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THE ANATOMY OF DISGUST IN CRIMINAL LAW

Dan M. Kahan*

THE ANATOMY OF DISGUST. By *William Ian Miller*. Cambridge, Mass.: Harvard University Press. 1997. Pp. 320. \$24.95.

I. A CONCEPTUAL BLINDSPOT

My goal in this review is to call attention to a defect in the dominant theories of criminal law and to identify a resource for remedying it. The defect is the absence of a sophisticated account of how *disgust* does and should influence legal decisionmaking. The corrective resource is William Miller's *The Anatomy of Disgust*.¹

To make my claims more vivid, consider two stories. Both involve men who were moved to kill by disgust toward homosexuality.

Stephen Roy Carr observed two female hikers in the woods and decided to follow them at a distance. That night, as the women were engaged in lovemaking at their secluded campsite, the armed Carr burst from his hiding place and shot them repeatedly, killing one and severely injuring the other.² Carr maintained at trial that "the 'show' put on by the women, including their nakedness, their hugging and kissing and their oral sex," had filled him with overpowering revulsion.³ In support of this defense — which he offered to mitigate the charge of murder to voluntary manslaughter⁴ — Carr proffered psychiatric evidence relating to his rejection by his mother, whom he suspected of being a lesbian, and by other women.⁵ After the judge refused to admit this evidence, Carr was convicted of first-degree murder.⁶ The Pennsylvania Superior

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1. William Miller is a Professor of Law at the University of Michigan.

2. See *Commonwealth v. Carr*, 580 A.2d 1362, 1363 (Pa. Super. Ct. 1990). See generally CLAUDIA BRENNER, EIGHT BULLETS: ONE WOMAN'S STORY OF SURVIVING ANTI-GAY VIOLENCE (1995) (relating the surviving victim's account).

3. See *Carr*, 580 A.2d at 1364.

4. See *Carr*, 580 A.2d at 1363-65.

5. See *Carr*, 580 A.2d at 1363-64.

6. See *Carr*, 580 A.2d at 1363-65.

Court affirmed.⁷ “[The law] does not recognize homosexual activity between two persons as legal provocation sufficient to reduce an unlawful killing . . . from murder to voluntary manslaughter,” the court concluded.⁸ “A reasonable person would simply have discontinued his observation and left the scene”⁹

Richard Lee Bernardski was convicted of a double murder.¹⁰ Evidence at trial demonstrated that the eighteen-year-old Bernardski and his friends had set out one evening to “pester the homosexuals.”¹¹ They proceeded to a part of town known for its gay nightlife and accepted a ride from two gay men whom they met there.¹² After the group drove to a remote spot in the woods, Bernardski ordered the gay men to strip.¹³ When they refused, Bernardski drew a pistol and opened fire, killing both.¹⁴ Unlike the judge in the *Carr* case, however, the judge who presided over Bernardski’s trial expressed sympathy for Bernardski’s revulsion. “I put prostitutes and gays at about the same level,” the judge explained, “and I’d be hard put to give somebody life for killing a prostitute.”¹⁵ After all, he said, Bernardski’s victims would not have been killed “if they hadn’t been cruising the streets picking up teen-age boys”; “I don’t much care for queers cruising the streets [picking up teen-age boys]. I’ve got a teen-age boy.”¹⁶ The judge rejected the prosecution’s recommendation of life imprisonment and instead sentenced Bernardski to a term in line with the ones imposed for persons convicted of voluntary manslaughter.¹⁷

Which judge got it right — the one who refused to let Carr tell his story of disgust; or the one who not only listened to Bernardski, but who mitigated the sentence because of his own disgust toward homosexuality? Can we possibly answer this question without some account of what disgust is? Maybe disgust consists, as Carr seemed to suggest, of an impulsive and unthinking revulsion toward its object. If so, then shouldn’t the court have admitted Carr’s psychiatric evidence to determine whether his disgust had impaired his capacity for self-control and hence his moral responsibility for his

7. See *Carr*, 580 A.2d at 1367.

8. *Carr*, 580 A.2d at 1364-65.

9. *Carr*, 580 A.2d at 1364.

10. See Lisa Belkin, *Texas Judge Eases Sentence For Killer of 2 Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at 8; *Judge Is Censured Over Remark on Homosexuals*, N.Y. TIMES, Nov. 29, 1989, at A28.

11. Belkin, *supra* note 10, at 8 (quoting testimony at trial).

12. See *id.*

13. See *id.*

14. See *id.*

15. *Id.*

16. *Id.*

17. See *id.*

behavior?¹⁸ If that's what disgust is and why it matters, shouldn't the judge who sentenced Bernardski have been *less* sympathetic — both because Bernardski's attack was so clearly premeditated, and because the judge himself had a duty to rely on reason, rather than instinctive aversions, in fashioning an appropriate sentence?

Or perhaps disgust embodies an evaluative appraisal that is itself susceptible of being evaluated as morally true or false.¹⁹ But in that case, we can again ask, who got it right — the court in *Carr*, when it labeled the defendant's disgust "unreasonable"; or the judge in *Bernardski*, when he allowed his own disgust to tell him that the defendant deserved mitigation for his? The conventional principles of homicide law don't supply answers to these questions, because those principles have nothing to say about the nature of disgust.

This frustrating muteness generalizes. Many jurisdictions authorize the death penalty for murders that are "outrageously or wantonly vile, horrible, or inhuman" or the like.²⁰ This formulation says, in effect, that capital sentencers — typically juries — should trust their own disgust sensibilities to identify which murderers deserve to die. But why should we have this much confidence in disgust to discern what's just?

Many judges now punish offenders with shaming penalties — from bumper stickers for drunk drivers, to stigmatizing publicity for men convicted of soliciting prostitutes, to signs or even distinctive clothing for thieves.²¹ Shame and disgust are obviously related: those who are shamed predictably incur the disgust of others and even of themselves (pp. 34, 80). Is the eliciting of disgust an appropriate or sensible aim of punishment?

Finally, the law often treats disgust toward an activity — such as obscenity or sodomy — as sufficient to make it criminal. Is disgust by itself a legitimate ground for coercion?

Miller's work, I will try to show, furnishes a solid theoretical foundation for addressing the role that judgments of and about disgust play in the criminal law. Drawing on a rich variety of sources in psychology, history, literature, and philosophy, Miller paints a

18. See Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 753-56 (1995) (defending the use of the provocation defense in "homosexual advance" cases on this ground).

19. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 285-89 (1996) (describing the "evaluative conception" of emotion).

20. See, e.g., GA. CODE ANN. § 17-10-30(b)(7) (1997); see also 18 U.S.C. § 3592(b)(6) (1994) (authorizing the death penalty in "especially heinous, cruel, or depraved" cases).

21. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-34 (1996) (discussing "the shaming alternative").

vivid picture of disgust as “a moral and social sentiment” (p. 2). By “mark[ing] out moral matters for which we can have no compromise” (p. 194), disgust, he convincingly argues, plays an indispensable role in our evaluative life. It plays just as important a role, moreover, in social life, “rank[ing] people and things in a kind of cosmic ordering” (p. 2), and thus supplying “the basis for honoring and respecting as well as for dishonoring and disrespecting” (p. 202). These insights do not by themselves resolve all of the criminal law controversies in which disgust figures — a topic, sadly, about which Miller himself has little to say. But they do, I believe, help to reveal exactly what is at stake in these disputes, and why they take on the political salience that they typically do.

Indeed, Miller’s account can help us to see why, despite the pervasiveness of judgments of and about disgust in criminal law, official and academic criminal law theory has so little to say about it. Disgust, Miller shows us, is brazenly and uncompromisingly judgmental; the moral idiom of modern liberalism is not. Miller attributes the relatively peripheral role that disgust plays in this discourse to “[a] newer style of moralist, . . . one for whom tolerance and respect for persons are fundamental virtues” and who therefore “wish[es] our disgust sensitivities lowered so we would be less susceptible to finding difference and strangeness sources of disgust” (p. 179). The dominant forms of normative theorizing in criminal law are no less averse to the kind of intolerant moralizing that disgust embodies. Miller argues that it’s naïve for contemporary moral theorists to pretend that disgust doesn’t influence moral judgments; I want to suggest that the willful blindness of criminal theorists toward disgust is even worse than that.

II. MILLER’S *DISGUST*

Miller addresses disgust as part of an ongoing project to defend a style of social theorizing that “privileges the emotions in general and certain emotions in particular” (p. 21). This project has two adversaries: behaviorist forms of social science, which “try to explain most social action by reference to self-interest” and thus ignore emotions altogether (p. x); and contemporary psychoanalysis, which “reduc[es emotions] to mere veneering on [some] underlying oedipal master narrative” (p. xii). In the place of these emotion-inattentive accounts, Miller seeks to show that the contours of a community’s emotional life “make possible social orderings of particular stripes,” and that it therefore “behooves social and political theory to care about these emotions” (p. 18). *The Anatomy of Dis-*

gust is the second installment in this project; the first was Miller's book *Humiliation*,²² and the next a forthcoming book on cowardice.

Unlike the social scientists and psychoanalysts he attacks, Miller is a social constructivist.²³ On this view, social norms and meanings determine the content of emotions, which in turn reinforce those norms and meanings.²⁴ "Emotions," Miller contends, "are feelings linked to ways of talking about those feelings, to social and cultural paradigms that make sense of those feelings by giving us a basis for knowing when they are properly felt and properly displayed" (p. 8). This is so for "even the most visceral" emotions, such as disgust:

Even when the source of disgust is our own body the interpretations we make of our bodily secretions and excretions are deeply embedded in elaborate social and cultural systems of meaning. Feces, anuses, snot, saliva, hair, sweat, pus, the odors that emanate from our body and from those of others come with social and cultural histories attached to them. [p. 8]

At the same time, emotions such as anger, humiliation, and disgust have "functions": they enable certain experiences and foreclose others, in much the way that language selectively enables thoughts; they supply powerful "motives for action," demarking some experiences and objects as worthy of aspiration and others as not (pp. 8, 18). For these reasons, emotions inevitably feed back into the norms and meanings that construct them, entrenching those phenomena as the basis of a community's distinctive mode of social organization (p. 217).

For Miller, disgust is constructed by norms of hierarchy. "Disgust evaluates (negatively) what it touches, proclaim[ing] the meanness and inferiority of its object" (p. 9). It is suffused, too, with "ideas of a particular kind of danger, the danger inherent in pollution and contamination, the danger of defilement" (p. 8). Accordingly, we feel urgently constrained to remove or eliminate the offending object, or to cleanse ourselves after contact with it, lest it contaminate us and bring us down to its level. In this way, disgust "presents a nervous claim of right to be free of the dangers imposed by the proximity of the inferior. It is thus an assertion of a claim to superiority that at the same time recognizes the vulnerability of that superiority to the defiling powers of the low" (p. 9).

This sensibility in turn constructs the hierarchies that give rise to it. At the level of perception, disgust naturally "ranks people and things" (p. 2). "[A]long with desire, [it] locates the bounds of the other, either as something to be avoided, repelled, or attacked, or,

22. WILLIAM IAN MILLER, *HUMILIATION* (1993).

23. For a general account of this approach to emotions, see Claire Armon-Jones, *The Thesis of Constructionism*, in *THE SOCIAL CONSTRUCTION OF EMOTIONS* 32 (Rom Harré ed., 1986).

