Review Essay

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

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

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

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

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

3. See *id.* at 14–15.
psychologists. We share Nussbaum’s interest in how affect, emotions, and moods influence decision making, decision avoidance, and judgment. One of us has analyzed psychological game-theoretic models to examine the role of guilt in upholding social norms and organizational cultures; parental choices regarding reproductive genetic technologies; fiduciary duties and trust in corporate and securities law; and the influence of shame on bargaining over property rights and compliance with international environmental law. The other has analyzed how to predict and normatively evaluate the inaction of individuals presented with opportunities that could benefit them, and with opportunities to help alleviate great human suffering, such as genocide and poverty.
We concur with many of Nussbaum’s conclusions and find much to admire in her scholarship and in *Hiding from Humanity* in particular. Yet even though Nussbaum drew from many disciplines in *Hiding from Humanity*, she left other potentially fertile fields, such as neuroscience, untouched. In addition, despite the book’s recent publication date, a number of subsequent developments have occurred in affective, cognitive, and social neuroscience; dispute resolution; economics; affective psychology; and positive psychology. These developments have not gone unnoticed by other academics. For example, two negotiation scholars, Professor Roger Fisher, who is known for coauthoring a landmark book about negotiation, and Professor Daniel Shapiro, who is associate director of the Harvard Negotiation Project, recently observed that “strong emotions serve a useful function. You do not want to ignore emotions and lose their energy and information.” Other examples of advances in recent scholarly understanding about emotions that are relevant to Nussbaum’s thesis are experimental studies using functional magnetic resonance imaging (fMRI) to examine the neural bases of decision making and moral judgment, including many by her cousin, Joshua Greene. Cognitive neuroscientist Elizabeth Phelps and social

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34. See, e.g., Joshua D. Greene et al., An fMRI Investigation of Emotional
psychologist Mahzarin Banaji have used fMRI to link people’s brain activity to the way they evaluate racial groups. Other studies provide fMRI evidence that social exclusion activates the same brain regions as feeling physical sensations of pain. Our contribution is to reassess Nussbaum’s arguments in light of these research developments.

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

I. PSYCHOLOGY, EMOTIONS, AND THE LAW

A number of scholars from such diverse fields and perspectives as anthropology, economics, history, neuroscience,
philosophy, psychology, and sociology are (re)discovering emotions. American psychology, for example, largely avoided the use of certain emotions as constructs for much of the twentieth century while under the influence of the philosophy of positivism. Since then, mental constructs have emerged within cognitive science, paving the way for the study of emotions. Emotions promise to play an important role in twenty-first century psychology; the American Psychological Association has founded a new journal dedicated to the study of emotion, other new journals specializing in emotion-related articles have emerged, and we have noticed a trend towards established psychology journals publishing more articles about emotions.

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

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

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


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


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

53. Id. at 6–7.

54. See, e.g., Nico H. Frijda, The Emotions 69–71 (1987) (providing an often-cited definition of emotions as states of “action readiness”). But see Anderson, supra note 18, at 162 (pointing out that decision conflict and emotions such as regret often lead to inaction and passivity).
emotion, and thus provides a strong case for seeing the legal field, which provides protection from, and recourse for, breached vulnerabilities, as being intimately tied to the human experience of emotion.

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

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

II. REVULSION AND DISGUST

Nussbaum states that “[d]isgust appears to be an especially visceral emotion” and cites psychologist Paul Rozin’s...
definition of disgust as involving revulsion at its core. Nussbaum finds disgust “unworthy of guiding public action” and “a dangerous social sentiment.” Does this mean it can never be proper to impose legal sanctions on the basis of revulsion or disgust? Should laws, and those involved in making and interpreting them, ever consider revulsion or disgust?

A. THE RESEARCH

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

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

59. HIDING FROM HUMANITY, supra note 2, at 87.
60. Id. at 171.
B. THE VALUE OF DISGUST TO THE LAW

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

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

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65. See *Hiding from Humanity*, supra note 2, at 75. Nussbaum defines “indignation” as anger triggered by unfairness. *Id.*
66. *Id.* at 75–87.
69. *Hiding from Humanity*, supra note 2, at 79.
70. Although *Hiding from Humanity* portrays this as a conservative argument, it can and has been used across the political spectrum. See, e.g., Richard M. Ebeling, *Political Correctness and the Closed Society*, FREEDOM DAILY, Jun. 1992, available at http://www.fff.org/freedom/0692b.asp.
71. See *Hiding from Humanity*, supra note 2, at 84.
72. That is, based on an unpleasant mental or physiological experience.
73. *Hiding from Humanity*, supra note 2, at 85–87.
that individual will arguably welcome any emotion that would promote goals associated with those values, and underpin legal decisions that support those values. Thus, although people of varying political affiliations might define cruelty differently, they all might agree that certain cruel acts are disgusting; a shared disgust with those acts is a potentially relevant indicator that the acts should be abolished.

