Sitzung am 12.01.04

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Hiding from Humanity.

Disgust, Shame, and

the Law.

Princeton 2004



## VII. Stigma and Brand: Shame in Social Life

All societies mark some people as normal. As Goffman trenchantly observed, all deviations from the normal are marked as occasions for shame. Each person in a society looks out at the world from the perspective of its norm of normalcy. And if what he or she sees when looking in the mirror does not conform to that norm, shame is the likely result. Many occasions for social shame are straightforwardly physical: handicaps and disabilities of various kinds, but also obesity, ugliness, awkwardness, lack of skill in sports, lack of some desirable secondary sexual characteristic. Some are features of the person's form of life: sexual minorities, criminals, and the unemployed are major recipients of stigma.

These latter types of deviation from the normal are not branded on the face. Societies have, in consequence, found it convenient to inflict a visible mark. The word "stigma" is in fact the Greek term for this mark.[111] In the ancient Greek world the word-group (noun *stigma,* verb *stizô*) referred to tattooing, not to branding,[112] and tattoos were widely used for penal purposes. As the edict of Constantine records, the mark was frequently applied to the face, in order to shame the offender in a publicly visible way.[113] Similar practices are found in many societies, some involving branding as well as tattooing. And the evidence shows, time and again, that those singled out for branding include not just those convicted of a particular offense, but various other undesirables: slaves, the poor, members of sexual and religious minorities.

What is going on when societies stigmatize minorities? How might this behavior be connected to the dynamics of human development I sketched out above? At this point any account is bound to be highly conjectural, but with shame as with disgust, we are dealing with phenomena of such ubiquity that we ought at least to try to understand them. At the heart of the matter is the strange notion of the "normal," with its way of linking what might seem to be two altogether distinct ideas.[114] On the one hand, there is the idea of statistical frequency: the normal is the usual, that which most people are or do. The opposite of "normal" in that sense is "unusual." On the other

hand there is the notion of the good or normative: the normal is the proper. The opposite of "normal" in this sense is "inappropriate," "bad," "disgraceful." Social notions of stigma and shame typically link the two rather closely together: whoever does not do what most people do is treated as disgraceful or bad. The puzzle is why people should ever have drawn this peculiar connection. For, obviously enough, what is typical may or may not be very good. Bad backs, bad eyes, and bad judgment are all very typical, and Senator Roman Hruska's claim in the 1970 Senate debate that intellectual mediocrity should be represented on the U.S. Supreme Court met the widespread mockery it deserved. As Mill observed, much progress in human affairs comes from people who are unusual and who live lives that the majority does not live or even like. So why, in more or less all societies, has the notion of the normal as the usual also served a normative function, setting the different up for stigmatizing treatment?

The puzzle becomes more complex when we recall Goffman's observation about the normal in the sense of the usual: that, as a composite picture of a person, it is actually a fictional construct. Almost nobody is, in every aspect, the "normal" man. Even if with regard to each single attribute that attribute is widespread, when we combine the whole list of such attributes, there is almost nobody who has them all. Protestants, people under fifty, and heterosexuals may all be "usual" categories, but when you begin to combine them the intersection is much smaller; by the time we go all the way down Goffman's list, we get a person who is rare indeed, and highly temporary, given that we all move too rapidly into the stigmatized category of the aging. So why should a category this elusive and in a sense contradictory have such power to mar human lives?

I believe the use of the category "normal" to stigmatize deviant behavior should be understood as the outgrowth of the primitive shame that to some degree affects us all. Because we are all aware that there are many ways in which we fail to measure up to the exorbitant demand of infancy for complete control over the sources of good, because we retain our nostalgic longing for the bliss of infantile oneness with the womb or the breast, we need a surrogate kind of safety or completeness. And those who call themselves "normals" find this safety in the idea of a group that is both widespread, surrounding them on all sides, and good, lacking in nothing. By defining a certain sort of person as complete and good, and by surrounding themselves with such people, normals gain comfort and the illusion of safety. The idea of normalcy is like a surrogate womb, blotting out intrusive stimuli from the world of difference.



But of course, this stratagem requires stigmatizing some other group of persons. Normals know that their bodies are frail and vulnerable, but when they can stigmatize the physically disabled they feel a lot better about their own human weaknesses.[115] They feel really all right, almost immortal. Normals know that their intellects are flawed in many ways; all human beings have many deficiencies in knowledge, judgment, and understanding. With the mentally disabled around them, however, and stigmatized as "morons," "idiots," "Mongoloid idiots," or "crazy people," normals feel positively sage and brilliant. Normals know, again, that their relations with other people are vulnerable and that loss and betrayal may affect anyone, but when they stigmatize another group as morally depraved, they feel positively virtuous. In sexual relations all human beings feel deeply exposed, and sex is a particular site of both physical and emotional vulnerability, but if normals can brand a certain group as sexually deviant, this helps them avoid the shame that they are prone to feel. In short, by casting shame outwards, by branding the faces and the bodies of others, normals achieve a type of surrogate bliss; they satisfy their infantile wish for control and invulnerability. Goffman revealingly refers to the stigmatized person, therefore, as "the person he [the normal] is normal against."[116]

In short, I am suggesting that the stigmatizing behavior in which all societies engage is typically an aggressive reaction to infantile narcissism and to the shame born of our own incompleteness. Even if in many respects many human beings overcome infantile narcissism, learning to form relationships of mutual interdependence with other people and to recognize their separate reality, there is an instability to that recognition given that people still don't want to be mortal and weak; in consequence there is a powerful tendency to revert to self-protective aggression when weakness makes itself felt. We might even say that the presence of disabled people functioning in our midst reminds normals too much of their own weakness, so that

they feel an urge to reject from their sight through public shaming those who wear their weakness on their face. Thus shame in the self often leads to the wish that others feel shame, and to practices of humiliating or active shaming that inflict stigma on vulnerable people and groups.[117]

This suggestion is amply borne out in the clinical literature. Repeatedly, patients troubled by a pathological degree of primitive shame show an interest in representing themselves as "normal" according to the norms of their society: because, says Kernberg, "they are afraid of the attacks to which they would be subjected if they do not conform."[118] Morrison, similarly, reports that part of the experience of primitive shame is often a feeling of being "weird," not "normal." Normalcy is thus a good way of hiding.[119] This aim to be seen as normal looks at first inconsistent with the aim of most such patients to be seen as grandiose or invulnerable. But we should insist, with Goffman, that social norms of the normal usually have little to do with the weaknesses of the average man: the normal is a thoroughly normative notion, and a kind of surrogate perfection or invulnerability.

This analysis does not mean that when society holds out certain norms and asks people to live up to them, shaming them when they do not, those norms are never valuable and good. I have already said that shame can serve a valuable moral function in connection with good ideals. But thinking about the infantile roots of shame does inform us that society's shaming behavior is not to be easily trusted, or taken at face value. It can easily get out of control, and it will be difficult both to keep it tethered to genuinely valuable norms and to calibrate it properly. Behind the parade of moralism and high ideals, there is often likely to be something much more primitive going on to which the precise content of the ideals in question, and their normative value, is basically irrelevant. Such reflections should make us more skeptical about even the moralizing type of shaming, more determined to sift and analyze the ideals in question to see if they have more going for them than their sheer ubiquity.

Central to the operation of stigma is a dehumanization of the victim. The urge to brand the face keeps on recurring in the history of this topic, not only because the face is visible, as hands and calves



may not be, but precisely because it does, as Constantine says, bear the mark of our humanity and individuality. Accordingly, Romans were particularly keen on shame penalties that tattooed the name of the offense, or of its punishment, on the forehead of the offender.[120] In this way, the penalty inflicted a permanent mark of what Goffman calls "spoiled identity." It was also a mark of loss of uniqueness: the offender becomes a member of a degraded class,[121] and it is that, rather than his distinctive personality, that is written on his face.[122]

Recall that one remarkable reflex of B's shame was the inability to recognize individual people or to call them by their Christian names. In his desire to control and to shut off sources of need, he saw other people only as vague looming threats to his projects; their qualitative distinctness could not be seen, and their separateness could not be acknowledged. So too with the narcissistic aggression that underlies much social stigmatizing: its urge is to efface the human individuality of the other, whether by a literal brand or simply by classifying the person as a member of a shamed class rather than as an individual person. By classifying a person as "a cripple," "a mongoloid idiot," "a homosexual," we deny both the humanity we share with the person and the person's individuality. As Goffman says, "He is thus reduced in our minds from a whole and usual person to a tainted, discounted one. . . . By definition, of course, we believe the person with a stigma is not quite human. On this assumption we exercise varieties of discrimination."[123]

An advantage of an approach to public policy issues through issues of infant development is that it alerts us to the dynamics frequently involved in shaming and gives us reason to suppose that its dehumanizing tendency is no accident, nothing we might easily remove while keeping shame's expressive and deterrent potential. It is part of the logic of infantile narcissism itself. Let us now turn to issues of law and public policy with these problems in mind.

Chapter 5

# Shaming Citizens?

*Quamdiu vixerit, habebit stigmam.*
[He will have the penal tattoo as long as he lives.]
—Petronius, *Satyricon* 45.9

*Sit denique inscriptum in fronte unius cuiusque quid de re publica sentiat.*
[Let each man's opinions about our state be tattooed, at long last, on his forehead.][1]
—Cicero, *Against Catiline* 1.32



## I. Shame and the "Facilitating Environment"

Societies inflict shame on their citizens. They also provide bulwarks that protect citizens from shame. Law plays a significant role in both parts of this process. A decent society, one might think, would treat its citizens with respect for their human dignity, rather than degrading or humiliating them. A decent society would also protect its citizens from at least some types of degradation or humiliation. In this chapter we shall investigate public shaming, asking whether the law should ever use shame as a device to bolster public morality. In the next chapter we shall study a few of the ways in which law can protect citizens from humiliation. The two topics are closely linked, since one of the types of humiliation from which citizens might most want protection is law-based or law-administered humiliation.

By examining these aspects of the role of a legal system, we are asking, in effect, how law can provide what Donald Winnicott called a "facilitating environment" for lives of trust and reciprocity. We are thus investigating the psychological underpinnings of some cherished liberal norms. Let us now return, then, to our argument about child development. Although my ensuing account of law will be supported by a variety of arguments, many of them independent of that particular psychological account, the account provides the political argument with additional depth and force.

Having described the dangers and excesses of narcissism, Winnicott and Fairbairn go on to describe a norm of emotional health, a condition in which emotional development is said to culminate in a person who has not suffered some unusually disturbing blow. Fairbairn revealingly uses the term "mature dependence," rather than "independence," and contrasts this with the young child's "infantile dependence."[2] In infantile dependence a child perceives itself as terribly needy and helpless, and its desire is to control and incorporate the sources of good. In mature dependence, by contrast, which from now on I shall call "mature interdependence," children are able to accept the fact that those whom they love and continue to need are separate individuals and not mere instruments of their will. They allow themselves to depend upon caretakers in some ways, but they

do not insist on omnipotence; they also allow the caretakers, in return, to depend in certain ways upon them.

Although this acceptance is never achieved without anger, jealousy, and envy, the story of maturity is that at a certain point children will be able to renounce envy and jealousy along with other attempts to control. They will use the resources of gratitude and generosity that they have by now developed—and developed in part on account of their guilt and sorrow—to establish the relationship on a footing of equality and mutuality. They acknowledge that they will always need love and security, but they see that this can be pursued without a jealous attempt to possess and control. It is only at this point, Fairbairn stresses, that adult love is achieved, since love requires not only the recognition of its object's separateness, but also the wish that this separateness be protected.

This state of health is a precarious achievement, however, and highly prone to destabilization by forces both personal and social. Behind the increasing competence and maturity—and, indeed, the mature and generous love—of such an adult lurk immature wishes that are never altogether displaced: seething jealousy, a demand to be the center of the world, a longing for bliss and comfort, a consequent desire to surround oneself with "normals" and to stigmatize vulnerable people and groups. The form these demands take will be influenced by each individual's familial and personal history; but it will also be influenced by the surrounding society, which can create to varying degrees what Winnicott calls a "facilitating environment" for the emotional health of its citizens.

What, then, should these issues of stigma, shame, and narcissism mean for public policy? If the only issue we had to deal with were the emotional health of those who stigmatize others, some liberals might insist that law and public policy have no business promoting emotional health by moderating the influence of stigmatizing and branding in citizens' lives. If those "normals" are acting out an infantile type of shame, and failing to form relationships of mature interdependency, so much the worse for them, such a liberal might say, but that is part of their choice of a way of life, and the law has no business intervening. I think that even such a liberal might be answered, because surely the capacities for emotional health, self-respect, and



mutually respectful relationships with other citizens are "primary goods" that it seems reasonable to think any liberal society should make available to its citizens.[3] It is clear, however, that the stigmatizers and their mental health are not our only concern. The stigmatized suffer tremendous damage from the stigmatizing behavior of others. Sometimes they suffer legal and civil disabilities through no fault of their own, as when a minority religion or a minority lifestyle that does no harm to nonconsenting third parties is discriminated against under law. Still more frequently, they suffer from pervasive discrimination in housing, employment, and other social functions, with no legal recourse, as has long been the situation of gays and lesbians in most modern societies, along with the short, the fat, the HIV positive, and many others. Almost always, too, individual members of stigmatized groups suffer pain from mockery, taunting, and the assault on their human dignity and individuality that is so intrinsic a part of shaming.

This being the case, any society built on norms of mutual respect and reciprocity has very strong reasons to consider how the harmful impact of stigma can be minimized. Although political liberals and communitarians differ on many questions, they presumably can agree that mutual respect and reciprocity are extremely important social goods, goods that lie at the heart of the political conception of a liberal democracy such as the United States.[4] Thus, up to a point at least, we may advance an argument that has some hope of persuading communitarian proponents of greater social homogeneity, as well as political liberals who hold that reasonable disagreement about values is a hallmark of a liberal society.

One point should be strongly emphasized from the start: the impact of institutions on child development goes deep. It is crucial not to think of children as if their development takes place in the "private sphere" until they are adult citizens. At every stage, it is affected, for better or worse, by laws and institutions. A society's public norms regarding matters of gender, sexuality, and discrimination affect the lives of parents, hence those of their children, in many different ways. As children mature, these norms affect children more directly. Thus, for example, the norms of masculinity that I have discussed with reference to Chodorow and to Kindlon and Thompson are

transmitted by parents and peers to children against the background of social norms and institutions. There are many ways in which laws and institutions can affect these norms: for example, through public education, formal and informal; through policies that give men incentives to participate more fully in child care; and through parental leave and through incentives to employers to create more flexible work policies.[5] The creation of a norm of maleness that emphasizes interdependence rather than self-sufficiency is a complex task, involving the participation of institutions in many different aspects of children's and parents' lives, and at many different levels. Thus the specific areas of law that I shall henceforth investigate are but a small and especially obvious part of the terrain to be considered.

Our first question concerns the active participation of law in inflicting shame: when, if ever, is this a good thing? It may look pretty obvious that the law should not cause citizens degradation or humiliation any more than it should participate in slavery. Even if a citizen wants to be humiliated (and even if the preference for humiliation is one that, within certain limits of bodily safety, the law typically respects among consenting adults in personal relationships), for the state to dole out humiliation to the willing customer seems subversive of the very ideas of dignity and equality on which liberal democracy is based. Suppose the law said to its citizens: "Here is a penny. If you give back the penny we will treat you with respect; but you may keep the penny, in which case we will subject you to humiliating treatment." This offer seems unacceptable, even in a democracy that attaches great value to freedom of choice.[6] We do not want to live in a democracy in which people have to pay to be treated with respect—even if the money is trivial and is given to them by the state. Respect is a sine qua non of the relationship between the state and its citizens, all of its citizens.

Those who propose that the state participate in shaming citizens do not directly question this conception of the liberal state. Instead, they appear to rely on two distinctions that we will need to examine: a distinction between criminal offenders and other citizens; and a distinction between shaming that merely humiliates and shaming that performs a constructive social function. Thus we cannot rule



out their proposals from the beginning on the basis of a general conception of liberal democracy. We must investigate the proposals in their detail.

## II. Shame Penalties: Dignity and Narcissistic Rage

Shame penalties have recently attracted a great deal of interest. In part, this interest stems from a more general conservative desire to revive the blush of shame. Communitarian theorists claim that citizens today have lost inhibitions and that social disorder and decay have been the result. We can best promote social order and give support to important values connected with family and social life if we do stigmatize people who behave in a deviant way: alcohol and drug offenders, single mothers, people living on welfare, and so forth.[7] Kahan and other proponents of shame penalties in the law are in part motivated by something like this general idea.

For Dan M. Kahan, the basic purpose of punishment is expressive: by punishing certain sorts of offenders, society expresses its most basic values.[8] This being the case, he argues, shame penalties have a particular power. Humiliating someone in public makes a definite statement.[9] The person cannot hide: his offense is exposed to the gaze of others. By contrast, even imprisonment, humiliating though it is, is too anonymous: the person is shut away behind closed doors rather than being hung up for public viewing. And Kahan commends shaming particularly strongly as an alternative itself to other "alternative sanctions," that is, sanctions not involving imprisonment. Paying a fine, he argues, is just not humiliating; thus fining really does not involve a statement by society that a given form of conduct is disgraceful. We think nothing much about paying a parking or even a speeding ticket; we think we have got off, and we don't feel disgraced. (We may note that he ignores the burden fines impose on poor people.) And the alternative of community service, Kahan argues, is even worse, because it rewards a person for disgraceful conduct. Instead of being humiliated, the person is given

something good to do, something about which he can feel good himself, and something that will make others think well of him.

In addition, Kahan and Etzioni add, shame is likely to have a very powerful deterrent effect.[10] People who pick up prostitutes will be far less likely to do so if they know that part of their penalty will be unpleasant publicity in the newspapers. People will think twice about driving while intoxicated if they know they may have to drive around for a year with a license plate saying DUI. And those New York businessmen who went to Hoboken to eat lunch and then peed in the street would probably have thought twice had they known that the penalty would be not a quiet, hidden fine, but rather the public act of scrubbing the streets with a toothbrush.

These are plausible claims. Shame does have powerful expressive and deterrent effects. So we need to have more to say against these punishments than the simple fact that they seem unpleasant. Let us, then, grant to Kahan that one thing punishments do is to express social values. If the primary function of shame penalties were to express certain valuable, concrete social norms and to give people (both the offenders and the general public) very strong incentives to live up to those norms, then there would be a strong expressivist case to be made for them.

Even in this imagined situation, where shame penalties are securely tethered to specific concrete norms, political liberals would still have reason to inquire whether the norms being enforced in this way are norms that law is really entitled to enforce. Are they central to the political conception of a liberal democracy, or are they the sort of thing about which citizens reasonably disagree, and whose enforcement is therefore, according to the political liberal, not the business of law? I have argued in chapter 1 that such a liberal, while not strictly committed to accepting Mill's harm principle as a necessary condition of the legal regulation of conduct, is likely to be quite sympathetic to that principle. Thus, the political liberal will still object to many shaming penalties on the grounds that they are penalties for offenses that really should not be offenses because they involve "self-regarding" conduct, that is, conduct that does no harm to nonconsenting third parties. Many laws dealing with drugs and sexual behavior, for example, fall in this category.



This objection, however, is not an objection to shaming penalties as such: it is an objection to all forms of punishment for offenses that fall in the category of the "self-regarding." And it is clear that one objection we often have to certain shaming penalties—for example, to newspaper publication of the names of men who solicit prostitutes—is that we are uneasy with the criminalization of prostitution and soliciting, and become even more uneasy when a harsh punishment ensues. We need to separate that objection from reasons we might have for objecting to shaming penalties as such. So from now on let us consider only offenses that involve harm to nonconsenting parties: they meet Mill's test. Kahan's failure to separate these two categories of offense seems to me unfortunate, but we need not follow him. Let us, then, consider offenses such as drunk driving, theft, fraud, harmful sexual conduct (e.g., child molestation), and other related offenses.[11] These are really bad things that deserve to be punished.

Notice that the nature of our system of criminal justice makes it impossible to institutionalize a pure shaming punishment, as we have articulated the distinction between shame and guilt. Shame, I argued, pertains to a trait or feature of the person, whereas guilt pertains to an act. Our system of justice is based on the idea of a guilty act. In order to get to the point of punishment at all, an offender must have been indicted and convicted of a criminal act, and the punishment, strictly speaking, is a punishment for the commission of that act. Thus the use of shame comes along after guilt has already determined the structure of indictment, trial, and conviction. In other times and places, things were not so: religious minorities, heretics, people with "deviant sexuality" were punished by public shaming without a conviction for any criminal act.[12] What we are assessing, then, is a mixed proposal: that shaming come along at the penalty phase, for a person convicted of a criminal act, after guilt has already shaped the trial. The fact that many consider shame penalties acceptable can in part be traced to the mixed character they inevitably take on in our legal system.