24. *See id.* at 33-34.

in other settings, as something to be emulated, imitated, or married" (p. 50). It "build[s] . . . moral and social community" by "separating our group from their group" (p. 194), by "prevent[ing] *our* way from being subsumed into *their* way" (p. 50). At the level of action, disgust is a powerful "motivator of discipline and social control" (p. 80). It impels us to steer clear of deviance, both to avoid the acute discomfort of being disgusted with ourselves, and to avoid the unpleasant consequences of being the object of the disgust of others. It likewise impels us to shun deviants, both to avoid their potentially contaminating influence, and to suppress the subversive claims to respect that their behavior embodies. "If you were casually to enumerate the norms and values, aesthetic and moral, whose breach prompts disgust, you would see just how crucial the emotion is to keeping us in line and minimally presentable" (p. 18).

Of course, there is by no means universal agreement on what — or who — is disgusting. Variation in disgust sensibilities across societies and across communities within a single society is another phenomenon that Miller's social constructivist account is uniquely suited to explaining. "It is culture, not nature, that draws lines between defilement and purity, clean and filthy, those crucial boundaries disgust is called on to police" (p. 15). Miller sounds a note of moderation on this score. Certainly, there are some things — among them incest, excrement, and (according to Miller) menstrual blood — that virtually no society excludes from the disgust menu, perhaps for sociobiological reasons. Nevertheless, there is a significant residuum of variation, especially on what to *include*, that must in the end be chalked up to the diversity of cultural norms (pp. 15-16).

In our day, we are accustomed not only to variance in perceptions of disgust, but also to political contention over them. To whose sensibilities should the law defer — the heterosexual soldiers who are disgusted by the idea of sharing barracks with gays or opponents of the gay-soldier ban who are disgusted by homophobia?²⁵ With whom should we be disgusted — the National Endowment for the Arts for funding sacrilegious art or conservative congressmen for proposing to screen NEA grant applications for offensiveness?²⁶

25. Compare Eric Schmitt, *Pentagon Chief Warns Clinton on Gay Policy*, N.Y. TIMES, Jan. 25, 1993, at A1 ("The Joint Chiefs of Staff, headed by Gen. Colin L. Powell, contend that repealing the ban would wreck morale and discipline, undermine recruiting, [and] force devoutly religious service members to resign.") with 139 CONG. REC. H9656 (Nov. 15, 1993) (remarks of Rep. Woolsey) (deriding the Pentagon's policy as "offensive" and "appall[ing]").

26. Compare Amei Wallach, *The Funding Fight*, NEWSDAY, Sept. 5, 1989, § II, at 4 (reporting the controversy surrounding the NEA's funding of "Piss Christ," a crucifix submerged in artist's urine) with Valerie Richardson, *Helms' Photo in Urine at NEA-Funded Show*, WASH. TIMES, Sept. 12, 1989, at A1 (reporting the controversy surrounding the NEA's funding of "Piss Helms," a urine-submerged photograph of Sen. Jesse Helms, the sponsor of legislation to ban the funding of disgusting art).

Miller's account helps to explain these types of disagreements, too. Hierarchy not only constructs disgust; disgust also constructs norms of hierarchy. "[W]hat is being established or confirmed" when we experience it "is [the] relative social and moral value" of its object (p. 217). It's predictable, then, that the shifting content of disgust would spark contention, particularly in a pluralistic society. "In [the] hurly-burly of anxious competition for status," different groups aggressively market their favored conceptions of disgust "either to maintain rank already achieved, to test whether it ha[s] been achieved, or to challenge for its acquisition" (p. 217). Miller sees this dynamic at work in challenges to "hierarchies based on race, ethnicity, gender, physical and mental handicap, sexual orientation" and the like, movements that are concerned at least as much with securing "changes in the emotional economy" as they are with securing "equal rights" (p. 235).

Miller develops this account of disgust across a series of topics as diverse as the methodologies and disciplines on which he draws. Early on in the book, he undertakes a rigorous philosophical analysis aimed at distinguishing disgust from related emotions. Both fear and disgust, for example, make us crave distance from their objects, but fear is content merely to escape, whereas disgust "puts us to the burden of cleansing and purifying, a much more intensive and problematic labor" (p. 26). Indignation and disgust are both emotions of disapprobation, but whereas indignation tends to be "precise in its manner, focusing on particular wrongs" to the person experiencing it, disgust "is a more generalizing moral sentiment casting blame on whole styles of behavior and personality traits" with an intensity that indignation rarely matches (pp. 35-36).

The middle chapters present a revolting but riveting phenomenology of disgust. Here Miller catalogs the various things that disgust us (bad breath, pubic hair, rotting food, masturbation, even laughter) as well as the diverse modes (oral, olfactory, anal) of taking in the disgusting in.

One of Miller's most compelling claims relates to intimacy, which, he argues, consists in the "suspension of certain important disgust sensitivities and rules" (pp. 20). For one thing, those with whom we spend our private time inevitably come into contact with the smells and emissions that we succeed, with effort, in masking or containing in public (pp. 138-39). But the relationship between disgust and intimacy turns out to be much more fundamental than this. "[T]he boundary of the self is manned at its most crucial and vulnerable points by disgust" (p. 137). For that very reason, there can be no more potent "means for demonstrating and proving love" than to forebear — or even invite — the transgression of such a boundary (p. 137). By handling their children's feces and vomit,

parents mark themselves out as “those who will care no matter what” (pp. 133, 134-35). “[S]omeone else’s tongue in your mouth can be a sign of intimacy [precisely] *because* it can also be a disgusting assault” (p. 137). In this improbable manner, disgust enables us to experience love’s signature merging of self into other.

Another provocative thesis is the link Miller sees between disgust and misogyny. “[T]he durability of misogyny,” he argues, “owes much to *male* disgust for semen,” which Miller describes as “perhaps the most powerfully contaminating emission” (pp. 19-20). Men are sickened by their own sperm not merely “because it shares a pathway with urine” or even “because it has other primary disgust features (it is slimy, sticky, and viscous),” but primarily “because it appears under conditions that are dignity-destroying, a prelude to the mini-shames attendant on post-ejaculatory tristesse” (pp. 103-04). Thus, according to Miller, men loathe women both as the instigators of the indignity of ejaculation and as the receptacles of their ejaculate — a claim for which Miller finds evidence in “the enormous expenditures on pharmaceuticals, personal ‘hygiene’ products, and advertising designed to cleanse the whole terrain” of the vagina (p. 104).

After a brief excursion into history, the book concludes with three masterful chapters on the moral and political significance of disgust. Drawing on Adam Smith — whose “moral world,” Miller argues, was “primarily one of shame [and] disgust . . . rather than one of guilt and anger” (p. 189) — Miller depicts disgust as an indispensable member of our moral vocabulary. “It signals seriousness, commitment, indisputability, presentness, and reality” (p. 180); “it marks out moral matters for which we can have no compromise” (p. 194), “harms that sicken us in the telling, things for which there could be no plausible claim of right” (p. 36). No other moral sentiment is up to the task of condemning such singular abominations as “rape, child abuse, torture, genocide, predatory murder and maiming”; bare indignation, for example, is too self-centered, too obsessed with “setting the balance right” for perceived slights to one’s own person, to motivate the impassioned desire to punish such wrongs even when visited upon strangers (pp. 36, 186, 195). Indeed, we cannot “put cruelty first among vices,” writes Miller, unless we treat properly directed disgust as one of our virtues.²⁷

Nevertheless, disgust can also mislead because of its sweep. Unlike moral sentiments such as guilt and anger, disgust is not much concerned with whether a person’s failings originate in culpable choices; it regards those arising from unchosen defects of character — indeed, unchosen defects themselves — as proper objects of re-

27. Here Miller draws on the philosopher Judith Shklar. See JUDITH N. SHKLAR, *ORDINARY VICES* (1984).

vulsion as well: we are disgusted not just by cruelty but also by stupidity, ugliness, and deformity (p. 198). Moreover, disgust implores us to *condemn* persons for these failings. We rationalize our aversions to them by “imput[ing] intentionality to their disgustingness” (p. 65); we “blame[] [them] for not attending to the special duties to avoid contact that their pariah status imposes on them” (p. 65); and we ultimately “judg[e]” them for *what* they are, “according [them] a lower place in the moral and social order because of” their unchosen defects (p. 183). In this way, disgust collapses the “distinction between the moral and the aesthetic” (p. 21) — a distinction that can itself be “understood to be . . . a moral claim about the proper content of the moral,” intended “to cabin by a fiat of categorization the rather insistent psychological and social tendencies we evince to accord moral significance to beauty and ugliness and to fail to distinguish consistently the good from the beautiful” (p. 200). As a result of the moral claims of disgust, “[w]e end up punishing the stigmatized, who may have no justifiable cause for feeling guilty for their stigma, although they often internalize the social judgments of their stigmatization as shame, self-loathing, self-disgust, self-contempt, self-hatred” (p. 202).

“Our moral world is thus at odds with itself” (p. 201). “We fear that disgust and contempt may violate norms of fairness and justice, of a liberal respect for persons; that they may maintain brutal and indefensible regimes” (p. 202). The solution, however, can’t be to banish disgust and related sentiments, for “despite their considerable warts contempt and disgust do proper moral work” (p. 202). “What we need,” then, “are ways of knowing when to trust our disgust and contempts” (p. 202). For that purpose, moreover, there is no mechanical algorithm to apply; we can do no better than to “limit[] the scope of [disgust’s] legitimacy by recourse to other norms we accept” (p. 202).

No doubt in part because of its indispensable — if problematic — moral function, disgust also plays an inescapable role in ordering political and social life. The ordering, of course, is hierarchical; but the fascinating point is that disgust and related sentiments, according to Miller, do no less hierarchical ordering in contemporary democratic regimes than they did in historical aristocratic ones. In democracy, disgust becomes aligned with a species of “upward contempt” in which members of lower classes feel empowered to look *down* on members of *higher* ones, whose “manner and smell reveal the[ir] feminization” (pp. 207, 253) — a metaphor that underscores the affinity between disgust and misogyny. Of course, the high for their part continue to look down on the low as well. Indeed, “the mutuality of contempt,” not the obliteration of it, is “what pluralistic democracy is all about” (p. 234). For that reason, groups seeking to raise their status in society are more intent on appropriating the

idiom of disgust and turning it on their detractors than on vanquishing those sensibilities altogether (pp. 235-37).

Still, the durability of disgust does ultimately constrain the forms of equality that society can experience, because at least some of those forms do demand that we overcome our revulsions toward those who aren't like us. This is the theme of the concluding essay of the book, "Orwell's Sense of Smell," in which Miller details George Orwell's disgust for the grimy lack of hygiene he encountered in the home of the workers whom the English socialists wished to organize (pp. 235-54). No amount of bathing, Miller suggests, would have solved this problem either, for Orwell's disgust was constructed as much by his belief in the filthiness of the workers as the reality of their grime: "Whether they really smelled or not, a stench would be imputed to them and presumably suggestion and wishful thinking made it so" (p. 247). In the end, then, socialism founders not on the shoals of individual self-interest or greed but on the disgust sensibilities of the elite, in whose nostrils the working class will always stink.

III. APPROPRIATING MILLER'S *DISGUST* FOR CRIMINAL LAW

How persuasive is Miller's account? His analysis can be — and has been — criticized on numerous grounds.²⁸ For an avowed social constructivist, Miller shows surprisingly little interest in cross-cultural variation in disgust sensibilities. He can't be faulted for aiming to produce an account that "resonat[es] with Americans of [his] social class" (p. 11) — who else could really be expected to read it? — but he can be faulted for assuming that their understanding of disgust wouldn't be deepened by knowing how theirs differs from that of others. In addition, Miller's methods are decidedly nonempirical, consisting largely in his interpretations of selected works of literature, philosophy, and Freudian psychology, leavened with liberal doses of introspection and personal anecdote. As a result, many of Miller's central claims — including the asserted loathsomeness of semen — seem idiosyncratic, if not weirdly autobiographical.

