

BOOK REVIEW

MAKING HAPPY PUNISHERS

HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW. By Martha C. Nussbaum. Princeton and Oxford: Princeton University Press. 2004. Pp. xv, 413. \$29.95 (cloth).

*Reviewed by James Q. Whitman**

This is a book by a philosopher, on a subject of urgent importance to legal scholars. Yet the truth is that most legal scholars have not understood how urgent that subject is. The book is about the psychology of the darker and uglier emotions in the law: shame and disgust. Legal scholars have certainly had plenty to say about this topic. There has been a steady flow of literature on the emotions and the law, and in particular on shame and disgust, for the past decade or so.¹ Nevertheless, much of the legal debate has revolved around problems of strikingly minor importance in American criminal justice. In particular, we have had a lot of literature on a few colorful shaming penalties, like sentencing businessmen who urinate in public to scrub the streets with toothbrushes, or sentencing shoplifters to wear T-shirts announcing their offenses to the world.² It is no surprise that criminal law professors enjoy debating these shaming penalties — call them T-shirt and bumper-sticker sanctions. They are tailor-made for discussions of

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¹ See, e.g., JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997); THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733–62 (1998); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) [hereinafter Kahan, *Anatomy of Disgust*] (reviewing MILLER, *supra*); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630–52 (1996) [hereinafter Kahan, *Alternative Sanctions*]; Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

² E.g., Garvey, *supra* note 1, at 734–37; Kahan, *Alternative Sanctions*, *supra* note 1, at 633; Markel, *supra* note 1, at 2176. To be sure, this literature has seen that the underlying issue of shame extends well beyond such modern forms of the pillory. For an example of this recognition, see ERIC A. POSNER, LAW AND SOCIAL NORMS 88–111 (2000). Nevertheless, the literature's focus has been on shaming penalties, and not on the wider extent of shame and stigma in the American legal system. The appropriate extent of shame and stigma has also recently come before the courts. See, e.g., *United States v. Gementera*, 379 F.3d 596, 604–06 (9th Cir. 2004).

familiar classroom topics like communitarianism³ and “norms.”⁴ Most of all, they make everybody titter. Who can resist that?

Nevertheless, the reality is that T-shirt and bumper-sticker sanctions are unlikely ever to play more than the most subordinate role in American punishment. The really pressing and troubling problems, as Martha Nussbaum well understands, lie elsewhere — and they involve practices that should make nobody titter. The problems of shame and disgust appear everywhere we discover degradation and humiliation in the law; and American criminal punishment is rife with degradation and humiliation. Our prisons in particular are theaters of appalling human degradation.⁵ Outside prison, too, American criminal justice humiliates offenders in ways unique in the Western world, from the moment of arrest, sometimes televised,⁶ through the occasional “perp walk,”⁷ and beyond.⁸ To be arrested or convicted in America is sometimes to run a devastating gauntlet of public exposure. The same spirit has apparently established itself in our detention camp at Guantanamo Bay, where the Red Cross has complained that the United States engages in “humiliating acts” that are tantamount to “psychological torture.”⁹ Indeed, it is hardly a secret that the United States

³ See, e.g., AMITAI ETZIONI, *THE MONOCHROME SOCIETY* 37–47 (2001).

⁴ POSNER, *supra* note 2, at 89–94.

⁵ See, e.g., HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* (2001); Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN’S L.J. 27, 31–44 (1998); Vincent Schiraldi & Mark Soler, Editorial, *Locked Up Too Tight*, WASH. POST, Sept. 19, 2004, at B5 (detailing abuses in juvenile justice institutions).

⁶ See Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1 (noting that the return to shaming penalties “began in the 1980’s with mortified Wall Street traders appearing on the nightly news in handcuffs”); Scot J. Paltrow, *Giuliani Has Fans, Foes in War on White-Collar Crime*, L.A. TIMES, Dec. 22, 1988, pt. 4, at 1 (describing the public arrest of alleged white-collar criminals as part of U.S. Attorney Giuliani’s efforts to make examples of the accused).

⁷ See *Lauro v. Charles*, 219 F.3d 202, 212–13 (2d Cir. 2000) (holding that “perp walks” violate the Fourth Amendment when not sufficiently related to a legitimate government objective); Hannah Shay Chanoine, Note, *Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment*, 104 COLUM. L. REV. 1356, 1367–80 (2004) (reviewing and discussing “perp walk” law).

⁸ Sex offender registries are one notable example. See *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (upholding use of publicly accessible sex offender registry). The United Kingdom is the European country that comes closest to adopting such measures of public exposure for offenders who have already served their sentences. Even the British do not go as far as the Americans, though. See Richard Ford, *Figures Show Where Most Criminals Live*, TIMES (London), July 29, 2004, at 4 (noting that U.K. police and probation services publish figures on numbers of offenders monitored in particular localities, but not the offenders’ identities).

⁹ Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (quoting confidential reports issued by the Red Cross) (internal quotation marks omitted).

has pursued policies of deliberate degradation, such as keeping Muslim prisoners naked.¹⁰

Is it right for a decent country to use such methods? Should we really be humiliating and degrading prisoners of war, or “unlawful combatants” — or, for that matter, prison inmates? The use of humiliation and degradation in punishment raises deeply unsettling questions. The occasional alternative sanction involving T-shirts is the least of our worries. In the grand scheme of things, the T-shirt and bumper-sticker sanctions are simply of paltry importance, and our debates about them cannot do justice to the truly pressing and troubling problems.

If we need dramatic evidence of what the truly pressing problems are, we need only reflect on the demoralizing Abu Ghraib scandal, which broke a few weeks after Nussbaum’s book was published. All Americans remember — or at least all Americans ought to remember — the Abu Ghraib photos.¹¹ They make it only too clear how disturbing the psychological challenges of shame and disgust are for the law. Why did the soldiers in those photos flash the thumbs-up sign, and grin such simian grins, while they stood over the human pyramid of naked bodies that they had built? We all remember such scenes as the young American woman festively cocking her finger at the exposed genitals of the cowering prisoner, or the *tableaux vivants* of naked Iraqi men forced to kneel down and push their unseeing, hooded faces into other men’s penises, in a parody of fellatio. We also all know — or ought to know — that Abu Ghraib raises troubling questions about domestic American prisons. As newspaper reports observed in the midst of the scandal, some of the soldiers involved were corrections officers back home,¹² and there is disturbing evidence that similar sorts

¹⁰ See INT’L COMM. OF THE RED CROSS, REPORT ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS IN IRAQ para. 24 (2004) (“Several military intelligence officers confirmed to the [Red Cross] that it was part of the military intelligence process to hold a person deprived of his liberty naked in a completely dark and empty cell for a prolonged period [and ,] to use inhumane and degrading treatment, including physical and psychological coercion, against persons deprived of their liberty to secure their cooperation.”), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf.

¹¹ There is evidence that the abuses at Abu Ghraib were not isolated events. According to a recent disclosure by the military, at least twenty-six prisoners have died under suspicious circumstances while in U.S. custody in Iraq and Afghanistan. See Douglas Jehl & Eric Schmitt, *U.S. Military Says 26 Inmate Deaths May Be Homicide*, N.Y. TIMES, Mar. 16, 2005, at A1.

¹² E.g., Tom Bowman, *Reservist Sentenced to 8 Years in Abu Ghraib Abuse*, BALTIMORE SUN, Oct. 22, 2004, at 1A (identifying a convicted Abu Ghraib participant as a Virginia state corrections officer in civilian life); Edward Wong, *Top Commanders Face Questioning on Prison Abuse*, N.Y. TIMES, June 22, 2004, at A1 (identifying the Abu Ghraib “ringleader” as a former corrections officer).

of brutal and degrading practices go on in ordinary American corrections facilities.¹³

What makes people charged with the task of punishment behave this way? Do events like Abu Ghraib tell us something important about the psychological dynamic, and psychological dangers, of punishment? The question, after all, is not just whether the soldiers involved were directly ordered to engage in the particular acts we see in those photos. Those acts were surely improvised on the spot. The question is whether this awful human disaster was encouraged by the broader American tolerance of humiliating and degrading punishment methods. Did military officials invite the outbreak at Abu Ghraib by condoning such practices as stripping prisoners naked and hooding their faces, thus creating a climate of humiliation and degradation? Is it possible that punishment always threatens to spin out of control, if there is no concerted effort to guarantee that prisoners are treated respectfully?¹⁴ These are questions to which decent Americans must find answers, and the answers are manifestly not to be found in our merry little controversies about T-shirts and bumper stickers.

