

Preface: From Disgust to Humanity



"WHEN I WAS in the eighth grade I realized what all the male fantasies that I had were about and that they were sticking and that I had to deal with them. I was terrified." That's what one gay man told social psychologist Ritch Savin-Williams, whose pathbreaking study of gay male adolescence contains dozens of similar stories.¹ The young man was terrified, of course, because he knew he was in for a difficult future in American society. To some extent, too, he had internalized society's attitudes: a student at an evangelical school, he had learned to feel horror and disgust at the behavior he desired and to think of it as base or animalistic, not suited to the full dignity of a human being. Many other gay youths interviewed by Savin-Williams felt fine about their feelings—and yet they, too, knew that they had a difficult road ahead, since many people, if not they themselves, would regard their desires and acts with disgust. "I knew that this was... the path that I wanted," writes another young man about his early sexual experiences with other male teens, "and I knew that I was on it. I knew that others could sort of experience what I was and I knew that other people would think of it as being disgusting."²

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This book, although concerned with abstract issues of constitutional law, is essentially about the divide that teen saw before him: between people who can "sort of experience" what a gay teenager feels and people who simply think of those desires, and, no doubt, the teenagers themselves, "as being disgusting." For a long time, our society, like many others, has confronted same-sex orientations and acts with a politics of disgust, as many people react to the uncomfortable presence of gays and lesbians with a deep aversion akin to that inspired by bodily wastes, slimy insects, and spoiled food—and then cite that very reaction to justify a range of legal restrictions, from sodomy laws to bans on same-sex marriage. Partisans of the politics of disgust can barely stand to think about what that gay teenager did with his friends; they say, "that stuff makes me want to throw up," and turn away from the reality of gay-life as from a loathsome contaminant to the body politic. Even to look closely at what that gay teen does is to be defiled. To be looked at by a gay man is probably worse, for it means being penetrated by the defiler. Although this political approach has lost ground in recent years, it continues to influence the ways in which many people think.

Disgust, so described, seems pretty nasty, a fundamental refusal of another person's full humanity. One might therefore think it a bad basis for lawmaking in a democratic society. Disgust, however, has had some highly respectable and influential defenders in the law. In Britain in the 1950s, Lord Patrick Devlin argued that the disgust of the average member of society was a sufficient reason to make a practice illegal, even if it caused no harm to nonconsenting third parties. He applied his conclusion directly to the Wolfenden Commission's proposal to decriminalize consensual same-sex sexual acts, which he strongly opposed. He argued that society would decay from within if it did not make law in response to the feelings of disgust with which average people (he claimed) view same-sex practices. More recently, in the United States, Leon Kass, until

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recently the head of President Bush's President's Council on Bioethics, argues that repugnance has an inherent "wisdom": it is a device implanted in our natures that steers us away from destructive and terrible choices. Like Devlin, Kass concludes that disgust is a sufficient reason to ban a practice that causes no harm to nonconsenting parties.³

Nor are these positions merely academic: they are in tune with widespread social forces. Today, large segments of the Christian Right openly practice a politics based upon disgust. Depicting the sexual practices of lesbians and, especially, of gay men as vile and revolting, they suggest that such practices contaminate and defile society, producing decay and degeneration. Like Kass and Devlin, they believe that disgust is a reliable guide to lawmaking. Although the influence of such appeals peaked, perhaps, in the 1980s and 1990s, and has since been declining, the politics of disgust continues to exercise influence, often in more subtle and unstated ways. We need, then, to understand why it is not a good approach to politics and law in a democratic society.

The politics of disgust is profoundly at odds with the abstract idea of a society based on the equality of all citizens, in which all have a right to the equal protection of the laws. It says that the mere fact that you happen to make me want to vomit is reason enough for me to treat you as a social pariah, denying you some of your most basic entitlements as a citizen. As we shall see, even the U. S. Supreme Court has held that legal deference to this sort of "animus" violates the idea of the equal protection of the laws in its most basic and general form. It also violates a fundamental paradigm of political rationality: laws made in response to such animus lack a rational basis.