Even more critically, Miller simply assumes that disgust is a unitary phenomenon. His account ranges over a breathtakingly wide expanse of aversions — from the shuddering horror we have toward snakes to the niggling irritation we have toward strange-sounding laughter; from the sickening heaviness we experience from eating too much rich food to the incensed outrage we experience toward heinous crimes. We do in fact use the term *disgust* to

28. See, e.g., Robert Grudin, *Eew! Gross!*, N.Y. TIMES, Mar. 16, 1997, § 7, at 34; Martha C. Nussbaum, *Foul Play*, NEW REPUBLIC, Nov. 17, 1997, at 32.

refer to all of these sensibilities, but does it follow that what we find appalling about each is really the “same”? If that isn’t so — if, in fact, “disgust,” like “bad” or “unpleasant,” is a conventional shorthand for diverse collections of aversions that can’t intelligibly be extricated from the particular settings in which we experience them — then an account that tries to amalgamate all of our “disgust” usages into one master conception amounts to a contrived and futile exercise.

My aim, however, is not to determine whether Miller gets it right about disgust. Rather, it is to see whether Miller’s account supplies a useful remedy for the inattention to disgust in criminal law theory. And for that purpose, it is neither necessary nor sufficient that his account be *true* in some abstract philosophical sense. The law has its own distinctive purposes and needs. If it doesn’t suit these, even an admittedly true account of disgust would be irrelevant or possibly even pernicious. By the same token, the law might be justified in accepting the guidance of an admittedly false account if it could nonetheless be shown to be useful.²⁹

I believe Miller’s account is extremely useful both for understanding and for evaluating the role of a particular type of recurring disgust sensibility in criminal law. Broadly speaking, this is the sensibility of revulsion that individuals experience when confronted by others — whether sexual deviants or sadistic criminals — whose values seem shockingly alien and dangerous. The desire to separate them from the rest of us — literally or symbolically — motivates individuals to lash out against them in violence, and communities to punish them in appropriately severe and expressive ways.

Recognizing this species of motivation fills a sizeable gap in the dominant theories of criminal law. Neither *consequentialism*, which focuses on the future societal benefits associated with punishing a particular offender, nor *voluntarism*, which insists that we confine punishment to those who freely choose to break the law, take any overt stance on the moral quality of offenders’ values.³⁰ Their taxonomies of relevant emotions are correspondingly limited: they purport to tell us how the law will deal with *fear* or *anger* to the extent that those passions can be understood to correlate with a person’s propensity for violence or to undermine her volition to a particular degree; but they have nothing to say about *disgust* understood as an aversion to deviancy. As a result, the dominant theories

29. See Kahan & Nussbaum, *supra* note 19, at 350; cf. Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785, 786 (1994) (defending a mode of analysis that values “philosophical positions strategically on the basis of their expected consequences”).

30. See generally Kahan & Nussbaum, *supra* note 19, at 301-05.

lack the conceptual resources to make sense of a diverse range of legal phenomena that are concerned with exactly that sensibility.

But as important as disgust so conceived is to criminal law, it should also be clear that my claims about it are limited. In particular, unlike Miller, I have no stake in demonstrating that the salient features of this species of "disgust" are in fact essential to all the diverse sensibilities conventionally assigned that label. Indeed, nothing in particular rides on whether aversion to deviant values is properly called "disgust," although that is usually what it's called in the contexts I'll address. Nor will I be attempting to show that what I'm calling "disgust" for this purpose explains every important feature of criminal law. Appraisals of anger, fear, and other emotions also explain a lot (although, as Martha Nussbaum and I have argued elsewhere, the way in which the law appraises them differs from what either consequentialism or voluntarism contemplates³¹).

The next two parts of this review use Miller's account to explain and appraise the role of disgust in criminal law. To set up that discussion, I want to distill from Miller four distinct theses that I believe have particular relevance.

The first I'll call the *evaluative thesis*. Broadly speaking, the Western tradition in philosophy and the social sciences reflects two competing conceptions of emotion. The mechanistic conception sees emotions as thoughtless surges of affect, or bare physiological impulses. The evaluative conception treats emotions as embodying a person's cognitive evaluations of particular goods and experiences. It holds, too, that emotions, as judgments of this sort, can themselves be evaluated as true or false, good or bad, reasonable or unreasonable, and not just as strong or weak.³²

By virtue of the connection he sees between disgust and social norms, Miller falls squarely into the evaluative camp. For him, disgust is not a "purely instinctual drive"; nor can it be flatly equated with any physiological state, such as nausea (pp. 7-8). Rather, "[d]isgust necessarily involves particular thoughts" — themselves culturally determined — "about the repugnance of that which is its object" (p. 8). Disgust "evaluates (negatively) what it touches, proclaim[ing] the meanness and inferiority of its object" and the imperative of being rid of it lest one be contaminated by it and thus lowered in status (pp. 8-9). What's more, we can and do evaluate persons based on the content of their disgust sensibilities: "depending on how far they deviate from our norms," we view individuals whose sensibilities are less sensitive or simply different from ours

31. See *id.* at 301-46.

32. See Kahan & Nussbaum, *supra* note 19, at 275-301; see also MICHAEL STOKER & ELIZABETH HEGEMAN, *VALUING EMOTIONS* (1996) (defending an evaluative conception).

“either as foreign or primitive and thus vaguely exotic, or as barbaric and disgusting” in their own right (pp. 11-12).

Second is the *hierarchy thesis*. The social function of disgust, according to Miller, is to construct and reinforce status rankings. Disgust sensibilities police social boundaries, determining who deserves esteem and admiration and who loathing and contempt. By feeling it and acting on it, individuals prevent subversion of the norms that keep the low in their proper place and assure the high their own preeminence. Disgust and related sensibilities thus “work to hierarchize our political order: in some settings they do the work of maintaining hierarchy; in other settings they constitute righteously presented claims for superiority; in yet other settings they are themselves elicited as an indication of one’s proper placement in the social order” (pp. 8-9).

Third is the *conservation thesis*. Although the objects of disgust vary across societies and communities, *all* societies inevitably make use of disgust to inform their judgments of high and low, worthy and unworthy. This is so not only for aristocratic regimes, in which distinctions of class are uncontested, but also for egalitarian democratic ones, which are “based less on mutual respect for persons than on a ready availability of certain styles of contempt to the low that once were the prerogatives of the high” (p. 21). The conservation of disgust across distinct and evolving modes of social organization explains why groups that are low in status seek to appropriate rather than annihilate the idiom of disgust, and why disgust, rather than disappearing, instead becomes a salient focal point for political contention within socially fluid, pluralistic societies. The question is never whether a society should organize itself around emphatic ideas of high and low, worthy and worthless, but only what the content of those animating hierarchies will be.

Fourth is the *moral ambivalence thesis*. For Miller, our moral world is tragically configured. We *need* disgust to mark the emphatic nature of our strongest moral commitments and to motivate us to punish atrocious wrongs against strangers. Yet Miller recognizes, too, that disgust has the power to mislead by treating “beauty and ugliness [as] a matter of morals” (p. 200), and thus importuning us to hold persons accountable for nonculpable defects of character. There is, sadly, no reliable moral theory that stands outside our disgust sensibilities and that we can treat as normative for them. All we can do is test the urgent claims of disgust by appeal to “other moral sentiments, like guilt and benevolence,” (p. 197) and to “other norms we accept” (p. 202).

IV. EXPLAINING DISGUST IN CRIMINAL LAW

A. *Disgust Crimes*

What to do about “hate crimes” — assaults motivated by animus toward victims’ group identities — is now an issue of national concern.³³ Should persons who commit such offenses be punished more severely? If they kill, should they be ineligible for mitigation under the voluntary manslaughter doctrine? Indeed, should group hatred be a grounds for the death penalty? If the answer to any of these question is yes, which kinds of group animus — those based on race, religion, and ethnicity only, or also those based on gender and sexual orientation — should the law concern itself with? These are all issues of dispute.³⁴ Drawing on Miller, I want to suggest that the “hate crimes” debate is better understood as a “disgust crimes” debate: at issue is whom we should regard as low and contaminating — the persons singled out for attacks on the basis of their identities, or the persons who attack them for that reason.

Return to *Carr* and *Bernardski*, the cases with which I started this review. The disagreement between them is in fact representative of a schism in the law over whether killers should be permitted to assert homophobia — frequently styled “homosexual panic” syndrome by expert witnesses³⁵ — as mitigation under the voluntary manslaughter doctrine.³⁶ The source of the disagreement seems puzzling under the standard view of how that doctrine works: if voluntary manslaughter mitigates when strong impulses undermine the offender’s volition,³⁷ then why wouldn’t jurisdictions converge on an approach to such killings based on prevailing scientific views

33. See, e.g., James Bennet, *Clinton Backs Expanding Definition of a Hate Crime*, N.Y. TIMES, Nov. 11, 1997, at A20.

34. See, e.g., 143 CONG. REC. S12577 (Nov. 13, 1997) (remarks of Sen. Kennedy) (advocating the addition of assaults motivated by animus against gays, women, and the handicapped to federal “hate crimes” legislation); *The ‘Hate-Crime’ Problem*, Editorial, WASH. POST, Nov. 17, 1997, at A22 (“[T]he victim of a bias-motivated stabbing is no more dead than someone stabbed during a mugging. Ultimately, we prosecute crimes, not feelings. Guiding how people feel about one another is only marginally a law enforcement concern.”); Ruth Shalit, *Caught in the Act*, NEW REPUBLIC, July 12, 1993, at 12 (criticizing federal legislation aimed at treating certain forms of violence as “hate crimes” against women).

35. See, e.g., *Parise v. Greer*, 705 F.2d 882, 893 (7th Cir. 1983) (en banc) (Posner, J., concurring); *People v. Cord*, 607 N.E.2d 574, 577 (Ill. App. Ct. 1993); *State v. Dietrich*, 567 So. 2d 623, 632 (La. Ct. App. 1990); *State v. Thomas*, 616 A.2d 365, 370 (Md. 1992).

36. Compare, e.g., Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992) (collecting authorities and arguing against permitting use of the manslaughter theory in such circumstances) with Dressler, *supra* note 18 (defending the availability of manslaughter).

37. See, e.g., Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 467 (1982) (rationalizing the doctrine on these grounds). But see Kahan & Nussbaum, *supra* note 19, at 306-10 (challenging this view).

on whether “homosexual panic” impairs self-control?³⁸ Indeed, the disagreement in the cases doesn’t seem to have much at all to do with the effect of this condition on offenders’ volition. The court in *Carr*, for example, refused even to consider psychiatric evidence relating to the intensity of the defendant’s homophobia,³⁹ whereas the court in *Bernardski* cheerfully mitigated the defendant’s sentence notwithstanding the premeditated nature of his attack.⁴⁰

But Miller’s account of disgust suggests a set of hypotheses that clarify matters. Clearly offenders who kill (or assault) on the basis of “homosexual panic” are disgusted by their victims. Under the evaluative thesis, what would be distinctive about their aversion wouldn’t be its physiological intensity — a mechanistic notion — but rather its embodiment of the offenders’ appraisal of gays and lesbians as inferior and contaminating. Under the hierarchy thesis, the offenders’ animus would be constructed by and reinforce status norms, which the offenders understand to be threatened by homosexuality. By the same token, we would have to understand courts to be evaluating the offenders’ disgust sensibilities and constructing norms of hierarchy by deciding how severely to punish them. Decisions that withhold mitigation would be doing this every bit as much as ones that grant it. Indeed, consistent with the conservation thesis, we should expect to see the forces who are committed to raising the status of gays and lesbians engaged in their own effort to seize hold of the law’s machinery for expressing disgust and redirecting it against homophobes.