Five arguments against shaming penalties have been advanced in the recent literature. I shall now argue that each of them receives a deeper rationale by being connected to the account of shame and stigma I advanced in chapter 4. We might oppose shaming penalties

without endorsing that account, but the account gives more power and flesh to the arguments, and thus gives us new reasons to accept them.

The first argument that has been advanced is that shame penalties humiliate, and thus constitute an offense against human dignity.[13] This argument, rightly understood, does not require us to hold that people who receive these punishments actually *feel* humiliated; thus it is not undermined by the phenomenon (known in the ancient Roman world as well as in subcultures today) that groups targeted for shaming may come to feel pride in the marks inflicted upon them.[14] Rightly understood, the argument focuses on what the penalty itself expresses: the intent to degrade and humiliate. Thus it is incompatible with a political commitment to giving all citizens the social conditions of self-respect, even if, for some contingent reason, the person happens not to feel humiliation.

Why is shaming supposed to be an offense against human dignity in a way that fines and imprisonment are not? The claim is that those punishments are meted out for acts; they do not constitute a humiliation or degradation of the whole person (though the punishment itself may come to have such features, as I shall discuss at the end of this section). Thus they track guilt, and indeed are predicated on a finding of guilt. Shame punishments, historically, are ways of marking a person, often for life, with a degraded identity. Shame, I have argued, is an emotion that focuses on a trait, whereas guilt focuses on an act. Guilt punishments make the statement, "You committed a bad act." Shame punishments make the statement, "You are a defective type of person." The two statements may be difficult to distinguish in our current legal situation, since shame piggybacks on guilt, and is a mode of punishing a person who has been convicted of a guilty act. But tattoos, brands, signs—these mark a person as having a deviant identity, and their role historically has been to announce that spoiled identity to the world. In many times and places no finding of a guilty act was required; the identity was targeted directly, often in ways that persisted through life—the tattoo, the scarlet letter. And even in our inevitably mixed case, shame announces to the world that this is a person of a certain (degraded) sort: a "drunk," a "bad woman," et cetera. When the public laughs at someone in the pillory, they are not invited to focus on any particular act: they are invited to scoff at the person's spoiled identity. The first argument against penalties that shame is that this message, administered by the state, is incompatible with the proper public regard for the equal dignity of all citizens.



A variant of this argument, which does deal with the offender's actual feelings, has been recently advanced by Julia Annas.[15] Using evidence from literature and history, she argues that shame, because it targets the whole person, is particularly likely to be linked to "a broken spirit"—a long-term inability to recover self-respect and a sense of one's own worth. These psychological claims, which are plausible, would give additional impetus to the contention that shaming penalties rob people of a central "primary good."

At this point I would like to inject a personal observation. As the child of an alcoholic mother, I contemplate the prospect that she might have had to drive around with a "DUI" license plate on her car. (In fact, she was never arrested, although no doubt she often drove while somewhat intoxicated.) Instead of quietly settling her score with the state through driving school, license suspension, and the other guilt penalties that are in common use, she would in that case have a public mark that would stain her identity permanently. Long after the license plate came off, she would be sullied in the community. She would be permanently marked as a "drunk mother." Moreover, my father, sister and I would also be marked as having a substandard identity (after all, it's a family car, and people would know her family connections even if it weren't). The difference between that penalty and the guilt-based alternatives seems to me enormous. I know that such a penalty would indeed have broken her spirit. It would be a cruel state, with deficient respect for human dignity, that would string up someone for public viewing in that way rather than offering treatment for the underlying problem, together with protection for privacy and dignity.

But let us consider the dignity argument in light of the account of shaming that I have presented. As I have suggested, one thing that shaming of subgroups typically expresses is a denigration of the very humanity of the people being shamed. They are somehow, in Goffman's terms, subhuman, not distinct human beings with individuality and dignity. More generally, in shaming people as deviant, the

shamers set themselves up as a "normal" class above the shamed, and thus divide society into ranks and hierarchies. Such statements do have expressive power: they give voice to something many people deeply feel. Nonetheless, there is surely something indecent about the idea that a liberal society, one built upon ideas of human dignity and equality, and respect for the individual, would express that particular meaning *through its public system of law.* The fact that the state is complicit in the shaming makes a large difference. People will continue to stigmatize other people, and criminals are bound to be among those stigmatized. For the state to participate in this humiliation, however, is profoundly subversive of the ideas of equality and dignity on which liberal society is based.

Some proponents of penalties that (seem to) involve shame deny that their proposed penalties humiliate. I shall turn to a few such proposals below. At this point I am only confronting the proposals of Kahan and Etzioni, who never deny that humiliation is a goal of the sort of shaming they favor. The dignity argument seems powerful against their view. Public humiliation by the state does appear profoundly at odds with norms inherent in liberalism. The basic attitude animating Kahan's policy is one that divides people into two groups, the frail and the above-it-all, and that scoffs at those disgraceful wretches down below us. Such forms of hierarchy may, and probably will, continue in human life. The liberal state, however, cannot become their agent without deeply compromising its role as guardian of equality.

In developing the dignity argument, I have so far relied only on my analysis of stigma and what it expresses, not on my underlying causal thesis about "primitive shame." And we could stop here. We have said enough to make the dignity argument a powerful one. If, however, we believe something like the developmental story I have given, we have further reasons to accept it. For on that account, people who inflict shame are very often not expressing virtuous motives or high ideals, but rather a shrinking from their own human weakness and a rage against the very limits of human life. Their anger is not really, or at least not only, anger at immorality and vice. Behind the moralism is something much more primitive, something that inherently involves the humiliation and dehumanization of others, because it is only in that way that the self can defend its fragile narcissism. Thus we can show that it will not be easy, if indeed it is possible, to remove from even the most morally tethered shame penalties the quality of insult and humiliation to which the proponents of the dignity argument rightly object. Primitive shame is only satisfied by humiliation: thus it is not easily removable from shame punishments, so long as primitive shame remains on the scene. Kahan does not seek to remove humiliation from shame penalties; indeed he seems strongly to favor it. So his proposal is vulnerable to the dignity objection directly. A different type of communitarian might, however, try to maintain that morally tethered shame penalties can avoid humiliating. Here our developmental story proves valuable, indicating that the link between shaming and humiliating is no accident. So if we have even a suspicion that this developmental story, or something like it, is correct, we should at least be more skeptical of some likely retorts to the dignity argument. The social conditions of self-respect for all citizens may indeed be jeopardized by the widespread use of punishments based upon shame, even if they claim that humiliation is not involved. I shall return to this point later, when we study some apparently constructive shame penalties.



Guilt, and punishments predicated upon guilt, do not suffer from a similar problem. For guilt contains within itself a separation between the person and the person's act, and is thus fully compatible with respect for the dignity of the person. Punishments may treat the act very harshly, while still expressing the sense that the person is worthy of regard and of ultimate reintegration into society. Indeed, Kant's view was that retributive harshness was a *way* of expressing respect for the person, by holding him fully responsible for his acts. By both holding people responsible for their crimes and then offering them ways through which to make reparation and to reintegrate themselves into society, we strengthen the reparative capacities, in the process treating the offender as someone from whom good things may come. Community service, for certain crimes, would be one way of promoting reparation and reintegration.

Let us now turn to a second argument against shaming penalties advanced by James Whitman.[16] Whitman argues that shaming penalties typically involve a type of mob justice and are problematic for that

reason alone. In shaming, the state does not simply mete out punishment through its own established institutions. It invites the public to punish the offender. This is not only an unreliable way to punish, but one that is intrinsically problematic, for it invites the "mob" to tyrannize over whoever they happen not to like. Justice by the mob is not the impartial, deliberative, neutral justice that a liberal-democratic society typically prizes.[17]

This argument, like the dignity argument, can be strengthened by thinking back to our account of stigmatization in chapter 4. If fears of inadequacy typically lead people to form groups and to define themselves as "normals" over against some less powerful group, and if the infliction of stigma and shame is typically connected with this process of group formation, as Goffman has powerfully argued, then we can see more clearly just what is likely to prove objectionable about it. These mechanisms of group self-protection look very different from the type of balanced and impartial administration of justice we rightly demand from a system of law.

Adding to Goffman's account of stigma the causal account of "primitive shame," we can go still further: often, the reasons why people form such groups and target others is a kind of deeply irrational fear of defect that is part of a more general shrinking from something troubling about human life, a search for an impossible type of hardness, safety, and self-sufficiency. Appreciating the irrational roots of the desire to shame makes us see even more clearly why a system of law ought not to build on this motive. As with disgust, the claim is not that all emotions are unreliable as a basis for legal rules. The claim is a specific claim about the etiology and operations of this particular emotion.

A third argument, distinct from Whitman's though closely related to it, is Eric Posner's historical argument that shame penalties are simply unreliable.[18] History shows that they very often end up targeting the wrong people, and/or calibrating inaccurately the magnitude of the penalty. They therefore fail to fulfill well the deterrent function of punishment: they may deter behavior that is not bad, but rather simply unpopular, while failing to deter other, far worse behavior. To the ample evidence from Europe presented by Posner (and also Whitman), I can add the ancient Roman evidence, which shows the same thing very clearly. Although shaming penalties in late antiquity were introduced with a clear class of real offenses in view (theft, fraud, et cetera), they very quickly ended up being used to stigmatize whatever group happened to be unpopular at the time: sexual minorities, Christians, and, in the era of Christian domination, heretics.[19]



We can understand why shaming is likely to be unreliable by connecting this historical argument to Whitman's argument about mob justice. Shaming is unreliable in part because it is administered not by neutral and impartial agencies of government but by the mob. When government invites the mob to punish, it can expect targeting of people who are regarded as unsavory, even if they have done nothing, or nothing much, wrong.

Once again, the historical evidence by itself makes a very strong case for Posner's point. But history is slippery. Our data are always going to remain incomplete, and it is hard to know how representative recorded cases are. It would be good to have a causal hypothesis, in addition, showing us some reasons why shaming can be expected to be unreliable and uneasily tethered to the nature and magnitude of actual offenses. My story about shame and stigma provides such a causal hypothesis. It is no accident that shame shifts rather rapidly from real offense to mere dissident identity, because shame is not about a bad act in the first place. It is addressed to a person or group of persons, and to a person seen as embodying some deviant identity (perhaps even an identity seen as disgusting), against which a dominant group seeks to define, and thus protect, itself. When we add that the mechanism behind the protection is a search for invulnerability and narcissistic triumph, we can see that the people who are likely to be targets of the shamer's rage are not particularly likely to be real malefactors but, instead, anyone who reminds the "normal" of his weakness, anyone who can become, as it were, the scapegoat of these weaknesses, carrying them out of the community. Narcissistic rage is inherently irrational (in the normative sense) and unbalanced, and so it is no surprise that it goes after Christians as well as thieves, disabled people as well as forgers.

A fourth argument addresses the claim that shame-based penalties have strong deterrent potential. Psychologist James Gilligan argues that the evidence supports a very different conclusion: people who are humiliated become more alienated and troubled than before.[20]

Especially for alcoholics, child molesters, and others whom Kahan's shame penalties would target, shame is a large part of their problem in the first place. To expose that person to humiliation may often shatter the all-too-fragile defenses of the person's ego. The result might be utter collapse. Short of that, it is likely to be a sense of great alienation from society and its norms, which may well lead to greater violence if the offender is prone to violence. Using shame to control crime is, in that sense, like using gasoline to put out a fire. An additional, related consideration is that the shamed person may have no available source of respect in the community other than criminals or other stigmatized people; thus shame can reinforce a tendency to identify oneself with antisocial groups. These claims have been strongly supported by recent empirical research conducted by criminologist John Braithwaite, showing "stigmatization to increase lawbreaking."[21]

Once again, this argument, expressed in terms of general ideas of shaming and stigmatization, derives new force and depth from the psychological account of shame that we explored in chapter 4. In a person with an already fragile ego, as I argued, the experience of shame is closely connected with both depression (the broken spirit) and aggression. Then to reinforce the sense of shame may well lead to more, rather than less, violence. Recall Theweleit's German officers: it was precisely because they felt publicly humiliated by the defeat in World War I that they focused obsessively on violent imagery and projects of revenge. Kindlon and Thompson's research on boys—and our experience with violence in incidents such as Columbine—tell the same story. The infliction of shame, far from containing crime, is likely to lead to more violent outbursts.

Finally, we have an argument proposed by Steven Schulhofer, which appeals to the well-known phenomenon of "net-widening."[22] The basic idea is that shame penalties are likely to lead to an ever-widening attempt to put more people under social control. With shame as with some other initially promising reform proposals, the argument goes, the reform (such as early parole, juvenile courts, et cetera) is initially packaged as a way to divert low-level, less dangerous offenders to a regime that is less harsh than prison. They are then proposed, however, to a public that is in no mood to take chances, especially with people who might otherwise have been sent



to prison. So a shift occurs: the allegedly "lighter" penalty is not used for people who would otherwise go to prison after all. It is used, instead, for people who would probably have gotten light probation or would not have been prosecuted at all, in a regime of limited resources. So instead of being diverted out of prison the shamed person is diverted into social control and penalties they otherwise would have escaped. This argument suggests that shaming will not function as a progressive reform, but rather as an agent of increased social homogeneity and social control.

This argument reveals a tension in Kahan's pro-shame argument, for he shifts his ground between two conceptions. When he faces opponents who criticize shaming as harsh, he portrays his proposal as an alternative to prison. In other contexts, however, he embraces the goal of increased social control, focusing on offenses that are usually not prosecuted at all, and/or treating shaming as an alternative to fines and community service. Unlike our other arguments, this is not a direct argument against shame penalties since we would need to combine it with a normative assessment of increased social control. It does, however, raise some serious worries about the claim that shaming will be "light" and "progressive." Combined with the dignity argument and the argument of Eric Posner, it becomes a very serious worry about the extent and reach of these penalties.

This worry is exacerbated when we think about the psychology of shame. People are all too ready to project shame outward, dealing with their own uncertainties in ways that stigmatize others. The "net-widening" involved in shaming can easily be imagined as an instance of this baneful social dynamic. This suspicion will be reinforced when we study "moral panics" in our next section.

We have, then, five arguments against shaming penalties. All of them have independent force, and any one of them might be sufficient to convince us that these penalties are a bad idea. I have argued that we get additional support for these arguments from the account of shame I have presented, and a much deeper understanding of why shaming penalties should be thought to threaten key values of a liberal society.

Defenders of shame penalties frequently reply by insisting that these penalties well serve four primary purposes of punishment: retribution, deterrence, expression, and reform or reintegration. I have

already argued that, though shame penalties are powerfully expressive, what they express is deeply problematic in a society based on ideas of dignity and equal worth. Their deterrent potential has also been called into question by Posner's and Gilligan's convincing arguments. But we need to consider further the claims about retribution and reform.

James Whitman has written that shame penalties are "beautifully retributive."[23] Toni Massaro, another leading analyst of such penalties, concurs.[24] And of course there is something quite striking about punishments like the Hoboken toothbrush cleanup—they have a Dantesque flavor, and seem exquisitely tailored to the crime. Similarly Dantesque is the Kahan example of a slumlord who was sentenced to live for a period of time in one of his own rat-infested tenements. Some of these examples appear not to be about shame at all. The slumlord's punishment was not apt on account of the way it shamed him in front of others. In fact we have no reason to suppose that he was shamed at all, as in the cases where people wear special signs or marks. The public did not administer the punishment; he was not held up for public viewing, and, so far as we know, his ordinary dealings with people were not affected by marks of a "spoiled identity." In fact this punishment seems like a perfectly ordinary retributive guilt punishment: in retribution for his bad act, he is being assigned a penalty that seems more nearly apposite and proportional than simply going to prison.

If we consider the core group of shame penalties, however, it is not clear that they really do serve the purpose of retribution, as that notion is best understood. In an excellent recent article,[25] Dan Markel has argued (drawing on Herbert Morris's classic discussion)[26] that the best way to make sense of retributivism in the theory of punishment is to think of it as a view about free riding and equal liberty. We believe that all citizens are equal and should enjoy an equal liberty of action. The criminal offends against this basic social understanding, claiming for himself an unequal terrain of liberty. He implicitly says, I will steal, and you will continue to obey the law. I will rape, and nobody will rape me. As Kant argued, people who in this way make an exception of themselves are treating humanity as a mere means, rather than respecting it as an end. (This is the best way



of connecting the Formula of Universal Law with the Formula of Humanity: the way we can tell whether we are using other people as a means is to test our conduct by seeing whether it could be made into a Universal Law of Nature.)[27] Retributive punishment brings the offender to book for that claim of unequal liberty: it says, no, you are not entitled to an unequal liberty, you will have to accept the limits that are compatible with a like liberty for others.[28] It is thus very different from revenge, which is typically based on personal motives and has little concern with general social equality.

If we understand retributivism in this way, we see, as Markel argues, that shame penalties are not at all retributive. They do not express a sense of the equal worth of persons and their liberty, but something very different, something connected to hierarchy and degradation. Returning to my account, we see this very clearly: for defining a top group against deviant groups is what shaming penalties seem to be all about. They certainly may and often do express the desire for revenge—and as I have argued there is often a powerful connection between primitive shame and vindictive rage.[29] They are not, however, "beautifully retributive" in anything like Kant's sense, the sense in which retributivism is a defensible and powerful theory of punishment for a liberal democratic society.

What about reform? John Braithwaite has argued influentially that shaming penalties serve very well the purpose of confronting the offender with his offense and the toll it has taken on others, and, ultimately, of reintegrating the offender into the society.[30] He practices, a type of "reintegrative conferencing" between victims and offenders that promotes these goals.[31] Such efforts are becoming increasingly common in a variety of liberal democracies.

It is important to understand Braithwaite's argument correctly because his views have sometimes been assimilated to those of Kahan and Etzioni, who cite his work as if there is agreement. He insists that he does not favor "shaming penalties," and writes, "This is a term I have never used in my writing unless it has been to disagree in passing with shaming penalties in response to the U.S. law review debates of the late 1990s."[32] Moreover, Braithwaite's overall theory of punishment is "utterly opposed to retribution," and focused instead on prospective questions of reform and reintegration. Normatively,

Braithwaite is not a communitarian, valuing social homogeneity as a central goal, but a republican, valuing both strong communities and strong individuals.[33] He uses the term "communitarian" in a descriptive sense only, as a variable indicating the strength of social bonds in a society. And while he admires some aspects of a strongly "communitarian" society such as Japan, where social bonds are very strong, he finds fault with Japan in other respects, for its insufficient protection of individuals against pressure to conform.[34] The type of consensus he values is the type a political liberal also values: consensus about society's core political values. And respect for each person is a core value of the society he would favor. "[F]undamental human rights should set legal limits on what restorative processes are allowed to do."[35] It is against this general background that we must situate Braithwaite's argument on behalf of a limited use of shame in punishment.

Not surprisingly, Braithwaite's normative proposal is very different from those of Kahan and Etzioni. First of all, he makes it clear that he considers shaming appropriate only for crime that involves harm to a victim: "predatory crime" is his characteristic phrase. Thus he operates from the start within the limits of Mill's principle. Second, he draws a very strong distinction between shaming that stigmatizes and shaming that promotes reintegration. He is critical of the former (although at times he suggests that it might be better than no shaming at all), and supportive of the latter. The proposal with which he has experimented over the years is one that confronts victims and aggressors, arranging a type of "reintegrative conferencing." He makes it abundantly clear that humiliation is entirely unacceptable in the context of this endeavor.

There are certainly aspects of Braithwaite's book that have contributed to the mistaken assimilation of his position to those of Kahan and Etzioni: one example is his unusual use of the term "communitarian," which can easily be misread as expressing a sympathy for normative communitarianism as a political philosophy.[36] From the point of view of my argument here, however, the central problem with Braithwaite's account is his failure to make any clear distinction between shame and guilt. He favors punishments that focus on the act rather than the person, and that ask the person to make atonement for an act, as a prelude to being forgiven and reintegrated into the



community. He insists that these punishments must be meted out without stigmatization, and in an atmosphere of mutual respect for humanity. All of this is very appealing, and I am inclined to have much sympathy with the proposals he advances.[37] What is totally unclear is whether this has anything at all to do with shame. He insists that malefactors are not to be humiliated, and that we are to separate the act from the person. All this is characteristic of guilt rather than shame. Similarly, notions of forgiveness and atonement are at home in the world of guilt rather than shame. In fact, there would appear to be no important difference between Dan Markel's confrontational conception of retributivism, which focuses on expressing to the wrongdoer the badness of an act that claims an unequal liberty and violates the rights of others, as a prelude to atonement and forgiveness, and Braithwaite's so-called shaming penalties. But Markel, it seems to me correctly, situates his conception in the Kantian world of respect, guilt for an act, and subsequent apology and atonement. (Kant is not enamored of forgiveness, but that is a feature of Kant, not of the type of conception he advances.) So I conclude, tentatively, that Braithwaite's ideas are not only very far removed from those of Kahan and Etzioni—as he himself stresses—but also quite unconnected to traditional notions of shaming punishment, and rather part of the universe of guilt punishments. Braithwaite himself acknowledges this point, when, in recent writings, he uses the term "Shame-Guilt" in place of the simple "shame" for the emotion that (within limits) he favors, and when he describes the spectatorial emotion he seeks as a "just and loving gaze."[38]

What, then, of constructive shaming? In chapter 4 I have said that there are instances in which guilt is an insufficient response and shame is appropriate. I have mentioned Barbara Ehrenreich's account of working-class poverty in America as one instance of a public invitation to shame that seems legitimate. Americans should examine their ways of life and their commitments, and, so doing, realize with shame that we have failed to live up to ideals of equal respect that are central in our society. This sort of shame, as a result of critical self-examination, seems likely to promote reform. Is there a way in which the law could devise shame penalties (as distinct from Braithwaite's basically guilt-based penalties) that focus on this constructive sort of shame, which involves an acknowledgement of one's

common human weakness and is thus not only not narcissistic, but actually antinarcissistic? What might such shame penalties (as distinct from guilt-based penalties) look like, and for what crimes would they be meted out?