Despite these legal setbacks in recent years, the politics of disgust is alive and well in America today, as many groups aggressively depict same-sex practices in such a way as to arouse disgust and then draw on that reaction when campaigning against the

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legalization of same-sex marriage, or nondiscrimination laws. Such appeals are often seen as not politically correct today, so other arguments are increasingly put forward. Disgust, however, has not gone away, it has gone underground. We still need to understand its force, and why arguments based upon it are bad political arguments. A closer study of the emotion of disgust and the ways in which it has been used politically through history will suggest some powerful arguments against disgust's apostles in theory and in practice, by showing how that emotion expresses a universal human discomfort with bodily reality, but then uses that discomfort to target and subordinate vulnerable minorities.⁴

Disgust has two opponents today, each increasingly powerful in social, political, and even legal life: respect and sympathy. The idea of equal respect for persons, surely a key concept throughout the history of the American democracy, combined with a high evaluation of personal liberty, suggests to many citizens that even when they don't think well of someone's intimate personal choices, they should give them space to make them, so long as they do not violate other people's rights. Such a politics of equal respect/equal liberty has long been the norm in the area of religion, where we are used to the idea that we should live on terms of respect with people whose choices we think bad, or even sinful, and to the related idea that such deeply meaningful personal choices require the protection, for all, of a sphere of personal freedom. The object of respect is the person, not the person's actions; but respecting one's fellow citizens as equals, a long tradition holds, requires seeing them as choosers and seekers who need a wide area of liberty around them, whether they use that liberty well or poorly (so long as they do not trample on the rights of others). Many people see sexual orientation as similar: a characteristic intimately connected with a person's search for a meaningful life, and therefore something whose abridgment or legal restriction inflicts profound psychic damage. Equal respect for

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citizens, many believe, precludes the infliction of such damage on those who simply seek to act on their desires without violating the rights of others.

A politics of equal respect is also by now the norm in the areas of gender, race, and disability, where we have gradually come to see that deep-seated characteristics are not a legitimate basis for the systematic legal subordination of a group. Many people now feel that sexual orientation is in important ways like these other areas. Like race and gender, sexual orientation is a deep-seated characteristic that has profound meaning for people, affecting their possibilities for self-expression and happiness; it should not be turned into a systematic source of social inequality. Equal respect for citizens, many now hold, requires not converting a person's sexual orientation into a reason for denying them a wide range of political entitlements on a basis of equality with others—any more than a person's race, or gender, or disability would be such a reason.

The politics of equal respect, in our constitutional tradition, goes hand in hand with the idea that the fundamental bearer of entitlements is the person, not the group, and with the related idea that respect for persons involves protecting certain spheres of liberty around them, in which they can make choices crucial to their lives. Articulating and protecting these spheres of personal liberty has been a crucial task of our tradition of constitutional law. This sort of constitutional politics is anticollectivist: it says that the interests of the majority cannot trump such basic entitlements of the individual, except in very unusual circumstances, usually where harm to others, or some grave danger for the whole nation, is in the offing. Such a political stance is not that of the left as opposed to the right; it is that of classical liberalism, as contrasted both with the collectivism of the left and the collectivism of the right. We shall later explore this contrast, as it works itself out in the area of sexual politics.

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That "terrified" gay teenager needs, and deserves, equal respect, and a sphere of liberty equal to that enjoyed by others. Before he is likely to get these things, however, something else also has to be present in our world: the capacity to imagine his experience and that of other gay and lesbian citizens. Disgust relies on moral obtuseness. It is possible to view another human being as a slimy slug or a piece of revolting trash only if one has never made a serious good-faith attempt to see the world through that person's eyes or to experience that person's feelings. Disgust imputes to the other a subhuman nature. How, by contrast, do we ever become able to see one another as human? Only through the exercise of imagination. Humanity does not automatically reveal itself to strangers. No placard hung on the front of a fellow citizen announces that this one is a full-fledged human being (and not a vile bug or a piece of refuse). Seeing the shape of a human being before us, we always have choices to make: will we impute full equal humanity to that shape, or something less? Only by imagining how the world looks through that person's eyes does one get to the point of seeing the other person as a someone and not a something. (Sadly, racial minorities have long been seen as somethings rather than someones, and women are all too frequently so seen today, given the ever-present phenomenon of sexual "objectification," in which a person is treated as a mere thing.⁵) That crucial imaginative engagement has been sadly and sorely lacking in majority dealings with lesbian and gay lives.

Today, a number of social factors have begun to alter that situation. Central among them is the coming out of so many gay men and lesbians, each of them a child of two parents and a friend and fellow-worker of many, each with a personal narrative, an individual name, and eyes into which people have been accustomed to look with the belief that they see humanity in there. When the person then comes out as lesbian or gay, it is usually difficult to withdraw those ascriptions of humanity in favor of the old disgust-laden picture. Even the

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most shocked and judgmental of parents rarely get to the point of thinking of their child as merely a slimy slug. Most are a lot more generous than that, and this generosity influences their view of other gays and lesbians.