All of these hypotheses turn out to be true. Start with the nature of homophobia. Empirical social psychology confirms that homophobia, like Miller’s disgust, is an evaluative sensibility infused with hierarchical status norms. Homophobia depends on a set of beliefs, derived from membership in a social group, that assign status according to conventional gender roles.⁴¹ Members of such groups may view homosexuality as a potentially contaminating influence in part because of anxiety about their own sexual orienta-

38. In fact, there is essentially no credible psychiatric evidence that it does. See Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 *LAW & SEXUALITY* 81, 83-89 (1992).

39. See *Commonwealth v. Carr*, 580 A.2d 1362, 1365 (Pa. Super. Ct. 1990).

40. See Bellin, *Texas Judge Eases Sentence*, *supra* note 10; *Judge Is Censured*, *supra* note 10.

41. See Gregory M. Herek, *Beyond “Homophobia”: A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, in *BASHERS, BAITERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY* 1, 12-13 (John P. De Cecco ed., 1985) [hereinafter Herek, *Beyond “Homophobia”*]; Gregory M. Herek, *Psychological Heterosexism and Anti-Gay Violence: the Social Psychology of Bigotry and Bashing*, in *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* 149, 153-54 (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter Herek, *Psychological Heterosexism*].

tion.⁴² But even more fundamentally, homosexuality threatens them insofar as they perceive it as subverting the norms that underwrite their own status and sense of self-worth: the more widespread toleration of homosexuality becomes, the less esteem and credit are due for conforming to conventional, heterosexual gender roles.⁴³ Against the background of such norms, feeling and expressing homophobia are mechanisms for assuring oneself of one's own value,⁴⁴ for acquiring status within the group,⁴⁵ and for securing the status of that group in society by clearly marking out homosexuals as lower in rank.⁴⁶

The judicial decisions, too, conform to Miller's account. Thus, the court in *Bernardski* mitigated the defendant's punishment *not* on the mechanistic ground that he had been deprived of the capacity for self-control, but on the evaluative one that the defendant was *right* to be disgusted by his victims' homosexuality. The judge himself was disgusted by it: for him, the lives of homosexuals, whom he "put . . . at about the same level" as prostitutes, were obviously worth less than those of good heterosexual persons.⁴⁷ Indeed, "cruising" homosexuals threaten good persons, like the judge's own teenage son, who might be "picked up" and thus lowered to the homosexuals' level.⁴⁸ By mitigating *Bernardski*'s sentence on these

42. See, e.g., Herek, *Psychological Heterosexism*, *supra* note 41, at 155 (asserting that those anxious about their own orientation "often express[] . . . strong feelings of disgust toward homosexuality or . . . perce[ive] . . . danger from gay people of [their] own gender").

43. See Herek, *Beyond "Homophobia," supra* note 41, at 12 ("As with symbolic racism, symbolic sexual attitudes express the feeling that cherished values are being violated and that illegitimate demands are being made for changes in the status quo."); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 987-89 (1995) (using this aspect of homophobia to explain opposition to lifting of ban on gays in military).

44. See Herek, *Psychological Heterosexism*, *supra* note 41, at 153 ("Such attitudes help people to increase their self-esteem by expressing important aspects of themselves — by declaring (to themselves and to others) what sort of people they are. Affirming who one *is* often is accomplished by distancing oneself from or even attacking people who represent the sort of person one *is not* (or does not want to be).").

45. See *id.* at 154 (asserting that homophobia "strengthens one's sense of belonging to a particular group and helps an individual to gain acceptance, approval, or love from other people whom she or he considers important" and that "denigrating [gays and lesbians] solidifies one's own status as an insider, one who belongs to the group").

46. See Karl M. Hamner, *Gay-Bashing: A Social Identity Analysis of Violence Against Lesbians and Gay Men*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 41, at 179, 182-83 (arguing that homophobes "use denigration and discrimination, including violence, to create a negative evaluation of gay men and lesbians and thereby" raise their own status and that "[a]s a group generally held in low regard by society, lesbians and gay men are likely to represent a relevant out-group for all quarters of society, particularly for individuals lower in the social system"); see also Richard A. Berk et al., *Thinking More Clearly About Hate-Motivated Crime*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra* note 41, at 123, 127 (characterizing homophobic assaults as "symbolic crimes" among competing groups).

47. See Belkin, *supra* note 10.

48. See *supra* text accompanying note 16.

grounds, the judge was clearly motivated by, and clearly sought to reinforce, hierarchical social norms.

Indeed, Miller's conception of disgust helps to explain a peculiar doctrinal disconnect in the homosexual panic cases. The usual occasion for mitigation under the voluntary manslaughter doctrine is an uninvited affront that provokes a flash of immediate anger or fear.⁴⁹ But as *Bernardski* illustrates, homophobic killers frequently plan their killings, oftentimes hunting down victims who pose no physical threat.⁵⁰ This species of violence, and the inclination of decisionmakers to excuse it, are best understood within the logic of disgust. Whereas anger and fear react to transgressions against one's own person, disgust takes aim at a more diffuse object — namely, the threat that open deviance poses to the status of those who faithfully abide by dominant norms. Merely rebuffing the odd homosexual advance isn't enough to protect the homophobe from that sort of threat; rather he must undertake the “much more intensive and problematic labor” of “cleansing and purifying” (p. 26) the normative environs.⁵¹ Mitigating the punishment of those who shoulder this burden enables legal decisionmakers to show that they, too, are committed to the norms that underwrite status in homophobic communities.

Decisions rejecting mitigation do just as much evaluating and constructing, albeit in the opposite direction. They tell us, as the court did in *Carr*, that the homophobic killer's disgust — no matter how intense — is not “reasonable.”⁵² And in so doing, they repudiate norms that value persons according to conventional gender roles: “the law does not condone or excuse the killing of homosexuals any more than it condones the killing of heterosexuals.”⁵³

But do these decisions — as the conservation thesis predicts — also assign *homophobes* to a lower status because *their* aberrant disgust sensibilities render *them* “barbaric and disgusting” (pp. 11-12)? That's at least a reasonable interpretation of them: unable to assert a manslaughter theory, Carr ended up convicted of first degree murder; what better result to convey that homophobia, like “rape, child abuse, torture, genocide, predatory murder and maiming” is one of the “things for which there could be no plausible claim of right” (p. 36), that our opposition to it is one of the “moral matters

49. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 7.10 (2d ed. 1986).

50. See Comstock, *supra* note 38, at 96-97.

51. See generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 372-75 (1997) (showing how “esteem norms” can motivate individuals to engage in conspicuous disciplining of deviants).

52. See *Commonwealth v. Carr*, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990).

53. *Carr*, 580 A.2d at 1364.

for which we can have no compromise"?⁵⁴ But it's also possible to read these decisions as being indifferent to disgust or even hostile to it insofar as that sentiment ranks persons on the basis of their values.

Laws that enhance the penalty for bias-motivated crimes, however, unambiguously seek to appropriate and redirect disgust. Supporters of such laws want the public to understand not just that the "hate" killers are wrong to be disgusted by their victims, but that they themselves are "twisted," "warped," "sick," and "disgusting," and as a result properly despised as outsiders.⁵⁵ Severe punishment is the idiom that the criminal law uses to get that message across. Indeed, advocates for gays, women, African Americans, Jews, and others perceive severe punishments as *conferring* the high status that violence against them seeks to deny — which is exactly why political contention surrounding hate crimes is so intense.⁵⁶

Consider here another disgust-crime story. To show a friend how easy it would be to get away with killing, Gunner Lindberg, a self-proclaimed white supremacist, picked out Vietnamese-American Thien Minh Ly from a crowd of roller skaters at a high school playground and stabbed him some fifty times in the body and

54. P. 196. Because the standards that most jurisdictions use to delimit first degree murder are essentially contentless, the only basis juries have for assigning killings to that class is that such killings strike them as exceedingly reprehensible. See Kahan & Nussbaum, *supra* note 19, at 324-25. The killers whose motivations seem repulsive are likely to dominate this class. See Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437 (1990).

55. See, e.g., James Brooke, *Crowd in Denver Rallies Against Skinhead Violence*, N.Y. TIMES, Nov. 26, 1997, at A20 ("They [white supremacist 'skinheads'] are not part of Denver's culture. They are not part of Denver's vision. They are not wanted here." (quoting Denver Mayor Wellington E. Webb)); Roger Buckwalter, *Hate Remains a Poison in Society*, JUPITER COURIER (Jupiter, Fla.), Sept. 11, 1996, at A4 (describing swastika graffiti: "This disgusting act by a mental and moral midget . . . was just more evidence — as if any more was needed — that hate continues to infest this free society . . ."); *Hundreds Mourn Victim of Skinhead*, 19, in *Denver*, L.A. TIMES, Nov. 22, 1997, at A16 (quoting mayor at funeral of hate crime victim: "It's intolerable that something like that happens. It's disgusting to me personally that it happened in our city"); *Neo-Nazis Still Here*, Editorial, SEATTLE TIMES, Mar. 25, 1997, at B4 (denouncing "[t]he disgusting celebration marking Hitler's birthday that's usually held by [local] neo-Nazis"); John Nichols, *'Time to Stand Up, Be Counted,' Protest Klan*, CAPITAL TIMES (Madison, Wis.), Aug. 22, 1995, at 8A (reporting a local woman's decision to display a pink triangle "to signal disgust with the Klan's homophobia"); *President Starts Anti-Hate Campaign*, CHI. TRIB., June 8, 1997, § 1, at 7 ("Voicing disgust over violent bigotry, President Clinton on Saturday ordered a Justice Department review of laws against hate crimes and said he will convene a White House conference on the problem next fall."); Ryan R. Sanderson, Letter to the Editor, *Cunanan crime isn't homosexuality*, BALTIMORE SUN, July 24, 1997, at 14A (reacting to a comment that a gay man deserved to be shot by asserting that "[t]his is the sickest belief I can imagine").

56. See GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME* 2-4 (1995); Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111, 140-42 (1988); see also Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1393-94, 1425 (1988) (describing willingness to execute murderers of African Americans as measure of African American status).

neck.⁵⁷ Writing later to a cousin, Lindberg boasted of “kill[ing] a Jap a while ago.”

I walked right up to him and he was scared. I looked at him and said, “Oh, I thought I knew you,” and he got happy that he wasn’t gonna get jumped, then I hit him. I stabbed him in the side about seven or eight times. He rolled over a little, so I stabbed his back 18 or 19 times. Then he lay flat and I slit . . . his throat on his jugular vein.⁵⁸

For this crime, Lindberg (who wore a Dallas Cowboys football jersey every day at trial to mark that team’s Super Bowl victory on the day of the attack⁵⁹) earned the distinction of becoming the first offender sentenced to death under a California law authorizing capital punishment for racially motivated killings.⁶⁰ Civil rights advocates — including some who ordinarily oppose the death penalty — hailed the sentence on the ground that it appropriately remarked society’s *disgust* for Lindberg and his deed. “It was an incredibly disgusting tale of torture and mutilation,” the chairman of the Orange County Human Relations Commission noted in support of the sentence. “There’s no question this is a sick act of a really troubled mind.”⁶¹

B. *Disgust and Punishment*

In the last section, I used the evaluative thesis, the hierarchy thesis, and the conservation thesis to explain the nature of the “hate crimes” debate. In this one, I use the moral ambivalence thesis — or at least the part of it that asserts that disgust is an indispensable component of our moral vocabulary — to explain another criminal law phenomenon: namely, the distinctive *forms* that punishment assumes in American criminal law.