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

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

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74. Id. at 91–93.
75. Id. at 105.
76. Id. at 93–96.
77. Id. at 117–20.
78. Id. at 108–14.
79. Id. at 87.
which is also relevant to the law.80 People respond to disgust by distancing themselves from the object. In Nussbaum’s view, this “out of sight, out of mind” reflex undermines the ability to productively use disgust in fighting for progressive causes such as human rights. This is an oversimplification, and at least in some cases, personal experience discredits this. For example, disgusting images from the genocide in Rwanda motivate some to turn away from the information and avoid learning more about it, which in turn prevents them from actively working to prevent future crimes against humanity. For others, the images are seared into the memory, and they are thereby motivated to support the prevention of such crimes.81 This second response might also be seen as “turning away” from what is disgusting, but it entails a different kind of turning away that requires seeing one’s own inaction and passive bystanding82 as complicit in producing the disgusting image.

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

81. See, e.g., Paul Slovic, Mass Murder: Why Do We Ignore It? (Nov. 14, 2005) (unpublished slides presented as part of the speech, Paul Slovic, Address at the Society for Judgment and Decision Making (Nov. 14, 2005), on file with authors) (proposing that people ignore genocide in part because available information fails to convey meaningful affect and emotions).
ple forms of “turning away,” and thus may underestimate the usefulness of disgust. More behavioral research is required to understand the possible responses to disgust and the personal and contextual factors that determine them before a definitive stance is taken on Nussbaum’s argument.

C. ELIMINATING DISGUST FROM THE LAW

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

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

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

83. See Rozin & Fallon, supra note 80, at 23.
84. See Hiding from Humanity, supra note 2, at 75. But cf. id. at 120–22 (suggesting that a disgust-free society may not be an ideal norm given disgust’s value and beneficial role in certain aspects of life and thought).
85. See id. at 108–14.
and bestiality, vice, and physical pollution are down. Research by psychology professor Jonathan Haidt and his colleagues provides evidence across contexts and cultures that human beings find it easy to link together divinity, morality, and physical purity. Thus, it can be quite natural for people to be convinced that they should feel disgust, even if that disgust is based upon phantom or unjustified associations. It might be possible to convince people that they should experience disgust about disgust. But a far more difficult endeavor would be to convince people to actually feel disgust about disgust. This difficulty relates to the fact that disgust, like many emotions, is usually automatic and unconscious. Nussbaum does not address this feature of the emotion.

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

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

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

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

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

96. See SUSAN T. FISKE, SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY (2004); Susan T. Fiske, What We Know Now About Bias and Intergroup Conflict, the Problem of the Century, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 123 (2002).
especially based upon observable indices such as their age, gender, and race. Individuals require motivation to get past such categorization in order to learn about others. Fiske’s laboratory studies demonstrate that depending on another individual or being a team member with someone motivates us to get past our stereotyping. Another experimental study by Fiske demonstrates that competition sometimes causes individuation, because each person is motivated to learn how others act.

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

III. SAVING FACE AND LOSING IT

Nussbaum takes great care in differentiating shame from disgust, guilt, depression, embarrassment, humiliation, and rage. As Nussbaum points out, shame is revealed in one’s face by blushing. A famous sociologist who is well-known for analyzing human interaction, Erving Goffman, utilized the notion of “face” to explain how Americans manage their public image and social presentations. Nussbaum argues in Hiding from Humanity, supra note 2, at 203–11.

102. See HIDING FROM HUMANITY, supra note 2, at 203–11.
103. Id. at 173–74.
104. See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF
from Humanity that shame is an improper, inappropriate, and unreliable basis for law, especially with respect to punishment in criminal law.\textsuperscript{105}

A. CULTURAL AND DEMOGRAPHIC VARIATION IN THE EXPERIENCE OF SHAME

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

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

\textsuperscript{105} See HIDING FROM HUMANITY, supra note 2, at 13–16.