Maybe it takes a philosopher to remind us that human psychology presents tougher and more frightening problems than the ones we most enjoy discussing in the classroom. The human animal is capable of behaviors unimagined by our rational actor models, and even by our most resolutely “behavioral” brands of law and economics. *Hiding from Humanity* faces up squarely to that psychological truth. Although it has been marketed, to some extent, as a book about T-shirts and bumper stickers, Nussbaum’s book is more. It is an effort at frank reflection on the nastier human emotions, and an exploration of their place throughout the entire landscape of the law. If the book achieves nothing else, it will deserve praise for that. This is a book that rubs legal scholars’ noses in the problems represented by Abu Ghraib, and it arrives at a moment in our history when that is exactly what we need.

The ultimate success of a book depends, though, on the power of its particular arguments, and by the end of this Review I will have to report that I find Nussbaum’s arguments disappointing. This is a book by an author with an admirably humane sensibility, and a much

¹³ See Paul Lieberman & Dan Morain, *Unveiling the Face of the Prison Scandal*, L.A. TIMES, June 19, 2004, at A1 (detailing prisoner abuse scandals in a prison where an Abu Ghraib guard had worked previously, including stripping prisoners naked); Schiraldi & Soler, *supra* note 5 (detailing abuses in juvenile justice institutions).

¹⁴ See Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT’L J. CRIMINOLOGY & PENOLOGY 69, 93–94 (1973) (finding that many guards became far more aggressive and dehumanizing toward the prisoners than would ordinarily be predicted in a simulation study).

richer grasp of the human predicament than most of our legal academics display. It is also a book that could hardly be more timely. In the end, however, it is a book by an author who has not, to my mind, fully reckoned with the problems presented by the law.

I. TOWARD A EUDAIMONISTIC LAW?

Hiding from Humanity draws on many different literatures, including psychoanalysis, law, cultural criticism, and poetry. At core, though, it is a book of moral philosophy, and its fundamental claim is that moral philosophy — in particular Nussbaum's eudaimonistic neo-Stoic ethics — can shine the right kind of light into the seamy cracks of the law. Nussbaum is one of several leading figures of the last couple of decades, among them Alasdair MacIntyre, Robert Solomon, and the late Bernard Williams, who have tried in various ways to create a new style of ethics.¹⁵ These philosophers are a diverse bunch, but they generally reject the late-eighteenth- and early-nineteenth-century orthodoxies of figures like Bentham and Kant. Moral philosophy, they argue, should not be founded on the image of the rational, calculating human being known to the Benthamite tradition. Nor should it be based on the pinched concept of submission to duty that we find in Kant. Instead, it should start from a richer and more complex understanding of human nature and the human predicament.

These philosophers have often turned back to the ancients, in particular Aristotle and the Stoics, and to Nietzsche as well. Moral philosophy, they have tried to show, is often best understood as a project involving self-realization and human flourishing. It is eudaimonistic: it is about the pursuit of the right kind of measured happiness and the maintenance of a whole and healthy personality.¹⁶ Moral philosophy ought to be naturalistic, they further argue, in the sense that it should be about human nature: moral philosophy's concept of the good life should be a concept of the distinctly *human* good life, founded in an understanding of the complexity and diversity of the human experience in the world.¹⁷

¹⁵ See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); ROBERT C. SOLOMON, *NOT PASSION'S SLAVE: EMOTIONS AND CHOICE* (2003); BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) [hereinafter WILLIAMS, *ETHICS*]; BERNARD WILLIAMS, *SHAME AND NECESSITY* (1993).

¹⁶ See MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 31–33 (2001).

¹⁷ See, e.g., WILLIAMS, *ETHICS*, *supra* note 15, at 34–35 (discussing Aristotle's view that "a human being is not an immaterial soul, but is essentially embodied and essentially lives a social life"); *id.* at 45–47 (discussing the promise of and problems with linking psychology to the ethical life).

In line with their emphasis on the natural complexity of the inner life of human beings, these philosophers have pleaded for a new attitude toward the emotions. They argue that part of having a whole and healthy personality is enjoying a rich emotional life. This means that disregarding or denigrating the emotions would be a foolish mistake. It is particularly wrong to posit, as Kant does, sharp distinctions between “reason” and the “irrational” emotions. Emotions cannot be reduced to physiologically hard-wired or subrational instincts.¹⁸ Nor are they stupid or inherently uncontrolled. They have cognitive content, and they involve moral evaluation (pp. 31–37). Anger, for example, is not necessarily a crazed response. It may well be an entirely rational one, which appropriately condemns behavior that is simply wrong (p. 34). Indeed, no well-lived life is without its moments of wholly appropriate anger.

That does not mean that all the emotions are good, of course. Nussbaum in particular has argued that one of the great lessons of the Stoics is that the emotional life can be a source of suffering.¹⁹ A healthy emotional life is a life of the *juste milieu*, a life that avoids excess. Correspondingly, the goal of much of moral philosophy is “therapeutic.” As the Stoic Epictetus put it, “the philosopher’s lecture room is a hospital: you ought not to walk out of it in a state of pleasure, but in pain — for you are not in good condition when you arrive!”²⁰ The Stoic philosophy of the emotional life is not about surrendering to the emotions. It is about evaluating them, and mastering them. It is about, in the title of a well-known Nussbaum book, *The Therapy of Desire*.²¹

These philosophical ideas are Nussbaum’s starting point. They do indeed seem to promise something that can help remedy the ills of our legal scholarship. Why, after all, do we lack an analytical vocabulary adequate to explain the degradation and humiliation of Abu Ghraib? Is it not precisely because, to one degree or another, we remain too attached to the orthodoxies of Bentham and Kant? Some of us, children of the Utilitarians, continue to think of human beings as obeying the dictates of calculated reason, or at least of “bounded” reason. Some of

¹⁸ See, e.g., ROBERT C. SOLOMON, *THE PASSIONS* 15 (1976).

¹⁹ E.g., Martha C. Nussbaum, *Poetry and the Passions: Two Stoic Views*, in *PASSIONS AND PERCEPTIONS: STUDIES IN HELLENISTIC PHILOSOPHY OF MIND* 97, 128 (Jacques Brunschwig & Martha C. Nussbaum eds., 1993).

²⁰ Malcolm Schofield, *Stoic Ethics*, in *THE CAMBRIDGE COMPANION TO THE STOICS* 233, 253 (Brad Inwood ed., 2003) (citation omitted) (quoting 3 EPICTETUS, *DISCOURSES* 24.30) (internal quotation marks omitted).

²¹ MARTHA C. NUSSBAUM, *THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS* (1994) (exploring Hellenistic philosophy’s dual commitments to the “combination of logic with compassion” and to “various types of detachment and freedom from disturbance”).

us, children of Kant, think of human beings as moral actors who can be expected to submit piously to the demands of some version of the categorical imperative. Neither of these approaches is completely foolish or false. At the same time, neither gives us any analytical way to account for the gleeful savagery that broke out at Abu Ghraib, and that all too often breaks out in American punishment at home.

The truth is that we are working with exceedingly thin accounts of human psychology, which means that we are prey to serious risks in our efforts to manage human society. How can we organize a just system of punishment if the people we put in charge of it start stacking up their naked prisoners in human pyramids? How can we develop either Benthamite or Kantian theories about how “we” should administer effective punishments, if the very business of punishment threatens to turn “us,” or our agents, into barbarians? A sophisticated philosophy of how the human emotions function, and how they can go wrong, may be exactly what we need.

So how does Nussbaum apply her philosophy of the emotions to the law? She begins by insisting that the emotions do matter, in the law as in the rest of life. In particular, she wants to fend off any suggestion that the law should be based too casually upon appeals to “reason” or “rationality.” In rejecting easy appeals to “reason,” she abandons a very attractive argument, of course. One really is tempted to describe the Abu Ghraib scandal as a descent into the subrational. The soldiers in those terrible photos, one instinctively thinks, yielded to their “lower,” animal selves, experiencing a failure of reason. One is even tempted to compare Abu Ghraib to the “madness” of the Nazi period, whose horrors were attributed by a figure like Georg Lukács to “[t]he destruction . . . of reason.”²² Nussbaum wants to warn us away from that route.²³ From her point of view, it would be quite wrong to react to Abu Ghraib, or more broadly to the problems of shame and disgust, by condemning emotionality or preaching a return to reason. Instead, the right approach is more difficult. We must walk a finer line, distinguishing the appropriate emotions from the inappropriate, dangerous ones — the ones that are at the root of human moral and emotional suffering.