To punish serious crimes, the American public has a decided preference for imprisonment. There’s really no alternative to incarceration — aside, perhaps, from the death penalty, which I’ll put aside for now — for murderers, armed robbers, and rapists. But violent offenders such as these make up far less than half the American prison population.⁶² The rest are there for nonviolent offenses — from theft, to drunk driving, to drug possession, to various and

57. See Thao Hua, *Murderer Had Troubled Youth, Psychologist Says*, L.A. TIMES, Oct. 7, 1997, at B1.

58. Greg Hernandez, *Supremacist Sentenced to Death For Hate Crime*, L.A. TIMES, Dec. 13, 1997, at A1.

59. See Greg Hernandez, *O.C. Jury Votes Death for Hate Crime Murder*, L.A. TIMES, Oct. 10, 1997, at A1.

60. See CAL. PENAL CODE § 190.2(a)(16) (West 1988); Hernandez, *supra* note 58.

61. Hernandez, *supra* note 59.

62. Only 47% of the 989,000 persons incarcerated in state prisons and jails (as of 1995) were serving time for violent offenses. See Bureau of Justice Statistics, *Correctional Populations in the United States, 1995*, at 9, tbl. 1.11 (June 1997) (NCJ-163916). The percentage was even smaller for persons incarcerated in federal prisons (as of 1996), where nearly 60% of the

sundry white collar crimes — and serve two years of jail time or less on average.⁶³ Criminologists of diverse ideologies have long opposed imprisoning offenders such as these on the grounds that it's unnecessary to incapacitate them and that their brand of criminality could be deterred just as well by alternative sanctions such as fines and community service.⁶⁴ But this shopworn case for alternative sanctions has made essentially no impression on legislators, judges, and sentencing commissioners.⁶⁵

The political resistance to alternative sanctions seems puzzling under the conventional theories of punishment. From an optimal deterrence point of view, the alternatives seem superior because they are just as effective and less costly to society.⁶⁶ Retribution insists that offenders be made to experience pain in strict proportion to the moral wrongness of their respective crimes, regardless of the effects of punishment.⁶⁷ But liberty deprivation isn't the only way to make offenders suffer; taking their property and appropriating their labor can do that, too. If we can translate short prison terms into equally painful fines or community service dispositions, retribution shouldn't as a conceptual matter foreclose alternative sanctions.⁶⁸ Indeed, if, as some argue, relatively well-to-do nonviolent offenders typically suffer *more* when imprisoned than down-and-out violent ones, then insisting that the former be imprisoned rather than fined or ordered to perform community service might inflict more pain on them for less serious crimes, in violation of the retributive norm of proportionality.⁶⁹

Elsewhere I've tried to solve the alternative sanctions puzzle with the expressive theory of punishment.⁷⁰ Punishment can't be reduced to the imposition of suffering. As Henry Hart long ago observed, a person can suffer just as much discomfort in the military as he can in prison, and yet only imprisonment — and not con-

inmates were serving time for drug offenses. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1996, at 533, tbl. 636 (1997).

63. See *id.* at 476, tbl. 5.58 (reporting that the average expected sentence for nonviolent property offense was 24 months and for drug possession, 16 months).

64. See, e.g., NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 409-10 (1980).

65. See Kahan, *supra* note 6, at 592, 605-06.

66. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193-98 (1968); Posner, *supra* note 38, at 409-11.

67. See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179-80 (Ferdinand Schoeman ed., 1987).

68. See Kahan, *supra* note 21, at 619.

69. See John R. Lott, Jr., *Should the Wealthy Be Able to "Buy Justice"?*, 95 J. POL. ECON. 1307, 1315 (1987).

70. See Kahan, *supra* note 21; Dan M. Kahan, *Punishment Incommensurability*, 2 BUFF. CRIM. L. REV. 691 (1998).

scription — counts as “punishment,” because only imprisonment expresses moral condemnation.⁷¹ We expect punishment to voice our moral outrage, in addition to protecting us from harm and imposing deserved suffering. And that’s the problem with fines and community service: they don’t express condemnation, or at least don’t express it as unequivocally as imprisonment.⁷²

But why is this the case? What determines whether a particular mode of affliction expresses condemnation or not? Obviously, there are many influences, most of which are likely to be a matter of historical happenstance.⁷³ But drawing on Miller, I want to argue in addition that the adequacy of a punishment along the expressive dimension will have a lot to do with whether it resonates with the public’s disgust sensibilities.

On expressive grounds, serious crimes strike us as such — that is, as *crimes* and as *serious* — not just because they impair another’s interests, but because they convey that the wrongdoer doesn’t respect the true value of things.⁷⁴ To express condemnation, then, society must respond with a form of punishment that unequivocally evinces the community’s repudiation of the wrongdoer’s valuations. According to Miller, that’s what we use “the idiom of disgust” for: “[i]t signals seriousness, commitment, indisputability, presentness, and reality” (p. 180); “it marks out moral matters for which we can have no compromise” (p. 194), harms “for which there could be no plausible claim of right” (p. 36). It follows that an expressively effective punishment must make clear that we are in fact disgusted with what the offender has done.

The conventional alternative sanctions don’t do that. Fines, for example, seem to say that society is willing to put a price tag on a particular species of crime. That connotation is clearly incompatible with disgust: no morally upright person would consent to a disgusting act in exchange for cash! Community service, too, fails to evince disgust. Because we see nothing disgusting in repairing dilapidated low-income housing, educating the retarded, installing smoke detectors in old age homes, and the like, it’s hard to see the seriousness and indisputability of society’s commitment to con-

71. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 404-05 (1958).

72. See Kahan, *supra* note 21, at 617-30.

73. See, e.g., *id.* at 610-17 (examining historical origins of social meaning of imprisonment and corporal punishment).

74. See Jean Hampton, *Forgiveness, Resentment, and Hatred*, in MURPHY & HAMPTON, *supra* note 56, at 35, 43-45; Jeffrie G. Murphy, *Forgiveness and Resentment*, in MURPHY & HAMPTON, *supra* note 56, at 14, 25.

demning the behavior of offenders whom it sentences to engage in such services. Sensibilities like these are in fact commonplace.⁷⁵

Prison, in contrast, does unequivocally evince disgust in Miller's terms. By stripping individuals of liberty — a venerated symbol of individual worth in our culture — and by inflicting countless other indignities — from exposure to the view of others when urinating and defecating to rape at the hand of other inmates — prison unambiguously marks the lowness of those we consign to it. At the same time, imprisonment removes offenders from our midst, shielding us from their contaminating influence. Martha Grace Duncan emphasizes these themes in her recent work, *Romantic Outlaws, Beloved Prisons*,⁷⁶ which probes the social meanings of criminality and punishment. For her, it is popular disgust for criminals that explains the durability of the prison, which the public sees as “a suitably dark, filthy, and remote place” to dispose of the “filth” of criminality.⁷⁷

There's no reason to suppose, though, that imprisonment is the only form of punishment that evinces disgust. Duncan, for example, uses disgust sensibilities to explain Britain's establishment of a penal colony in Australia. Historians uniformly regard this policy as having been a grotesquely inefficient alternative to the simple expansion of prison space in Britain itself. But delving into the contemporaneous debates that surrounded this issue, Duncan shows how transporting criminals recommended itself to eighteenth and nineteenth century Englishmen because of its power to symbolize the nation's virtuous attempts to cleanse itself of “refuge” and “scum” — to expel, in Bentham's words, “the excrementitious mass” of criminality from the body politic.⁷⁸

For a contemporary disgust-evincing alternative to imprisonment, consider the revival of shaming penalties, which are now being used for a wide variety of common and white collar offenses that would otherwise be punished with imprisonment.⁷⁹ Such penalties typically involve an element of self-debasement: thus, burglars in Tennessee have been ordered to permit their victims to enter their homes and take items of the victims' choosing;⁸⁰ a New

75. See Kahan, *supra* note 21, at 621-24, 626-30 (distilling the social meaning of fines and community service from various sources).

76. MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT* (1996).

77. *Id.* at 146.

78. See *id.* at 152.

79. See Kahan, *supra* note 21, at 631-34; Dan M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines* (unpublished, Dec. 15, 1997).

80. See Mark Curriden, *Making punishment fit crime often not popular*, ATLANTA CONST., Jan. 9, 1992, at A3.

York City slumlord was sentenced to house arrest in one of his rat-infested buildings, where tenants greeted him with a banner that read, "Welcome, you reptile!";⁸¹ a woman in Florida was required to buy a newspaper ad announcing, "I purchased marijuana with my two kids in the car."⁸² Because they "inflict[] disgrace and contumely in a dramatic and spectacular manner,"⁸³ these punishments, like imprisonment, unambiguously mark out offenders as proper objects of revulsion and separate them, symbolically if not literally, from virtuous law-abiders.⁸⁴ Consequently, substituting shame for imprisonment does not offend the expressive sensibilities that the conventional alternatives rankle.

The power of shame to express disgust obviously doesn't imply, by itself, that shame is a morally appropriate punishment. Indeed, as the moral ambivalence thesis predicts, the disgust they express and excite is exactly what makes these penalties seem inappropriate to some.⁸⁵ Nevertheless, the link between political acceptability of alternative sanctions and their power to express disgust suggests that it behooves criminologists and reformers, every bit as much as it behooves social and political theorists, to learn the lessons of Miller's work.

C. *Disgusting Enough to Die*

If disgust supplies the idiom that we use to "voice . . . our strongest sentiments of moral disapprobation" (p. 20), then we

81. See Don Terry, *Landlord in His Own Jail: Tenants Debate His Fate*, N.Y. TIMES, Feb. 18, 1988, at B1, col. 5; see also CHI. TRIB., July 3, 1988, at C1 (reporting the same sentence for a California slumlord); John Larrabee, *Fighting Crime with a Dose of Shame*, USA TODAY, June 19, 1995, at 3A (reporting that Framingham, Massachusetts, places banners with the name of a slumlord on a building after condemning a unit).

82. Susannah A. Nesmith, *Advertise your guilt, judge orders woman after drug case plea*, PALM BEACH POST, Nov. 23, 1996, at 1A.

83. *Goldschmitt v. State*, 490 S.2d 123, 125 (Fla. Dist. Ct. App. 1986) (internal citation omitted). See also Carol-Faye Ashcraft, *DUI Offenders on Display*, ORLANDO SENTINEL, July 8, 1990, at 6 (criticizing fines because they "may not mean much" while praising shaming penalties on the ground that "public humiliation" is "more sobering"); Maureen Fan, *Red-Faced Offender: Is It a Real Shame?*, NEWSDAY, June 21, 1995, at A27 ("One of the reasons why people find these kinds of things appealing is not only because they think it'll make them safer . . . but it's also a way of expressing outrage." (quoting Bob Gang, head of the Correctional Association of New York)); *Punishment* (editorial), CIV. ENQ., June 2, 1994, at A10 ("It's my way to impress upon him the humiliation of the act." (quoting a judge who ordered a man convicted of assault to permit his wife to spit in his face)); *Scarlet Bumper*, TIME, June 17, 1985, at 52 ("[H]umiliation as punishment is valid . . .").

84. Indeed, this separation can be more than symbolic to the extent that shaming penalties effectively facilitate shunning of the offender. See ERIC A. POSNER, LAW, COOPERATION, AND RATIONAL CHOICE, Ch. 7 (Harvard Univ. Press forthcoming 1999).