Together with this development is the growing presence of gay men and lesbians in politics, in the arts, in sports, in the academy, and in other places to which people are accustomed to look for role models—and, perhaps even more important, the growing presence of lesbian and gay characters in mainstream media, where countless viewers learn to identify with their stories and their emotions. *Will and Grace* is not sociology, but it has had a much greater social influence than all the sociological treatises on this topic combined, because it gets straight people to identify with the emotions of Will, as he searches for love, to laugh at Jack's vanity and frivolity in a way that is participatory and accepting rather than harsh, and to feel how a straight person, Grace, owes her emotional stability to Will's generous concern. (Thus straight people are reminded that gays are not pathetic victims, but creative moral and social agents.)

All of these developments have begun to produce what I shall call the *politics of humanity*, a political attitude that combines respect with curiosity and imaginative attunement. (The word "humanity" was used in much this sense by Adam Smith in the eighteenth century to describe the capacity for generous and flexible engagement with the sufferings and hopes of other people. (It is, however, much older, going back at least to the Roman philosopher and statesman Cicero, who used the Latin term *humanitas* to designate a kind of responsiveness to others that prominently included the ability to imagine their experiences).⁶

The politics of humanity, as I shall use the term, includes respect. But respect, as usually conceived, is not sufficient for it: something else, something closer to love, must also be involved.

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First of all, we are unlikely to achieve full respect for one another unless we can do something else first—see the other as a center of perception, emotion, and reason, rather than an inert object. Put that way, it might appear that this imaginative and emotional attitude is a mere instrument to a respect that might be arrived at by some other route. However, respect without this attitude is certainly not a complete basis for political action in a diverse society: for only imagination animates the cold and abstract categories of morality and law, turning them into ways we can live together. So, respect is politically incomplete without imagination.

One may, however, make a stronger claim, and I shall defend this claim: the capacity for imaginative and emotional participation in the lives of others is an essential ingredient of any respect worthy the name. Only this capacity makes real an ability that is a key part of respect, the ability to see the other as an end, not as a mere means. The politics of humanity includes, then, both respect and imagination, and imagination understood as an ingredient essential to respect itself.

We are living in an era of transition between two very different types of politics in the area of sexual orientation. The politics of disgust, which so long has called the tune, is facing unprecedented challenges from the politics of humanity, as the life stories of so many lesbians and gay men have engaged people's imaginations, as people increasingly see their struggles for respect, inclusion, and even marriage with the sort of sympathy with which they might participate in the struggles of a child or friend or relation or coworker—and of course most of us have gay or lesbian children or friends or relations or coworkers. The politics of disgust, however, keeps pushing back, and the outcome, where law is concerned, remains unclear. Even when we suppose that we have put disgust behind us, we may be taken by surprise, as people confront issues concerning HIV/AIDS, or gay bathhouses, or sex in public places.

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This book will explore all these issues, showing what a politics of disgust has been like and why it is unworthy of America, and mapping the contours of a politics of humanity. Its focus is constitutional law, but its argument has implications for the way in which we see many related questions. Beginning with the well-known constitutional cases involving sodomy laws and nondiscrimination laws, I shall then move on to the contested issue of same-sex marriage, trying to sort through the legal issues and the related social arguments. Finally, I shall ask what a right of intimate association requires in the areas of "public" sex, sex clubs and bathhouses, and condomless sex in the presence of a risk of HIV transmission, arguing that in such areas the impulse to react with disgust remains extremely powerful, and disruptively so, as a determinant of both social norms and lawmaking.

The transformation from a politics of disgust to a politics of humanity involves almost every aspect of American society. Ideas about family, about employment, about the common good, all these are implicated in the concept of a politics of humanity, and this politics must be enacted and reenacted in each of these areas, in each region of the country, each time a new issue comes along. Like the process of gay coming out, which is often said to be endless, in that new people may always come along who have not been told about one's orientation, so too the process of transforming social attitudes is multifaceted and requires a new effort every time a new issue or group needs to be confronted and persuaded. Ultimately, the process involves transformation at the level of the human heart, and that means that it requires great patience. Nonetheless, these broad and deep social transformations are currently under way, though with an uncertain future.

The transformation I recommend will also involve changes in many domains of the law. Family law, antidiscrimination law, labor law, all are currently undergoing a complex set of challenges and

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reexaminations, most of which can barely be alluded to in a book that forms part of a series dedicated to issues in constitutional law.