Her book is, accordingly, an effort to walk the fine line between acceptable and unacceptable emotions in the law. This means that *Hiding from Humanity* undertakes two slightly oddly yoked projects. Some parts of the book aim to demonstrate that emotions have their place in the law. “Reason,” contrary to what its advocates (especially

²² GEORG LUKÁCS, *THE DESTRUCTION OF REASON* 752–53 (Peter Palmer trans., Humanities Press 1981) (1962).

²³ See NUSSBAUM, *supra* note 16, at 25.

its Utilitarian advocates (pp. 8–9)) say, is not the answer. Other parts, though, aim to demonstrate that certain emotions — especially shame and disgust — are out of bounds. As a result, the book inevitably has a somewhat disjointed character. Nevertheless, in the end it hangs together perfectly well as a general assessment of the role of emotions in the law.

Emotions, Nussbaum tells us, play an indispensable role in the law. For example, the law of provocation is incoherent unless we recognize that emotional reactions are sometimes regarded as wholly justifiable (pp. 39, 68–70). Much the same is true of appeals to compassion in sentencing (pp. 20–22, 49, 52–56). Moreover, criminalization itself presupposes the validity of the emotions: “[T]he whole structure of criminal law might be said to imply a picture of what we have reason to be angry at” (p. 11). Criminal punishment, she believes, must be founded on some kind of emotion cognate with resentment. Without that, it has no moral force. Even Utilitarians are compelled to admit as much: we criminalize because we feel collective anger (pp. 9–10). After all, Nussbaum argues, Utilitarians must have “some account of why certain acts are bad,” and any such account “is bound to refer to human vulnerability and our interest in flourishing. But then we are already dealing with and evaluating emotions” (p. 9).²⁴

Nevertheless, if there can be no law without emotions, it remains necessary to distinguish between right and wrong emotions. Which emotions are the right ones? This question requires, Nussbaum believes, a complex answer. Even the potentially appropriate emotions — anger, for example — can go wrong (p. 12). But the greater dangers lie in shame and disgust: those are emotions that almost always fail to give “good guidance for political and legal purposes” (p. 122).

Why? With this we come to the crux of Nussbaum’s argument. According to her analysis, shame and disgust are supremely dangerous emotions for two reasons above all. First, they involve “hiding from humanity”: they are the product of discomfort with our own bodily animality, which confronts us in the form of the various sticky and oozy substances we secrete (pp. 89, 186). We do not like our fluidity, which reminds us of our mortality. This translates into discomfort with the sexuality of women, and of men who engage in passive homosexual relations: such persons are all too easily thought of as “foul cesspit[s] of fluids” (p. 113). Those sorts of feelings are to be

²⁴ Nussbaum offers another, curiously unconvincing, attack on utilitarianism (pp. 58–59). Utilitarians, she asserts, take an “antiemotion” position, which, if taken seriously, requires them to rethink criminal law from the ground up. Yet the proudest boast of the utilitarian tradition is that a rigorously utilitarian philosopher does not shy away from rethinking everything from the ground up. Nussbaum’s attack is hardly damning — and not only because she acknowledges that she is herself unwilling to be bound by “traditional understandings” (p. 59).

condemned by the eudaimonistic moral philosopher. Shame and disgust are emotions experienced by people who have not mastered their own animal existence. Such people are bad at governing themselves. They have not learned the lesson of happiness taught by the grand tradition of eudaimonistic philosophy stretching back to Aristotle, and reinforced by modern psychoanalysis: the lesson that the happy person is the person who is master of his own emotions. They are people who are "shrinking from their own human weakness" (p. 232), as Nussbaum calls those who inflict shame.

Nor does it end there. Shame and disgust are further dangerous because they are inherently hierarchical. Shame is something we inflict on inferiors; disgust is something we feel toward inferiors (pp. 93-94, 98, 207).²⁵ Both emotions "typically express themselves through the subordination of both individuals and groups based on features of their way of life" (p. 321). Indulging such emotions is thus "profoundly subversive of the ideas of equality and dignity on which liberal society is based" (p. 232). The dangers in the hierarchical character of these emotions are especially clear when we review the horrible record of the language of disgust in justifying "misogyny, anti-Semitism, and loathing of homosexuals" (p. 75).²⁶

These various evils, according to Nussbaum, are linked to a basic failing in the sort of moral reasoning associated with both shame and disgust. Unlike more laudable emotions, shame and disgust are always about *persons* and never about *acts*. A potentially good emotion like indignation can take a bad act as its target, without denying the ultimate value of the person who committed that act (p. 166). Shame and disgust, by contrast, operate by dismissing, rejecting, or degrading the person who is their target (pp. 106, 207, 230, 233, 239). They are emotions that are founded on the denial of the equal dignity of others. Because shame and disgust deny the personhood of those we condemn, moreover, they allow us to go too easy on ourselves: they allow us simply to cast the offender out from society, without searching our own breasts to see if we too might be at fault (pp. 167-68). Not least, their focus on persons rather than acts also allows these emotions to spin out of control: "It is no accident that shame shifts rather rapidly from real offense to mere dissident identity," for example, "because shame is not about a bad act in the first place" (p. 235).

²⁵ Nussbaum draws links to the work of Professors Mary Douglas and Robert Kaster. See MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1966); Robert A. Kaster, *The Dynamics of Fastidium and the Ideology of Disgust*, 131 *TRANSACTIONS AM. PHILOLOGICAL ASS'N* 143 (2001).

²⁶ Nussbaum further explores this topic elsewhere in the book, such as when she examines "projective disgust and group subordination" (pp. 107-15) and when she links the pattern of "hiding from humanity" with the hierarchical impulse (p. 336).

All this means that we must condemn nearly all use of shame and disgust in the law.²⁷ To be sure, these emotions may be ineliminable in human life (p. 70). Nevertheless, “their social operations pose dangers to a just society” (p. 70), which means that they must be kept out of the management of social problems.

With those arguments in hand, Nussbaum can turn to her attack on the legal literature. Her first targets are the defenders of disgust. Nussbaum is particularly concerned with refuting a style of legal analysis that dates back to Lord Devlin’s famous response to the Wolfenden Report of 1957, which addressed the law’s treatment of homosexual conduct and prostitution.²⁸ Devlin insisted that the law had to be founded on the sensibilities of “the man in the Clapham omnibus,” whose disgust in the face of homosexuality could not be ignored.²⁹ Devlin’s arguments have recently been echoed by American scholars like Judge Posner³⁰ and Professor Dan Kahan,³¹ who also believe that the law should somehow reflect such popular sensibilities (though not necessarily with regard to homosexuality). Nussbaum does agree that the emotions lie at the foundation of our decision to criminalize: as she sees it, we criminalize because we are angry. Nevertheless, she thinks these sorts of arguments represent an unacceptable blindness to the dangers of disgust. She is especially concerned about our attitudes toward homosexuality, which she believes are driven by an utterly inappropriate and inhumane spirit of disgust (pp. 113–14). But the same is also true, she thinks, of our attitude toward the disabled (pp. 305–19), and she wants to speak for the party of humanity against all forms of demeaning and degrading mistreatment. Playing with disgust means blundering into a moral minefield of human psychology. Disgust is simply “unreliable as [a] guide[] to public practice” (p. 13).

For Nussbaum, the same is true of shame. Some of the participants in the T-shirt debates have taken the position that shaming has a valuable role to play in the criminal law. To be sure, none of them favors systematic humiliation or degradation as a matter of legal policy. Scholars like Professor Kahan are hunting for humane solutions to the problems of criminal justice: Kahan just wants to encourage relatively

²⁷ Nussbaum does grant that disgust has an appropriate role in the law of nuisance (pp. 158–63), and that shame has an appropriate role in political critique and in some social interactions (pp. 211–16).

²⁸ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (discussing REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, Cmnd. 247).

²⁹ *Id.* at 15.

³⁰ Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW*, *supra* note 1, at 309, 317–18.