85. See Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997); James Q. Whitman, *What's Wrong with Inflicting Shaming Sanctions*, 107 YALE L.J. 1055 (1998). For a normative defense of shaming penalties, see Kahan, *supra* note 21, at 637-50; Dan M. Kahan, *It's a Shame We Have None*, WALL ST. J., Jan. 15, 1997, at A16.

should expect to see disgust playing a critical role in administration of the criminal punishment that voices disapprobation in the most emphatic terms — namely, the death penalty. And we do. The overwhelming majority of states that have the death penalty authorize the sentencer to impose it when the murder is “outrageously vile wanton or inhuman,” “especially heinous, atrocious, or cruel,” or the like.⁸⁶ This sentencing factor — which I’ll refer to as the “outrageously vile” standard — singles out killings that are so nauseatingly cruel, and killers whose own tastes are so sickeningly depraved, that the only just disposition is literally to dispose of the offender.

The cases applying the “outrageously vile” standard involve tales that “sicken us in the telling.”⁸⁷ They are the stories of men who gang rape an eleven-year old girl in the woods, poke sharp sticks through her vagina into her abdominal cavity, and then smash her skull with a brick, while she begs for her life;⁸⁸ who cut out the vocal cords of a witness to a crime and then amputate his feet and hands with an electric saw;⁸⁹ who leave the scene of a terrifying nighttime burglary with the eighty-year-old victim dying in prayer, a knife protruding from her eye socket.⁹⁰ (As Miller himself observes — in a much more prosaic context — it is impossible to write of disgusting things without becoming disgusting oneself (p. 5).) These cases graphically bear out Miller’s contention that we cannot “put cruelty first among vices” without counting properly directed disgust as a virtue (p. 202): it is not enough to become angry when one hears of these atrocities; one must want to retch.

The “outrageously vile” standard, moreover, recognizes that we can be sickened not only by what brutal murderers do, but also by what they value and hence who they *are*. Thus, the sentencer is entitled to find the standard satisfied by facts that “evidenc[e] debasement or perversion,” or that show that the defendant “relish[ed] the murder.”⁹¹ Consider here the man who enjoyed shooting a woman so much that (with no additional stimulation) he experienced an orgasm, and who thereafter entertained himself by listening to music on her stereo system and drinking wine from her

86. Richard A. Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases — the Standardless Standard*, 64 N.C. L. REV. 941, 943 (1986).

87. P. 36. Such cases are gruesomely catalogued in Thomas M. Fleming, Annotation, *Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance that Murder Was Heinous, Cruel, Depraved or the Like — Post-Gregg Cases*, 63 A.L.R.4th 478 (1988).

88. See *State v. Brogdon*, 457 So. 2d 616, 621-22, 631 (La. 1984).

89. See *Cavanaugh v. State*, 729 P.2d 481 (Nev. 1986).

90. See *Battle v. Armontrout*, 814 F. Supp. 1412, 1417 (E.D. Mo. 1993), *affd. sub nom Battle v. Delo*, 19 F.3d 1547 (8th Cir. 1994).

91. *Walton v. Arizona*, 497 U.S. 639, 655 (1990) (plurality opinion) (internal quotes and citation omitted).

kitchen before finally hanging her from a door knob in a parting gesture of contempt.⁹² Or the men who forced their victim to lick beer from the floor and to eat her used sanitary napkin before killing her.⁹³ Or the one who cut his victim's chest open to observe her heart.⁹⁴ The sentencer's revulsion in such cases, moreover, needn't be linked to the suffering that such depraved behavior inflicts on the victims; even cases in which a killer mutilates the victim's body, or has sex with it, *after* the victim's death can satisfy the "outrageously vile" standard.⁹⁵ Just as the evaluative thesis suggests, it is the killer's very appetite to do what disgusts *us* that marks *him* as "barbaric and disgusting" (pp. 11- 12), enough so in fact to justify his execution.

Commentators tend to view the "outrageously vile" factor with a constitutionally jaundiced eye. The first principle of the Supreme Court's death penalty jurisprudence — represented in *Furman v. Georgia*⁹⁶ — commands that the sentencer's discretion be constrained by precisely worded statutory aggravating factors. The "outrageously vile" factor came to grief over the *Furman* principle early on, on the ground that it was too vague to separate the worst killings from all the rest: "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman[,]'" the Court claimed.⁹⁷ Thereafter, state courts attempted to revive the factor by fashioning "limiting constructions."⁹⁸ But as critics noted, these constructions — defining "heinous," for example, as "hatefully or shockingly evil: grossly bad"; "cruel" as "disposed to inflict pain esp[ecially] in a wanton, insensate or vindictive manner: sadistic"; and "depraved" as "marked by debasement, corruption, perversion or deterioration" — seemed no more determinate or constraining than the statutory terms they are explicating.⁹⁹ The Court has nevertheless upheld such constructions of the "outrageously vile" factor as constitutionally sufficient: "an aggravating factor of this nature," the Court now recognizes, "is not susceptible of mathematical precision."¹⁰⁰

92. See *Bunch v. Commonwealth*, 304 S.E.2d 271, 282 (Va. 1983).

93. See *Thompson v. State*, 389 So. 2d 197, 198 (Fla. 1980).

94. See *Smith v. State*, 407 So. 2d 894, 896 (Fla. 1981).

95. See, e.g., *Hance v. State*, 268 S.E.2d 339, 346 (Ga. 1980).

96. 408 U.S. 238 (1972) (per curiam).

97. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980); accord *Maynard v. Cartwright*, 486 U.S. 356, 363-64 (1988).

98. See *Rosen*, *supra* note 86, at 968-70.

99. See *Walton v. Arizona*, 497 U.S. 639, 693-97 (1990) (Blackmun, J., dissenting); *Rosen*, *supra* note 86, at 968-70.

100. *Walton*, 497 U.S. at 655 (plurality opinion); accord *Lewis v. Jeffers*, 497 U.S. 764, 777 (1990); see also *Arave v. Creech*, 507 U.S. 463 (1993) (upholding "utter disregard" standard construed as meaning "pitiless").

The tortured constitutional history of the “outrageously vile” factor itself testifies to the indispensable contribution that disgust makes to the capacity for moral discernment. As Miller would predict, courts recognize the role of disgust sensibilities in revealing to us the most singular acts of wickedness and depravity, the ones we are obliged to strike back against in the most emphatic form of action that our conventions and laws make available to us. And the power that disgust gives us to discern and remark such atrocities is indeed insusceptible of being captured by — reduced to — a precise verbal formula. If being guided by such a sensibility is incompatible with the demand for formally determinate rules in capital sentencing, then, unsurprisingly, it is that demand, and not the sensibility, that gives way.¹⁰¹

D. *Disgust vs. Mercy*

But we should also expect the durability of disgust in capital sentencing to be a cause of unease. The moral ambivalence thesis sees disgust as furnishing not only indispensable but also imperfect moral guidance. In the grip of disgust, Miller argues, we too readily blame persons for deformities of character over which they have no control. In the nonlegal domain, we construct conventions — including the distinction between aesthetics and morals — to check this feature of disgust. In law, constraining disgust is the role that we assign to *mercy* in capital sentencing.

The place of mercy is secured by the rule — established in the Supreme Court’s decisions in *Lockett v. Ohio*¹⁰² and *Eddings v. Oklahoma*¹⁰³ — that the state may do nothing to prevent the sentencer “from considering . . . any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁰⁴ By obliging the sentencer to listen to the defendant’s story in the terms in which he chooses to tell it, the *Lockett-Eddings* rule recognizes that in even the most aggravated cases we may be moved by “compassionate or mitigating factors stemming from the diverse frailties of humankind.”¹⁰⁵

101. Indeed, one might argue that the ultimate vagueness of the “outrageously vile” standard is, in this sense, a virtue, because any determinate rule would necessarily disable the sentencer from recognizing the diverse forms that cruelty and depravity can assume. For a perceptive (and doctrinally heretical) argument to this effect, see Paul J. Heald, *Medea and the Un-Man: Literary Guidance in the Determination of Heinousness Under* *Maynard v. Cartwright*, 73 TEXAS L. REV. 571 (1995).

102. 438 U.S. 586 (1978) (plurality opinion).

103. 455 U.S. 104 (1982).

104. 438 U.S. at 604 (plurality opinion); *Eddings*, 455 U.S. at 110 (quoting *Lockett*).

105. *Eddings*, 455 U.S. at 112 n.7 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion)).

The tension between the *Furman* rule and the *Lockett-Eddings* rule is patent.¹⁰⁶ The former tells the state that it *must* adopt statutory factors that constrain the capital sentencer's discretion, the latter that it must *not*. More than one Justice has concluded that these directives are conceptually and practically irreconcilable.¹⁰⁷

But why assume the values at stake in capital sentencing admit of rational harmonization? According to Miller, our moral world is tragically configured: both disgust and individual autonomy make legitimate claims upon us; any approach to moral decisionmaking that even purported to dispel the tension between them would necessarily blind us to the insights of one or the other or both. The only proper response to this conflict is to avoid giving "any one moral sentiment the power to govern all situations in which it may be elicited" (p. 202) — to structure our moral conventions to assure that *both* the norms embodied in disgust *and* the norms embodied in "other moral sentiments, like guilt and benevolence" (p. 197) are given free range to appraise the situation.

Furman and *Lockett-Eddings* structure the capital sentencing process to reproduce this tension-embracing solution. *Furman* gives free range to our moral-condemning norms. It is at that point that the law allows disgust to appraise the offenders' crime through aggravating factors such as the "outrageously vile" standard or California's racial-hatred factor. But under *Lockett-Eddings*, the law tests the claims of our disgust by creating the space for mercy. That sentiment embodies our condemnation-abatement norms, including recognition of the role that "the diverse frailties of humankind" may have played in making the offender an object of revulsion. Whatever tension there is between *Furman* and *Lockett-Eddings* is thus a genuine tension in our moral values; the response of that doctrinal regime is to conserve the insights of *all* our moral sentiments rather than privileging only a subset of them.

Consistent with the moral ambivalence thesis, the law remains faithful to both the certainty of our disgust sensibilities and the second-order doubts we have about whether that certainty is warranted. When we contemplate the cruelty of his deeds, and the depravity of his motivations, we may have no doubt that a Gunner Lindberg or a Stephen Roy Carr is a proper recipient of the law's most severe punishment. But we know that even a Lindberg or a

106. See, e.g., Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

107. See *Callins v. Collins*, 114 S. Ct. 1127, 1128-38 (1994) (Blackmun, J., dissenting from denial of certiorari); *Graham v. Collins*, 113 S. Ct. 892, 909-911, (1993) (Thomas, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 661-73 (1990) (Scalia, J., concurring in part and concurring in the judgment). For attempts to dispel the tension, see Stephen P. Garvey, "As The Gentle Rain From Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 115-122 (1996); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993).

Carr is likely to have a story to tell — of the warping influences of childhood neglect; of psychoses, intermingled with drug abuse; of traumatic events, such as prison rape or perceived racial discrimination¹⁰⁸ — a story that seeks to persuade us not that we are wrong to be disgusted by him, but that he has become disgusting for reasons that he couldn't control.¹⁰⁹ Such stories may not move us; indeed, the California jury that sentenced Lindberg to death obviously was not moved. But the law's unwillingness to put such offenders to death before it even hears how they became what they are evidences the war that mercy wages against the imperial ambitions of our disgust.