Why, though, should one suppose that constitutional law has any significant role to play in the transformation? That domain of law seems so abstract and formal, so concerned with fundamental political principles and entitlements, so legalistic, one might feel, that it is difficult to connect it to anything as mundane as the struggle of a gay teenager to find respect and understanding.

And yet, or so I shall contend, the domain of constitutional law has been, and continues to be, profoundly relevant for the politics of humanity—precisely *because* it concerns the most fundamental entitlements we all have as citizens, the most basic and general ways in which we make sense of our common political life and articulate its deepest purposes. Ideas such as the idea of the equal protection of the laws, or the idea of fundamental liberties, are abstract, but they are not lifeless. They are living realities, which must be duly articulated and made real in every citizen's life, if the words of the Constitution are to be more than idle talk.

One might agree with that idea and still doubt that "humanity," defined as involving not only respect, but also sympathetic imagination and responsiveness to the complexities of another's situation, is relevant to constitutional law. And yet, when cases reach the U.S. Supreme Court, they are usually legally difficult cases, to which formal legal analysis has suggested no unequivocal solution. In dealing with such cases, judges need to try to be human beings, seeking to understand the issues in their historical and cultural setting and with an eye to the human meanings they embody.⁷ As we shall see, some of the Supreme Court cases dealing with sexual orientation show a remarkable moral obtuseness, involving a failure of basic human imagination. Others, however, show the Court attempting to grapple with human beings in their historical setting and to see the human meaning of the issues in question. I shall try

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to explain how a capacity for not just respect, but also for sympathy and imagination can, should, and occasionally does inform the lofty process of constitutional adjudication.

My own imagination on this topic was set to work by the man to whom I dedicate this book: the actor Herbert Foster, who for many years has played a wide range of roles in Shakespeare and other plays at the New York Public Theater. I met Herb when I was sixteen, a young apprentice actress in summer stock at the Berkshire Playhouse, where he was a featured professional actor. He was the first gay man I was aware that I knew, since I had led a very closeted life on Philadelphia's Main Line. (It seems right to speak of a closet of socially imposed ignorance about gay people, as well as a closet of personal concealment.) I was paired up with him in the ball scene in *My Fair Lady*; we danced together as Lord and Lady Tarrington (although he had other and more significant roles). I had a big crush on Herb, because he just seemed (and was) so much nicer than most of the other men around. (The theater, wonderful though it is, has its share of creeps.) When I realized he was gay, and met his partner, who came up on visits from New York, I was disappointed, but I also started thinking. I thought it so odd that the nicest person in the whole place should be in a position of semiconcealment, at least outside the "little world" of the theater (to use Ingmar Bergman's lovely term). I thought it would be nice if these two men, who had exchanged school rings in token of some type of commitment, could actually do what the straight men around them, however egotistical, or predatory, or emotionally frozen, could do any day. So I thought a lot about that, although Herb and I never spoke of this topic, and I later realized that he never knew I knew he was gay.

In 2008, reading about Herb's career on the net, I wrote him a letter telling him that I remembered him with pleasure, and I told him a little bit about my work, including my work on gay rights. He responded with a very warm letter and told me that he was gay

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(thus confirming the claim that the process of coming out never ends, since in this case it had taken forty-four years). He had broken up with that earlier partner long since, but for many years, he told me, he had had, and still has, a long-term happy relationship with someone else. Since they live in New York, which has decided to recognize same-sex unions legally contracted elsewhere, they now have the option that I imagined in 1964. I don't so much care whether they take it up—that is a profoundly personal matter, and my own views about it are mixed, as you will see. But I care that they have the same “capability” as others. The politics of equal respect already entails that equality of fundamental rights and opportunities. To get there, however, we first have to learn to think about one another with sympathy and imagination, and that is why we need something deeper and wider: the politics of humanity.

NOTES

1. Ritch Savin-Williams, “...And Then I Became Gay”: *Young Men's Stories* (New York: Routledge, 1998), 52.
2. *Ibid.*, 74–75.
3. Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); Leon Kass, “The Wisdom of Repugnance: Why We Should Ban the Cloning of Human Beings,” *New Republic* 216, issue 22 (June 2, 1997), 17–26; reprinted in Leon Kass and James Q. Wilson, eds., *The Ethics of Human Cloning* (Washington, DC: AEI Press, 1998), 3–60; related material is in chapter 5 of Kass's *Life, Liberty, and the Defense of Dignity: The Challenge for Bioethics* (San Francisco: Encounter Books, 2002).
4. This part of my analysis will draw on my *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004).
5. See my “Objectification,” in *Sex and Social Justice* (New York: Oxford University Press, 1999), 213–39.