³¹ Kahan, *Anatomy of Disgust*, *supra* note 1, at 1626. Nussbaum also frames her argument in part as an attack on Professor William Miller (pp. 82–84), although Miller in truth has little to say about law as such.

benign, but socially expressive, T-shirt and bumper-sticker sanctions.³² Nevertheless, Nussbaum rebels against any such approach. She believes that shame, like disgust, is simply “normatively unreliable in public life” (p. 15). Even experimenting with such relatively tame measures as T-shirts and bumper stickers may amount to playing with psychological fire. Law is not some sort of technocratic enterprise in governing human beings whose psyches are easily understood and easily manipulated. Law is an enterprise that involves moral choices, which means that we may decide that certain tools, no matter how potentially effective, cannot appropriately be used.

In order to avoid the evils of shame and disgust, Nussbaum concludes, we must draw on the resources of different traditions: Kantian social contract theory and Millian liberalism. The Kantian tradition provides the foundation of an egalitarian ethics. This is particularly important for framing a theory of criminal punishment. Kant and his followers have taught that retributivism is the proper theory of punishment. In a society founded on the social contract, we all agree to submit to the criminal law. This implies that, as members in good standing of our society, we have (in the famously weird Kantian phrase) a “right to be punished.”³³ The punishment to which we have this right must of course be punishment for our acts, not a rejection of our selves as persons (pp. 238–39).

The Millian tradition also offers a valuable resource, if we read it in light of eudaimonistic ethics. The good life is a life of eudaimonistic self-realization. Mill believed that the purpose of liberty, or at least one of the purposes of liberty, is to facilitate self-development (pp. 334–35). Shame and disgust are the enemies of happy self-development. This implies that a Millian liberal order is one that must condemn shame and disgust. Moreover, Mill’s suspiciousness toward the tyranny of the “normal” can be interpreted as a rejection of hierarchy similar to Nussbaum’s own rejection (p. 337). Together, Kant and Mill help guide us to a law unencumbered by dangerous emotions.

II. THE PERSON/ACT DISTINCTION IN MORAL PHILOSOPHY AND LAW

It is hard to be anything but glad that Nussbaum has written this book. We need pleas on behalf of civilization, and this is a passionate one, powerfully written and based on some of the best of what the contemporary humanities have to offer. Nussbaum is absolutely right

³² See Kahan, *Alternative Sanctions*, *supra* note 1, at 630–52.

³³ See Markus Dirk Dubber, *The Right To Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 115–16 (1998) (discussing the philosophical origins of the “right to be punished”).

that legal academics have not appreciated the challenges that the post-liberal world presents. The familiar theories of punishment give us no way to analyze the dangers posed by the human tendency that erupted at Abu Ghraib — the tendency to degrade and humiliate. There is also much to be said for the idea that law should be oriented toward the ideals of human flourishing and self-realization. One of the finest and most subtle legal traditions of our age, German law, embraces precisely those ideals: contemporary German law is founded on a constitutionalized “right to the free development of . . . personality”³⁴ that embraces many of the ideals advocated by Nussbaum; and those who know German law are commonly full of admiration for it.³⁵ Not least among this book’s virtues, Nussbaum offers many sensitive and interesting arguments about a variety of legal problems, notably in her consistently stimulating chapter on the right and wrong uses of disgust in the law (pp. 124–71).

Nevertheless, there is something uncomfortably utopian about Nussbaum’s vision of a law that radically resists hierarchical impulses, and there is something implausible about the idea that the law can be consistently in the business of fostering individual flourishing. Nussbaum herself acknowledges that the kind of morally just society she hopes for can never be “fully achieve[d]” (p. 17). The problems run deeper than that, though: There are more severe obstacles to realizing her vision than she has been willing to recognize. There are obstacles in applying the person/act distinction in the law. There are obstacles in making her theory of the control of the emotions a practical reality. There are obstacles in eliminating hierarchy. None of these obstacles are faced in this book.

Many of the obstacles have to do with straightforward difficulty in applying eudaimonistic moral philosophy to the law. Eudaimonistic moral philosophy addresses itself to individuals who are making decisions about their own lives. The law, by contrast, generally addresses itself to legal officials and other legal actors — to people who are obliged to make decisions affecting the lives of others. There is a significant moral gap between the responsibility for one’s own life and the responsibility for the lives of others. Of course, that gap can be, and has been, bridged by thoughtful eudaimonistic philosophers.³⁶ But the

³⁴ GRUNDGESETZ [GG][Constitution] art. 2(1) (F.R.G.).

³⁵ For a general comparison of German and American constitutional law, see EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* (2002).

³⁶ For a discussion of Seneca’s focus on the problems of legal officials and judges in the treatise *ON ANGER*, see Brad Inwood, *The Will in Seneca the Younger*, 95 *CLASSICAL PHILOLOGY* 44, 58–59 (2000).

work of bridging it must be done carefully and convincingly, and all too often one feels that Nussbaum has not done so.

Consider, for example, shame. Nussbaum argues eloquently for the unacceptability of shame as a matter of eudaimonistic moral philosophy: I was moved by her argument that a person who surrenders to shame is “hiding from humanity,” and thus living an emptier life. Moving as it is, though, that argument is not easy to translate into legal policy. Even the most dedicated critics of shaming (among whom I count myself) must acknowledge that there will always be some unavoidable element of shame and stigmatization in the law, especially in the criminal law. Criminals cannot be completely shielded from exposure: at some point, the public interest in being informed about potential criminality must trump the offender’s interest in being protected from exposure. Accordingly, even legal systems profoundly committed to safeguarding the dignity of the offender recognize that there are limits.³⁷ Why is this? The basic answer is that legal officials cannot limit themselves to worrying about their own lives and well-being, or even about the lives and well-being of offenders. They are also responsible for the lives and well-being of the general public. The moral responsibilities of the law are not primarily responsibilities for the care of oneself.

In consequence, the question is not whether we can ban shame from the law — we cannot — but how legal officials should balance the conflicting interests of the offender and society. This question is, moreover, one of pressing public importance, on which a book about the law of shame should take a position. When exactly may the press publicize the names of offenders? Should the public have access to sex offender registries? Many views can be held on these issues. Rejecting shame without reservation is not a plausible one. Nussbaum could certainly respond to this objection by offering a more nuanced account of eudaimonistic philosophy — one that explored how good and happy legal officials should take moral responsibility for others. If she did so, though, I believe she would arrive at a different, and less absolutist, account of the place of shame in the law.

The difficulties do not end there. Other examples raise even deeper doubts about her argument. In particular, I am uneasy with one of her

³⁷ For an example of how German law tries to balance these interests, see KARL EGBERT WENZEL, *DAS RECHT DER WORT- UND BILDBERICHTERSTATTUNG* 448–49 (4th rev. ed. 1994). Nussbaum cites my work, JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003), for the proposition that shame and stigma, or at least humiliation, need not always accompany imprisonment (p. 247). Yet the absolute elimination of shame is too much to hope for. Professionals in France and Germany, the subjects of my book, certainly do make every effort to introduce dignity into punishment. Complete elimination of stigma, however, is more than anyone can achieve.

principal approaches to the problem of distinguishing shame and disgust from more acceptable emotions like anger: her effort to condemn shame and disgust on the grounds that their targets are persons, not acts (pp. 13–15). Here again, and here especially, good eudaimonistic moral philosophy is not easy to translate into law.

The proposition that law should be about acts and not persons certainly has great appeal. There is an old Christian tradition that strongly endorses the proposition that we must look upon acts and not upon persons.³⁸ We are charged, according to Augustine, to love the sinner even while hating the sin.³⁹ The classical liberalism of the nineteenth century insisted strongly on the same view,⁴⁰ as do opponents of affirmative action in our day.⁴¹ Moreover, Nussbaum is surely right that a law that uses persons rather than acts as units of analysis is a law that may lend itself to excesses of shame and disgust and to nasty forms of social hierarchy.

Nevertheless, no legal system has ever succeeded in focusing entirely on acts rather than on persons, and the jurisprudential difficulties raised by the person/act distinction are immense. Some of the difficulties are of no great interest to Nussbaum: she is not likely to be bothered by the question whether commercial law is properly a law of merchants or a law of commercial transactions. But there are other corners of the law of direct interest to her, in which the debate is intense and almost violent. Is the law of homosexuality a law of homosexual acts or a law of homosexual persons?⁴² Opinion is deeply divided. Some of our gay fellow citizens want to be regarded as homosexual persons. Others want to be regarded as persons who perform homosexual acts. Is one of these views morally preferable? How should we deal with the same issue when it appears in the law? The

³⁸ The classic Christian term is "prosopolepsia," which translates from Greek as "respect of persons." See *Colossians* 3:25; *James* 2:1; *Romans* 2:11.

