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

KEY WORDS: absolutism, consequentialism, disgust, John Stuart Mill, Martha Nussbaum, priority, John Rawls, shame, stigma

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

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

¹ I thank an anonymous referee for *The Journal of Ethics* for comments on a first draft of this essay.

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

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

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

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

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

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

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

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

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

1. SHAME AND THE EGALITARIAN ETHOS

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

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

⁵ For a qualification of this claim see footnote 17.

⁶ Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. SHAME AND DISGUST REACTIONS AND CRIMINAL PROHIBITION

In her fascinating book, *Hiding from Humanity* Nussbaum offers many insights about the relationship between emotion and law.¹³ Her central thesis, however, is puzzling. She concentrates on two roles that emotions can play in shaping law. Emotions can "figure in the justification for making certain sorts of acts legal," and can also serve as mitigating factors when present in the mind of an agent who has committed an act the law forbids. With respect to these two roles, she singles out shame and disgust for special suspicion. "My general thesis will be that shame and disgust are different from anger and fear, in the sense that they are especially likely to be normatively distorted, and thus unreliable as guides to public practice, because of features of their specific internal structure," she writes. Disgust, unlike anger, is typically unreasonable, so disgust "should never be the primary basis for rendering an act criminal, and should not play either an aggravating or mitigating role in the criminal law where it currently does so."¹⁴ She connects this thesis with an account of the political philosophy of liberalism and with opposition to Patrick Devlin's "legal moralistic" claim that the fact that a type of conduct is regarded with revulsion and disgust by the ordinary member of society is good evidence that the type of conduct should be legally forbidden.¹⁵ The story about shame is more complex, but broadly similar. Shame can be reasonable and dispositions to experience shame can do good. But following psychoanalytic theorizing she identifies a type of shame, "primitive shame," that we all experience and that is pathological in its effects and that tends to arise whenever

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

¹⁴ Nussbaum, *Hiding from Humanity*. The first quote in this paragraph is at p. 7, the second at p. 13, the third at p. 14.

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

shame is experienced and that is hard to disentangle from benign shame. Hence “shame is likely to be normatively unreliable in public life.” Moreover, “a liberal society has particular reasons to inhibit shame and to protect its citizens from shaming.”¹⁶

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

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

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

Much the same holds true of the issue, what emotional factors, if any, should serve as mitigating or aggravating the severity of a given

¹⁶ Nussbaum, *Hiding from Humanity*, p. 15.

criminal offense. Suppose it is the case that many people in a given society have a visceral disposition to react with disgust and revulsion to the idea of men having sex with men, or would be ashamed to think of themselves participating in gay sexual activity. I entirely agree with Nussbaum that such reactions of disgust and shame should not be exculpatory if what is at issue is a murder carried out in retaliation against one who has made a homosexual sexual advance or carried out against people engaged in same-sex sexual activity in the vicinity of the perpetrator. But the grounds for this judgment do not stem from a conviction that shame and disgust are generally unreliable emotions prone to distortion. The fact that a man becomes angry and indignant when he receives an offer to engage in sex with another man should not be exculpatory if he proceeds to assault, maim, or kill the person who has tendered the offensive offer. Nothing particular about the emotions of shame and disgust drives this judgment – that being subject to unwanted homosexual advances does not even slightly excuse a murder in retaliation.

3. SHAME AND DISGUST AS TOOLS OF SOCIAL CONTROL

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

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

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

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

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

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

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

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

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

Here a clarification is necessary: The disagreement between Nussbaum and her critic need not involve the issue of consequentialism versus nonconsequentialism. The issue is really absolutism versus nonabsolutism.¹⁷ Suppose you are a nonconsequentialist intuitionist of the W. D. Ross variety.¹⁸ You believe that people ought to keep their promises, tell the truth, and so on sometimes even when fulfilling those duties does not bring about the best consequences obtainable in the circumstances. Suppose you accept "Don't inflict shame and humiliation on anyone" as one moral duty or *prima facie* obligation. However, if you also accept a significant duty of beneficence, and allow that no duty is absolutely binding in all circumstances all things considered, you accept that sometimes, when the consequences of not inflicting shame and humiliation would be sufficiently drastic, you morally ought all things considered to do the inflicting. Nussbaum is opposed to the Rossian intuitionist position just described as well as to the consequentialist, since either is unwilling to say that the decent society refrains from inflicting shame and humiliation on any person come what may.

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

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

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

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

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

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

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

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

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

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

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

¹⁹ John Rawls, *Political Liberalism*, Second Edition (New York: Columbia University Press, 1996).

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

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

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

²¹ John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, 1980), p. 11.

4. PRIMITIVE AND PRODUCTIVE SHAME

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

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

²² Nussbaum, *Hiding from Humanity*, pp. 234–237.

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

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

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

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

²³ Nussbaum, *Hiding from Humanity*, p. 212.

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

²⁵ Nussbaum, *Hiding from Humanity*, pp. 213–214.

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

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

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

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

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

²⁶ Margalit, *The Decent Society*, p. 146.

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

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

5. SHAMING PENALTIES

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

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

penalties might succeed in deterring crime at lesser total cost to offenders than alternative punishments.²⁷

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

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

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

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

²⁸ Nussbaum, *Hiding from Humanity*, p. 230.

