. Mill supported unequal democratic  
 1080 citizenship rights, with extra votes accruing to the better educated  
 1081 and more competent voters.<sup>33</sup> In *On Liberty* Mill conjectures, but  
 1082 does not attempt in any rigorous way to demonstrate, that the utility

<sup>32</sup> John Gray develops this interpretation of Mill's *On Liberty* argument in *Mill on Liberty: A Defence*, Second edition (London: Routledge, 1996).

<sup>33</sup> John Stuart Mill, *Considerations on Representative Government*, in *Collected Works*, Volume 19, J. M. Robson, (ed.), (Toronto: University of Toronto Press, 1977), Chapter 8.



1083 maximizing policy will justify equal rights to liberty for action for all  
 1084 (rather than, say, a stringent harm principle for the elite and a weaker  
 1085 set of protections for others). The prioritarianism I affirm assigns  
 1086 extra moral weight to obtaining gains for badly off persons, so is less  
 1087 likely than straight aggregative utilitarianism to recommend policies  
 1088 that impose costs on disadvantaged persons in order to secure gains  
 1089 for those who are already better off. But this prioritarian tilt does not  
 1090 automatically justify egalitarianism in the assignment of rights:  
 1091 Perhaps a morally sensitive cost–benefit calculation would show that  
 1092 in some circumstances disabled persons should be assigned greater  
 1093 rights to liberty of action than other people, on the ground that this  
 1094 group is reliably expected to face low well-being prospects so policies  
 1095 that generate well-being gains for them register amplified moral  
 1096 value. It is clear there are imaginable circumstances, and probably  
 1097 actual circumstances, in which prioritarian consequentialism rejects  
 1098 equal rights of a sort Nussbaum would want unconditionally to  
 1099 affirm. It is not clear this fact counts as an objection against the  
 1100 doctrine; more argument is needed here than Nussbaum supplies.

1101 Nussbaum cites the Kantian humanity formula, that one ought  
 1102 always to treat the humanity in each individual always as an end and  
 1103 never merely as a means. This formula is supposed to govern our  
 1104 conduct unconditionally.

1105 She does not venture an interpretation of the humanity formula.  
 1106 My sense is that the attraction of the formula is bound up with its  
 1107 ambiguity. It can naturally be interpreted in a purely formal way. On  
 1108 this reading, one treats a person merely as a means when one treats her  
 1109 in ways to which she could not rationally consent, and so long as one  
 1110 treats her according to correct moral principles, she could, if rational,  
 1111 consent to being so treated. So interpreted, the humanity formula is  
 1112 unexceptionable, but lacks content. It does not help us determine what  
 1113 correct moral principles permit and require. The formula alternatively  
 1114 can be interpreted as substantive, but then it will be controversial, not  
 1115 at all obviously correct. Most often in this guise the formula suggests  
 1116 generic nonconsequentialism: one treats someone merely as a means  
 1117 when one's sole justification for so treating her is that doing so will  
 1118 produce a desirable outcome or even the best possible outcome. Either  
 1119 way you take it, the humanity formula by itself is just a slogan,  
 1120 asserting which does not advance the argument. Either the slogan is  
 1121 uncontroversial but lacks content, or the slogan has substantive  
 1122 content but is controversial, and in the absence of further supporting  
 1123 argument provides no reason for any policy.



1124 Nussbaum argues that Mill advances morally inappropriate,  
 1125 illiberal arguments in defense of the harm principle he espouses. I  
 1126 have been concerned to rebut these objections to Mill's arguments.  
 1127 She leaves it an open question whether or not the morally acceptable  
 1128 arguments for the harm principle suffice to justify it. This further  
 1129 open question is also left unsettled by the considerations I assert in  
 1130 this essay.

1131 7. CONCLUSION

1132 I have argued that the use of shame as a tool of social control is in  
 1133 principle acceptable in a decent (tolerably just) society. Citizens  
 1134 should be disposed to experience shame if they violate morally  
 1135 appropriate social norms, and to react to violators in punishing,  
 1136 shame-inducing ways. Shame functions in a similar way to uphold  
 1137 criminal law. Any conviction of a person accused of a seriously  
 1138 wrong criminal offense condemns the individual and induces a shame  
 1139 reaction in him. We could not realistically extrude this element of  
 1140 shaming from criminal law without abolishing criminal law enforce-  
 1141 ment. Criminal penalties might also be deliberately designed to be  
 1142 shaming rituals, imposing stigma.<sup>34</sup> If such penalties bring about  
 1143 morally better outcomes by fundamental justice standards of  
 1144 assessment than alternative social policies, we should opt for the  
 1145 shaming penalties. The objection that the institutions of society must  
 1146 refrain from humiliating and degrading any person so as to deny her  
 1147 basic dignity, and hence the criminal justice system absolutely must  
 1148 refrain from shame imposition, goes wrong for two reasons. First,  
 1149 shaming penalties seek to impose a lower social status on the shamed  
 1150 individual, but this process need involve nothing like denial of  
 1151 anyone's status as a human person with dignity. Second, in extreme  
 1152 circumstances, when extreme shaming that assaults an individual's  
 1153 basic human dignity and status as a person with rights maximizes the  
 1154 fulfillment of just outcomes all things considered, we should not  
 1155 eschew extreme shaming. Of course, in any circumstances (which  
 1156 might be widespread) in which shaming is counterproductive, we  
 1157 should not engage in it.

<sup>34</sup> See Harold Garfinkel, "Conditions of Successful Degradation Ceremonies,"  
*American Journal of Sociology* 61 (1956), pp.

SHAME, STIGMA, AND DISGUST IN THE DECENT SOCIETY

1158 Given that my support for shaming penalties is tentative and  
1159 hedged, why make a fuss over disagreement with Nussbaum on this  
1160 policy issue? I object to the way that Nussbaum approaches the issue.  
1161 She asserts an absolute prohibition on state infliction of shame and  
1162 humiliation, roughly corresponding to an absolute moral right of  
1163 each person not to be shamed and humiliated by state agency. I doubt  
1164 such prohibitions will ever hold up under scrutiny. In political  
1165 philosophy, absolutism is absolutely unacceptable.

1166 *University of California*  
1167 *San Diego, La Jolla, CA*  
1168 *92093, USA*  
1169 *E-mail: rarneson@ucsd.edu*

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