\textsuperscript{106} See George Loewenstein & Ted O’Donoghue, “We Can Do This the Easy Way or the Hard Way”: Negative Emotions, Self-Regulation, and the Law, 73 U. Chi. L. Rev. (forthcoming Winter 2006).


\textsuperscript{108} See HIDING FROM HUMANITY, supra note 2, at 16.

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

\textsuperscript{110} See, e.g., CULTURE AND SUBJECTIVE WELL-BEING (Ed Diener & Eunkook M. Suh eds., 2000).
evidence that individuals process information differently in response to emotional advertisements, due to the motivational and cognitive changes associated with age.\(^{111}\) One study proposes that anxiety explains the difference in social risk perceptions across gender and race.\(^{112}\) This cultural and demographic heterogeneity in emotional responses means that people are likely to experience shame in legal situations in qualitatively and quantitatively different ways. A sociologist recently found that the presence and amount of shame experienced from seeking legal remedies varies across cultures, which helps explain why the ethnic Chinese and Korean in Aotearoa New Zealand make little use of antidiscrimination law as compared to Pacific Island peoples and Indians.\(^{113}\)

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

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

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


\(^{114}\) See HIDING FROM HUMANITY, \textit{supra} note 2, at 185–86.


\(^{117}\) Id. at 327.

\(^{118}\) Id. at 328.

\(^{119}\) Ho, \textit{supra} note 116, at 876 n.3.
other cultures.120 “Because Chinese social behavior is framed in terms of mutual dependence, social face, read as social adequacy, is maintained relative to social position.”121 There are distributions in the severity and range of losing face that extend “from temporary and only in a circumscribed area of social life to permanent and irreversible” loss,122 which casts doubt over an individual’s “fitness as an acceptable member of society.”123 These distributions of shame are not constant across cultures or over time because “judgments concerning the extent, loss, or gain of face are based on sets of criteria or standards which vary both cross-culturally and over time within a single culture.”124

B. SHAME’S POWER AND LIMITATIONS

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

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120. See Whitman, supra note 7, at 2719–24 (arguing that law has to seriously take into account human impulses for hierarchy).
122. Id.
123. Ho, supra note 116, at 872.
124. Id. at 874.
125. Id. at 873.
127. Id.
128. Ho, supra note 116, at 880.
their children the concept and significance of face.132 One of us experienced parental “shame sharing” first-hand and powerfully in childhood.133

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

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

133. As a child, Huang received a parental scolding including this admonition: “You should be ashamed of your face-losing behavior in public because you’re embarrassing not only yourself, but your parents, your brothers, your grandmother, your family, Chinese people, human beings, and in fact all carbon-based life-forms.”
134. See HIDING FROM HUMANITY, supra note 2, at 186–89.
135. See id. at 189, 199.
136. Id. at 215.
137. See id. at 191–92.
138. See id. at 202.
some criminals might develop new family and friends consisting of fellow criminals or members of a common gang, united by a shared, perverse sense of pride in their criminality and lack of morality. When this happens, shame no longer effectively deters criminal behavior.

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

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

141. See HIDING FROM HUMANITY, supra note 2, at 273.
143. See id.
144. See id.
145. See id.
146. See id.
C. ELIMINATING SHAME FROM THE LAW

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

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

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

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

\begin{enumerate}
\item\textsuperscript{148} See, e.g., MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006).
\item\textsuperscript{149} HIDING FROM HUMANITY, supra note 2, at 15.
\item\textsuperscript{150} Id.
\item\textsuperscript{152} See id.
\item\textsuperscript{153} See id.
\end{enumerate}
between positive and negative affective states.\textsuperscript{154} Examples of negative emotions are disgust and shame. Examples of positive emotions include awe\textsuperscript{155} or elevation.\textsuperscript{156}

A. \textbf{P}ositive \textbf{E}motions

Positive psychology,\textsuperscript{157} a recent brainchild of Professor Martin E.P. Seligman,\textsuperscript{158} focuses on positive emotions in general and on human strengths and virtues in particular,\textsuperscript{159} instead of the absence of diseases and illnesses. A robust finding of positive psychology is that positive emotions improve aspects of decision making generally\textsuperscript{160} and have an especially pronounced effect on complex decisions.\textsuperscript{161} A few legal scholars