³⁹ SAINT AUGUSTINE, *THE CITY OF GOD* bk. XIV, ch. 6, at 448 (Marcus Dods trans., Modern Library 1993).

⁴⁰ Thomas Holland expressed a classic nineteenth-century view:

Now as a matter of fact the personal dimension is one which in the majority of cases needs no consideration at all. When the Persons . . . are human beings who are citizens of full age and sound mind, not under coverture, or convicted of crime, in other words when their personality is "normal," the personal dimension of the right in question is wholly disregarded.

THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 118 (Oxford, The Clarendon Press, 4th ed. 1888).

⁴¹ See, e.g., Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 101 n.340 (1999) ("Opponents of affirmative action defend principles of formal equality . . ." (emphasis omitted) (citing William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979))).

⁴² See Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 919–23 (1989).

majority opinion in *Lawrence v. Texas*⁴³ vindicated the right of “homosexual persons” not to be “demean[ed].”⁴⁴ Justice O’Connor’s significantly different concurrence, by contrast, rested in effect on the claim that the law must afford equal treatment to homosexual acts.⁴⁵ Which is it? Is it possible that we do not have to make a choice? The problem is vexing — and central to our thinking on law and homosexuality. Although *Hiding from Humanity* is a philosophical book in large part about homosexuality, and one that depends on the distinction between persons and acts, it gives us no sense of what position Nussbaum would take. This omission is a serious disappointment, on a matter on which we would hope a philosopher of her caliber would give us guidance.

Affirmative action is another unavoidable example. Opponents of affirmative action typically insist that judgments should be made strictly on the basis of acts and not on the basis of personal identity — that the law should hold to the basic norm of formal equality.⁴⁶ Nussbaum has publicly declared her disagreement with this view: “I believe that formal equality is not enough. Some people face more obstacles than others to come up to a minimum condition of decent existence. You have to do something more for those who are clearly at a disadvantage.”⁴⁷ This is cogently put, but how are her views on the morality of affirmative action related to her views on the morality of shame and disgust? Are there moments in making legal policy when it is morally appropriate to focus on persons?

Criminal law presents comparably complex problems: with the rise of determinate sentencing, our punishment system has moved sharply against individualization. This means that in contemporary American sentencing we have dramatically shifted the focus from persons to acts. Some commentators think this is a bad thing — that it has

⁴³ 123 S. Ct. 2427 (2003).

⁴⁴ *Id.* at 2482 (emphasis added).

⁴⁵ See *id.* at 2487 (O’Connor, J., concurring in the judgment) (“[T]his law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause . . .”). Justice O’Connor’s analysis certainly rested on the protection of persons under the Equal Protection Clause. See *id.* at 2484 (“The Equal Protection Clause of the Fourteenth Amendment ‘is essentially a direction that all persons similarly situated should be treated alike.’” (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985))). But Justice O’Connor viewed the statute as one whose units of analysis were acts and not persons. See *id.* at 2485 (“Texas treats the same conduct differently based solely on the participants.”). An opinion, like Justice O’Connor’s, that imagines the law as regulating acts rather than persons is relatively unlikely to be framed in terms of dignitary interests. An opinion, like that of Justice Kennedy, that imagines the law as regulating persons is far more likely to emphasize dignity.

⁴⁶ See Tushnet, *supra* note 41, at 101 n.340 (citing Van Alstyne, *supra* note 41, at 809).

⁴⁷ “*The Bush Govt Is Turning the War Against Terrorism into a Cold War*”, INDIAN EXPRESS (New Delhi), Jan. 30, 2003, at 9 (quoting Martha Nussbaum), available at http://www.law.uchicago.edu/news/nussbaum_indianexpress.html.

undermined the best virtues of judging⁴⁸ and has contributed to the spectacular punitiveness of American justice.⁴⁹ Does Nussbaum agree? Do her views on the law of punishment square with her views on the morality of shame and disgust? It may be that Nussbaum has answers to these questions. The difficulty is that she has not addressed them, in a book whose logic seems to require that she do so.

Behind these failures lies a deeper one. The person/act distinction raises difficult questions in the law precisely because the moral dilemma of legal actors is so complex and challenging, and so different from the basic moral dilemmas presupposed by Nussbaum's eudaimonistic ethics as presented in this book. Legal actors, to say it again, make decisions about the lives of others. In consequence, they often crave information about those others' lives. We should interpret the person/act distinction in the law against this backdrop. When we choose to focus on "persons" rather than on "acts" in the law, we do so in order to provide legal officials with more information, so that they can reassure themselves that they are making morally justifiable decisions. Thus, if we insist that we should have a law of homosexual persons rather than a law of homosexual acts, it is because we think that there are morally relevant complexities in the lives of those affected that are not captured by an account of any momentary act. If we favor affirmative action, it is because we think the predicament of an individual cannot be seen in abstraction from a richer texture of historical and social experience. If we insist that commercial law should be a law of merchants rather than a law of commercial transactions, it is because we think focusing on a given transaction without attention to the identities of the parties may make for injustice or poor policy. The same, finally, is true of individualization in punishment. To say that we consider "persons" in the law is just a way of saying that we insist on a thick account of the world before we make judgments that affect the fate of others.

I suspect that Nussbaum agrees with this way of characterizing the person/act distinction in the law. Indeed, when she has written directly about legal philosophy, notably in her well-known essay on mercy, she has shown tremendous acuity in addressing exactly such questions: that essay is precisely about the link between humane punishment and "sensitivity to all the particulars of a person and situation."⁵⁰ Nor is it surprising that she should agree. When we focus on persons in the law, we do so for much the same reason that Nussbaum

⁴⁸ See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 84 (1998).

⁴⁹ See James Q. Whitman, *A Plea Against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 85-86 (2003).

⁵⁰ Martha C. Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83, 85 (1993).

and other moral philosophers insist on the moral value of the emotions: in the pursuit of a richer account of human life. Of course, this does present a danger: any time we focus on persons rather than acts, we risk yielding to some ugly hierarchical impulses. Punishment offers the most familiar example. If we allow ourselves to punish the same act differently when it is committed by different persons, we may be opening the door to racism: we may end up punishing blacks more severely than whites.⁵¹ Nevertheless, it is not clear that the right response to this problem is to ban all consideration of persons in the law. The right response may involve the more delicate philosophical task of distinguishing between the good and the bad ways of considering persons in the law.

This is exactly the kind of delicate task that one expects a philosopher with Nussbaum's gifts to undertake. She does not do so. In *Hiding from Humanity*, she has simply not chosen to address legal philosophy directly. She has not made the effort to square her moral philosophy with her legal philosophy, to explain why her eudaimonistic reasoning about shame and disgust seems to lead her in a different direction from her legal reasoning about mercy. The result, when it comes to the person/act distinction, is that the reader — even a reader who, like me, is thoroughly sympathetic to Nussbaum's project — closes her book feeling somewhat put off, and somewhat disappointed.

In other ways, too, the failure of this book to address directly the problems of the law creates frustration. The law of homosexuality is not the only area in which there are raging debates on which one would expect Nussbaum to offer guidance. For example, the logic of her book would seem to require her to take a position on the law of privacy. Legal scholars often conceive of the law of privacy as involving protection from shame in order to guarantee individual dignity — especially in the European countries that treat the protection of privacy as an aspect of the larger protection of “personality.”⁵² At the same time, plenty of arguments can be offered against the proposition that law should be in any such business. The issues are tense and difficult; here, as elsewhere in the law, there are too many conflicting interests to permit a clean answer. Consider workplace privacy, for example. Many courts have seen good reason to view the privacy claims of employees skeptically, no matter how humiliated or violated those employees may feel.⁵³ Does this raise the same questions for Nussbaum as violations of the dignity of criminal offenders or gays?

⁵¹ This danger was famously flagged by MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 9–11 (1973).

⁵² See, e.g., EBERLE, *supra* note 35, at 79–110.

⁵³ See, e.g., *Thompson v. Johnson County Cmty. Coll.*, 930 F. Supp. 501, 507–08 (D. Kan. 1996), *aff'd*, 108 F.3d 1388 (10th Cir. 1997) (unpublished table decision).