CHAPTER THREE

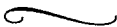


Sodomy Laws: Disgust and Intrusion

Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

—JUSTICE STEVENS,

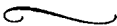
DISSENTING OPINION IN *BOWERS V. HARDWICK*



I asked [Officer] Torick if he would leave the room so we could get dressed and he said, "There's no reason for that, because I have already seen you in your most intimate aspect."

—MICHAEL HARDWICK,

DESCRIBING HIS ARREST IN HIS OWN BEDROOM¹



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I. TWO VISIONS OF SOCIETY: DEVLIN VERSUS MILL

Sodomy laws are intrusive. Under the laws that used to exist in all states, what people did consensually and in seclusion, without inflicting anything on outsiders, without even the knowledge of outsiders, could become the basis for criminal prosecution and, often, for severe criminal punishment. Public enforcement of personal sexual conduct was once the norm in both Britain and the United States. To most Americans today, however, it seems outrageous that the police would have the right to enter someone's bedroom to see what sexual acts are being performed there. Officer Torick's response to Michael Hardwick's polite request (as he stood in Hardwick's bedroom after serving a warrant for public possession of alcohol that had expired ten days before) conjures up, for most of us, the specter of a police state, and we know we don't want to go there.

It's not just the loss of liberty that makes Officer Torick's remark scary, it's something deeper: an insult to human dignity reminiscent of prisons and even concentration camps, where the removal of simple bodily privacy became a way of marking some people as not fully human.

Despite the fact that most Americans would probably react with disapproval to such intrusive behavior by an officer of the law, the road to a decisive rejection of such governmental scrutiny and coercive control of consensual intimate conduct, in our constitutional tradition, was long and difficult. Michael Hardwick died in 1991, before he could see the vindication of his right to intimate association.

Legal regulation of sexual conduct raises profound questions about the type of society we want to be. Lord Patrick Devlin preferred a picture of society in which the key value is solidarity. Personal liberty counts for something, Devlin concedes, but it can

always be trumped by sufficiently strong feelings of disgust and abhorrence on the part of the majority. That's the basic idea animating the politics of disgust.

Devlin aimed his arguments, above all, against the very different conception of society favored by nineteenth-century British philosopher John Stuart Mill. Mill lived in an England even more intrusive and puritanical than yesterday's America. As a young man, he went to jail for distributing information about contraception in the slums of London. For a long stretch of his adult life, he was treated as a social pariah by many for his intimate friendship with Harriet Taylor, a married woman—despite the fact that her husband did not object, and the pair almost certainly did not have sexual relations until after the husband's death and their own marriage. On the basis of this and other experiences, Mill came to abhor the tyranny of public sentiment over personal choice. In his famous work *On Liberty*, he argued that conduct that involves only the interests of those who participate in it (he called this "self-regarding" conduct) is never a proper object of legal regulation. Gambling, drinking, unusual sexual behavior—all these might be morally objectionable to most people, but they could not properly be regulated so long as they involve only those who choose to perform them. Conduct is appropriate for legal regulation, Mill argued, only when it is "other-regarding," when it interferes with nonconsenting others.

Behind Mill's distinction is a deep idea about people: that they need zones of freedom around them in order to work out their own course in life, and that these zones of freedom ought to protect, above all, certain rights of personal decision and association. A society that protects these zones of liberty, Mill believed, will be both more just to individuals and stronger as a whole than a society that allows conventional norms to tyrannize over personal freedom. It is just this idea that we have been investigating in thinking about the analogy between religion and sexual expression.

To see what is at issue between Devlin and Mill, we need to distinguish three different ways in which sexual conduct might potentially affect the interests of others. First, it might involve some type of violence or coercion. Both Devlin and Mill agree that such conduct (for example, rape or child abuse) is properly regulated by law.²

Second, it might involve the infliction of a direct offense that is comparable to a harm or a rights violation. We can understand this category most easily by thinking of the legal category of nuisance: disgusting smells or sounds on my neighbor's property that spoil my enjoyment of my own give me a cause of legal action. Here we can see that rights are being directly violated by the nuisance, in a way that looks very close to battery or assault.³ Notice that this sort of offense, insofar as disgust is involved, concerns the primary objects of disgust, not projective disgust.