The minute the law starts shaming individual citizens, there are always issues of degradation and humiliation to be worried about. Even when that individual is extremely powerful, and guilty of a kind of narcissism and a pretension to invulnerability that seems rightly addressed by Ehrenreich's sort of invitation to shame, the idea that the law should assail the fragile individual with a ritual of public humiliation seems unpleasant. Let us consider two recent examples, where public shaming seems initially attractive for the type of reason that Ehrenreich gives. Martha Stewart stands accused of insider trading. (She has not been indicted for that criminal offense, but rather for a related civil offense for which the burden of proof is lower.) Her whole career has been one long paean to narcissism. The idea purveyed in her magazine and her television appearances, that women and their homes should be perfect, is a narcissistic fantasy of a baneful type, which has diverted attention from the real burdens (such as elder care and child care) facing women in our society. Indeed, Stewart's success can be attributed in large part to the shame she induces in messy ordinary women, whose homes are far from perfect. So it seems delicious that Stewart would be publicly shamed by being shown up as nothing but a common criminal. Well, of course, one will say, if she is guilty she should be punished. But that is too quick a response: for any prosecutor must choose among many possible crimes, and Stewart is being singled out for prosecutorial attention, on the basis of what looks to be a very mild and questionable case, while other much more serious probable offenders have not been indicted. Worse still, however, is the punishment of public shame that is a large part of Stewart's situation: she has suffered significant reputational losses through shame, even before her case is heard.

One of the downsides of fame is that one is strung up for public humiliation willy-nilly, and nothing a judge could do would equal what has happened to her already. It seems to me, however, that what is happening is quite morally unpleasant, and that the relationship between the legal assault on Stewart and the public shaming is most



problematic. For example, the indictment was issued on the next working day following a television special on her life that was nothing but food for the public desire to see her shamed. People are gleeful about her "downfall" because they like to see her alleged perfection sullied, but that is no excuse for parading intimate aspects of her life across network television in a tasteless and humiliating manner. Indeed, the pleasure the television drama solicits is itself narcissistic: for it says to the viewer, "She told you that she was perfect, and that you are a mess. Well, she is a mess, and you (because you no doubt are not guilty of insider trading) are, by contrast, perfect." Suppose a judge had ordered the making of that NBC special as a punishment: I think that would have been an egregious abuse of the legal system. But it is almost as bad that the drama and the indictment were so closely linked together, as though life imitated art.

Even when the law does not participate, public shaming that might initially look constructive often has a deeply unpleasant aspect. Let us now consider another recent recipient of shame, William Bennett. Bennett stands revealed as a heavy gambler. Even though he has not harmed his family or even violated the norms of his own religion, people find hypocrisy in the juxtaposition of this reality with the public pretense of virtue. I am quite unsure of the charge of hypocrisy, but at any rate there probably is something narcissistic about Bennett's use of his vast wealth for his own private amusement. And Bennett has long been in the habit of casting shame upon the imperfect. So, is it right to shame him publicly? And, were there an occasion, would it be right for the legal system to join in?

Here we are confronted with the inconvenient problem that Bennett has not broken any law: so the public will have to step in without the law's assistance. I have to say that I find the spectacle distasteful, indeed distastefully narcissistic. Many of the people who are shaming Bennett are guilty of what seems to me to be exactly the same moral error: namely, they are spending their money on their own personal pleasure, rather than on the needs of the poor. That is what most well-off Americans do. Is there really a great moral difference between gambling and ski vacations? So the shaming is not as antinarcissistic as it seems; it is in many respects an anxious defense-from-scrutiny of people's own narcissism. Even if Bennett had violated some law in

the course of his gambling, it seems to me that it would be quite inappropriate for the judge to join in the public chorus of shame, for example, by ordering the making of a prime time television special (which we will shortly have, no doubt), documenting Bennett's allegedly shameful behavior. In general, public intrusion into people's private conduct, where that conduct is not relevant to their performance of their public duties, is often an unpleasant form of narcissistic self-defense.

By considering these individual cases, we come to see that part of what makes Ehrenreich's invitation to shame constructive is its utterly general character, and, importantly, its self-inclusiveness. The public shaming of Stewart and Bennett is oppositional: people line up against them, taking pleasure in their downfall. In this way, shaming others reinforces narcissism, buttressing people's false belief in their own invulnerability. Ehrenreich's proposal, by contrast, is inclusive: issued to all relatively well-off Americans, including herself. Moreover, it is informal, and in that sense gentle: readers are urged to reflect, rather than forced into some ritual of public confession. And it is, so to speak, silent: each person is invited to reflect in the privacy of that person's conscience, and to join in public discussion only as chosen. Could we imagine a compulsory public penalty that would be constructive in a similar way? These features seem difficult to capture in a system of law.

The closest that I can come in thinking about this issue would be to imagine shame-based penalties for powerful organizations—corporations, law firms—who have committed crimes of a sort that reveals the very kind of hubris and narcissism that Ehrenreich attacks. And in fact both Julia Annas and Deborah Rhode have suggested that shaming penalties might be appropriate for organizations that do harm, where they would be inappropriate as applied to individuals.[39] Annas argues that organizations cannot suffer the deep harms that individuals suffer, and that they have, as such, no dignity to protect: thus it may be appropriate to humiliate them by bad publicity. Rhode, thinking particularly of law firms that violate norms of professional conduct, suggests that bad publicity for offending firms, for example, would not be objectionable in the way that shaming would be outside this institutional context.



Of course there is informal public shaming of sleazy corporations and sleazy law firms. And possibly there should be more of it, both in the press and in public discussion. Certainly the narcissistic pretension to invulnerability has been a major source of criminal activity on the part of corporations and their officers, and antinarcissistic shaming of a sort that reinforces common human vulnerability is much to be desired in an America all too hooked on myths of invulnerability. As to whether shame should be meted out by the legal system, however, I have no clear view. Annas and Rhode certainly make a strong argument with respect to issues of dignity and certainly bad publicity among one's peers is not the type of mob justice about which Whitman is most concerned. The worry that shame will produce more bad behavior, not less, probably does not apply in such cases as it does to people with alcohol or drug problems. Whether Posner's worries about uneven deterrence apply here remains unclear. It seems to me that deterrence is likely to be most appropriate if the focus is on the acts of which the organization has been guilty, rather than on a simple shaming of the whole organization. To that extent, the punishment would be on the borderline between shame and guilt.

Etzioni raises another interesting question: should shame penalties be used for acts that it makes no sense to render illegal? A red flag goes up immediately. One good thing about the penalties he and Kahan favor is that they are not pure shame penalties because they are securely tethered to a finding of guilt for an act. We know that in other times and places people have been publicly shamed for the sort of people they are and that this has caused great damage. Etzioni's example is initially more attractive, however: he focuses on failures to aid, arguing that "bad Samaritan" laws are probably not workable and that a much more feasible way of punishing people who do not intervene to help someone who is being assaulted, for example, is to give them bad publicity, thus promoting norms that encourage people to take risks for others. He recognizes that liberals will ask, Why not focus on good publicity for people who help? His answer is that people, as he sees it, are more likely to be motivated by fear of bad publicity than by desire for good publicity. We could say that this sort of shaming has many of the features that make

Ehrenreich's example attractive, even if not all: it is antinarcissistic and aimed at jolting obtuse people out of their complacency.

Etzioni's psychological claim is speculative, and he offers no evidence for it. More important, he avoids the key question: who does the publicizing? Obviously there can be no objection to citizens getting together to disseminate information of this sort, or to journalists making a practice of reporting on such failures. But that, of course, is not a shaming punishment. If, however, the state is really going to get involved, then what will be the basis for this involvement? If there is no bad Samaritan law, what is the state saying, exactly, when it metes out a shame punishment for these bad acts? We are punishing you for something that is not illegal, and which we have no intention of rendering illegal? That would be a rather peculiar statement. And how will the punishment be determined? Will there be a trial, and evidence? If not, then the idea is obviously unacceptable. If so, we require a totally new institutional framework for trials concerning acts that are not illegal. Etzioni is so unclear about what he is actually proposing that we really do not yet have a position to assess.

The right direction, in thinking about nonimprisonment sanctions, seems to me to be Braithwaite's: whatever penalties we choose, our focus should be on the future, on reform and reintegration. Community service is often valuable in this effort, precisely for the reason for which Kahan does not like it: it gives people something good to do, and a good new relationship to the community, strengthening the sense of self as good and constructive rather than bad and antisocial. Also of the first importance are programs aimed at treatment for drug and alcohol problems, and therapy for sex-based offenses. Such treatments are generally most effective precisely to the extent that shaming is kept carefully out of them. Thus Alcoholics Anonymous, by far the most effective treatment program for alcoholism, practices what its name preaches. Members are never able to use publicly the full name of any other member. Even when they have come to know a person as a friend, they may not mention that person's name in connection with A.A. (Alcoholics Anonymous) membership. So strict is this prohibition that it was for a time unclear whether quite a few of my mother's friends would be allowed to allude to her A.A. service, and their personal experience with it, at



her funeral. They did speak, but it was understood to be a rare breach of decorum.

Admittedly, there are numerous crimes for which community service and other types of restorative justice are not appropriate alternatives. Usually for these crimes shame penalties are not appropriate either, and prison is chosen. Nonetheless, defenders of shame penalties point to the humiliating character of imprisonment in order to convict the opponent of inconsistency: either reject prisons, Kahan's argument goes, or accept signs and placards and other types of public shaming.

We should admit that as they operate in many societies, and certainly in the United States, prisons are profoundly humiliating. The question is whether this must of necessity be so. James Whitman's extensive comparative study of punishment in the United States, France, and Germany establishes that the trend in Europe has been toward mildness in punishments and toward an acute concern with respect for human dignity.[40] Because in Europe's history penal practice was strongly class-divided, with harsh punishments going to the lower classes, modern European democracies focus anxiously on respect for the equal dignity of each individual, and punishments are always attentive to this respect. That focus has led to lighter punishments generally, to improved prison conditions, and to an emphasis on the fact that prisoners retain most of the rights of citizens. Maria Archimandritou's new book *The Open Prison,* a study of penal practices in the Nordic countries, Germany, and several others parts of Europe, comes to a similar conclusion; she documents in detail the trend toward extending to prisoners all the basic rights of citizens, including rights to health care.[41] The United States is the outlier, and we should not allow the deplorable state of our prisons to make us believe humiliation and prison must always go together.

Even in the United States, defenders of the rights of prisoners have long waged a campaign to establish in the courts and in the public mind the fact that prisoners are not just animals, that they have certain rights of privacy and rights to personal property.[42] We recall that issues of human dignity were central in leading a Pennsylvania court to rule that disgusting toilet facilities were a "cruel and unusual punishment." Judge Richard Posner recently wrote a very

interesting opinion that came to the same conclusion in the area of shame: he held that it is cruel and unusual punishment for a male prisoner to be forced to undress, shower, and use the toilet while being watched by a female prison guard.[43] In the process, he made some very significant observations about the status of prisoners:

> There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. In particular there would be no inhibitions about using prisoners as the subject of experiments. . . . I do not myself consider the 1.5 million inmates of American prisons and jails in that light. This is a non-negligible fraction of the American population. And it is only the current inmate population. . . . A substantial number of these prison and jail inmates, including the plaintiff in this case, have not been convicted of a crime. They are merely charged with crime, and awaiting trial. Some of them may actually be innocent. Of the guilty, many are guilty of . . . victimless crimes uncannily similar to lawful activity (gambling offenses are an example). . . . It is wrong to break even foolish laws . . . [b]ut we should have a realistic conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them. We must not exaggerate the distance between "us," the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.

Posner now goes on to argue that the plaintiff in the case deserved the right to protect his personal modesty from the gaze of strangers, given that the right to cover oneself is an essential element of human dignity.[44] Posner is not just issuing an opinion in a single case.[45] He is issuing a fundamental critique of American prisons. He clearly thinks that too many people are in prison in the first place, and that the treatment of prisoners as vermin is widespread and incompatible with the acknowledgment that they are human and, indeed, citizens. His reference to the Nazi practice of medical experimentation on



Jewish prisoners makes this point forcefully. We abhor that history, and yet we behave in similar ways.

There is no reason to think that the whole institution of imprisonment is incompatible with basic human dignity and respect. The very fact of limiting a person's freedom for a period of time does not express the view that this person is not fully human. The right direction to go in order to respond to Kahan is to pursue the humanization of prisons and the protection of certain basic rights of inmates. One essential first step in this process would be to rethink the grotesque policy current in ten U.S. states that denies convicted felons the right to vote for life.[46] Approximately 510,000 African-American men alive today in the United States are unable to vote for this reason; that is to say, one-seventh of the African-American men in the United States, and one-third of the African-American men in Florida and Alabama. In addition, 950,000 more African-American men are temporarily ineligible because of incarceration. One-third of the 4.2 million Americans disenfranchised for such reasons are African-American, although African-Americans comprise only 12 percent of the population.[47]

Such a policy surely does shame and stigmatize for life. European nations have never endorsed such an idea; indeed, in the nations where voting is compulsory, prisoners are required to vote like everyone else. Whitman has drawn attention to a very important difference between European and U.S. penal practices, although he may somewhat underestimate the importance of race as an explanatory factor.[48] Denying African-Americans equal dignity as citizens was not easy to do after the Voting Rights Act, until, that is, this expedient was found (and the timing of the laws chimes in ominously with that act). It is obvious that this "Southern strategy" worked, deciding at least one national election. In any case our situation is not like that of the European democracies, eager to live down the legacy of a class-divided society. Indeed, many people in the United States are eager to maintain a race-divided society, and a focus on harsh incarceration, and concomitant deprivation of rights, is a powerful weapon in the service of this goal.

Rethinking imprisonment along European lines (if the public will to do so could be created) would establish that prison is not a form

of lifelong stigmatization, but, rather, a basically respectful form of deterrence and/or retribution, preferably coupled with programs aimed at reform and reintegration. The public will to support such programs does not exist because in the United States we have not yet acknowledged the full and equal humanity of our racial minorities.

### III. Shame and "Moral Panics": Gay Sex and "Animus"

Shame at oneself can all too quickly become stigmatization of a deviant group. We have seen some examples of this dynamic in chapter 4, section V, examining the connection between shame and aggression. And Theweleit's study of the Freikorps (discussed in chapters 2 and 4) shows how shame at weakness, which is identified with the feminine, converts itself into aggression against groups (communists, Jews, sexual minorities) who come to symbolize a threat to a controlling male identity. The officers in question came to believe sincerely that these groups were threatening their health, their values, their very being, and their panic at the "red flood," et cetera, turned into a campaign of aggression whose ultimate results are all too well known.

These phenomena are hardly sui generis. Indeed, there is by now a burgeoning literature in sociology on the phenomenon of "moral panics"—situations in which deviant groups become targeted for aggressive treatment at the hands of police and other authorities because they are believed to pose a grave and immediate danger to society—but the danger is in large measure constructed, as are the danger-bearing characteristics of the targeted group. The classic work that coined the term "moral panic" and elaborated the key concepts is Stanley Cohen's *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (1972). Cohen's account, which can be closely connected to Goffman's work on stigma, has implications for some controversial contemporary issues, so it is worth summarizing in some detail.

Clacton, a small holiday resort on the east coast of England, was the scene of the event that began the "panic." Easter Sunday was cold and wet. Many shops were closed. Irritated and bored, some young



people roared up and down the street on bikes and scooters, broke some windows, and wrecked some beach huts. One boy fired a gun into the air. The young people wore clothing that popular lore began to distinguish into two groups, one called the Mods, and the other the Rockers.

These events were, by themselves, not very alarming. The news media, however, having little else to distract them at the time, sensationalized the incident. All national newspapers but one bore headlines such as "Day of Terror by Scooter Groups," "Wild Ones Invade Seaside." This type of coverage spread across Europe and on to the United States, Australia, and South Africa. The news stories that accompanied these headlines exaggerated the number of people involved and the extent of the damage, primarily through the use of suggestive language such as "orgy of destructon," "battle," "beat up the town," and "screaming mob." They alluded to "deserted beaches" and to "elderly holidaymakers" trying to escape the violence—all without mentioning that on the day in question the beaches were deserted anyway because the weather was so bad.

Similar overreporting greeted later minor incidents. Typical was a paragraph in the *Daily Express;* "There was Dad asleep in a deckchair and Mum making sandcastles with the children, when the 1964 boys took over the beaches at Margate and Brighton yesterday and smeared the traditional postcard scene with blood and violence." Papers continued to publish rumors as fact, and even to publish already discredited stories. Over time, the public got a picture of events that was in all key respects false: instead of loosely organized and disparate gatherings of mostly working-class youths looking for something to do, they got a picture of tightly organized gangs of affluent young men from London who swooped down on holiday resorts with the express intent of terrorizing and inflicting violence.

Although the initial culprits were the media, at this point public perception begins to take off on its own. Folk mythology constructed images of the two "gangs," Mods and Rockers, and of their characteristic clothing. "Symbols and labels," writes Cohen, "eventually acquire their own descriptive and explanatory potential" (41). In all parts of British society, the danger was discussed, and the inventory of the characteristics of the allegedly dangerous group further refined. Summarizing the errors that were thus further perpetuated, Cohen

concludes that here, as in other inventories of characteristics of deviant groups, "are elements of fantasy, selective misperception and the deliberate creation of news. The inventory is not reflective stock taking but manufactured news" (44). Rapidly the inventory is connected to the idea of a crisis of values: all that we hold dear is threatened by the group, and the group becomes of interest less in its own right than as a symbol of what is wrong with modern society. As in the case of Theweleit's Freikorps, so here: the key idea is that of civilization under threat from something amoral and atavistic, as "restraint normal to civilized society was thrown aside."[49] Terms such as "wild ones" and "hooligans" enter the account of the situation, serving, as Cohen argues, "to provide a composite stigma attributable to persons performing certain acts, wearing certain clothes or belonging to a certain social status, that of the adolescent" (55).

The next stage in the process is an attempt at social control. Not surprisingly, given the widespread misreporting and misattribution, and the public hysteria about civilization under threat, the reaction was poorly calibrated to the nature and severity of particular offenses. Discussing the roles played by the police, the courts, and local civic bodies, Cohen demonstrates that there were all too many cases in which individual rights were violated. Many juveniles accused of relatively minor offenses were held in custody for up to three weeks, as the refusal of bail came to be seen as a tough measure to restore societal boundaries. In one case two juveniles, eventually fined five pounds each for obstruction, spent eleven days in Lewes Prison. Tough sentencing was another way in which the legal system tried to respond to public fear. A young student, a first offender with a good school record, was sentenced to three months in a detention center for "using threatening behavior": he had thrown a make-up case at a group of Rockers. In Margate, a magistrate gave fines of fifty to seventy-five pounds to youths arrested for "threatening behaviour," and to one of them a three-month prison sentence. He accompanied these remarkably tough sentences with a speech designed for the gallery and the news media:

> It is not likely that the air of this town has ever been polluted by the hordes of hooligans, male and female, such as we have seen this weekend and of whom you are an example.



> These long-haired, mentally unstable, petty little hoodlums, these sawdust Caesars who can only find courage like rats, in hunting in packs, came to Margate with the avowed intent of interfering with the life and property of its inhabitants.
>
> Insofar as the law gives us power, this court will not fail to use the prescribed penalties. It will, perhaps, discourage you and others of your kidney who are infected with this vicious virus, that you will go to prison for three months. (109)

The imagery of this speech, in which youths are compared to vermin, to a virus, and to air pollution, is uncannily similar to imagery of German anti-Semitism and anticommunism, as Theweleit and others document these diseases. Notice that it evokes disgust at the same time as it shames.