\begin{itemize}
\item \textsuperscript{154} See \textsc{David Watson}, \textsc{Mood and Temperament} (2000) (providing a comprehensive review and synthesis of this research and clinical literature).
\item \textsuperscript{155} See generally \textsc{Dacher Keltner} \& \textsc{Jonathan Haidt}, \textit{Approaching Awe, a Moral, Spiritual, and Aesthetic Emotion}, 17 \textsc{Cognition} \& \textsc{Emotion} 297 (2003) (presenting a summary of awe research and a conceptual approach to awe).
\item \textsuperscript{156} \textsc{Jonathan Haidt}, \textit{The Positive Emotion of Elevation}, \textsc{Prevention} \& \textsc{Treatment}, Mar. 7, 2000, \texttt{http://content.apa.org/journals/pre/3/1/3c.html}.
\item \textsuperscript{157} \textsc{See}, \textit{e.g.}, \textsc{Shelly L. Gable} \& \textsc{Jonathan Haidt}, \textit{What (and Why) Is Positive Psychology?}, 9 \textsc{Rev. Gen. Psychol.} 103 (2005); \textsc{Martin E.P. Seligman} \& \textsc{Mihaly Csikszentmihalyi}, \textit{Positive Psychology: An Introduction}, 55 \textsc{Am. Psychologist} 5 (2000).
\item \textsuperscript{158} \textsc{See generally} \textsc{Martin E.P. Seligman}, \textit{Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment} (2002) (describing the positive psychology movement and its practical application).
\item \textsuperscript{159} \textsc{See}, \textit{e.g.}, \textsc{Alan Carr}, \textit{Positive Psychology: The Science of Happiness and Human Strengths} (2004); \textit{Character Strengths and Virtues: A Handbook and Classification} (Christopher Peterson \& Martin E.P. Seligman eds., 2004).
\item \textsuperscript{160} \textsc{See} \textsc{Barbara L. Fredrickson}, \textit{The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions}, 56 \textsc{Am. Psychologist} 218, 221 (2001); \textsc{Barbara L. Fredrickson}, \textit{What Good Are Positive Emotions?}, 2 \textsc{Rev. Gen. Psychol.} 300, 308–11 (1998); \textsc{Barbara L. Fredrickson} et al., \textit{What Good Are Positive Emotions in Crises?: A Prospective Study of Resilience and Emotions Following the Terrorist Attacks on the United States on September 11th, 2001}, 84 \textsc{J. Personality \& Soc. Psychol.} 365, 366 (2003); \textsc{Barbara L. Fredrickson}, \textit{Cultivating Positive Emotions to Optimize Health and Well-Being}, \textsc{Prevention \& Treatment}, Mar. 7, 2000, \texttt{http://content.apa.org/journals/pre/3/1/1a.html}; \textsc{Sonja Lyubomirsky}, \textit{On Studying Positive Emotions}, \textsc{Prevention \& Treatment}, Mar. 7, 2000, \texttt{http://content.apa.org/journals/pre/3/1/5c.html}.
\item \textsuperscript{161} \textsc{See} \textsc{Alice M. Isen}, \textit{An Influence of Positive Affect on Decision Making in Complex Situations: Theoretical Issues with Practical Implications}, 11 \textsc{J. Consumer Psychol.} 75, 78–80 (2001); \textsc{Alice M. Isen}, \textit{Positive Affect and Decision Making}, in \textsc{Handbook of Emotions} 417, 426–27 (Michael Lewis \& Jeannette M. Haviland-Jones eds., 2d ed. 2000); \textsc{Alice M. Isen} et al., \textit{The Influence of Positive Affect on Clinical Problem Solving}, 11 \textsc{Med. Decision Making}
have analyzed the roles that positive emotions such as empathy and sympathy play in law.\footnote{162}

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

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


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


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

\footnote{166. See, e.g., Paul Ekman et al., \textit{Buddhist and Psychological Perspectives on Emotions and Well-Being}, 14 Current Directions Psychol. Sci. 59, 60 (2005).


low decision latitude, and adversarial litigation being zero-sum. Seligman proposes a number of possible ways to increase lawyers’ happiness, including changing law-firm culture, engaging in “cooperative” litigation, and reforming legal education.

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


171. Id. at 50–51.

172. Id. at 51–53.


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


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

B. NEGATIVE EMOTIONS

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

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

181. See HIDING FROM HUMANITY, supra note 2, at 22, 37.
182. Id. at 5.
Ideally the law would have a clear and robust rationale for doing so. In this type of process, a legal system would play a role of protecting minority groups from disgust-related offenses or even disgust-related legal prejudices, without providing others the sense that that they have to operate outside the legal system because it never considers their strong feelings to be relevant.

CONCLUSION

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

\(^\text{183}\). Id. at 17.