V. EVALUATING DISGUST IN CRIMINAL LAW

My aim so far has been to show that disgust does in fact play a central role in criminal law. But nothing I've said implies, necessarily, that this role is morally justified. Indeed, seeing how much consequence the law invests in our disgust sensibilities should make us more intent, not less, on determining whether the law's confidence in that sentiment is warranted.

I now want to take a step in the direction of vindicating that confidence. I don't intend to advance a complete defense of disgust in criminal law, but drawing on Miller, I will address what I take to be the most powerful claim that can be made on disgust's behalf — namely, that it is essential to perceiving and condemning cruelty. If this is so, then opponents of disgust in criminal law will be hard pressed to prove that disgust should be extricated, as opposed to merely constrained and tested by other sentiments such as mercy. I will also take up the question whether the connection between disgust and hierarchy makes disgust an illegitimate guide for criminal-law decisionmaking within a liberal political regime.

A. *Disgust and Cruelty*

Miller's strongest normative claim — that we cannot “put cruelty first among vices” without regarding disgust as a moral virtue (p. 202) — is also the most contentious. In every case in which disgust exhorts us to lash out at cruelty, won't we have additional sufficient reasons to punish? Alternatively, if *all* we have to go on

108. See *Commonwealth v. Carr*, 580 A.2d 1362, 1363-64 (Pa. Super. Ct. 1990) (recounting Carr's evidence of child neglect and prison rape); Thao Hua, *supra* note 57, at B1 (reporting defense evidence that Lindberg suffered from psychosis exacerbated by drug use and had been victim of perceived mistreatment while growing up in Japan).

109. In fact, far from denying the reprehensibility of the offender's conduct, mercy presupposes it. See Kahan & Nussbaum, *supra* note 19, at 367-71. Because mercy bears this signification, it enables us to withhold the degree of reprobation that our disgust calls for without endorsing in any way the wrongdoer's own reprehensible (and, in the view of our disgust, potentially contaminating) valuations. Or at least this is the aspiration.

is disgust, why should we trust our perception that punishment is just?

The “outrageously vile” cases furnish a tempting, but ultimately inadequate, basis of support for Miller’s position.¹¹⁰ We might indeed wonder about the moral acuity of someone who purported not to be sickened by such atrocities. But condemnation in such cases is overdetermined: wholly apart from whether they revolt us, killers who mutilate and torture, who savor the suffering and degradation of their victims, warrant severe punishment for purposes of deterrence and incapacitation. What’s more, for many — myself included — the lessons that such cases can teach us seem clouded by the morally problematic status of the death penalty itself.

What we need to test Miller’s claim, then, is a noncapital case in which disgust seems both necessary and sufficient to remark the cruelty of an offender’s behavior. For this consider the request of Dennis Beldotti.¹¹¹

Beldotti committed murder to gratify his sadistic sexual appetites. His female victim, strangled and stuffed into trash bags, was found in the bathroom of his home. Bruises and cuts covered her body. Her nipples had been sliced off. Incisions rimmed her pubic area. From Beldotti’s bedroom, the police recovered numerous nude photographs of the victim: some of these had belonged to the victim and her husband and had apparently been stolen by Beldotti from the victim’s home; others had been taken by Beldotti himself, after the victim’s death, and showed dildos penetrating her vagina and anus.¹¹² Based on these and other facts, the jury found that Beldotti’s crime reflected “extreme atrocity or cruelty,” a factor justifying life imprisonment without parole.¹¹³

Massachusetts law provides that at the conclusion of criminal proceedings the property seized and used in evidence should be dealt with in a manner consistent with “the public interest.”¹¹⁴ Beldotti requested that the state return certain items of his to his representatives outside of prison. These included “four dildos”; “bondage paraphernalia”; “one plastic encased photo of the victim”; “female undergarments”; “one broken ‘Glad Heavy Weight Trashbag’ box” — presumably the one containing the bags he used to wrap his victim; “twenty-four magazines depicting naked pubescent and prepubescent girls and boys”; and scores of pornographic tapes and magazines “bearing such titles as ‘Tamed & Tortured,’

110. See *supra* section IV.C.

111. See *Beldotti v. Commonwealth*, 669 N.E.2d 222 (Mass. Ct. App. 1996).

112. See *Beldotti*, 669 N.E.2d at 224.

113. See MASS. GEN. LAWS ANN. ch. 265 §§ 1-2 (West 1996); Ray Richard, *Beldotti Convicted in Needham Murder*, BOSTON GLOBE, Jan. 26, 1989, at 17.

114. MASS. GEN. LAWS ANN. ch. 276, § 3 (West 1996).

‘Tit & Body Torture,’ and ‘Tortured Ladies.’”¹¹⁵ The state opposed Beldotti’s request on the ground that surrendering these items “would justifiably spark outrage, disgust, and incredulity on the part of the general public.”¹¹⁶ “The overwhelming public interest here,” the state’s attorney argued, “is that they be thrown in the trash can where they belong. This has nothing to do with free expression. It has to do with the degradation of a young woman by a depraved individual.”¹¹⁷

The Massachusetts Court of Appeals agreed. “Although property may not be forfeited simply because it is offensive or repugnant,” the court observed,

we see a connection between the property that Beldotti seeks to have returned to him and the crime he committed. The murder for which Beldotti is serving his life-term was particularly gruesome; he photographed the victim’s naked torso after inserting dildos into her vagina and anus and after sexually mutilating her body. The items that Beldotti seeks to have returned to him can be seen as being directly related to those acts, as having influenced his behavior, or as being relevant to an understanding of the psychological or physical circumstances under which the crime was committed.¹¹⁸

“In these circumstances,” the court concluded “to return the property would be so offensive to basic concepts of decency treasured in a civilized society, that it would undermine the confidence that the public has a right to expect in the criminal justice system.”¹¹⁹

My guess is that this decision will strike nearly everyone as indisputably correct. What I want to argue is that there is in fact no viable basis for that intuition other than the one the court gave — namely, the disgustingness of Beldotti’s request.

What other rationale could there be? The idea that possession of such items would undermine Beldotti’s “rehabilitation” makes no sense, insofar as he was serving a term of life without parole. Perhaps inmates shouldn’t be allowed to possess such materials, all of which could cause disruption inside a prison, and some of which could actually be used to torture other prisoners. But Beldotti sought to have the materials released only to his representatives outside of prison; whether Beldotti himself could have taken possession of the items, the court recognized, was a separate issue that

115. *Beldotti*, 669 N.E.2d at 225.

116. 669 N.E.2d at 225.

117. Patricia Nealon, *X-Rated Materials Held by Court Sought*, BOSTON GLOBE, Apr. 2, 1992, at 21 (quoting district attorney).

118. *Beldotti*, 669 N.E.2d at 225.

119. *Beldotti*, 669 N.E.2d at 225.

would have had to have been addressed in the first instance by prison administrators.¹²⁰

It might be thought that no one — in or outside of prison — should be allowed to possess legally obscene materials. But preventing the consumption of obscenity would hardly be a disgust-neutral ground for the decision. What's more, as the court recognized, the mere possession of the seized magazines and tapes, as opposed to the distribution of them, would not have violated state law.¹²¹

Forfeiture of the property might be defended as a punitive measure aimed at promoting general deterrence. But deterrence doesn't explain why Beldotti should be made to forfeit *these* particular articles rather than some others. Assume that imposition of a fine of a certain size could deter as effectively as the forfeiture of Beldotti's dildos and trashbags, his picture of the victim, and his "Tit & Body Torture" magazines and tapes. Would it then be acceptable — morally — to let Beldotti have his toys after all in exchange for a payment of that amount? If the answer is no, deterrence can't be the reason why. What grounds do we have, anyway, for thinking that the forfeiture of Beldotti's property adds *any* marginal deterrence to that achieved by sentencing him to life imprisonment without parole? If our confidence in the intuition that *Beldotti* was correctly decided outstrips our access to the empirics that would substantiate the deterrent benefits of forfeiture of his property, then something else besides deterrence explains the intuition.

That something *is* disgust. As the court recognized, the items Beldotti wanted bore the unmistakable aura of his crime. Bureaucratically processing his request — treating it as if it were no more remarkable than a claim for a stolen wallet or an impounded automobile — would have trivialized the unfathomable cruelty of his deeds. Indeed, because the atrocity of his crime consisted largely in the satisfaction he took in defiling his victim, restoring these items to his control, and thereby facilitating even his vicarious enjoyment of them, would have allowed Beldotti, as the state argued, to continue degrading her after death. By connecting the denial of Beldotti's request to "public confidence" in the law, moreover, the court recognized that enabling Beldotti to satisfy his tastes would inevitably have made the *state itself* complicit in his depravity. The *only* way to avoid being tainted by his request was to throw Beldotti's misogynistic magazines and his trash bags and his dildos and his kiddie porn "in the trash can where they belong" — rhetori-

120. See *Beldotti*, 699 N.E.2d at 224.

121. See *Beldotti*, 699 N.E.2d at 224.

cally, if not literally. All of these motivations and thoughts are native to disgust as an evaluative sentiment.

I don't mean to exaggerate the significance of this analysis. Obviously, showing the indispensability of disgust to the result in one case doesn't prove Miller's claim that disgust is essential to our perception of, and opposition to, cruelty. But I do see *Beldotti* as an appropriate challenge to put to those who might advocate a disgust-free conception of criminal law. In effect, it turns the questions with which I started this section completely around: What besides disgust (and "just so" stories) can really explain the perception that granting his request would be wrong? And if nothing else does, what could possibly justify committing ourselves to a regime that quiets so urgent a moral instinct?

B. *Disgust and Illiberalism*

One answer might be *liberalism*. Disgust is constructed by and reinforces status norms. It does not merely condemn, but also remarks the lowness and inferiority of its object. As Miller himself recognizes, such sensibilities are marred by their disreputable history, having been used to "maintain brutal and indefensible regimes" (p. 202) — misogynistic, racist, classist, and homophobic ones, among others. Opposition to such rankings motivates modern liberalism, which is naturally suspicious of disgust. Indeed, Miller credits the declining prominence of disgust in our moral discourse to "[a] newer style of moralist, . . . one for whom tolerance and respect for persons are fundamental virtues" and who therefore "wish[es] our disgust sensitivities lowered so we would be less susceptible to finding difference and strangeness sources of disgust."¹²²

The insights of liberalism give us just as much reason to be suspicious of disgust in criminal law, where, as *Bernardski* reminds us, its role has often been just as brutal and indefensible as it has elsewhere. Nevertheless, drawing on the conservation thesis, I want to suggest that renouncing the guidance of disgust in criminal law would in fact defeat, rather than advance, liberal ends.

The strongest version of this argument objects on principle to the perceived opposition between liberalism and hierarchy. It's true that liberal regimes renounce (at least in theory) rankings of a particular sort — such as those based on race, gender, and class — but they haven't renounced *all* perceptions of high and low, noble and base, worthy and unworthy. Even egalitarians hold pedophiles and sadists in low esteem, for example, not just because such persons threaten physical harm, but because their values reveal them

122. P. 179. For a critique of Miller along exactly these lines, see Nussbaum, *supra* note 28.

to be despicable. Indeed, as Miller points out, those who seek to raise the status of historically subordinated groups seek to reshape our “emotional economy” so that we’ll come to see racists, sexists, and homophobes, among others, as debased in exactly the same way (p. 235). On this account, the proper course for liberalism is not to obliterate disgust, but to reform its objects so that we come to value what is *genuinely* high, to despise what is *genuinely* low.