Panic was not satisfied by mere toughness. The demand was for public humiliation of the offenders. "Deviants must not only be labelled but also be seen to be labelled; they must be involved in some sort of ceremony of public degradation" (95). These shaming ceremonies ranged from the requirement that offenders' fathers take time off work to appear publicly in court with their sons to the practice of removing the belts from suspicious young people's pants before they had done anything wrong. "They complain that they cannot keep their trousers up, but that is their problem entirely." Interestingly enough, that last comment, reporting on the crisis in Britain, was made by a British constable, but then admiringly cited by Judge J. Edward Lumbard, then chief judge of the U.S. Court of Appeals for the Second Circuit, in a speech addressing the Chicago Crime Commission on the need for U.S. police to seek broader powers of search and seizure.[50] Notice that the penalty (or deterrent, since no offense preceded it) is exactly the same one that Amitai Etzioni has recommended for first-time young African-American drug offenders.

Cohen's analysis shows graphically that many wrongs were done to individual young people through the regime of panic. Interestingly enough, even the proponents of harsh measures do not deny this. They justify the inappropriately harsh sentences they impose by pointing to the gravity of the social danger they have been facing. A crime is not just a crime, it is *part* of a dreadful social threat. As the chief judge at Hastings puts it:

> In considering the penalties to be imposed, we must take into account *the overall effect* on the innocent citizens of and visitors to the Borough. Though some of the offences committed by individuals may not *in themselves* seem all that serious, they form *part and parcel* of a *cumulative series* of events which ruined the pleasure of thousands and adversely affected the business of traders. The Hastings Bench has always taken a stern view of violent and disorderly conduct and we do not propose to alter that attitude. In pursuance of that policy we shall impose in these cases penalties—in many cases the maximum—which will punish the offenders and will effectively deter other law breakers.[51]

This response would not exactly be consoling to individuals who have been singled out for a sentence wildly disproportionate to other sentences typically meted out for that type of offense. Nor does it even touch on the (obviously widespread) phenomenon of railroading the innocent, or the even more widespread phenomenon of targeting and harassing youths who were pursuing perfectly lawful activities (as with the belt-removal scheme, so much admired in Chicago).

The concept of the moral panic has been used to analyze a number of different social issues. Nachman Ben-Yehudah has put it to work analyzing the reaction to youthful drug offenders in Israel.[52] Philip Jenkins's *Moral Panic* focuses on the fear of psychopathic sexual predators.[53] In *Policing the Crisis,* Stuart Hall and his coauthors study the creation of the term "mugging" and related issues about the fear of urban crime in Britain.[54]

Cohen's concepts are fruitful in themselves, but we can take them further if we combine them with Goffman's work on stigma and with our causal hypotheses about the roots of shame. Goffman's work helps us to see the moral panic phenomenon as an instance of a more general pattern in which unpopular and "deviant" groups are stigmatized. And our causal hypothesis helps us to understand why such panics tend to recur. Indeed, Theweleit's material about German aggression against communists and Jews, which he analyzed convincingly in terms of narcissism and misogyny, is, as I have already suggested, an instance of the phenomenon Cohen identifies, since the stigmatized groups were believed to be dangerous sources of cultural decay, subverters of cherished social values.



My analysis of primitive shame and narcissism suggests that narcissistic anxiety and aggression are very likely to produce a herd mentality in which "normals" find a surrogate safety by bonding together over against a stigmatized group. What Cohen's analysis helpfully adds to this picture is the fact that this bonding often takes a moralized form. The category of the "normal," as we have seen, is already heavily normative. In many circumstances, this normativity is *moral* normativity. Condemnation of the "deviant" group is particularly effective if it takes the form of invoking cherished moral values, to which the deviant group is allegedly a threat. Portraying one's normal group as under siege from a menacing group of devils is, as Cohen shows, one very potent way of organizing hostility and energizing the struggle to preserve one's own safety.

In contemporary American society, few issues are as fraught as our struggles to come to terms with the presence of same-sex attraction and conduct in our communities. Such struggles exist in many societies, but the United States has had a particularly difficult time with this issue—more so, in almost all respects, than the nations of Europe. In chapters 2 and 3, I have already suggested that gays and lesbians are, to many Americans, a revolting source of contamination, a threat to the safety of (male) American bodies, but those chapters, focused on revulsion, left a lot of the terrain of contemporary anti-gay feeling uncharted. Animosity to gays and lesbians does not always take the form of disgust. In chapter 2, indeed, I suggested that disgust is most likely to be a male reaction to gay men. Lesbian sexuality is greeted with a rather different range of emotions, and women typically do not respond with disgust to the sexuality of gay men. But the absence of disgust does not mean the absence of intense hostility, however. We can now fill in another piece of the picture by seeing the operations of primitive shame at work, in converting the encounter with homosexual men and women into a classic moral panic.

Moral judgment about homosexuality is ubiquitous in American society, and much of it takes the form suggested by Cohen's analysis: gays are seen as a threat to all that Americans hold dear. In particular, as the trial of Amendment 2 in Colorado showed, they are routinely portrayed as enemies of the family and dangers to children. The state, defending the amendment, argued that it had six different

"compelling interests" in maintaining the law in question. These included an alleged compelling state interest in protecting family privacy, and a separate alleged compelling interest in "promoting the physical and psychological well-being of children." Furthermore, the state alleged that a compelling interest in "public morality" pervaded all the other compelling interests: thus, for example, the interest in protecting the family was to be understood as pervaded by an interest in public morality.[55]

More recently, the "Defense of Marriage" Act, passed by an overwhelming majority in Congress, defines marriage (for purposes of federal law) as the union of a man and a woman, and tries to ensure that no state will be under pressure to recognize same-sex unions celebrated in states that might decide to legalize them. This law suggests in its very title the idea that the institution of heterosexual marriage is under threat from the possibility of same-sex unions and their public recognition. The debate surrounding the law contained a high level of rhetorically expressed anxiety about the alleged dire threat to cherished values and to the very survival of American society. Consider, for example, a speech made in the floor debate regarding this act by Senator Robert Byrd of West Virginia:

> Mr. President, the time is now, the place is here, to debate this issue. It confronts us now. It comes ever nearer . . . Mr. President, throughout the annals of human experience, in dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between men and women is a keystone to the stability, strength, and health of human society—a relationship worthy of legal recognition and judicial protection. . . .
>
> [*After reading a long list of Biblical passages mentioning marriage*] Woe betide that society, Mr. President, that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator in the beginning. . . .
>
> [*After describing a trip to the ancient city of Babylon*] I stood on the site, or at least I was told I was standing on the site of where Belshazzar, the son of Nebuchadnezzar, held a great feast for 1,000 of his lords. Belshazzar took the cups that had been stolen from the temple by Nebuchadnezzar. He and his wife and concubines and his colleagues drank from those vessels, and Belshazzar saw the hand of a man writing on the plaster of the wall, over near the candlestick, and the hand wrote "me'ne, me'ne, te'kel, uphar'sin" and the countenance of Belshazzar changed, his knees buckled, and his legs trembled beneath him. He called in his astrologers and soothsayers and magicians and said, "Tell me what that writing means," but they were mystified. They could not interpret the writing. . . . Daniel interpreted the writing:
>
> > God hath numbered thy kingdom and finished it. Thou art weighed in the balances and art found wanting. Thy kingdom is divided and given to the Medes and Persians.
>
> That night Belshazzar was slain by Darius the Median, and his kingdom was divided.
>
> Mr. President, America is being weighed in the balances. If same-sex marriage is accepted, the announcement will be official—America will have said that children do not need a mother and a father; two mothers or two fathers will be just as good.
>
> This would be a catastrophe. Much of America has lost its moorings. Norms no longer exist. We have lost our way with a speed that is awesome. What took thousands of years to build is being dismantled in a generation.
>
> I say to my colleagues, let us take our stand. The time is now. The subject is relevant. Let us defend the oldest institution, the institution of marriage between male and female, as set forth in the Holy Bible. Else we, too, will be weighed in the balances and found wanting.

Many other speeches, if less colorfully, referred to a grave threat to America's survival, to the very existence of family as its oldest and most important unit, to "homosexual groups" bent on carrying out a subversion of traditional standards. Representative Asa Hutchinson of Arizona said, for example, that "I am convinced that our country can survive many things, but one thing it cannot survive is the destruction of the family unit which forms the foundation of our society." Representative Tom Coburn of Oklahoma stated that "the fact is, no society . . . has lived through the transition to homosexuality and the perversion which it lives and what it brought forth." Speaking

very near to a national election, many politicians seemed eager to whip up a storm of fear around the issue of same-sex marriage.

We must move cautiously here because many people of religious conviction sincerely hold that homosexual acts are immoral. We should not suggest that in and of themselves such beliefs are an instance of moral panic. What does hook up with the phenomena investigated by Cohen, however, is the special urgency and salience given to this judgment and to dire threats rhetorically associated with it, especially when we inspect the whole range of the moral values of the religions in question. One sentence in Leviticus condemns some (male) homosexual acts. Hundreds of sentences in both Testaments condemn greed. And yet we do not hear that the greedy, or those who perform greedy acts, are an infestation in our community, that they are subverting our cherished values, and that a compelling interest in public morality leads us to deny them equal civil rights.

Nor does the condemnation of same-sex relationships and even unions seem to be an issue peculiar to religious believers. Indeed, the largest single body in the United States today that officially recognizes same-sex marriage is a religious body, the Reform Jews; and every major religious denomination in the United States contains a wide range of positions on this and related issues, as do secular groups.[56] All this being so, the highly rhetorical and aggressive singling out of same-sex conduct and same-sex unions for condemnation in the name of values and Judaeo-Christian religion does seem problematic, especially when the nature of the threat posed by these instances of alleged immorality is left so vague.[57]

Why, in fact, should it be thought by anyone that the presence of gay men and lesbians living openly without discrimination in our communities is a threat to families or to children? As Judge Bayless said in his opinion in the bench trial of Colorado's Amendment 2, it seems logical that a "compelling interest" in the family would be pursued by action that was profamily: "Seemingly, if one wished to promote family values, action would be taken that is profamily rather than anti some other group." And in particular, why should it be thought that recognition of same-sex marriage would ruin heterosexual marriages? It is difficult even to identify the logic behind this



thought. Is the idea that heterosexuals are so unhappy with the institution of marriage that they will all rush out and choose same-sex unions if they are made available? Surely that is highly unlikely. Or is the idea that in some nebulous way the institution will be degraded or demeaned, made shameful, by contact with that which is shameful? This seems the more likely reading of the "defense of marriage" idea, and yet the mechanism by which something "good" becomes shameful by proximity to something allegedly shameful is reminiscent of the magical thinking involved in disgust, with its core ideas of contamination and contagion. Similar thinking is often at work with stigmatization and moral panics.

If the public debate about gay marriage sometimes seems like a case of moral panic, we still need to ask what the panic is really about. Cohen's research suggested that at a time of social change, people fear for the stability of their lives; the immediate occasion becomes a way of expressing a more personal and general unease. We may conjecture, similarly, that if gay marriage seems threatening to so many heterosexuals, it is likely to be because of some anxiety about changes in their own lives that is somehow associated with the growing toleration of same-sex relationships. The debate focused on this connection: something is going wrong with heterosexual marriage, and gays and lesbians are somehow to blame. What, then, is this connection likely to be about?

If there is a connection between same-sex relationships and trouble for the institution of heterosexual marriage, it appears to be the indirect connection that is described by legal thinkers Andrew Koppelman, Sylvia Law, and Cass Sunstein. Discrimination against gays and lesbians, they argue, is a form of sex discrimination, because what it is all about is shoring up traditional heterosexuality, including the patriarchial nature of traditional marriage. Gays and lesbians are a symbol, in much of the public imagination, for sex without reproduction, for the decoupling of marriage from commitment to raising a family in the traditional way, which has certainly been a male-dominated way.[58] (Never mind that many gay and lesbian couples do in fact have and raise children, whether their own from previous marriages, or conceived within the relationship through artificial insemination, or adopted; many more do not and would like to in the

future.) The connection between recognition of gay unions and the erosion of traditional marriage is that if sex is thought to be available outside of the marriage bond, women will have fewer incentives to embark upon marriage and child rearing, and may not wish to do so if marriage continues to be a largely patriarchal and unequal institution. In much of Europe, the birth rate has been falling alarmingly, largely, it is thought, because women have other opportunities in life and are unwilling to enter unions that will work to their disadvantage. For many Americans, gay marriage is scary because it is a symbol of sex, and therefore women, eluding patriarchal control. This sort of anxiety about change that eludes control, and the loss of control over cherished values, can easily awaken narcissistic fear and aggression. We may tentatively conjecture that the panic about gay marriage is at least in part a panic about women eluding male control.

If the institution of marriage is indeed in trouble, as divorce statistics in many modern democracies suggest, there are many things that could be done to come to its assistance, many of which would involve making marriage more attractive for women who have other options. As Senator John Kerry said during the Senate debate on the Defense of Marriage Act:

> The truth that we know, which today's exercise ignores, is that marriages fall apart in the United States, not because men and women are under siege by a mass movement of men marrying men or women marrying women. Marriages fall apart because men and women don't stay married. The real threat comes from the attitudes of many men and women married to each other and from the relationships of people in the opposite sex, not the same sex. . . . If this were truly a defense of marriage act, it would expand the learning experience for would-be husbands and wives. It would provide for counseling for all troubled marriages, not just for those who can afford it. It would provide treatment on demand for those with alcohol and substance abuse, or with the pernicious and endless invasions of their own abuse as children that they never break away from. It would expand the Violence against Women Act. It would guarantee day care for every family that struggles and needs it. It would expand the curriculum in schools to expose high school students to a greater set of practical life choices. It would guarantee that our children would be able to read when they left high school. It would expand the opportunity for adoptions. It would expand the protection of abused children. It would help children do things after school other than to go out and perhaps have unwanted teenage pregnancies. It would help augment Boys Clubs and Girls Clubs, YMCAs and YWCAs, school-to-work, and other alternatives so young people can grow into healthy, productive adults and have healthy adult relationships. But we all know the truth. The truth is that mistakes will be made and marriages will fail. But these are ways that we could truly defend marriage in America.



Such practical steps to support marriage were not even on the table. The law was entirely negative in orientation, aimed at injuring an unpopular group rather than at giving real support to traditional values. So even if we bracket the deep moral issues involved for many people when they think about issues of same-sex conduct, we have strong reasons to think that the panic surrounding the debate over this particular law is not just about morality and family—that it expresses, at least in part, the more primitive aggressive feelings we have been exploring.

Sex, as I argued in chapter 4, is an area of great human vulnerability and anxiety. It is thus a likely locus for shame, even if, as I have argued, it is not *the* (only or even primary) locus. People are extremely anxious about their sexuality, and feel threatened with shame in that area, especially in an America in which ideas of sexual perfection suffuse the popular culture, promoting unrealistic and inflexible norms for all. Because sex is both intimate and in its very nature not susceptible of full control, it is likely that in this area people who experience difficulties with lack of control and with the very idea of intimacy (which entails lack of control) will feel particularly threatened. All this leads us to expect that "moral panics" will crop up with particular frequency in the area of sex.[59] Freud long ago observed that Americans appear to be particularly fearful and shame-ridden about their sexual lives; he added that they convert their libido into moneymaking, which is easier to manage. A similar observation was made by philosopher Theodor Adorno, an emigré to the United States from Germany, who observed that Americans

are preoccupied with norms of health in the area of sex, and spoke often of a "healthy sex life." "Sexuality is disarmed as *sex*," he continued, "as though it were a kind of sport, and whatever is different about it still causes allergic reactions."[60]

The family is also an area of great anxiety and lack of control. Families often contain our most intimate relationships, through which we search for the meaning of life. And yet there is much hostility, ambivalence, and anxiety involved in many, if not most, family relationships. Thus shame once again enters the picture: the roles we assign ourselves in the family, as "the good father," "the good mother," are cherished and comforting norms, and precious aspects of people's attempts to define themselves as normal, precisely because there is so much at stake when control is lost and something unexpected happens. People are typically aware of deficiency in their family roles, and thus they need all the more anxiously to shore up their purity.

We have many reasons to suppose, then, that a good deal in the aggressive public campaign against same-sex marriage and nondiscrimination laws for gays and lesbians is not about religion at all, but contains elements of a primitive narcissistic type of aggression, desirous of reasserting control over family and sex by stigmatizing gays and lesbians. In the debate over the "Defense of Marriage" Act, several participants referred usefully to the climate of panic and hatred that once surrounded interracial marriage, which was legal in some states and illegal in others until the U.S. Supreme Court declared the state bans unconstitutional in 1967. The possibility of interracial marriage was a related, deeply upsetting challenge to the structure of the "normal" family, which made white men, in particular, sense a potential for shame about their masculinity. The need to draw boundaries rigidly expressed the desire to keep this threat of shame at bay.

As evidence of the sort of thinking involved in our "moral panic" over gay marriage, let me mention one more rather alarming example. In July 2001, a letter came to my home. Although I usually throw away most mass mailings unopened, this one caught my eye because the envelope announced, in red letters, a "National Campaign to Stop the American Civil Liberties Union" (ACLU). I looked again, and saw that, unlike most commercial solicitations, it was addressed



to me as "Professor Martha Nussbaum," which seemed to indicate some personal acquaintance. So I opened it. The letter inside, signed by a coalition of Christian groups and leaders called the Alliance Defense Fund, and backed by a warm testimonial from former U.S. Attorney General Edwin Meese, addressed me as "Dear Christian Friend"—a double irony. The letter described a legal challenge by the ACLU to a referendum recently passed in Nebraska that amended the state constitution to bar legal recognition of same-sex "marriages" and "civil unions" (scare quotes as in letter). First, the letter accused the ACLU of hypocrisy, on the grounds that the organization had insisted, apropos of the Florida election recount, that it was extremely important that each person's vote should be counted. And yet, here they are holding, at the same time, that the votes of the citizens of Nebraska, who had passed the referendum by 70 percent to 30 percent, ought not to count. This use of clever rhetoric to obscure the distinction between fundamental constitutional rights, which cannot be overturned by a majority vote, and the election of a president, where a state's electoral votes are determined by a majority vote, was just one instance of a Cohen-like rhetoric of distortion that filled the letter.[61]

The letter then continued by documenting all the bad things that would allegedly happen in our communities if the ACLU were successful in its campaign. The catalogue of horrors began with imagery reminiscent of descriptions in both Cohen and Theweleit: "*If the ACLU wins in Nebraska, it will set a dangerous national precedent. The floodgates will be opened for extremists to overturn marriage laws in every state.* If that happens, you won't recognize America." One of the alleged horrible consequences was that "pastors" would be "forced" to perform same-sex unions, as if the existence of a civil marriage right could ever force a religious leader to perform a religious ceremony. (Has the Alliance forgotten that First Amendment rights of nonestablishment and free exercise do not currently force Catholic priests to marry Jews, or indeed to marry anyone whose commitment and background they do not approve of?) The culmination of all the horrors, however, was especially revealing: it was that "activists will be given immense power and boldness to pursue the rest of their agenda, including so-called 'hate crime' and other laws that could actually criminalize much public opposition to homosexual behavior."

This remarkable sentence looks like a slip. For the people who address me as "Christian Friend" surely don't want to admit that they support forms of "public opposition to homosexual behavior" that would be targeted by hate crimes legislation. Or do they? The scare quotes around "hate crime" are ominous. It would appear that the sentence is not careless, but a canny appeal to people who think that violence against gays and lesbians is a legitimate form of resistance, and that the very term "hate crime" for this conduct should be rejected. Now we are not dealing with religion at all, and certainly not Christian religion, which, even in its conservative form, typically stresses love for the sinner. We are dealing with a primitive, and dangerous, form of narcissistic aggression.

What is the appropriate remedy for this violent animosity? Above all, it must be to ensure that members of stigmatized subcultures receive the equal protection of the laws. In our next chapter we will discuss affirmative ways of protecting minorities from shame. But one necessary part of guaranteeing citizens the equal protection of the laws, pertinent to our inquiry in the present chapter, is to guarantee the equal protection of the laws to all citizens by invalidating laws that are based on mere prejudice and inflict stigma. I believe that it would be right to oppose the Defense of Marriage Act on these grounds, given the nature of the debate surrounding it.