Employees, after all, have an exit option not enjoyed by prison inmates, and their belief that they have a right to privacy over such things as their workplace e-mails may be philosophically dubious. Nussbaum offers only a cursory few pages on privacy, failing to wade into these sorts of messy debates about the legal realization of her moral ideals (pp. 296–304). This is frustrating to the reader.

The book's failure to address the messy details is particularly frustrating when it comes to criminal punishment. What theory of punishment should we favor if we believe in the eudaimonistic project of aiding humans in living the good life? The German answer, unsurprisingly, is to favor rehabilitation.⁵⁴ If we take a eudaimonistic approach, if we think of the law as having a "therapeutic" function, if we want to help offenders live better lives, then we should commit ourselves to crafting individualized therapies in order to reintegrate the offender into society as soon as possible, under the most effective supervision possible. Given her philosophical commitments, one might have expected Nussbaum to agree. Yet she comes out in favor of retributivism (pp. 169–70, 238–39). Why? Part of her answer, no doubt, is that rehabilitationism seems objectionable to her because it regards the person of the offender rather than the act committed. But that answer is much too pat. Even the most determined rehabilitationists leave some room for retributivist goals.⁵⁵ Indeed, a careful exploration of problems in the philosophy of punishment might have given Nussbaum an opportunity to show how her Kantian retributivism can be reconciled with her eudaimonistic philosophy. It is (again) disappointing that she does not do so.

III. AVOIDING EMOTIONAL EXCESS: THE PROBLEM OF RETRIBUTIVISM

Nussbaum's embrace of Kantian retributivism is unsatisfying for another reason — one that goes to the heart of her account of the emotions, and to the critical question of how the emotions can be practically controlled. It also goes to the heart of the peculiar choices she has made within the literature of psychology.

Nussbaum's emotionalism is an emotionalism of the *juste milieu*. In line with the long Aristotelian tradition to which she belongs, she neither endorses nor condemns the emotions *tout court*.⁵⁶ Instead, she

⁵⁴ See WHITMAN, *supra* note 37, at 88–90.

⁵⁵ Compare the well-known philosophical effort to identify the proper role of retributivism in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8–13 (1968). See also Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 365–78 (1997) (discussing Norval Morris's influential concept of "limiting retributivism").

⁵⁶ See *supra* pp. 2702–03.

is in search of a golden mean, a way of living an emotional life without living it to excess. Of course, the power of any such approach depends on its account of excess. When is it wrong to give in to our anger, for example, or our indignation? How do we control emotions that might potentially go bad?

Here again, Nussbaum's answers are drawn from the same moral philosophy. In part she holds, in line with the long eudaimonistic tradition, that the test of excess is the measure of our own individual well-being: we should not yield to our anger when doing so would make our lives less valuable and less well-spent (p. 100).⁵⁷ In part, her answers depend on the act/person distinction: emotions veer into the unacceptable when they target persons, rather than acts (p. 106). By having a healthy concern for our own inner well-being, and by remembering to love the sinner even while hating the sin, we will keep our emotions under control.

But here again, while Nussbaum's theory may make for good moral philosophy, it does not obviously make for good law. Consider the question of retributivism. Retributivism poses, one might think, the perfect case for exploring Nussbaum's approach. As philosophers frequently observe, the "retributive emotions" can take two forms in the law: one commonly deemed bad and one commonly deemed good.⁵⁸ The bad form is vengefulness. When we allow our desire for retribution to get out of hand, when we yield to our hatred for the offender, we cease to compute rational, proportional punishments. Instead, we begin to descend into the all-too-familiar syndrome of social vengeance. The good form, by contrast, involves the sober calculation of proportional punishment, to be dispassionately meted out to an offender whom we continue to regard as our fellow human being and fellow citizen.⁵⁹

The trick, of course, is figuring out how to keep the retributive emotions from degenerating into vengefulness. This is not just a parlor problem for philosophers. It is a pressing problem in modern societies, not least our own. America has seen a revival of both the philosophy and the rhetoric of "retribution" over the last thirty years or so.⁶⁰ This revival has coincided with a massive and troubling

⁵⁷ Ancient philosophers regarded "honor and money" as "external goods" that are typically overvalued, giving rise to unjustified anger (p. 100).

⁵⁸ For a philosophical discussion of the place of emotions in the law, see Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in *THE PASSIONS OF LAW*, *supra* note 1, at 123. For the phrase "retributive emotions," see Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *THE PASSIONS OF LAW*, *supra* note 1, at 149.

⁵⁹ Nussbaum provides her own account of this standard topos (pp. 238–39).

⁶⁰ I have more extensively reviewed the contemporary American scene in WHITMAN, *supra* note 37, at 41–67.

intensification of American punitiveness. This intensification is marked most notably by our incarceration rates, now the highest in the industrialized world,⁶¹ and it includes phenomena like the reintroduction of chain gangs and the determined prosecution of minors.⁶² Under these circumstances, it is hard not to regard our society as signally failing to make the philosophical distinction between the good sort of retributivism and mere vengefulness. Using the word “retribution,” however philosophically justifiable, seems to amount, all too often, to tossing red meat to the most animalistic instincts of those who vote in American elections.

This tendency toward vengefulness is not an exclusively American problem. Other societies faced the same kinds of problems throughout the twentieth century. After World War II, for example, Europe was wracked by destructive episodes of collective vengeance — a Europe-wide “politics of retribution” that is now the subject of a growing literature.⁶³ Durkheimian sociology argues, moreover, that these sorts of problems are inevitable everywhere: the collective desire for social vengeance is a human universal.⁶⁴ Anthropologists and legal historians regard the desire for vengeance as fundamental to the organization of human society.⁶⁵ Interpreting the history of almost any past society is impossible without acknowledging the prevalence and intensity of the human inclination toward escalating vengefulness.

Humans, one is forced to conclude, are simply vengeful animals, or at least ones that can be trained to abandon vengeance for retribution only with the greatest difficulty. This presents a prime challenge in the management of human society. Certainly, as Professor Victoria Nourse has recently argued, it presents a prime challenge in criminal law. Criminal law, claims Nourse, is largely an exercise in cabining vengeance.⁶⁶ Most notably, the law of provocation can be interpreted as a law concerned with nothing other than managing vengeful impulses.⁶⁷ This interpretation is indeed a familiar *topos* in debates

⁶¹ See Gail Russell Chaddock, *U.S. Notches World's Highest Incarceration Rate*, CHRISTIAN SCI. MONITOR (Boston), Aug. 18, 2003, at 2.

⁶² See Whitman, *supra* note 49, at 101.

⁶³ See, e.g., THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH (István Deák et al. eds., 2000); UNE POIGNÉE DE MISÉRABLES: L'ÉPURATION DE LA SOCIÉTÉ FRANÇAISE APRÈS LA SECONDE GUERRE MONDIALE (Marc Olivier Baruch ed., 2003).

⁶⁴ See ROGER COTTERRELL, ÉMILE DURKHEIM: LAW IN A MORAL DOMAIN 65–81 (1999); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 23–46 (1990).

⁶⁵ See, e.g., LA VENGEANCE: ÉTUDES D'ETHNOLOGIE, D'HISTOIRE ET DE PHILOSOPHIE (Raymond Verdier et al. eds., 1980–1984).

⁶⁶ See V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1692 (2003).

⁶⁷ See *id.* at 1716–20.

about the law dating back at least to the *Oresteia* of Aeschylus.⁶⁸ It is a familiar topos in the political theory of the law too, relevant most importantly to the work of Max Weber.⁶⁹

Surely this familiar topos is natural territory for Nussbaum.⁷⁰ The problem of keeping societies from descending into vengefulness is nothing other than a problem in the control of the emotions in the law. We have to find some way of keeping collective vengefulness from spinning out of control. Indeed, Nussbaum is fully aware of the dangers (p. 239). Yet how much help is Nussbaum's eudaimonistic approach? She cites Herbert Morris and the acute writings of Dan Markel for the proposition that we must maintain a distinction between good retributivism and bad vengefulness (pp. 238–39).⁷¹ All well and good. But how do we make this idea a practical reality? How do we succeed in controlling public emotions that spin out of control so readily? Nussbaum's moral philosophy does not give persuasive answers. We can certainly condemn the American punitiveness of the present, or the European punitiveness of the past, by observing that the people involved have forgotten the philosophical distinction between retribution and vengeance. We can wag our fingers at those who forget that morality commands us to condemn acts, not persons. We can feel philosophical pity for those who have yielded to their vengeful impulses; after all, they have only deprived themselves of the inner good life. At the limit, we can try to ensure that all citizens will receive an adequate moral education in school. None of that seems to take seriously the challenge of managing human society.