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

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

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

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

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

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

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

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

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

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

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

6. NUSSBAUM VERSUS MILL

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

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

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

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

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

respect for the dignity of all citizens as equals, one will find that Mill has put things just the wrong way round. Instead of thinking truth good because of what it does for the self-respect and flourishing of individuals, he subordinates individual flourishing and dignity to truth, conceived as an abstraction.³⁰ In this spirit she endorses John Rawls's ringing assertion that "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override." The foundation of social policy should be the inviolability of the person and the imperative of treating each person as an end and equal respect for the dignity of each individual.³¹

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

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

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

³⁰ Nussbaum, *Hiding from Humanity*, pp. 327–328.

³¹ I am unsure how to reconcile Nussbaum's affirmation of inviolability here with her sympathetic discussion of what she calls "Sensible Consequentialism" and "Sensible Deontology" in her "Comment" on Judith Jarvis Thomson's *Goodness and Advice*. Both sensible views agree that there is no ordinary deontological duty such as the duty to refrain from telling lies that one morally ought to fulfill come what may, whatever the consequences. The sensible views Nussbaum approvingly characterizes reject inviolability [See Judith Jarvis Thomson, *Goodness and Advice*, Amy Gutmann (ed.) (Princeton: Princeton University Press, 2001), pp. 98–102]. I should note that in her "Comment" Nussbaum explicitly declines to affirm consequentialism and expresses a concern that the doctrine of consequentialism may leave room for amendments and qualifications that render the doctrine purely formal, a notation in which any substantive moral position might be expressed.

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

Nussbaum quotes Rawls's ringing affirmation of inviolability. But in Rawls the inviolability of the person is interpreted in terms of lexical priority relations – of his principles over welfare promotion, of the equal liberty principle over the principle regulating social and economic benefits, and of the fair equality of opportunity component of this latter principle over the difference principle component. None of these lexical priority claims withstands scrutiny, I claim. This essay is not the place to argue this point, but one should notice that Rawls himself acknowledges that maximin, the core idea of the difference principle, is not acceptable as a general principle.³² Rawls proposes that the cases in which maximin gives counterintuitive recommendations are unlikely to arise for policy choices that involve the arrangement of the basic structure of institutions in modern conditions.

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

³² Rawls, *A Theory of Justice*, p. 133. For criticism of Rawls's lexical ordering of his principles, see Richard Arneson, "Rawls Versus Utilitarianism in the Light of Political Liberalism," in Clark Wolf and Victoria Davion (eds.), *The Idea of a Political Liberalism: Essays on Rawls* (Lanham: Rowman and Littlefield Publishers, 2000), pp. 231–252; Richard Arneson, "Against Rawlsian Equality of Opportunity, *Philosophical Studies* 93 (1999), pp. 77–112.

principle will really be utility-maximizing.³³ The strategy that Mill outlines might make sense independently of whether or not one finds his utilitarianism attractive. The strategy could be yoked to any version of consequentialism or even to a nonconsequentialism that recognizes a preponderance of consequences as in principle a valid ground for overriding rights claims. Inviolability, rejected at the level of fundamental moral principle, might emerge as plausible at the level of rules for social rule making. I do not think Mill's rehabilitation of inviolability actually succeeds, but his proposal is seriously debatable and might even be correct, whereas rights absolutism strikes me as hopeless.

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

Any consequentialist doctrine will support equal rights for all only if doing so would produce the best feasible outcome. This is objectionable only if we reasonably would affirm equal rights for all even in circumstances in which it is known that support for unequal rights would produce a better outcome, as assessed by the doctrine, all things considered. Mill supported unequal democratic citizenship rights, with extra votes accruing to the better educated and more competent voters.³⁴ In *On Liberty* Mill conjectures, but does not attempt in any rigorous way to demonstrate, that the utility

³³ John Gray develops this interpretation of Mill's *On Liberty* argument in John Gray, *Mill on Liberty: A Defence*, Second Edition (London: Routledge, 1996).

³⁴ John Stuart Mill, *Considerations on Representative Government*, in John Stuart Mill, *Collected Works*, Volume 19, J. M. Robson, (ed.) (Toronto: University of Toronto Press, 1977), Chapter 8.

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

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

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

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

7. CONCLUSION

I have argued that the use of shame as a tool of social control is in principle acceptable in a decent (tolerably just) society. Citizens should be disposed to experience shame if they violate morally appropriate social norms, and to react to violators in punishing, shame-inducing ways. Shame functions in a similar way to uphold criminal law. Any conviction of a person accused of a seriously wrong criminal offense condemns the individual and induces a shame reaction in him. We could not realistically extrude this element of shaming from criminal law without abolishing criminal law enforcement. Criminal penalties might also be deliberately designed to be shaming rituals, imposing stigma.³⁵ If such penalties bring about morally better outcomes by fundamental justice standards of assessment than alternative social policies, we should opt for the shaming penalties. The objection that the institutions of society must refrain from humiliating and degrading any person so as to deny her basic dignity, and hence the criminal justice system absolutely must refrain from shame imposition, goes wrong for two reasons. First, shaming penalties seek to impose a lower social status on the shamed individual, but this process need involve nothing like denial of anyone's status as a human person with dignity. Second, in extreme circumstances, when extreme shaming that assaults an individual's basic human dignity and status as a person with rights maximizes the fulfillment of just outcomes all things considered, we should not eschew extreme shaming. Of course, in any circumstances (which might be widespread) in which shaming is counterproductive, we should not engage in it.

³⁵ See Harold Garfinkel, "Conditions of Successful Degradation Ceremonies," *American Journal of Sociology* 61 (1956), pp. 420-424.

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

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