That law did not garner much opposition, and passed overwhelmingly. In another related area, however, the principle I advocate was recognized. In responding to the case concerning Colorado's Amendment 2, the U.S. Supreme Court found (highly unusually) that the law lacked a "rational basis" because it was based merely on "animus." Despite the moralizing rhetoric of the proponents of Amendment 2, the Court argued that the motivating force behind the amendment was "animus." The majority opinion argued that to disqualify gays and lesbians from seeking and winning nondiscrimination laws at a local level was in conflict with the basic idea involved in the notion of equal protection of the laws:

> The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . . It is not within our constitutional traditions to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[62]



The law was held to have no "rational relationship to a legitimate government purpose," and, further, to have been "born of animosity toward the class that it affects."[63]

A closely connected earlier case, indeed one of the very few cases in which the Supreme Court has held that a law duly passed by Congress or by state voters lacks a "rational basis," dealt with a similar issue of stigma and panic, establishing a precedent that the Court followed in *Romer*.[64] *City of Cleburne v. Cleburne Living Center* (also discussed in chapter 3) concerns a Texas city that denied a permit for a group home for people with mental retardation, following a city zoning law that requires special permits for such group homes.[65] (Permits were not required for convalescent homes, homes for the elderly, and sanatoriums: only for "homes for the insane or feebleminded or alcoholics or drug addicts.") The denial of the permit was plainly prompted by fear and other negative attitudes expressed by nearby property owners. The city further alleged that people with mental disabilities might be in danger by being located on a "five-hundred–year flood plain," since, in the event of a flood, they might be slow to escape from the building. The Supreme Court held that the permit denial had no rational basis, resting only on "invidious discrimination," "an irrational prejudice against the mentally retarded," and "vague, undifferentiated fears." Here the Court refuses to allow plainly pretextual arguments to parade as rationality: they know a panic when they see it, and they name it plainly.

In *Romer,* then, the Court pursues the same strategy, insisting that even the weak rational-basis standard is not satisfied by a law born of bare animosity.[66] In terms of our analysis of moral panics, they were entirely right to do so. If public rationality and the equal protection of the laws mean anything, they must mean that bare fear and dislike

are insufficient grounds for a law that withholds basic privileges.[67] A vigilant defense of equal protection of the laws is a minimal commitment for a decent society to make in protecting unpopular groups from the damaging effects of stigma and associated fears.

Let us now return to the topic of same-sex marriage: does the Defense of Marriage Act itself threaten the equal dignity of all citizens? The right to marry the person of one's choice is an extremely basic right. In *Loving v. Virginia,* the case in which the Supreme Court declared Virginia's ban on miscegenation unconstitutional, the Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[68] Arguing against the ban on grounds of both due process and equal protection, the Court also found that the only purpose of the statute was to uphold "white supremacy." The fact that the prohibition was worded neutrally—blacks could not marry whites, and whites could not marry blacks—did not prevent the statute from reinforcing a social hierarchy that, in the view of the Court, was incompatible with the basic meaning of equal protection.

Although it would take us too far afield to investigate the legal issues that would have to be faced in applying these two lines of reasoning to the question of same-sex marriage, it seems likely that they do apply to it, as the Hawaii Supreme Court argued in *Baehr v. Lewin,*[69] and that a ban on gay marriage is just as unconstitutional as the ban on interracial marriage.[70] This does not mean that judges will say so any time soon. It does not even mean that they ought to say so, for one legitimate concern will be not to create a panic reaction and thus energize the resistance to gay marriage still further.[71] It does mean, however, that the logic of the ban on same-sex marriage is constitutionally unacceptable. It enforces a hierarchy, defining some people's intimate choices as less worthwhile than those of others. Very likely, it also enforces a traditional notion of marriage, and thus a conventional sexual hierarchy.

Other nations have seen these problems, and have subsequently moved to legalize gay marriage. As U.S. citizens observe developments in Europe, where several countries have legalized same-sex marriage and many others have legalized Vermont-style civil unions, and especially in Canada, where, in June 2003, an Ontario court declared the heterosexual definition of marriage to be unconstitutional, and Prime Minister Jean Chrétien said that he would move to legalize gay marriage across the nation, there may be occasion to note that society does not fall apart, or even greatly change at these developments.



It is, however, somewhat unfortunate that the public debate has focused on the sole question of whether same-sex marriage should be given the privileges afforded heterosexual marriage. This way of posing the issue forestalls a prior question, namely whether a single institution, marriage, ought to enjoy the large and heterogeneous bundle of privileges it currently does enjoy, privileges in areas ranging from immigration, adoption, and inheritance to the spousal privilege in testimony to decisions about burial and medical care. Should the United States actually continue with its binary approach to the status of marriage, or pursue a more flexible strategy such as the strategy that France has recently adopted, recognizing some groupings for some purposes, others for other purposes?[72] This larger debate has been greatly inhibited by the single-minded focusing on same-sex marriage rights.

The fact is that marriage as an institution has housed both love and violence, both the nurturing of children and their abuse and degradation. Women and female children, in particular, have not typically done well in that institution, which continues to burden women with a grossly disproportionate burden of child care, and, today, a growing burden of elder care. The world contains many examples of how these burdens may be shared: by extended families, by villages and other local groupings, and with the aid of sensible reforms in public policy and the structure of the workplace. We need to ponder all these alternatives as we chart our course for the future. Unfortunately, both the panic over gay marriage and the natural response to it—the focus on securing equal marriage rights for gays and lesbians—postpone this urgently needed public debate.

One more area in which gays are targeted by law now demands our attention. In the light of *Cleburne,* we are invited to think about the issue of zoning for adult establishments. Zoning would appear to be a gray area where communities may in some instances be free to exercise judgment that certain nonharmful practices are nonetheless

to be restricted. Thus zoning restrictions for establishments offering sexually explicit materials are not off the table in my view, as restrictions on publication would surely be. General concerns about freedom of association suggest that residents should have at least some latitude in deciding what to permit in their communities. *Cleburne* shows, however, that a community is not free to enact into zoning law any prejudices against a group it may happen to hold. To refuse a permit to a home for mentally retarded persons, when similar permits had been given to homes for the aged and physically disabled, was an unconstitutional denial of the equal protection of the laws. Even in this area of law, moral panic has legal limits.

When we consider *Cleburne*, the recent debate about zoning regulations for gay bookstores and clubs in New York City raises very interesting issues. Michael Warner and other gay activists have already used the language of moral panic to describe the reaction of the Giuliani administration, calling it a "Sex Panic" and rallying against it. The group, called Sex Panic!, focuses on six recent trends: (1) the closing of gay video stores and sex clubs in the name of the health code; (2) the fencing off and patrolling of traditional gay meeting places on the piers along the Hudson River; (3) the upturn in arrests of gay men for cruising, often on public lewdness charges; (4) the general decline of available public space in the city; (5) the harassment of bars, dance clubs, and other sites of nightlife, often on technicalities of cabaret license violations; and (6) the 1995 zoning amendment that further restricts "adult businesses" by defining them in a broader and vaguer way and permitting them only in certain areas that are both poor and dangerous; there are other burdensome restrictions pertaining to size of establishment, location, signage, and inspection. All six changes are part of a policy aimed at making "sex less noticeable in the course of everyday urban life and more difficult to find for those who want sexual materials."[73]

These trends seem unfortunate to me, as they do to Warner. It is certainly legitimate to try to prevent behavior that offends many members of the community from being inflicted on children, for example; thus there is some legitimacy to laws against "public lewdness" and to zoning regulations for adult materials. (I shall return to this topic in chapter 6.) Yet of course most behavior penalized under the rubric of "public" lewdness takes place in seclusion—a washroom stall being the classic case, and secluded wooded areas. Massachusetts has recently issued a state police policy, to be included in the state police policy manual, stating that sex in public places such as beaches, rest areas, and parks will not be considered illegal if the activity is adequately hidden from view.[74] This is a reasonable policy, which strikes the right balance between the disparate values involved. "This is major," said Captain Robert Bird, a state police spokesman. "The State Police don't want to infringe upon anybody's rights and I think this order will help clarify exactly what those rights are." By contrast, the current New York situation is both unnecessarily restrictive and implicitly discriminatory in its application and impact: for it was clearly implemented in a way that targeted gay men.



As for adult materials, it is one thing to restrict them to a particular zone and still another to restrict them to areas that are (already) undesirable and dangerous. And again, it is plain that at least part of that Giuliani policy targets gay men. The policy is, in effect, a shame punishment: it stigmatizes gay meeting places and gay bookstores, requiring them to hide themselves as if everything they signify is shameful.

These examples show that the familiar distinction between the public and the private frequently offers bad guidance when we think about the regulation of conduct. Space that is "public," in the sense that it is part of publicly owned facilities and/or open to those who wish to enter (many privately owned establishments are "public accommodations in that sense), is not necessarily "public" in the sense that behavior in it necessarily affects nonconsenting parties. "Public" behavior may be quite secluded and free from impact on nonconsenting parties, as the Massachusetts police policy recognizes. I shall return to this issue in chapter 6, arguing that the "public-private" distinction is vague and offers bad guidance; good guidance, by contrast, is offered by John Stuart Mill's distinction between conduct that is "self-regarding," affecting only the interests of the doer and other consenting parties, and conduct that is "other-regarding," affecting the interests of nonconsenting others.

Is any of these policies unconstitutional? The legal issues are much less clear than in *Cleburne* because the regulations are discriminatory in effect while being neutrally written. Moreover, the regulation of clubs and adult stores is generally understood to be an area

in which city officials have broad discretion; in that way as well, the case looks quite unlike *Cleburne,* where the plaintiffs wanted a permit for a group home of a type for which permits had frequently been given. For these reasons and others, it seems unlikely that a constitutional challenge to the Giuliani zoning regulations based on *Cleburne*-type arguments would succeed. My argument suggests, however, that the issues involved in the two cases are actually very similar. Both are about the desire of the majority to hide away aspects of human behavior that trouble them. Shame and stigma is what they are both about. And the fact that gay men bore the effects disproportionately, that heterosexual men were not required to the same extent to conceal their sexual behavior (as, really, they never are), makes the issue look like the type of invidious stigmatization of an unpopular group against which I have been arguing throughout this chapter. The gay community will, and should continue to, debate the moral issues involved in the culture surrounding bathhouses and adult establishments. It is one thing, however, to hold that moral controversy is appropriate, quite another to hold that conduct may be regulated by law. It seems a good idea to continue emphasizing issues of shame and stigmatization, and criticizing the effort to regulate consensual gay sex by law.[75]

Same-sex conduct and relationships cause a lot of anxiety in our society. In part, I have argued, the anxiety is occasioned by issues about the body and its boundaries that we discussed in chapters 2 and 3. In part, as I have argued in this chapter, the anxiety is also a more general one about loss of control over cherished patterns of family relationship, including patriarchal control over women. In response to anxiety, people often try to use the law to shield themselves from what they fear. Sodomy laws, discussed in chapter 3, and the various laws dealing with gay life that we have discussed in this section—the Defense of Marriage Act, Colorado's Amendment 2, and a variety of zoning laws for adult establishments—seem inspired by the desire to stigmatize an unpopular group. Law is not going to solve all social problems, and yet it gives an important signal as to who is regarded as fully equal and who is not. I have argued that a decent society will not permit the desire to stigmatize to hijack the legal process and



will insist on giving all citizens the equal protection of the laws, no matter how unpopular they, and their practices, are. The desire to stigmatize is not a rational basis for law.

## IV. Moral Panics and Crime: The Gang Loitering Law

If Americans fear sexual degeneracy and the breakup of the family, they fear crime even more. Sex and crime, indeed, are the two focal points of contemporary panic about the subversion of core moral values. Cohen's study made clear that moral panic can easily be generated by the thought of young criminals, imagined as physically powerful and amoral. The panic so generated can lead to the adoption of remedies that show deficient respect for individual rights. It seems appropriate, then, to apply these insights to one of the most controversial issues in recent criminal law, namely laws and policies that target juvenile offenders. There are many such tactics, including curfews and informal police policies of detaining and harassing young men on the street. But a particularly interesting and controversial such tactic has been the passage of antiloitering laws targeted at members of inner-city gangs.

In 1992 the city council of Chicago held public hearings to explore problems caused in the city by street gangs involved in criminal activity. Testimony showed that such gangs are involved in a wide range of criminal activities, including drug dealing, drive-by shootings, and vandalism. One problem mentioned by many witnesses was the problem gang members cause by simply loitering in public, as part of their strategy to recruit new members, establish territorial supremacy, and intimidate rival gangs and ordinary members of the community. In response to these concerns, the city council passed the Gang Congregation Ordinance, commonly known as the gang loitering ordinance. The law states that "[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly

obey such an order is in violation of this section." "Loiter" is defined as "to remain in any one place with no apparent purpose." The law, and the police guidelines accompanying it, soon became a subject of controversy. In October 1997, the Illinois Supreme Court found the law unconstitutional on the grounds that it is impermissibly vague and an arbitrary restriction on personal liberties.[76] In June 1999, the U.S. Supreme Court upheld this judgment, holding the ordinance unconstitutionally vague and thus in violation of the due process clause of the Fourteenth Amendment.[77]

The primary arguments against the ordinance are fairly obvious. "Loitering" is very vaguely defined. Many people pursuing innocent activities remain in a place "with no apparent purpose"—resting after a run, getting out of the rain, waiting for a friend, and so forth. Indeed, the non-innocent purposes of drug dealing and intimidation would apparently not be covered by the law. The fact that one might be in the proximity of a person concerning whom a policeman has a "reasonable belief" that this person is a gang member is hardly easy to ascertain, since it depends on the subjective state of mind of the police officer. The order to disperse is itself vague, since it does not make clear how far away one must go, or for how long. In short, a criminal statute "must be sufficiently definite so that it gives persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct," and the gang loitering law fails to pass this test.[78]

The history of loitering laws, moreover, shows us that such vague laws invite arbitrary and discriminatory enforcement. Police officers are given absolute discretion concerning which persons are reasonably believed to be gang members and as to what "no apparent purpose" shall mean.[79] The police guidelines that accompany the ordinance do not solve this problem, for they are rather vague as well and have been inconsistently applied. For example, the guidelines state that gang "membership may not be established solely because an individual is wearing clothing available for sale to the general public." Nonetheless, the officer who arrested plaintiff Jesus Morales testified that his only reason for believing Morales to be a gang member was that he wore black and blue clothing, which are the colors of the Gangster Disciples criminal street gang.



Street gangs raise a very different set of problems from Cohen's Mods and Rockers. They are much more dangerous, and have been demonstrated to cause both more and worse criminal activity. They are a dire threat to life and safety in many inner-city neighborhoods, and they do use loitering to recruit and intimidate. Some of this conduct is already illegal, but one can sympathize with the city's feeling that it needed a further weapon to protect life in inner-city neighborhoods. In that sense, panic about gangs is rational, in a way that panic about the Mods and Rockers never was.

On the other hand, a fear may be both rational and irrational. That is, elements of legitimate fear may become complexly mixed with elements of stigmatization based on race and age. And there is little doubt that the fear of gangs on the part of both inner-city residents and the general public contains elements of panic, along with legitimate fears based on experience and evidence. As a society, we have a guilty history of violence against African-American men, fueled by irrational fears that they are dangerous predators. These irrational fears can become complexly intertwined with legitimate fears, and both can underwrite a general tendency to abuse of power that is a standing danger in all police departments. It is all too easy to imagine police officers targeting idle young African-American men unfairly under cover of such an ordinance. Even officers with completely honorable and nonracist motivations might let their anxieties run away with them when they form a "reasonable belief" that a given young man is a gang member, as the arresting officer in Jesus Morales's case evidently did.

In this situation, knowing what we know about social tendencies to moral panic, and knowing that moral panic often operates on the basis of flimsy stereotypes and stigma, we ought to respond by making very certain that there is clarity about what harmful behavior is being targeted and clear standards that distinguish the harmful behavior from innocent loafing around. When arbitrariness and discriminatory stigmatization threaten, the natural defense would appear to be an emphasis on clarity in the formulation of legal standards and on the protection of individual rights in their implementation. Reflection on shame and moral panics, then, seems to support the wisdom of the Illinois and U.S. Supreme Court decisions.

The decisions have been strongly challenged, however, in the name of communitarian values. Once again, Dan M. Kahan, defender of shame-based penalties, has been a central figure, coauthoring his work, in this instance, with African-American legal scholar Tracey Meares. The Meares-Kahan argument goes as follows. In the 1960s, when law enforcement was highly racist and African-Americans were underrepresented in the political process, it was important to focus on an individualistic conception of rights and to uphold these strongly against government intrusion. Now, however, things are different: African-Americans play a large and influential role in politics, and the police are far less racist than they used to be. At the same time, inner-city communities themselves feel threatened by the behavior of gangs. The impetus to pass the gang loitering ordinance came from within the poor and African-American communities most sorely affected by the problem of gangs, and these local communities ought to play a role in deciding what rights their members do and do not have. When a community is politically effective, and when it is prepared to shoulder within itself the burden that its proposals impose, such a community should be entitled to redefine rights in ways that seem limiting in the perspective of the 1960s. Judges are paternalistic if they insist on this older conception of rights when the communities themselves want rights to look different. Meares and Kahan apply their analysis not only to the gang loitering ordinance but also to so-called sweeps—unwarranted police searches for weapons in the housing projects, which are typically opposed by defenders of traditional individual liberties, but supported, they argue, by a majority of the members of the housing projects under discussion.[80]

There are a number of empirical questions to be raised about the Meares-Kahan argument. How broad, for example, is the support for the loitering law in the inner-city communities most affected by it? (Solid evidence is hard to come by, and the relevant aldermen and community leaders were actually quite split.) How much has the racist behavior of the police really changed? Who is it who comes to meetings in the housing projects at which votes on the sweeps are taken?[81]

These questions are important, but let us put them to one side for our purposes in order to focus on a deeper conceptual issue. This



issue is, what is the relevant "community"? The Achilles heel of all communitarian arguments is their disregard of this all-important question. No group is fully homogeneous. Even in the case of small religious or ethnic communities that are renowned for their homogeneity of values, that renown is typically based on a false and romanticized notion of the group in question, as Fred Kniss has eloquently shown in his important study of American Mennonite communities.[82] All communities contain differences about norms and values, and also differences of power. Frequently these two types of difference are connected: what gets to parade as the "values" of the "group" are, frequently, the values of the group's most dominant members. Thus, for example, most of what we think we know about the "values" of most ethnic and religious groups in history really represents the views of male members of those groups, rather than the views of women, which may be impossible to recover from the silence of history. Other dissident and relatively powerless groups—the young, the elderly, those who hold unpopular religious, political, or moral views—may not win recognition as part of what the "group" stands for. Differences of power also affect who is permitted to count as a group member and who is not. Groups frequently define their boundaries in ways that stigmatize and exclude; thus, rather than acknowledging the presence of a dissident or minority subgroup, they may simply refuse to recognize these people as members of their body at all.[83]

Communitarians, moreover, typically focus on groups that are united by ethnicity, location, or the history of a common culture or language. There are, however, other groups to consider: groups united, for example, by shared tastes or occupations, by shared problems, by a shared history of oppression. In this sense, women are a group, and share many common interests all over the world, though one will not find communitarians thinking of women as one of the "communities" whose values ought to be upheld. Other dispersed groups include the elderly, members of sexual minorities, children, adolescents, music lovers, defenders of the rights of animals, lovers of nature. All these people have common interests and values, but they are not counted as "communities" for purposes of arguments like those of Meares and Kahan.

These conceptual questions cause problems for the Meares-Kahan argument about the gang loitering ordinance and the sweeps. Throughout their argument there is much unclarity even about what they think the relevant community is: all African-Americans in Chicago? Poor inner-city African-Americans? All poor inner-city people?[84] Whatever the relevant characterization is, however, there is clear evidence of internal disagreement about the merits of the ordinance. More African-American aldermen voted against the ordinance than for it; the African-American press was divided; many prominent African-American leaders harshly criticized the measure. Most pertinently, it may be presumed (though nobody seems to have thought to ask them) that adolescent African-American men, whether gang members or not, would strongly oppose an ordinance that gives the police license to harass and disperse them. So what we seem to be dealing with, under the attractive language of "burden sharing," is a situation in which some adult members of the African-American community inflict a burden on other members. Clearly the aldermen and other community leaders who support the policy will not be bearing its burdens, which will be borne almost exclusively by adolescent males. If Meares and Kahan should reply by saying that these adolescents aren't really members of the group because the group only includes those who suffer from the criminal behavior of gangs, then they are conceding that their burden-sharing argument is mistaken: those who bear the burden of the policy are not members of the same group that supports it.

The sweeps raise the same issues in an even more troubling way. For the group consenting to the burden sharing was the group of people who showed up at a meeting in the projects to discuss the issue. As anyone who lives in a housing project, condominium community, coop apartment building, or other group dwelling knows, people who show up for meetings are not necessarily representative of all the relevant types and opinions that exist. People who are likely not to be present are not only the criminal elements such a policy targets; they also include people who work at night, people who work two jobs, people with child-care responsibilities, people who don't like meetings, young people who prefer to go on a date, people who don't like the people who usually show up at meetings.



Again, the people who are likely to bear the burden of the policy are extremely unlikely to be the same ones who support it. Indeed the whole idea of the sweeps presupposes the existence of a nonconsenting minority: for a search is always legal if the person gives consent, so the new contribution of the proposed policy is to inflict searches on those who do not consent. Some of the nonconsenting may have something to hide; others may just like to walk around home in their pajamas out of the gaze of the police officer.