When it comes to the retributive emotions, Nussbaum simply does not offer us the help we need; she does not offer any prescription for how to curb our seemingly inevitable tendency toward vengefulness. This is symptomatic of a larger failing in her approach to the psychology of the emotions. While vengefulness is a problem in the psychic

⁶⁸ See, e.g., ERIC A. HAVELOCK, *THE GREEK CONCEPT OF JUSTICE* 279–80 (1978).

⁶⁹ See, e.g., MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE* 516 (5th ed. 1976) (outlining his theory of monopolization of violence).

⁷⁰ Indeed, in a couple of passages, Nussbaum acknowledges the importance of this dynamic. She discusses the "true man" doctrine as reflecting concerns with personal honor (p. 43) and the problem of "manly honor" (p. 63) — incarnations of legally channeled violence.

⁷¹ I must protest one misuse of my own writings adopted by Nussbaum from Markel. I wrote several years ago that shame penalties "seem beautifully retributive." James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055, 1062 (1998) (emphasis added). Through this phrase I described the attitudes of others toward these punishments, without offering my own account of retributivism. But Markel, see Markel, *supra* note 1, at 2182, and Nussbaum (p. 239) cite this passage as though I had offered such an account. What I do believe is stated in the text of this Review: "retribution" is a slogan that encourages punitiveness, and Markel and Nussbaum have not offered any reason to suppose that careful philosophizing about the distinction between retribution and vengeance can do anything to ward off that danger.

constitution of human animals, it is not the problem that interests her. It is not about animals who make themselves unhappy by failing to come to terms with their body fluids or their mortality. It is about animals who have an inclination to feel slighted, and who gratify themselves by taking vengeance. It is about human animals who are all too often nasty, violent creatures — the kinds of creatures we see in the Abu Ghraib photos.

Because Nussbaum favors a “therapeutic” moral philosophy, she does not provide a psychological theory that can account for the social problems presented by those kinds of creatures. This focus on the therapeutic noticeably affects the choices she makes within the literature of psychology. Nussbaum draws on psychological theories that are either intended to comfort the ailing individual, or that can be turned to that purpose. This is what attracts her to the psychoanalytic theories of Winnicott and others like him (pp. 179–85). By contrast, she shows no interest in psychological studies that bring out the more troubling aspects of the *collective* psychological dynamic of punishment. For example, she does not cite the famous Stanford prison experiment of 1971, which seemed to show how quickly and spectacularly a group of subjects assigned the role of prison guards could spin out of control.⁷² Nor does she cite any of the numerous other studies that explore the prevalence of a kind of vengefulness among individuals who punish — a vengefulness little touched by philosophical sophistication.⁷³ Since those studies are not about providing therapy to the emotionally unbalanced individual, they are of no real relevance to her argument.

Yet the problems of the retributive emotions, at least from the lawyer’s point of view, are not problems in therapizing the souls of unhappy punishers. They are problems in managing collective impulses toward vengeance.

IV. TAKING HIERARCHY SERIOUSLY

Similar complaints can be voiced about Nussbaum’s treatment of human hierarchical impulses. Here again, her psychology does not

⁷² Haney et al., *supra* note 14.

⁷³ See, e.g., Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002); John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659 (2000); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans’ Views on the Death Penalty*, J. SOC. ISSUES, Summer 1994, at 19; Robert M. McFatter, *Purposes of Punishment: Effects of Utilities of Criminal Sanctions on Perceived Appropriateness*, 67 J. APPLIED PSYCHOL. 255 (1982); Robert M. McFatter, *Sentencing Strategies and Justice: Effects of Punishment Philosophy on Sentencing Decisions*, 36 J. PERSONALITY & SOC. PSYCHOL. 1490 (1978); Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y REV. 237 (1997).

seem adequate to the phenomena of collective behavior that confront us. I find this especially disappointing, since Nussbaum's Stoic tradition seems especially well placed to address the problems of human hierarchy.

Nussbaum condemns shame and disgust as hierarchical emotions, the indulgence of which is inconsistent with the demands that moral philosophy puts on the wise and honorable individual actor. Her project is to explore "the institutional and developmental conditions for the sustenance of a liberal respect for human equality" (p. 16). Any such project requires "removing stigma and hierarchy wherever they occur" (p. 17).⁷⁴ This project is stirring. But how useful is it as a prescription for managing the collective dynamic of human society? There is every reason to think that humans, like other primates, have a consistent tendency to organize their societies in the hierarchical way that the awful little society of Abu Ghraib was organized.⁷⁵ There is also every reason to think that this tendency resists easy correction through therapeutic individual psychology. There may be a foundation for tendencies toward hierarchy in individual psychology, to be sure. Studies do suggest that individuals perceive the social world as a place structured around respect, disrespect, claims of superiority, and claims of inferiority.⁷⁶ We can also propose therapies intended to help individuals overcome those perceptions.⁷⁷ What we cannot do is radically reconstitute human society. After all, a large body of sociology, including most famously the work of Goffman⁷⁸ and Simmel,⁷⁹ suggests that hierarchical relations are the very tissue of human social interactions.

A tendency toward hierarchy also arguably pervades the criminal law in particular, if we accept the well-known claims of Jean

⁷⁴ Nussbaum discusses a similar idea in her chapter on disgust (p. 117).

⁷⁵ See, e.g., CHRISTOPHER BOEHM, *HIERARCHY IN THE FOREST: THE EVOLUTION OF EGALITARIAN BEHAVIOR* (1999). By saying that human societies *tend* to take hierarchical forms, I do not deny that they sometimes take egalitarian forms. Boehm's book is an effort to demonstrate how the apparent egalitarianism of small hunter-gatherer societies could have been the evolutionary result of hierarchical forms of organization still observable in other primates. See *id.* at 171-96.

⁷⁶ See, e.g., Dale T. Miller, *Disrespect and the Experience of Injustice*, 52 ANN. REV. PSYCHOL. 527 (2001).

⁷⁷ See, e.g., AARON T. BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND VIOLENCE* 249-68 (1999).

⁷⁸ ERVING GOFFMAN, *The Nature of Deference and Demeanor*, in *INTERACTION RITUAL* 47 (1967).

⁷⁹ GEORG SIMMEL, *SOZIOLOGIE: UNTERSUCHUNGEN ÜBER DIE FORMEN DER VERGESSELLSCHAFTUNG* 272-73 (1992).

Hampton.⁸⁰ As Hampton argued, the moral structure of the criminal law assumes a psychology of respect and disrespect, of inferiority and superiority. Our urge to punish grows out of a particular emotion: the emotion of resentment. We want to “put down” offenders, because we feel that they have treated themselves as our superiors, using us as mere means to their ends. The very morality of criminal punishment, on this Hamptonian account, is founded on the human psychology of superior/inferior status relations.⁸¹

Nussbaum is perfectly aware of the intractability of human social hierarchy. She insists, though, that the “liberal state” should not lend its agency to any such hierarchical form of organization (p. 232); law simply should not orient itself toward hierarchical values. But how practicable is this? Without a doubt, there are utterly obnoxious and unacceptable forms of hierarchy in the law. We are all committed to stamping out systems of apartheid, and indeed to stamping out anything that “puts the brand of servitude and degradation upon a . . . class of our fellow-citizens.”⁸² Any legal system organized in such a way as to enforce systematic status degradation is a legal system we can all agree to condemn as evil.

It cannot be the case, though, that condemning systematic status degradation commits us to the hopeless project of eliminating all superior/inferior relations in the law. Even in societies deeply dedicated to the general norm of equality, the particular moral challenges of the law are a product of the law’s necessary involvement in the hierarchical exercise of power. Punishers do indeed stand in a position of superiority over those they punish. Counseling those engaged in individual acts of punishment by citing Kant and declaring that we must regard our fellow human beings as equals does minimal good. The realities of the living relationship require us to admit that punishment is a hierarchical business, and to try to regulate it as such. As ancient philosophers recognized, there must always be an element of *chastisement* — of superior/inferior relations — in punishment.⁸³ Nor is it just a matter of the infliction of punishment. Judges in criminal sentencing, like punishers, stand as superiors over inferiors. They need ethical rules about how to comport themselves when deciding the fates of the

⁸⁰ See JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988); Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1 (Wesley Cragg ed., 1992).