The criminal law has traditionally been seen as performing a “moral educative” function of this sort.¹²³ Punishment is thought to discourage criminality not only by raising the “price” of such misconduct, but also by instilling aversions to it.¹²⁴ It’s no surprise that legal moralizing of this sort has been, and continues to be, an instrument of “brutal and indefensible regimes.” But why should the proponents of defensible regimes declare a unilateral cease-fire rather than fighting the indefensible ones on their own terms? Erecting a liberal counter-regime of disgust, I’ve tried to show, is exactly the aim behind “hate crime” laws, which seek to make the proponents of illiberal species of hierarchy the object of our revulsion. It seems unlikely that a philosophical abstraction as malleable as “liberalism” is conceptually incompatible with this form of legal moralizing.¹²⁵ But if it is, so much the worse for liberalism.

This is, as I’ve indicated, the *strongest* response to the liberal critique of disgust in criminal law; I want to lay more emphasis, however, on a weaker and more pragmatic rejoinder. This position views liberal opposition to disgust not as defective in principle, but as self-deluding and self-defeating in practice. Styles of criminal-law theorizing that purport to dispense with disgust do nothing in reality to mute its influence. They do, however, *disguise* it, and in so doing prolong the life of outmoded and illiberal norms in the law.

The dominant forms of criminal law theory both have liberal antecedents. *Voluntarism*, which derives from Kantian moral philosophy, treats punishment as justified if, and to the extent that, the offender’s behavior stems from choice.¹²⁶ *Consequentialism*, which derives from utilitarian theory, views punishment as warranted if, and to the extent that, visitng suffering on the offender promotes

123. See, e.g., Johs Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 176, 179 (1952); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212 (1984).

124. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as Preference-Shaping Policy*, 1990 DUKE L.J. 1.

125. See Kahan & Nussbaum, *supra* note 19, at 359-62.

126. The most influential voluntarist account is that of H.L.A. Hart. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 46- 49 (1968).

desired states of affairs.¹²⁷ Consistent with the liberal bias against public moralizing, both theories reflect the mechanistic rather than the evaluative conception of emotion, and thus assign no normative significance to the valuations that construct disgust sensibilities.¹²⁸

Neither theory, however, has succeeded in banishing such evaluations from the law. Voluntarism seeks to "lower" our "disgust sensitivities" by making excuses depend not on the quality of offenders' emotional evaluations but rather on the destructive effect of emotions (or "impulses") on offenders' choice capacities; its focus is not on who is too virtuous, but on who is too sick to be punished. Yet juries are notoriously resistant to excusing mentally unbalanced offenders who commit heinous crimes, no matter how obvious the origins of such behavior in pathology.¹²⁹ "[t]he muddle-headed reformers who seek to make crime a matter of illness rather than culpable intention," Miller writes, "fail to realize that we do not cease blaming just because someone is sick" (p. 203). At the same time, if we insist that decisionmakers speak in a mechanistic rather than an evaluative idiom, then we can expect them to describe as "sick" the offenders who are too virtuous to be held accountable for their crimes. Consider the historic use of the "irresistible impulse" conception of insanity as a vehicle for excusing all manner of virtuous outlaws, from the cuckold to the battered woman.¹³⁰ And if their disgust sensibilities tell decisionmakers that a particular offender, such as the homophobe, deserves solicitude, we can expect them to see him as excusably "sick," too, a lesson taught to us by the selective receptivity of the law to the "homosexual panic" defense.¹³¹

The same story can be told about consequentialism. It attempts to suppress evaluative appraisals by connecting excuse to the relative dangerousness of an impassioned or impulsive offender.¹³² But which impassioned offenders juries and judges see as dangerous

127. This is the position associated with Jeremy Bentham, see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in *THE UTILITARIANS* 162 (1961), and his successors, see, e.g., Becker, *supra* note 66; Posner, *An Economic Theory of the Criminal Law*, 85 *COLUM. L. REV.* 1193 (1985).

128. See Kahan & Nussbaum, *supra* note 19, at 301-05; see also Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense In Law*, 37 *ARIZ. L. REV.* 251 (1995) (discussing "voluntarist" and "welfarist" theories of criminal law).

129. Empirical evidence, for example, suggests that juries, no matter how instructed on the definition of insanity, give little weight to the condition of the defendant's psyche and focus instead on a cluster of factors relevant to his culpability. See, e.g., Norman J. Finkel & Sharon F. Handel, *How Jurors Construe "Insanity,"* 13 *LAW & HUM. BEHAV.* 41, 57 (1989); James R.P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 *LAW & HUM. BEHAV.* 509, 521, 526 (1991).

130. See Kahan & Nussbaum, *supra* note 19, at 345-50.

131. See *supra* notes 35-53 and accompanying text.

132. See, e.g., Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide: II*, 37 *COLUM. L. REV.* 1262, 1280-82 (1937).

necessarily depends on which victims they see as valuable enough to be protected from harm: cuckolds/battered women aren't all that dangerous, unless one happens to be a paramour/tyrannical man.¹³³ And if disgust sensibilities tell the decisionmaker that homosexuals are worth little, then that decisionmaker will predictably see the killing of one as a "one-time tragedy" committed by an otherwise normal person who the decisionmaker can be "confident . . . w[ill] not kill again."¹³⁴

In short, the criminal-law theories associated with modern liberalism don't genuinely purge the law of disgust. They only push disgust down below the surface of law, where its influence is harder to detect.

And *that's* bad. It should be clear that there's no way to guarantee that decisionmakers will be guided by liberal rather than illiberal disgust sensibilities. But their sensibilities are likely to deviate least from the moral ideal when the evaluations they embody are most fully exposed to view. The prospect of publicly owning up to reliance on anachronistic or illiberal disgust sensibilities can itself shame decisionmakers into deciding on some other basis. Even more important, when we force decisionmakers to be open about the normative commitments that underlie their disgust sensibilities, members of the public are fully appraised of what those commitments are. This outcome facilitates the kind of self-conscious competition between liberal and illiberal conceptions of disgust, and between disgust and other moral sentiments, that is essential to redeeming disgust under the moral ambivalence thesis.

To illustrate, return once more to *Bernardski*.¹³⁵ The judge's conclusion that the lives of Bernardski's gay victims just weren't worth enough to justify a sentence of life imprisonment was outrageous — indeed, *disgusting*. And it *provoked* public disgust. The judge was formally censured for his remarks and thereafter defeated in an election in which the support of women and gays for the judge's opponent turned out to be decisive.¹³⁶ In the wake of this and other incidents, moreover, the Texas legislature enacted a hate crimes statute that expressly enhances the penalty for crimes motivated by bias against any group.¹³⁷ Had the judge cloaked *his*

133. See Kahan & Nussbaum, *supra* note 19, at 311-12.

134. See Steven Hunt, *Victim's Family, Gays Say Killer Got Off Too Easy*, SALT LAKE TRIB., Aug. 16, 1997, at C7; *Judge Draws Protest After Cutting Sentence of Gay Man's Killer*, N.Y. TIMES, Aug. 17, 1994, at A15 (reporting the comments of a judge explaining the lenient sentence for a man who hunted down and then shot between the eyes a gay man who had earlier propositioned him).

135. See *supra* notes 10-17 and accompanying text.

136. See Lisa Belkin, *Gay Rights Groups Hail Defeat of Judge in Texas*, N.Y. TIMES, Dec. 4, 1992, at B20, col. 5.

137. See TEX. PENAL CODE ANN. § 12.47 (West 1994); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West Supp. 1997); see also Clay Robison, *Richards signs hate crimes bill into law*,

disgust in the rhetoric of voluntarism or consequentialism, it's very unlikely that his decision would have furnished so salient a focal point for rooting out the illiberal sensibilities that the judge's decision embodied.

To Miller's four theses, we can now add a fifth: the *self-delusion thesis*. As one might surmise from the conservation thesis, the kind of hierarchic rankings characteristic of disgust are too durable to be driven from the scene by the morally antiseptic idiom of liberalism. Those who believe otherwise are fooling themselves. If we let them fool *us*, those of us who oppose brutal and indefensible hierarchies in law risk becoming their unwitting defenders.

VI. SEEING DISGUST IN CRIMINAL LAW

My goal in this review was to suggest the value of Miller's work for remedying the blindness of criminal law theory to disgust. I'll now take stock of some of the things that his account allows us to see.

For Miller, disgust is not an instinctive and unthinking aversion but rather a thought-pervaded evaluative sentiment. Disgust embodies the appraisal that its object is low and contaminating and the judgment that we must insulate ourselves from it lest it compromise our own status. By feeling and expressing disgust, we thus reinforce the hierarchical social norms that give disgust its evaluative content.

Armed with this account, I've argued, we can make sense of a range of issues that seem anomalous under the conventional theories of criminal law. Why, for example, is the law of two minds on homophobic violence? The answer is that society is of two minds on what we should regard as low and contaminating — homosexuality or homophobia. Indeed, I've argued that the "hate crimes" debate is better understood as a "disgust crimes" debate, in which adherents of competing conceptions of virtue war for control over the law's expressive capital.

Why do citizens stubbornly resist the use of fines and community service despite the efficiency of such penalties for nonviolent crimes? At least part of the answer is that the social meaning of these penalties render them less effective than prison in remarking the low status of criminals and in cordoning them off, literally and symbolically, from the rest of us. Because shaming penalties, in contrast, do unambiguously express disgust, they encounter much less political resistance as an alternative to imprisonment.

HOUS. CHRON., June 20, 1993, State section, at 3 (noting that the purpose of the legislation is to enhance "criminal offenses motivated by the victims' race, religion, ethnicity, sexual orientation or national origin").

Why does the “horribly vile” standard persist as a staple of capital sentencing, notwithstanding its incurable vagueness? The answer is the necessity of disgust for perceiving and motivating opposition to cruelty. At the same time, the law’s consciousness of the power of disgust to overshoot the mark — to condemn individuals for defects of character that they cannot control — enjoins the law to check disgust with mercy, thereby reproducing in doctrine an irreconcilable conflict that exists within our own moral sentiments.

Miller’s account also helps us to frame important normative questions about the role of disgust in criminal law. Miller is ambivalent about disgust. He recognizes the historical contribution that disgust has made to reinforcing unjust hierarchies, from racism to misogyny. But at the same time, he suggests that no abstract theory, and no other moral sentiment, can reproduce the work that disgust does in voicing our opposition to moral atrocities. Miller counsels us not to dispel the tension between disgust and other moral norms, but to embrace it through evaluative appraisals that pit disgust against other moral sentiments. I’ve argued that the same tension pervades the role of disgust in criminal law, and that we should try to resolve it in a similar way — that is, not by opposing disgust *per se*, but by opposing disgust *to* other sentiments such as mercy, and by opposing unjust forms of disgust *with* just ones.

Finally, Miller helps us to see why the dominant theories of criminal law have so little to say about the prominence of judgments of and about disgust. This inattention, I’ve suggested, is not so much an oversight as a strategy. The dominant theories of criminal law are aligned with a style of moral theorizing that is suspicious of disgust because of its origin in hierarchy and its indifference to individual autonomy. By directing our attention to other grounds for determining the law’s content, the dominant theories attempt to distract us from disgust, and thus to blunt the illiberal influence of that sentiment on our institutions.

As well-intentioned as this strategy might be, however, it is ultimately self-defeating. Ignoring disgust does nothing to counteract the force that that sentiment exerts over our moral imaginations. Indeed, dispensing with disgust leaves theory without the rhetorical resources to oppose the forces of illiberalism, to whom the hierarchic and intolerant idiom of disgust is no embarrassment.

In short, the hear-no-, see-no-, speak-no-disgust strategy makes theory politically impotent as well as morally obtuse. Miller’s account is the perfect antidote.