Indeed, both the sweeps and the gang loitering law create two tiers of people with two tiers of rights. Those who don't live in the inner city, whether they are good people or bad people, have the old rights that Meares and Kahan calls "1960s-style" rights: rights against arbitrary arrest, rights against unwarranted search and seizure. Those who happen to live in the inner city, and in the projects, have weaker and fewer rights: they may be harassed by the police because they happen to stand next to the wrong person; their dwelling may be invaded with no cause in the middle of the night.

Meares and Kahan rely on the premise that our society has become more fair-minded and less prone to harass people on arbitrary and racially biased grounds. This is where our analysis of shame and stigma enters the picture. We can, of course, point to particular evidence that the police are not as well behaved as this argument suggests: the use of racial profiling in traffic arrests is a clear example. More deeply, though, our argument suggests that "normals" are never likely to behave reliably toward minorities, because there is something deep in the logic of human psychology that drives stigmatizing behavior and the moral panics to which it is so closely linked. I have suggested, moreover, that issues of narcissistic aggression are particularly acute in today's America because of our culture's peculiar attachment to ideas of control and (especially male) invulnerability. These problems don't go away quickly, to the extent that they go away at all. Thus the rejection of 1960s-style rights seems premature. We can and should deal sternly with criminal behavior. But we have the resources to do this through laws already in place, including laws against harassment and intimidation. We need not sweep so broadly as to take in innocents who may simply want to loaf around, whether on the streets or in their own dwelling.

## V. Mill's Conclusion by Another Route

Considerations of stigma and moral panic have led us, by a slightly different route, to a conclusion that Mill long ago defended in *On Liberty*. The dignity and freedom of the individual person need constant and vigilant protection against the tyranny of majorities who define their own ways of doing things as right and normal, and who then set about inflicting damage on others. What Meares and Kahan call 1960s-style rights are always a good idea, as our constitutional tradition has wisely seen, because people have a tendency to band together in groups and to tyrannize over vulnerable minorities. What our analysis in terms of shame and stigma has added is a deeper account of why we should expect this to be a permanent feature of most or all human societies.

Mill simply observes the operations of stigma in England. He argued well for his conclusions, up to a point, but he did not have a sufficiently detailed or deep psychological understanding of the forces that lead to stigmatization and shaming. He therefore was forced to rest much of his argument on other considerations, which were in many ways less persuasive, as I shall argue in chapter 7. We have now advanced an account—sociological on one plane (Goffman, Cohen), psychological on another (Winnicott, Morrison)—that will help us defend Mill's policies in the face of opposition from optimistic communitarians who believe that the problems Mill talked about have gone away.

The first and most essential antidote to the operation of stigma is a firm insistence on individual-liberty rights and a firm guarantee to all citizens of the equal protection of the laws. The law should offer strong protections to individuals against the arbitrary intrusions, both of state power and of social pressures to conform. Thinking about the dynamics of group narcissism and shaming help us to see why the individual is always at risk in society, and therefore why vigilant protection for Millian liberties and for the equal dignity of all citizens is so important. So far, however, I have advocated only a minimal policy of refusal: the law should not use shaming as a part of the



public system of punishment, and we should refuse to make, or invalidate if made, laws whose primary or only purpose is to inflict stigma on vulnerable minorities. These are essentials of a decent society, but they are far from sufficient. In chapter 6 we must therefore consider more positive remedies.

Chapter 6

# Protecting Citizens from Shame

By necessaries I understand, not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable people . . . to be without. A linen shirt, for example, is, strictly speaking, not a necessary of life. The Greeks and Romans lived, I suppose, very comfortably, though they had no linen. But in the present times, through the greatest part of Europe, a creditable day-labourer would be ashamed to appear in publick without a linen shirt. . . . Custom, in the same manner, has rendered leather shoes a necessary of life in England. The poorest creditable person of either sex would be ashamed to appear in publick without them.

—Adam Smith, *The Wealth of Nations,* V.ii.k.3

How hard and humiliating it is to bear the name of an unemployed man. When I go out, I cast down my eyes because I feel myself wholly inferior. When I go along the street, it seems to me that I can't be compared with an average citizen, that everybody is pointing at me with his finger. I instinctively avoid meeting anyone.

—Quoted in Goffman, *Stigma*[1]

No courts have held or even darkly hinted that a blind man may rise in the morning, help get the children off to school, bid his wife goodby, and proceed along the streets and bus lines to his daily work, without dog, cane, or guide, if such is his habit or preference, now and then brushing a tree or kicking a curb, but, notwithstanding, proceeding with firm step



and sure air, knowing that he is part of the public for whom the streets are built and maintained in reasonable safety, by the help of his taxes, and that he shares with others this part of the world in which he, too, has a right to live.

—Jacobus tenBroek, "The Right to Live in the World: The Disabled and the Law of Torts"[2]

## I. Creating a Facilitating Environment

So far, I have argued that the law must refuse to take part in active stigmatizing of vulnerable people and groups. But of course a decent society needs to go further, finding ways to protect the dignity of its members against shame and stigma through law. This is such a fundamental goal of any decent society that it might lead us in many different directions. Laws protecting the freedom of religion and conscience; laws protecting citizens against arbitary search and seizure (touched upon in chapter 5); laws against cruel and degrading punishments (partially treated in chapter 5); laws against the sexual harassment of women in the workplace; laws against rape, together with enforcement procedures that show respect for women's dignity; laws against libel and slander—all these, and many more, play a role in making a society the sort of place that protects human dignity, creating a "facilitating environment" in which citizens can live lives free from shame and stigma. In this chapter I shall consider only a sampling of the pertinent issues. First, I shall briefly address the role of a society's system of social welfare in providing the opportunity for a shame-free life with others. Second, I shall turn to the area of antidiscrimination law and law against crimes based on hatred and bias. Third, I shall consider some aspects of the legal protection of personal privacy. And finally, I shall turn to a central locus of stigma in contemporary American society, disability, and to some recent legal reforms that attempt to protect citizens with disabilities from shame.

## II. Shame and a Decent Living-Standard

One of the most stigmatized life-conditions, in all societies, is poverty. The poor are routinely shunned and shamed, treated as idle, vicious, of low worth. Perhaps this is especially likely to be true in America, where it is widely believed that poverty is evidence of laziness or lack of will power. Goffman's research reminds us that this general stigmatization of poverty is compounded if the poor person



is unemployed, or has little education. And stigma runs in the family. As soon as children go to school, their wealth or poverty is marked in countless ways, by their clothing, the food in their lunch boxes, their accents, the homes to which they bring friends after school. As Adam Smith cogently argued, poverty has an absolute aspect: one may lack the necessities of life, such as food, shelter, healthcare. But it also has a comparative and social aspect: one may, while being adequately nourished and sheltered, lack items that are part of the social definition of a decent living-standard in one's society, such as a linen shirt and leather shoes in Smith's society, a personal computer, perhaps, in our own.

Although this vast topic can at most be mentioned in the present book, not to mention it would be a failing, since the failure to address it adequately is perhaps the major cause of shame and stigma in today's America.

There are many reasons for societies to concern themselves with securing a decent living-standard for all citizens, since life, health, educational opportunity, meaningful work, and a decent opportunity to develop one's mental faculties all have intrinsic importance. I address these questions elsewhere, arguing that a minimally just and decent society would provide all its citizens with a minimum threshold amount of certain key opportunities or "capabilities." For the purposes of my argument in this chapter, however, I shall focus on just one of my list of capabilities: "Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others."[3] How is this capability to be secured, and what role, in securing it, must be played by general policies in the area of social and economic entitlements?

When children grow up without adequate nutrition, health care, or shelter, the minimum level of this capability has not been secured. These are necessities of life in every society. In America today, several further requirements play the role of Smith's linen shirt: they are necessary in order to take one's place in society without stigma. Among these requirements, particularly important is free and compulsory primary and secondary education, plus access on a basis of equal opportunity to higher education. So too, in our society, is employment—at least for adult males. Although some societies (for

example ancient Greece) have ranked the unemployed above the employed, thinking it base to work for a living, our society has the reaction that Goffman's example depicts: the unemployed feel shame in their own eyes, and are forced to hide from the shaming gaze of others.[4]

Stigma also has a more localized comparative aspect: one may be stigmatized in a particular school, for example, simply for not having the same expensive clothes that the rich and popular students in that school have.[5] For the purposes of my argument here, however, I shall leave the upper levels of comparative shame to one side, focusing on the level of support that Smith is talking about: the minimum needed to appear in public without shame, as a citizen whose worth is equal to that of others.

Growing economic and educational inequalities in the United States contribute to a situation in which many Americans live stigmatized lives for reasons of poverty alone. Aspects of their poverty include lack of suitable health care, lack of adequate educational opportunity, unemployment, and lack of suitable housing. Indeed, the challenge of creating low-cost housing that does not stigmatize is a huge and fascinating topic, which could easily occupy an entire book on its own. Most cities and towns in America have not adequately met that challenge. Barbara Ehrenreich's *Nickel and Dimed,* to which I have referred in chapter 5, shows that many poor workers are forced to pay for sleazy and stigmatizing housing, such as cheap motel rooms, simply because they are unable to come up with a deposit for a rental.[6] Meanwhile, public housing projects that once were intended to give adequate and respectable shelter to poor residents now stigmatize all those who live in them.[7] Access to shame-free housing is among the major challenges our society must face in the next decades.

The connection between human dignity and some degree of public support for basic needs has been made in quite a few modern constitutional traditions, including those of South Africa and India. India, for example, has understood the constitutional requirement that no citizen may be deprived of life or liberty without due process (their analogue of our Fourteenth Amendment) to mean not mere life, but life with human dignity; removing the belongings of the



homeless has been held to violate this constitutional requirement. South Africa has gone further, recognizing affirmative rights to decent housing in severe cases. Both have constitutionalized as a fundamental right the right to free and suitable primary and secondary education. More generally, the international human rights movement has now recognized that social and economic rights are human rights comparable in importance to political and civil rights. Indeed, the very distinction between the two groups of rights probably cannot be maintained, for political and civil rights have necessary social and economic preconditions. A person who is in a bad way through lack of nutrition or health care cannot participate as an equal in politics. An illiterate person is unlikely to be able to go to the police or to the courts for enforcement of other political and civil rights.

The idea that human dignity has economic requirements is not alien to the tradition of thought in the United States. Franklin Delano Roosevelt's "Second Bill of Rights" focused on the provision to all citizens of essential aspects of material well-being, as did Lyndon Johnson's "Great Society."[8] In the Johnson era, moreover, courts were beginning to take the line that some of these rights enjoyed constitutional protection. In 1970, Justice William Brennan wrote a memorable opinion in *Goldberg v. Kelly,* a case that established that welfare rights could not be abridged without a hearing:[9]

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[10]

It is significant that Brennan makes his argument with reference to the idea of human dignity as well as that of well-being. He recognizes that poverty is not just deprivation, but also degradation. In this period, it seemed possible that the Supreme Court would gradually

move in the direction of recognizing that our Constitution protects a range of economic rights for the poor.[11] Justice Brennan clearly was interested in giving constitutional protection to at least some of these entitlements, which were, of course, widely, if unevenly, protected by popularly supported legislation.[12]

The move to full constitutional recognition of economic entitlements as inherent in the idea of human dignity did not take place. The "Reagan Revolution" changed the direction of constitutional jurisprudence. Meanwhile, legislative protection of welfare rights has also been gradually rolled back. It is certainly legitimate, and even desirable, for states to experiment with different welfare strategies, but something more troubling is currently in the air, a backing away from the "basic commitment" to dignity and well-being that Brennan finds, plausibly, at the heart of our traditions. Unlike Brennan, we seem to have come to the conclusion that the poor cause their poverty.[13]

Unemployment, growing at the time of this writing, is a problem closely linked to but distinct from poverty. Some societies that have an ample social safety net cannot guarantee full employment. (This is true, for example, of Finland, where the economy does well, but the available employment—for example, in the telephone-technology sector—is not labor-intensive.) Exactly how large a problem this is depends to some degree on the social context: if unemployment is not stigmatized, unemployed men and women can use the social benefits they have to continue their education and still function as fully equal citizens. In most modern societies, however, unemployment is stigmatized. So too, moreover, are many varieties of employment open to poor people, such as domestic service and many other types of low-income employment. Even when a type of employment is not stigmatized as such, as Ehrenreich's book makes clear, it may involve debasing and dehumanizing treatment, together with dangers to health and well-being that undermine generally the worker's attempt to live a life with human dignity. So the provision of employment and the humanization of work are also issues of the greatest urgency for any society that wants to call itself a decent one.

As I have said, these issues are too vast for policy-oriented treatment in this book, but to omit them would be absurd. It would be



equally absurd to omit the question of our own responsibility, as a rich nation, to the poor in other nations. Countless people all over the world suffer from hunger, malnutrition, lack of education, and lack of medical care when there would be a great deal that the United States, and its wealthy corporations, could do to relieve that misery. The present book has approached the issue of shame and stigma with a domestic focus, largely because of its legal emphasis. But the question of justice across national boundaries, a major topic of my work elsewhere, cannot fail to be mentioned when we consider how our public policy can protect human beings from stigmatized lives.

It will be said that it is absurd to think about the poor in other nations when we do not do enough for our own citizens. But it seems counterproductive to address the problems in a lexical order, trying to produce a perfect society internally before dealing at all with our responsibilities to our fellow world citizens. American corporations are doing business daily in other nations in a way that greatly affects well-being, opportunity, and access to medical care. It would be grossly culpable to fail to address the global AIDS crisis, for example, a major cause of stigmatized lives, until we had perfect health care in our own nation. The two problems are in large measure independent, and it is not the case that money spent (for example, by pharmaceutical companies) to address the former will be deducted from the latter. Moreover, other nations, not as prosperous as our own, are managing to devote a good deal more of their budget to foreign aid than we are without failing to address domestic problems of inequality. All these questions need to be on the table together, as we think about a world in which the goal ought to be that all people have the opportunity to lead lives with human dignity.

### III. Antidiscrimination, Hate Crimes

Let us now return, however, to the more narrowly demarcated issues on which we have been focusing: how might we use specific types of legal change to protect vulnerable minorities from stigma? In chapter 5, I argued that we should not enact, and should invalidate if

enacted, laws whose primary purpose or effect is the stigmatization of unpopular minorities. How much further should the social commitment to protect such groups extend? This is itself a vast question, raising complex issues, both legal and moral, that lie beyond the limits of the present book. Let me, then, show the direction in which my argument takes us by returning to the two issues that concerned us in chapter 5: the protection of suspected lawbreakers from the invasion of their individual rights, and the protection of gays and lesbians from shame.

About the first of these two issues, raised in my discussion of loitering laws in chapter 5, I have little to add to my defense, in that chapter, of the familiar battery of rights of criminal defendants. As I mentioned in that discussion, criminals and suspected criminals have slowly won a range of protections against the abuse of police power that should not be eroded, whether by new laws like the Chicago loitering law or by the slow undermining of guarantees such as the *Miranda* warning, the right to effective assistance of counsel, and so forth. Strong insistence on these protections is a crucial way to protect racial minorities from the damage that social stigma inflicts, linking race with criminal behavior.

An issue of intense current public concern in this area is racial profiling. Of course law enforcement officers use profiling in many ways when searching for criminals: for example, a serial killer's modus operandi is profiled by psychological experts in order to narrow the segment of the population within which police will search. That sort of profiling is unobjectionable, because it begins from a committed crime and works backward. Far more troubling is a kind of profiling that precedes crime, or at least discovered crime, using other traits as proxies for (alleged) criminal intent or activity. There may be some instances in which national-security interests strongly support these policies. Thus, there are at least some cogent arguments supporting the recent profiling of Arab and Arab-American men, given the shortage of time and money for comprehensive airport searches, et cetera. Even then, this policy unfairly stigmatizes all members of a group, and probably encourages police and airport-security officers to behave badly toward these people, sending the



message that they are not fully equal citizens (or visitors). So I am opposed to profiling even in such cases. Far more clearly, it is both intrinsically objectionable and unwise policy to use race as a proxy for crime, as when traffic stops and searches of vehicles are triggered by the race of the suspect. No doubt in order to use resources wisely police must engage in some types of profiling in searching for drugs. Searches of the vehicles of elderly motorists, for example, are likely to prove wasteful. Profiling by age and by type of vehicle probably does not raise a serious issue of fairness. But when profiling tracks existing social stigma, a grave issue of fairness is raised.

The stigmatizing of African-American men as criminals is one of the ugliest and most invidious aspects of American racism, closely linked to the racially skewed disenfranchisement of convicted felons that I discussed in chapter 5. Leading African-American intellectuals, from Cornel West to Brent Staples, have written eloquently about the pain and isolation inflicted by society's immediate perception of the black man as criminal, as when West, dressed in a suit and standing on Park Avenue, could not get a taxi to pick him up. Historically, this stigmatization was linked with gross harms: with lynching, unfair trials, discrimination in employment. If our society wants to pursue a course of racial reconciliation, as seems both just and prudent, racial profiling is a very stupid policy, even if it were efficient in terms of police resources, which has not been convincingly demonstrated by the evidence.[14] Profiling is probably also intrinsically unfair, since it denies people an important sort of equality before the law on grounds of race.

Let us now consider the protection of gays and lesbians from public stigma. In considering this issue, our society has recently turned to two remedies: antidiscrimination laws and hate crimes laws. In these two areas, the issue confronting a liberal society is how to safeguard the vulnerable without infringing on the expressive rights of those who hold views that offend liberals. Communitarians of various types can favor laws that express a commitment to protecting the vulnerable without encountering a countervailing tug, to the extent that they lack the liberal's deep commitment to the liberty of the individual, and, in particular, to a range of liberties in the area of

thought, speech, and expression. The liberal, by contrast, is committed to protecting those who say something hate-filled as well as those who are targeted by hate—within certain limits.

Nobody is really an absolutist about free speech. There is broad agreement about criminalizing many forms of speech, such as blackmail, threats, perjury, bribery, unlicensed medical advice, misleading advertising. In a gray area is most commercial speech and much artistic speech: there is a good deal of debate about whether and when these forms of speech are covered by the protection of the First Amendment. Even concerning political speech our society has not always agreed in giving it broad First Amendment protection. Only as recently as 1918, when Eugene Debs went to jail for urging people to refuse military service in World War I, the Supreme Court held that the political speech of dissidents during wartime was not protected by the First Amendment. By now, we have come to a different view: such speech is paradigmatic of what the First Amendment is taken to protect. However much people differ about the precise account of First Amendment liberties and their rationale, however much they differ about the precise protections to be afforded to various types of commercial and artistic speech, there is little disagreement that objectionable and unpopular political speech lies at the very core of what the First Amendment protects. Liberals today, however, are likely to hold that strong First Amendment protections apply very broadly—to all political speech and much artistic speech, at any rate. Liberals also ascribe considerable importance to freedom of association, which may also be at issue in dealing with discrimination, when claims of nondiscrimination clash with the wish of a club or group to exclude individuals whose practices or views it does not like.

With respect to these two important values, free speech and freedom of association, nondiscrimination laws seem unproblematic, at least up to a point. To protect gays and lesbians against discrimination in employment and public housing, in ways similar to the protections our country has already offered to racial minorities and women, does not, as such, prevent the expression of racist, or sexist, or homophobic political opinions. Thus the Employment Discrimination Act introduced by Senator Edward Kennedy at the same time



that the Defense of Marriage Act was debated, which would have added sexual orientation to the list of prohibited grounds of discrimination, seems a logical and indeed a required step, and it is a national scandal that this law has still not been passed some years later.

Nondiscrimination is a very complex issue, and there will continue to be disputed zones, particularly in the area of religion: how far should religions be exempt from general prohibitions on discrimination on grounds of race, sex, or sexual orientation? (The Employment Discrimination Act exempted religious organizations and educational institutions controlled by them, small businesses, private-membership clubs, and the military. Religious exemptions were also allowed in Denver's nondiscrimination law, challenged by Colorado's Amendment 2.) As a country we have not fully sorted out the issue of exemptions from nondiscrimination laws; our policies are not consistent. (For example, Bob Jones University lost its tax-exempt status for its policy opposing interracial dating, but religious universities that have statutory requirements that the university president be a male member of a particular religious order retain their tax exemptions.) Where sexual orientation is concerned, it is clear that our public debate is still at a much more primitive level than it is in the case of race and gender. We have not even resolved such obvious questions as whether private landlords can exclude gay tenants because of their sexual orientation, much less questions about how far religious institutions would be permitted to discriminate in hiring and benefits on such grounds.