⁸¹ See MURPHY & HAMPTON, *supra* note 80, at 125, 130; Hampton, *supra* note 80, at 14, 16.

⁸² *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting).

⁸³ See DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS* 69–70 (2000) (discussing punishment as a way to teach wrongdoers their proper place in society); Kenneth J. Dover, *Fathers, Sons and Forgiveness*, 16 *ILL. CLASSICAL STUD.* 173, 177 (1991) (discussing punishment as an element of training and education).

weaker persons thrown upon them. Testators also stand in a position of superiority to their potential beneficiaries. They need ethical rules about how to dispense the financial favors that they are in a position to dispense. Even contract parties contemplating breach can be thought of as standing in a position of superiority over their partners. These are the problems that the practical ethics of law must solve.

They are not problems that *Hiding from Humanity* has addressed. This is particularly disappointing because Nussbaum is in a position to provide such useful philosophical guidance. Ancient philosophy offers a wealth of resources for dealing with the ethics of human hierarchy. The ancient world was, after all, a world of sharp hierarchy — a world of masters and slaves, patrons and clients. In that world, moral philosophers worried constantly about how to exercise power. The Stoic tradition is particularly rich and subtle in this regard. In the writings of the ancient Stoics we learn, for example, that a master who is interested in pursuing the good life should not lose his temper while beating his human property: one is to beat one's slaves dispassionately.⁸⁴ We also find plenty of advice about how rich and powerful patrons should treat the clients who are their supplicants: a patron interested in pursuing the good life should understand how to make his superiority clear without showing contempt.⁸⁵

At first glance, it is understandable that Nussbaum does not care to discuss these aspects of ancient philosophy, or its modern parallels. *These* sorts of ancient ideas seem, well, disgusting and shameful, and completely out of place in our egalitarian world. The same goes for modern philosophy: when Nietzsche talks about hierarchical relations — something he does with endless zest and malign wit — he is at his most unpleasant.⁸⁶ Today, we can see absolutely nothing “moral” in a rule about how to stay cool and collected while you beat your slaves.

⁸⁴ See MIRIAM T. GRIFFIN, *SENECA: A PHILOSOPHER IN POLITICS* 261–62 (1976); see also KEITH BRADLEY, *SLAVERY AND SOCIETY AT ROME* 28 (1994) (describing Galen's advice against punishing slaves in the heat of anger); PIERO A. MILANI, *LA SCHIAVITÙ NEL PENSIERO POLITICO DAI GRECI AL BASSO MEDIO EVO* 220–21 & nn.44–45 (1972) (describing Seneca not as an abolitionist but as an advocate of humane treatment of slaves).

⁸⁵ Leading ancient historian Paul Veyne has provided a rich discussion on ancient philosophers' advice to patrons. See Paul Veyne, *Avant-Propos* to *SENEQUE: ENTRETIENS LETTRES À LUCILIUS*, at xix–xx (Paul Veyne ed., 1993) (noting that in pursuing the good life, the powerful man gives benefits without displaying arrogance); cf. Richard Saller, *Patronage and Friendship in Early Imperial Rome: Drawing the Distinction*, in *PATRONAGE IN ANCIENT SOCIETY* 49, 57–58 (Andrew Wallace-Hadrill ed., 1990) (discussing relations between powerful patrons and clients); Andrew Wallace-Hadrill, *Patronage in Roman Society: From Republic to Empire*, in *PATRONAGE IN ANCIENT SOCIETY*, *supra*, at 63, 63–85 (giving a general account of Roman patronage relations).

⁸⁶ See, e.g., FRIEDRICH NIETZSCHE, *JENSEITS VON GUT UND BÖSE*, chs. 204–40, at 129–80 (Kritische Studienausgabe ed., de Gruyter 1999) (1886) (surveying workings, and advantages, of hierarchical relations in human society).

Nevertheless, these most repellent passages of the ancient (and modern) philosophers may be the best starting point for an updated Stoic philosophy of law — one that provides a foundation for confronting pragmatically the moral challenges of our own legal system. Seneca and Nietzsche cannot be accused of a lack of psychological realism when it comes to the problems that led to Abu Ghraib. They knew perfectly well that human beings are naturally hierarchical primates, always inclined to surrender to the desire to humiliate and degrade others. To them, the challenges of quotidian ethics — the challenges of wielding power over others — could not be addressed by the utopian project of eliminating hierarchy entirely. Unlike Kant, they did not suppose that ethics could be reduced to the governance of relations between equals. Ethical problems, they knew, involve doing favors and exercising authority. By implication, ethical problems are problems in how superiors treat inferiors; and ethical solutions involve prescribing the right way for superiors to treat inferiors. Far from requiring that we eliminate hierarchy, their sort of ethics requires that we organize it, tame it, live it in the right way.

All that seems radically removed from modern morality. Nevertheless, it arguably offers a more faithful account of most of today's law than anything offered by most modern egalitarian philosophers. Stoic philosophy is useful in dealing with the ethical challenges of hierarchy precisely because it is written by and for powerful people — people, like the fabulously wealthy and powerful Seneca himself, with responsibility for the lives of others.⁸⁷ It is eudaimonistic philosophy, but the questions it asks about individual happiness are often questions about how to handle responsibility for the lives of others: how to best hand out favors, how to show mercy to inferiors, or as the case may be, to chastise inferiors. This is a philosophy that offers much for legal officials, and much for the law.

In particular, Stoic philosophy offers something when it comes to dealing with the horrors of an Abu Ghraib. The problems in controlling the soldiers of the November, 2003, nightshift at Abu Ghraib *are* problems of the emotions. But they are exactly the sorts of problems that preoccupied the Stoic hierarchical tradition: they are problems in learning to remain cool and collected *while exercising authority*. As Augustine, that most humane realist of antiquity, declared, they are problems in learning to act as a “minister of the law,” without *libido*, without passion.⁸⁸ I would insist, echoing Augustine, that the paramount problems of punishment involve maintaining a dispassionate

⁸⁷ See Inwood, *supra* note 36, at 58–59.

⁸⁸ FRANCO DE CAPITANI, IL «DE LIBERO ARBITRIO» DI S. AGOSTINO 250 (1987) (arguing that like soldiers, all legal officials who obey the law “sine libidine” (“without passion”) act legitimately).

professional attitude. This goal is best served by leaving punishment securely in the hands of professionals, by providing proper training and supervision for punishment professionals, and by inspiring a professional ethic.⁸⁹ This goal is also well served by avoiding red-flag slogans like “retribution,” not to mention red-flag practices like stripping prisoners naked and hooding them to hide their human faces from their punishers. In any case, it is a goal that can never be attained if we insist that reasoning about legal problems has to begin with a rejection of every hint of hierarchy.

V. CONCLUSION

Of course, it is no easy matter to explain exactly how legal actors can check their passion at the door. “Dispassion” is not a concept easy to analyze. Analyzing it is the challenging task of a philosophy of emotions in the law. The disappointing truth is that *Hiding from Humanity* never really tackles that task. This is a book by an acute and learned moral philosopher. With its sensitivity to the complexity of human psychology, and to the moral dilemmas of the human condition, this book offers what we need most: a philosophical call for common sense in the face of degrading practices that our legal theories seem unable to comprehend. It is written with conviction, and it speaks for civilization at a moment when we need voices that speak for civilization.

Yet it is just not a book that speaks enough about law. It speaks too much about the moral predicament of individuals in general, and too little about the moral predicament of legal actors in particular. Nussbaum never cracks the philosophical nut that must be cracked: she never explains how we can pass from the comparative clarity that is the world of moral philosophy into the murk that is always the world of law. She never explains how a philosophy oriented toward making good and happy individuals can be transformed into a philosophy about managing our legal responsibilities. There would be no disappointment in this if she were a lesser scholar, or if the Stoic tradition were not so rich in advice for legal actors. “Tu multa dare potes,” we want to say, with Seneca, “you are in a position to give us gifts in great quantity,” and we are willing to accept all of it.⁹⁰ In the end, though, *Hiding from Humanity* does not give us enough.

⁸⁹ This is the burden of the argument I have offered in Whitman, *supra* note 71.

⁹⁰ SENECA, DE BENEFICIIS bk. V, ch. 4.

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