The recent Supreme Court case regarding the Boy Scouts showed clearly the deep tension between the liberal value of freedom of association and the liberal value of nondiscrimination.[15] In this instance, freedom of association won out, although, in part, because the Boy Scouts were understood to be a private club, rather than a public accommodation, perhaps a mistaken judgment. These remain difficult areas and we will need to grapple with them. On the whole, however, it seems clear that a general policy of nondiscrimination on the basis of sexual orientation in employment and public accommodation, at least, is morally required (perhaps constitutionally required)[16] by the very notion of equal protection, and that lesbians

and gays should get the same types of protection that are currently extended to racial minorities, women, and people with disabilities.[17]

Discrimination against gays and lesbians has strong links to discrimination against women, as I argued in chapter 5. It also has close links to gender-based discrimination, a topic too little explored. People may be stigmatized and discriminated against for gender-deviant behavior: a woman who dresses in too "manly" a way, a man who is too "effeminate." One persistent problem in our legal culture is precisely how to deal with discrimination that, while evidently based on gender stereotypes, looks different from discrimination based upon sex all by itself. It seems clear that this type of discrimination is somehow connected to the two other types of discrimination. To fire a man because he acts in a feminine way is to denigrate female attributes, as well as, possibly, to impugn his sexual orientation. To tell a woman to behave in a more feminine way is to reify aspects of gender in a way that seems connected to the inferior and denigrated status of women, although the connection remains elusive. Finally, to tell a woman to behave in a more masculine way is also to signal that only the traits of the dominant are valuable—it is rather like telling an African-American employee to behave in a more "white" manner.[18]

There is something wrong with all these demands where not justified by a job-related necessity. So much is widely acknowledged, as we can see from the well-known case *Price Waterhouse v. Hopkins*, in which the Supreme Court held that it was impermissible sex stereotyping to advise a female candidate for an accounting partnership to walk and dress "more femininely."[19] What remains disputed is precisely how far these forms of discrimination are covered under existing laws, and whether a new law governing discrimination on the basis of gender is needed to address them. In an excellent recent analysis, legal scholar Mary Anne Case argues that in fact all are covered by existing law. The requirement that employees conform their gender to their sex merely for reasons of conformity is "already outlawed by the plain language of Title VII as well as by the prohibitions on sex stereotyping outlined by the Supreme Court. It is impermissible disparate treatment."[20] So too, she argues, is "categorical" discrimination on the basis of gendered characteristics: the requirement, for



example, that all workers in a given job, regardless of sex, display conventionally masculine traits.

Another problem closely related to discrimination on the basis of sexual orientation is a problem that Goffman calls "covering," and recently discussed in a detailed legal article by Kenji Yoshino.[21] Even when gays and lesbians are hired with knowledge of their sexual orientation, they may face a subtle battery of demands not to "flaunt" their orientation. These demands are usually asymmetric to similar demands made of heterosexuals, and are analogous to demands sometimes informally made of African-Americans that they imitate the behavior of the dominant race, playing down traits that are linked in the popular mind with their race. These demands are aspects of stigma: they are enforced upon a vulnerable group in a way that inflicts shame. A lesbian mother may find that she cannot mention her partner, or bring her to school functions, without jeopardizing her child's standing in school, even though the school knows that she is lesbian. A gay man, widely known to be gay, can attain a high position, but at the price of never bringing his partner to public functions or alluding to him as a partner. Goffman compares such cases to the way in which blind people learn to wear dark glasses, because they know that people don't want to look at their eyes.[22] Clearly not all forms of insensitivity and callousness should be regulated by law, but if employment is really conditional on this sort of "covering," asymmetrically applied to gays and not to "straights," that is a form of discrimination that probably should be regulated by antidiscrimination law.

In chapter 5 I analyzed a fund-raising letter that expressed anxiety about the growing popularity of laws against hate-based crimes, which mandate enhanced penalties for crimes based on racial bias, gender bias, or, in some cases, bias as to sexual orientation. Such laws raise complicated issues. On the one hand, there is no doubt that gays and lesbians urgently need protection from violence, which menaces them continually. [23] Police are often reluctant to enforce the laws that exist; all too often, they share the homophobic sentiments of the perpetrators of violence. On the other hand, one might argue that treating a hate crime based on race or sex or sexual orientation

more severely than a similar crime motivated, say, by hatred of one's brother is a way of penalizing unpopular political opinions. The only difference between the two acts is the nature of the motivation, and the significant difference in the motivation, in this case, is that a political opinion is part of it.[24]

I am not convinced by this retort. In all kinds of ways, the law already expresses a commitment to protecting vulnerable citizens and to penalizing especially severely those who prey on the vulnerable. Blackmailers, for example, get a higher sentence under the Federal Sentencing Guidelines if they prey on an "unusually vulnerable victim." In a very interesting opinion, Judge Richard Posner argued forcefully that gay men in America are in that category.[25] The behavior of a person who commits an assault or a homicide motivated by hatred of a vulnerable group is relevantly similar: he chooses to prey, in a criminal manner, on an unusually vulnerable type of victim. A hate crimes statute would simply arrange that he, like the blackmailer under the federal guidelines, would receive an upward departure in sentencing.

Nor, I think, should we accept the contention that the penalized motivation is protected political speech. The wish to eradicate someone from the earth does have a cognitive content, to be sure: that this person ought not to exist, or ought to suffer pain. We should not evade the issue by denying that emotions can and do have cognitive content. But there is a huge difference between a person who writes a pamphlet saying that gays ought to suffer, or even that hate crimes should not be curbed (as in the letter I received), and a person who goes out and perpetrates such an offense. This difference informs the cognitive content of the two people's emotional motivations. The person who wrote my fund-raising letter expresses hatred, but there is no evidence of criminal intent. So that person's speech is protected speech, and there is nothing else to penalize. The perpetrator of a hate crime has, in addition to his political opinions, a criminal intent, a specific type of hate-based mens rea, intrinsically directed toward conduct, that goes well beyond the content of the protected opinions expressed in the pamphlet. What is being penalized is a specific type of criminal intent, not just a specific type



of opinion. Using similar reasoning, the U.S. Supreme Court has upheld enhanced penalties for hate crimes.[26]

To be sure, this distinction is not, and should not be, easy to make. Many nations do regulate hate speech that is clearly political: in Germany, for example, one may not circulate anti-Semitic materials, and political parties organized along hate-based lines are illegal. Given Germany's past, it seems sensible for it to adopt a somewhat more restrictive attitude to political speech than the United States has (only recently) seen fit to adopt. Even Germany, however, does not propose to criminalize the writing of anti-Semitic pamphlets; it is enough to prevent them from circulating. We can agree, then, that a necessary condition of criminal conviction is a criminal act, understood in a traditional way. What the proponent of hate crimes laws asks is that the intent to harm a person as a member of a stigmatized group be singled out and treated more severely than the intent to harm a person for money, or jealousy, or a range of other motives. This demand does not seem to penalize speech in an unacceptable way.

One might ask what hate crimes laws actually accomplish. If the real problem is underenforcement of current laws, such an objector might say, it is not clear that making the laws tougher is the right way to solve the problem. That objection, of course, is very different from the free-speech criticism I have just rejected. But I think that it probably fails as well. We cannot tell until we experiment with such laws, but it seems to me that attaching especially severe penalties to hate crimes is likely to prove an effective deterrent. The criminals who prey on gays and lesbians are not, on the whole, a bunch of committed desperadoes who would go to their death for their principled opposition to the "gay agenda." As Gary David Comstock showed in his comprehensive study of antigay violence, they are for the most part young male troublemakers who don't have a particular political aim, but just want to beat up on someone whom the police probably won't protect.[27] They choose gays because they are gay, and commit hate crimes in that sense, but they aren't deeply committed to eradicating gays, and they probably would go do something else—many of them, at least—if they got the signal that this is something society was going to take really seriously. Moreover, a social statement that

these offenses are intolerable in our society has wider consequences: it is a way of affirming the equal dignity of gay and lesbian citizens, and the commitment to rendering them fully equal under the law. To make that statement, in the wake of our long indifference to such crimes, seems the decent thing to do.

### IV. Shame and Personal Privacy

Shame causes hiding; it is also a way in which people hide aspects of their humanity from themselves. In shaming others, people often, I have argued, project onto vulnerable people and groups the demand that they conceal something about themselves that occasions shame for the shamer. Thus, people's insecurity about sex and the lack of control involved in sex leads them to constitute themselves as a dominant group of sexual "normals," and to ask sexual minorities to conceal themselves. People's insecurity about bodily vulnerability leads them to demand that "the disabled" hide from the public gaze.

My argument so far has emphasized the importance, for a liberal society, of resisting these demands. People whose actions are threatening only in the sense that they occasion anxiety in the dominant group should not be punished by being hidden away. That type of scapegoating, in which some vulnerable minority bears the burden of the fears of the majority, is an unacceptable form of discrimination. Thus my argument has stressed the importance of protecting the right of minorities who are doing no harm to others to inhabit the public world alongside others. In my next section, discussing the disabled, I shall take this argument further.

At the same time, however, my argument suggests that we need to protect the spaces within which people explore and confront aspects of their humanity that are problematic and may occasion shame, whether to themselves or to others. I have suggested that imagination and fantasy, often in connection with art and literature, are ways in which people may learn to explore the problematic aspects of their humanity without undue anxiety, thus developing a richer sense of themselves. This self-exploration enhances the ability to



imagine the experiences of others; both abilities are crucial not only to good personal relationships, but also to the functioning of a healthy liberal society.

All this suggests that societies need to protect the spaces within which people imagine and explore themselves, even when their imaginings are perceived as shameful, whether by themselves or by others.[28] Thus my argument also suggests the importance of giving legal protection to areas of personal privacy, and in particular to privacy for activities and imaginings that some may regard as shameful.

Thus, although in chapter 5 I criticized certain ways in which vulnerable groups are forced to hide—and thus criticized a particular way of using the familiar public-private distinction, namely, one that forces unpopular people underground—it is now necessary to turn to the other side of the issue: a liberal society must also provide citizens with certain protected spaces within which they can hide from the shaming gaze of others if they choose to do so. Social groups will continue to inflict shame on others with or without the cooperation of the law, so the law needs to do more than simply refuse to join in this behavior. It should actively protect the individual who may want a place of retreat from the shame that inevitably will continue to attach to unusual people and behavior.

This is a vast topic. It has implications for the law of the press, the law of slander and defamation, the law of cyberspace, limits to surveillance by law enforcement agencies, the freedom of artistic expression, and much else. It seems best, in the context of the present argument, to approach it somewhat abstractly, considering a proposal that has recently been made by philosopher Thomas Nagel.

In an extremely interesting article entitled "Concealment and Exposure," Nagel speaks, in ways that are congenial to my argument, of the importance, for most people, of having spaces within which to pursue fantasies that others may find shameful or repulsive. Much sexual behavior, he plausibly argues, is bound up with such fantasies. Nagel then defends certain strict limits to intrusion on personal privacy by others, calling this one face of the public-private distinction. But this distinction, he then argues, has another "face": it is the importance of keeping disruptive material behind concealing barriers.

> The public-private boundary faces in two directions—keeping disruptive material out of the public arena and protecting private life from the crippling effects of the external gaze. . . . It is the other face of the coin. The public-private boundary keeps the public domain free of disruptive material; but it also keeps the private domain free of insupportable controls. The more we are subjected to public inspection and asked to expose our inner lives, the more the resources available to us in leading those lives will be constrained by the collective norms of the common milieu.[29]

Nagel explicitly endorses the idea of the "normal" as a construction through which we protect ourselves from disruption. Thus he endorses an asymmetry in the way in which the public-private boundary is likely to operate: as the price we (all) pay for (all) getting protection for our private fantasies, when we want to protect and conceal those, we must support a regime that forces *some* (the "abnormals") to conceal themselves from public view, even when they don't want to conceal themselves.

One feels that something has gone wrong at this point. Two crucial issues have been lost from view: the issue of liberty of choice and that of equality. The appearance of symmetry that Nagel creates by his use of the metaphor of the two "faces" is illusory. The public-private boundary does not function symmetrically on both sides because it protects "normals" both in their choice to conceal and in their choice to make public, whereas "abnormals" are required to conceal.[30] Thus "normals" may choose to conceal their kisses, or they may kiss in the public street. "Abnormals," beginning from an unequal social position, are protected only when they conceal themselves, even if they would quite like to kiss in the public street. Nagel seems to be saying that "normals" just can't take too much disruption, so the price our society will have to pay for a system of personal liberty is a set of unequal demands for concealment applied to vulnerable minorities.

If this were advanced as a predictive claim, we would test it by looking to history. I believe that we would find it false. Not too long ago, women were forced to hide their sexuality behind clothing that concealed legs and sometimes arms, and that surrounded the lower body with a large screen of fabric. They were also forced to conduct



themselves in ways that dissimulated desires they had and activities that they performed or at least wanted. Society told women: we can't tolerate too much disruption. We can't stand to have those legs in the world, and so we make you pretend that you don't have legs. As art historian Anne Hollander comments, the customary norm of female dress prior to the twentieth century

> corresponds to one very tenacious myth about women, the same one that gave rise to the image of the mermaid, the perniciously divided female monster. . . . Her voice and face, her bosom and hair, her neck and arms are all entrancing, offering only what is benign among the pleasures afforded by women . . . but it is a trap. Below, under the foam, the swirling waves of lovely skirt, her hidden body repels, its shapeliness armed in scaly refusal, its oceanic interior stinking of uncleanness.
>
> It is really no wonder that women seeking a definitive costume in which to enact their definitive escape from such mythology should choose trousers.[31]

Now women may show their legs, with or without trousers, and democracy has not collapsed. Indeed, Hollander plausibly argues that a precondition of genuine democracy was the recognition of women's equally human bodies; and that this, in turn, required the overturning of puritanical conventions in dress, allowing women to show their legs. Our system of personal liberty does not in fact say that we will protect women's fantasies on the inside only at the price of making them hide their bodies on the outside. These days, however, we do make that demand of gays and lesbians—that is, when we even go so far as to protect their consensual acts in private. Yet it seems wrong to think that society will collapse if gays and lesbians openly announce their sexuality, or even hold hands on the street in ways now acceptable among heterosexuals. One even knows places in which these things happen, and yet personal liberty has not altogether vanished. One might think that, as with female trousers, so here: what genuine democracy requires is that all citizens should be able to demonstrate their full and equal humanity.

But of course Nagel is not advancing a descriptive or predictive claim: he is advancing a normative claim about how society ought to

be: it *ought* to protect certain areas of liberty-in-seclusion for all actors, and, as the alleged price of this system of liberty, it *ought* to require of minorities that they refrain from "disruption," that is, of conduct offensive to "normals." For the idea that the resulting society would be either just or good, no support is offered, except the scare-predictive maneuver that says that we would lose our personal liberty without such restrictions on minorities. This is Mill turned upside down: Nagel wants to say that we can't have a subset of the liberties that Mill prized without supporting and protecting forms of social tyranny by the majority that Mill abhorred.

Nagel's argument is led in this unfortunate direction, I believe, because he uses the slippery notion of privacy, and the equally slippery notion of the public-private distinction. The concept of privacy has long been the target of criticism for several reasons; one is its unclarity.[32] In some arguments, "privacy" is used as equivalent to "liberty" or "autonomy." Thus, the right to privacy, in the areas of contraception and abortion, is really best understood as a right to certain forms of liberty of choice. Abortion and contraception are not particularly secret or secluded; in fact the right in question protects one whether one takes one's contraceptive pill in the public square or at home. In other discussions, "privacy" means seclusion or solitude: rights against intrusion by the media, for example, are rights that create a sphere of seclusion around the person. Seclusion, however, is quite a different matter from liberty, and, as we have seen, sometimes one may be forced to seclude or conceal some aspects of oneself that one might wish not to seclude: seclusion may be linked to a denial of liberty.

One key notion, in analyzing these areas of law, is that of liberty: what should people be at liberty to conceal, and what should they be at liberty to reveal or enact publicly? And the contrast we really need to think well about this question of liberty, in turn, is not the elusive contrast between the public and the private, but the contrast that John Stuart Mill advanced, between actions that are self-regarding, implicating the interests only of the agent and consenting others, and actions that are other-regarding, implicating the interests of nonconsenting others. I have already argued that this is the pertinent distinction to ponder in thinking about the regulation of gay



sexual conduct, no matter where it occurs. The pertinent question is not whether the conduct occurs in a place denominated "public," but rather if nonconsenting others are present, and, if so, how they may be affected. It seems to me that what Nagel's powerful argument about fantasy really shows is that we all ought to have areas of personal liberty in which we may pursue self-regarding acts, with or without consenting others. The rightful sphere of such liberty should be limited by the potentially harmful impact of this behavior on nonconsenting others who are, or may be, present.

To consider this distinction, think about nude dancing. Let us agree for the sake of argument that it would be permissible to ban nude dancing in a public park, on the ground that children and other nonconsenting parties are present. (I shall return to this issue later.) On the other hand, nobody disputes that nude dancing in one's living room with the blinds pulled down is not regulable by law (although many laws targeting sex acts do not observe this restriction). What, then, about a club that admits only those who choose to enter and pay a fee? Indiana restricted nude dancing in such clubs. The Seventh Circuit Court of Appeals declared that law an impermissible restriction on the freedom of expression.[33] The Supreme Court overruled this decision; Justice Rehnquist (joined by three others) cited the importance of "public morals."[34] The dissenting opinion, (written by Justice White and joined by Justices Marshall, Stevens, and Blackmun) made the Millian point well:

> The purpose of forbidding people from appearing nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates. [This] being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct.[35]

In other words, the important distinction is one between conduct that affects only those who consent and conduct that affects (in a potentially harmful way) those who do not consent.

This argument parallels our argument about disgust in chapter 3. The fact that people who merely imagine what is going on inside the club feel that the dancing is shameful is insufficient to restrict conduct that does not inflict or threaten harm. Once we put the issue in terms of Mill's distinction, however, the picture of a public-private distinction that has two faces necessarily interrelated, as two sides of a single coin, collapses. Liberty of choice in one sphere has not been shown to entail forced concealment in another sphere. There seems to be no reason to think that protection of spheres of liberty for self-regarding conduct entails, as its other face, the consequence that unpopular minorities *must* hide their conduct even when they don't want to. Protecting the liberty of heterosexual men and women to have sex without intrusion, when that is what they want and seek to do, obviously does not entail the requirement that women cover their legs when they don't want to. Protecting the liberty of gays and lesbians to have consensual sex away from the public gaze, when that is what they want to do, does not entail, as its other face, the requirement that they refrain from kissing and holding hands in public, when that is what they want to do. Nor, as the Massachusetts police have recognized (see chap. 5), is there any good liberty-based argument for requiring them not to have sex "in public," so long as they take steps to seclude themselves and thus to preserve the self-regarding nature of their acts.

The public-private distinction, as applied by Nagel to sexual expression, is inherently discriminatory: it asks minorities to conceal themselves in ways that it does not ask of the majority, and it excuses these restrictions by alleging that a system of personal privacy demands this as its other face. We have been given no good reason to believe in this connection. What we really need to sort out is the crucial question of impact on others: what forms of impact on nonconsenting others do we really worry about, and what limits on our conduct are we willing to tolerate in order to protect others from these harms, or putative harms? And we need to sort out the question of personal liberty: what choices do we want to protect for all citizens, and how do seclusion and informational privacy figure in the analysis of these liberties? In the process, we may decide that the



home deserves special protection, but it is unlikely that the sphere of protected liberty will coincide entirely with the boundaries of the home. Thus it was wise of the Supreme Court, in *Lawrence v. Texas*, while focusing on the protection of consensual sexual conduct in the home, to state in the very opening of the opinion that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds."

One issue that clearly must be faced is the more general issue of public nudity. I have conceded for the sake of argument that it is legitimate to restrict nudity in public places, on the ground that nonconsenting parties, including children, may be present. But elsewhere I have insisted that people do not have a right to restrict conduct, where that conduct does no harm, simply because they are repelled by it. In chapter 3, for example, I argued that nuisance law should be narrowly tailored (as it typically is) to regulate disgusting conduct that actually causes either danger or sensory offense serious enough to count as harm. The disgust someone feels when looking at unpopular conduct (for example, a gay couple holding hands) should not be grounds for legal regulation. It seems clear that there is a similar distinction in the area of shame: not all conduct that is widely viewed as shameful can legitimately be regulated when it occurs in places where nonconsenting parties are present. It is not at all clear, however, how to draw the boundary.

On one side is sexual conduct that has a clear potential for harm: a person who masturbates in public in the presence of children may threaten them and cause psychological harm. On the other side is conduct that is clearly innocuous, although once it would not have seemed so: a person walks down the street in shorts and a halter top, a lesbian couple hold hands in public, a mother nurses her infant on a public bus (something for which women have indeed been arrested). But what about public nudity, just walking around without clothes, without any sex acts or other behavior of a sort that might be thought to frighten and threaten children? It seems pretty innocuous; in many countries it is routine beach behavior. And by all accounts, nudity quickly becomes unremarkable when generally practiced; bodies in

a nudist colony are not regarded as sexually charged in daily interactions. So isn't this just like the question of women showing their legs? People may think it is a disruptive invitation to sex, but that is their problem. And if people mention their religious convictions, we can always point out that we do not allow religious objections to women in bathing suits to prevail in law, or religious objections to same-sex public hand-holding.

I am inclined to think that this is correct: the reasons supporting laws against public nudity are weak. But many people really do believe that premature exposure to the sight of adult genitals harms children, and the intrusion on personal liberty that is involved in restricting public nudity is probably not great enough to worry about, so long as zoning creates at least some beaches and park spaces in which nudists may congregate.

One area in which the pendulum is swinging toward greater toleration is that of women baring their breasts. Of course standard bathing suits cover very little. But in Europe there is widespread toleration for toplessness on beaches, and in some other contexts as well. In 1996, the Ontario Appeals Court reversed the conviction of university student Gwen Jacobs for indecency: she had walked through the streets of Guelph topless to protest the fact that on a hot day men can remove their shirts and women cannot. At trial she maintained that breasts are just fatty tissue, no different from the male analogue. While the court did not accept this reasoning, they did use Millian reasoning in finding that her conduct was not regulable: "No one who was offended was forced to continue looking at her." This ruling seems utterly rational, and one may hope that at least some parts of the United States will experiment with liberty in this area.

These are large questions, and we continue to wrestle with them in many areas. The fiction that a unitary concept of privacy, and a unitary and clearly understood contrast between the public and the private, gives us good guidance in these matters should be abandoned.

## Chapter 5. Shaming Citizens

1. See Gustafson (1997) and Jones (1987) on the terminology: very commonly, "inscriptum" means "tattooed." And Gustafson and Jones both argue cogently that tattooing was by far the most common variety of penal marking (and also of marking slaves). Branding was probably employed only rarely. Cicero's proposal is metaphorical, but only in the sense that he actually wants capital punishment for the conspirators rather than a mere tattoo. As for others, what he wants is that they will clearly take one side or the other: either support the death of the conspirators or confess that they are fellow-travelers.
2. Fairbairn (1952); compare Winnicott's use of the terms "absolute" and "relative" dependence.
3. Rawls (1971, 1996) calls the social conditions of self-respect the most important of the primary goods; my related account of the Central Human Capabilities in Nussbaum (2000a) includes the capacity for emotional health, as well as the social bases of self-respect.
4. At least this is true of the communitarian thinkers under consideration in my argument, such as Etzioni and Kahan. It is probably true of Devlin, and even, perhaps, of Leon Kass.
5. See J. Williams (1999).
6. See Nussbaum (2000a, chap. 1): this is where I reach my limit with the thesis that the political sphere should create capabilities, but not require a particular mode of functioning.
7. Which ones Kahan and Etzioni primarily have in mind is an interesting question. Both focus explicitly on alcohol and drug offenders, but Kahan likes to give examples where the shamed person is powerful: businessmen who urinate in public, well-off men who solicit prostitutes. Etzioni is more likely than Kahan to include the single mother in his list of shameful offenses; certainly many communitarian critics of our current "shamelessness" focus on this case.
8. Kahan (1996).
9. Unlike Braithwaite, who attempts to distinguish shaming from humiliating, Kahan has no qualms about favoring humiliation.
10. This is central to the case for shaming penalties in Etzioni (2001).
11. For examples of shaming penalties actually in use for each of these, see Kahan (1996, 631–34).
12. See Gustafson (1997) and E. Posner (2000).
13. See Massaro (1991, 1997).
14. See Gustafson (1997) on the way in which Christians used the tattoos they received as a positive symbol and even voluntarily tattooed themselves.
15. Annas (manuscript).
16. Whitman (1998).
17. See also Markel (2001), who argues that it is important for reasons of impartiality that punishments be administered by the state.
18. E. Posner (2000).
19. See Gustafson (1997) and Jones (1987).
20. Gilligan (1996); see also Massaro (1991).



21. Braithwaite, personal correspondence, April 2002.
22. Schulhofer, personal communication, June 2002. The general phenomenon is, he says, common in the literature on probation reform and other reform proposals.
23. Whitman (1998).
24. Massaro (1991).
25. Markel (2001).
26. Morris (1968).
27. This parenthesis is me talking, not Markel; he is not responsible for my interpretation of the *Groundwork*.
28. Markel's analysis, and Morris's, are a lot more detailed than this; I have presented only a crude summary.
29. That is what Massaro appears to mean: she conflates retributivism with revenge.
30. Braithwaite (1989).
31. Braithwaite (1999).
32. Braithwaite, personal correspondence, April 2002.
33. See Braithwaite (1989, 185): "[T]he good society is one in which there is consensus about certain core values, including the criminal law, but that has institutions to encourage conflict outside those areas. . . . Among the core values on which the good society must have consensus are freedom, the promotion of diversity and constructive conflict."
34. Braithwaite (1989, 158).
35. Braithwaite (2002, 13).
36. Braithwaite tells me that it was so understood by Etzioni, who sent him the "Communitarian Manifesto" to sign; he refused.
37. Braithwaite himself believes that the main area of disagreement between us is over retribution: he is entirely against it, while I am sympathetic to it, understood in a limited, Kantian way. As I say below, I am not sure that there is such a large difference between the sort of retributivism I favor and the sort of confrontation between victim and aggressor that he favors.
38. See J. Braithwaite and V. Braithwaite (2001).
39. Annas (manuscript); Rhode, in a comment on this chapter at Stanford University, 4 June 2001.
40. Whitman (2003).
41. Archimandritou (2000), written in modern Greek. (My knowledge of the argument derives from conversation with the author.)
42. See my discussion of *Hudson v. Palmer* in Nussbaum (1995). See also Richard Posner's very interesting (dissenting) opinion in *Johnson v. Phelan*, a case involving the privacy rights of prisoners.
43. *Johnson v. Phelan*, 69 F. 3d 144 (1995).
44. Johnson was African-American, and most of the female guards were white; although Posner was not able to mention this fact in the opinion, he told me that it was important to his thinking.
45. His view did not prevail: Judge Easterbrook found against the plaintiff, and the third member of the three-judge panel was a senior judge who was experiencing mental difficulties and voted with Judge Easterbrook under the impression that he was siding with Judge Posner.

46. The states in question are Alabama, Florida, Iowa, Kentucky, Maryland (after the second conviction), Mississippi, Nevada, New Mexico, Virginia, and Wyoming. Delaware removed its restriction recently. Many other states restrict the franchise partially: for example, Texas denies the vote for two years after release from prison. Most states deny the vote to prisoners currently incarcerated.
47. Data from Human Rights Watch (1998) and the *Los Angeles Times*, 30 January 1997. Together with this observation, we should study the classification of offenses as either felonies or misdemeanors. While some states deny the vote for a misdemeanor, the line between felony and misdemeanor is usually crucial, but some drug offenses are classified as misdemeanors, some as felonies, often in ways that, once again, track race. On this issue, see Fletcher (1999).
48. Whitman (2003).
49. Cohen (1972), quoting from an article in the 1964 *Police Review*.
50. Cohen (1972, 95), quoting from Lumbard (1964, 69). Lumbard understands the penalty as a sign that the British police have a sense of humor.
51. Quoted in Cohen (1972, 106); emphasis in original.
52. Ben-Yehudah (1990).
53. Jenkins (1998).
54. Hall et al. (1978).
55. *Evans v. Romer*, Defendants' Trial Brief at 56; Defendants' Motion for Reconsideration and to Alter or Amend Judgment at 1–2; the reasoning is criticized in Plaintiffs' Supplementary Memorandum on the Legal Status of "Morality" as a Governmental Interest at 2: "[M]oral norms are legitimate public purposes only when they are linked in some way with the preservation of public welfare and public order."
56. For detailed investigations of the range of opinion in the major U.S. denominations, see the essays in Olyan and Nussbaum (1998).
57. Equally odd was the repeated claim that no other society has legalized same-sex unions, although by that time at least five European nations had recognized same-sex domestic partnerships that offer most of the benefits of marriage. By now, the number is larger, and the Netherlands has gone all the way to the legalization of same-sex marriage.
58. See Koppelman (2002). Koppelman's argument (in its earlier article form) was accepted by a majority in the Hawaii Supreme Court's decision in favor of gay marriage in *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993). See also Law (1988) and Sunstein (2002).
59. See Warner (1999, chap. 1).
60. "Sexual Taboos and the Law Today," quoted in Warner (1999, 22).
61. Of course whether a fundamental constitutional right is or is not involved is an as yet unsettled question, but the ACLU's challenge to the referendum was based on a claim that such a right was involved, so there was no hypocrisy in the ACLU's conduct, as the letter alleged.
62. *Romer v. Evans*, 116 S. Ct. 1628 (1996).
63. *Romer*, 1622, 1628.
64. Rational-basis review is usually highly deferential; generally, when a law is found unconstitutional on equal protection grounds, it is because it does not meet some more exacting level of scrutiny. Laws involving racial and gender-based classifications need to pass such a more demanding test, but sexual orientation has never been recognized by the U.S. Supreme Court as a "suspect classification" triggering heightened scrutiny.
65. 473 U.S. 432 (1985).
66. See Sunstein (1999, 148): "In both *Cleburne* and *Romer*, the Court was concerned that a politically unpopular gorup was being punished as a result of irrational hatred and fear. Many people appear to think that mental retardation (like homosexuality) is contagious and frightening."
67. See also *Department of Agriculture v. Moreno*, 413 U.S. 528, cited in *Romer. Moreno* concerned Congress's refusal to give food stamps to households containing any individual who was unrelated to any other member of the household. The Court noted that the legislative history suggested a desire to cut off "hippies" and "hippie communes."
68. 388 U.S. 1 (1967).
69. 852 P. 2d 44 (Hawaii 1993).
70. See Nussbaum (1999a, chap. 7), and the comprehensive analysis of the constitutional difficulties with the Defense of Marriage Act in Koppelman (2002, chap. 6).
71. See Sunstein (1999).
72. See Warner (1999 and Nussbaum (2000a, chap. 4).
73. Warner (1999, 159).
74. Andrea Estes, "Massachusetts State Troopers Look the Other Way on Public Sex," *Boston Globe*, 2 March 2001.
75. My argument, then, does not apply to nonconsensual acts, or to acts in which there is deception about HIV status: for those acts are plainly not "self-regarding" in Mill's sense.
76. *Chicago v. Morales*, 177 Ill.2d 440, 687 N.E.2d 53.
77. *Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849.
78. *Chicago v. Morales* (Illinois).
79. Ibid.
80. Meares and Kahan (1998a, 1998b, 1999).
81. See respondents in Meares and Kahan (1999) and Alschuler and Schulhofer (1998).
82. Kniss (1997).
83. Compare Alschuler and Schulhofer (1998, 240)

> Neither race nor geography fully defines a person's communities. Community identity is likely to depend on varied characteristics in varied combinations—religion, race, ethnicity, residence, wealth, gender, sexual orientation, occupation, physical disability, age, and (especially in Chicago) political party and ward organization. Chicago's communities are in fact innumerable. . . . There is usually no way for outsiders to determine which communities are most affected by a legislative measure, . . . to mark the boundaries of informal, unorganized communities, or to assess the dominant sentiment of community members. The concept of community thus provides almost limitless opportunities for creative redefinition and manipulation.

84. In Chicago this is a particularly urgent question since the Mexican community is large and often quite hostile to the African-American community.

## Chapter 6. Protecting Citizens from Shame

1. Goffman's original citation is to an article by S. Zawadski and P. Lazarsfeld in *Journal of Social Psychology* 6 (1935).
2. TenBroek (1966). TenBroek prefaces his classic discussion by noting: "The views expressed, the author believes, are verified by his personal experience as a disabled individual far more than by all the footnote references put together."
3. Nussbaum (2000a, 2003a).
4. Of course the distinction between the unemployed and the employed corresponded to a distinction between the rich and the poor, and the poor are stigmatized today, whether employed or not, but the change that the Reformation, and the Protestant emphasis on work as a source of value, brought about in Europe should not be underestimated. A Greek gentleman would assiduously avoid doing any work, and whatever he occupied himself doing (politics, say) he defined as nonwork; meanwhile, his wife could run the estate, and running even a large opulent estate was stigmatized activity. A poor person who did not work was in some sense better off in terms of stigma because then he qualified as a beggar, to whom generally understood obligations were felt. Note that the returned Odysseus does not set up as a shepherd or swineherd, but, instead, goes round the table as a beggar (who says he was once a king). Presumably gainful employment would be even more stigmatizing for a hero.
5. See Kindlon (2001), Frank (1999).
6. Ehrenreich (2001).
7. See Sennett (2003).
8. On Roosevelt's views I am greatly indebted to a book in progress by Cass R. Sunstein.
9. 397 U.S. 254 (1970).
10. Ibid., 265.
11. See also *Shapiro v. Thompson,* 394 U.S. 618, invalidating a state residency requirement for receiving welfare.
12. Justice Black's dissent in *Goldberg* argues that welfare rights are an experiment in America, and that such experiments are best carried out by the legislature.
13. See Clark (1997), reporting reasons for Americans' refusal to have sympathy with the poor.
14. I am grateful on this point to unpublished work by my colleague Bernard Harcourt.
15. *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).
16. See Sunstein (2001).
17. This, of course, is a mixed list, since the members of the list receive different levels of protection, and thus my claims are (intentionally) vague.
18. Notice that we don't encounter many cases in which a man is told to behave in a more feminine way, although in "feminine" occupations we do find a few: see Case (1995).



19. 490 U.S. 228 (1989).
20. Case (1995), 4.
21. Yoshino (2002).
22. Goffman (1963, 102–4).
23. See Comstock (1991), and my discussion in Nussbaum (1999a, chap. 7).
24. Ronald Dworkin expressed this point to me in conversation.
25. *U. S. v. Lallemand* 989 F.2d 936 (7th Cir. 1993). The question was whether Lallemand, who had deliberately set out to blackmail a married homosexual, deserved an upward departure under the Guidelines for choosing an "unusually vulnerable victim": given that all blackmail victims are persons with guilty secrets, what was unusual about this one, a married government employee with two grown children (who had attempted suicide when approached by Lallemand with his blackmail demand)? The answer, Posner argues, lies in current American mores, which treat his sexual secret as more shameful than others. These circumstances indicate a "malevolent focusing in on a particularly susceptible subgroup of blackmail victims." In conversation Posner has mentioned to me that the victim was African-American, and had risen from poverty to a position of respect in the community; these issues also influenced his thinking, although he chose not to put them into the opinion.
26. *Wisconsin v. Mitchell,* 113 S. Ct. 2550 (1993).
27. Comstock (1991).
28. Cornell (1995) calls this space, plausibly, the "imaginary domain."
29. Nagel (1998, 17, 20).
30. See again Yoshino (2002), discussed in chapter 5.
31. Hollander (1994, 61–62).
32. See Nussbaum (2002b).
33. See *Miller v. Civil City of South Bend,* 904 F.2d 1051 (7th Cir. 1990).
34. There was no majority opinion in the case, since Justice Souter wrote a separate opinion.
35. *Barnes v. Glen Theatre, Inc.,* 501 U.S. 520 (1991).
36. See for example Tom Nagel's recent defense of this idea in Nagel (1997).
37. Goffman (1963, 19).
38. TenBroek (1966), see n. 2, above.
39. Morris (1991, 1992).
40. Bérubé (1996) and Kittay (1999).
41. Levitz and Kingsley (1994).
42. I borrow this example from Silvers (2000).
43. As runners know, wheelchair contestants in marathons typically complete the course in a faster time than do runners.
44. This is the central topic of tenBroek's discussion of tort law in tenBroek (1966). He shows that in many instances the analogy between the blind person in the daytime and the sighted person at night has helped guide communities toward inclusionary policy decisions: just as the streets ought to be safe to negotiate at night as well as by day, so too they ought to be safe for the blind as well as the sighted. Definitions of negligence and due care have also evolved to recognize the right of the blind to use public facilities, at least with a cane

or dog, although their right to use these facilities without such an aid is still disputed (see epigraph).

45. See Wasserman (1998). He suggests, following Anita Silvers, that a good question to pose to oneself is how the world would be if the unusual disability were in fact usual. If, for example, most people used wheelchairs, would we continue to build staircases rather than ramps?
46. Morris (1992).
47. Such an account is suggested in Amundson (1992, 2000a, 2000b).
48. See Amundson's criticism of Daniels, Boorse, and others.
49. See Silvers (1998) for this way of putting things.
50. That is my position in Nussbaum (2001a).
51. See Kavka (2000) and L. Becker (2000).
52. See Silvers (1998). The "regarded" clause of the ADA, however, has been interpreted by courts to mean that they must be regarded as having a disability that affects a major life activity, as that clause has been interpreted elsewhere: thus, people who are "regarded as" incompetent because of obesity will not gain relief from this section, except in the most extreme cases.
53. AIDS, for example, has been treated as a disability on the grounds that it limits the major life activity of reproduction—not a bad bottom line, one feels, but perhaps not the most pertinent way of reaching it.
54. Wasserman (2000) argues that such a broadening of the ADA would not lead to a flood of litigation because people will be embarrassed to come forward as litigants declaring themselves obese, or short, or unattractive: thus, he argues, only the most severe cases will present themselves. Yet in today's America, where litigiousness and a confessional mentality are combined, the reticence of which he speaks seems unlikely to prevail.
55. Locke, *Second Treatise on Government,* chapter 8.
56. Gauthier (1986, 18), speaking of "all persons who decrease th[e] average level" of well-being in a society.
57. Rawls (1996, 183 and passim).
58. See Goffman (1963, 17) for a moving first-person account of the stigmatizing of the unemployed: "How hard and humiliating it is to bear the name of an unemployed man. When I go out, I cast down my eyes because I feel myself wholly inferior. When I go along the street, it seems to me that I can't be compared with an average citizen, that everybody is pointing at me with his finger."
59. See Nussbaum (2000b, 2001b). I discuss these issues in detail in my Tanner Lectures, "Beyond the Social Contract: Toward Global Justice," delivered at the Australian National University in Canberra, November 2002, and under contract to Harvard University Press.
60. See Nussbaum (2000a).
61. Francis and Silvers (2000, xix).
62. *Watson v. Cambridge,* 157 Mass. 561 (1893). Watson was said to be "unable to take the ordinary decent physical care of himself." Similar is the oft-cited case of Merritt Beattie, who apparently was not mentally retarded, but whose paralytic condition produced symptoms that were held to have a "depressing and nauseating effect upon the teachers and school children" (*State ex Rel. Beattie v. Board of Education of the City of Antigo,* 169 Wisc. 231 [1919]). The Supreme Court of Wisconsin upheld the exclusion of Beattie.
63. 343 F. Supp. 279 (1972).
64. 348 F. Supp. 866 (D.C.C. 1972). Technically, because of the legally anomalous situation of the District, they held that it was a due process violation under the Fifth Amendment and that the Equal Protection clause in its application to education is "a component of due process binding on the District."
65. I wish to thank John Brademas, one of the authors of this legislation, for very helpful discussion about the background and history of the law. For discussion of the ensuing educational reforms, see Minow (1990, 29–40).
66. See Bérubé (1996) and Nussbaum (2001b). I describe Jamie at the time of his father's description in the book.
67. See Kelman and Lester (1997). They quote a special educator from Mississippi:

> Are there kids who fall through the cracks? Yeah . . . I think that every year we just keep doing it. We're going to reevaluate to see if we can't fit that discrepancy somewhere. "Did we get it yet? Has he fallen far enough behind in achievement now that we can make him eligible for special ed?" . . . I think that somehow, someday we're going to all have to say this is our kid, what we need to do is educate this kid. Whether it's the regular ed teacher taking him into a group for a certain subject or whether it's special ed or Chapter One or whomever, it's necessary.

68. This is Kelman and Lester's conclusion on the basis of their extensive study of IDEA as applied to LD children.



## Chapter 7. Liberalism without Hiding?

1. These two alternatives correspond, of course, to Aristotle's two interpretations of pleasure in Books VII and X of the *Nicomachean Ethics.* It is likely that Mill was strongly influenced by these famous ideas. He directs our attention, in *Utilitarianism,* to the fact that the nature of pleasure is far from clear; and there are texts in which he clearly seems to be analyzing pleasure as activity of a sort. He does not, however, devote a sustained inquiry to the conceptual analysis of pleasure, and his position cannot be pinned down with any precision.
2. See my discussion of this view, held by Harsanyi, Brandt, and others, in Nussbaum (2000a, chap. 2).
3. In referring to *On Liberty,* I shall simply cite the chapters because no single edition is in sufficiently widespread use for page references to be helpful.
4. However, the satisfaction of a permanent interest, or unfettered functioning in accordance with that interest, is probably constitutive of happiness in Mill's view, rather than merely instrumental to it.
5. Rawls (1971); Posner (1995).
6. Rawls (1971, 3).