Offense is very difficult to think well about when we move beyond such simple cases of noise or odor, but it looks as if at least some sexual behavior is in this category. If someone masturbates on a public bus, or exposes himself in the public street, this seems, at least, to be nuisance-like, and we feel that it is not simply self-regarding in Mill's sense. (In many such cases, furthermore, we know that the person's aim is often to inflict the conduct on unwilling spectators: exhibitionism involves an intention to shock and disturb.) Our judgment that this type of conduct is not self-regarding is perhaps clearest when it affects children, but it's at least plausible to think that the direct offense to adults is also a harm in a way that is close to harms in the first category. The case is clearest where primary objects of disgust are involved: thus, public defecation, which involves unpleasant smells and possible health issues, is a clearer case of direct offense than is public nudity, where any disgust people feel seems to be mediated by social ideas. Mill does not clearly discuss such cases, but it's pretty clear that they do not lie within the zone of liberty that he is striving to protect.

In dealing with what I have called direct offense in the law, we should be sensitive to constrained circumstances and to the nature of the actors. Thus, a toddler who defecates on a public playground should not be legally penalized, but an adult who defecates on that same playground could be. In designing and enforcing laws against offensive behavior, we need to allow public disgust (at primary objects) to play some role, but we need to be acutely sensitive to constrained circumstances. Thus, a homeless person who urinates in a railway station should be treated with greater leniency than a stockbroker who does the same thing. The issue is not just economic: a distance runner who defecates in an alleyway during a marathon, even if a stockbroker, should not be treated the same way as that same person would be treated if he or she were to defecate in a public building after lunch.⁴

In regulating direct offense, we should insist that the disgust in question involves primary objects in some way: thus, disgust at the public display of affection by an interracial or same-sex couple does not constitute a legally regulable harm in this sense, because the disgust is projective, not oriented to primary objects (bodily fluids, odors, etc.). The very idea that direct offense is legally regulable rests on an idea that the object is causing a sort of harm, and this idea cannot be defended without alluding to the role of primary objects.

Finally, there are cases where the conduct is consensual and takes place in seclusion, not impinging directly on any third party, but where other people are upset when they imagine that it is going on. This is what Mill called a "merely constructive" injury: people imagine how offended they would be if they were present at those acts, and in the process of imagining that, they get all worked up and feel disgust and indignation. Notice that, insofar as disgust is involved in such cases, it is always projective: no primary objects are present, and typically one's fantasy is not even really focused upon

them, but, rather, upon some alleged link between them and the person whose acts one is contemplating. (Thus, people usually don't get all worked up thinking about people defecating or urinating in their own bathrooms; instead, they get worked up thinking about the sex acts of people whom, in fantasy, they link to feces and other disgust-objects.) Many types of consensual conduct in seclusion arouse strong emotions in other people when they imagine them going on. In addition to same-sex sexual acts, adultery, fornication, and masturbation (all once objects of legal regulation and some of them still so in many states), we could mention nude dancing in private clubs, nudity on private beaches, consensual sex acts in private sex clubs, and—to move from the sexual to other related cases—the possession and consumption of alcohol in seclusion, gambling in seclusion or in a private club, and so on. Many laws regulating such “self-regarding” conduct remain on the books. As recently as 1991, the Supreme Court upheld an Indiana law forbidding nude dancing in private clubs, arguing that considerations of public morality made such laws constitutionally acceptable—overruling a passionate opinion from the Seventh Circuit Court of Appeals that held that the dancing was expression protected by the First Amendment.⁵

The debate between Devlin and Mill concerns this last group of cases. For Devlin, the “constructive” disgust of the average member of society is sufficient reason to regulate “self-regarding” conduct by law, even though the actions in question cause neither harm nor direct, nuisance-like offense. For Mill, such zones of seclusion and personal liberty are definitive of a free and healthy society.

What is involved, as we shift from a politics of disgust to a politics of humanity, is that more general question about the sort of society we wish to have. In essence, it is the age-old debate between proponents of collectivism and proponents of important spheres of individual liberty. This is not a left-right issue. Many Marxist

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movements have been as intrusive in sexual matters as the most vehement religious conservatives. In the 1970s, leftist movements on campuses prescribed what correct sexual behavior was for men and women, what clothes good men and women should wear, when one should get married and when one should not, and so on. They were disagreeing with the conservatives they opposed only over what should be regulated, not over the propriety of intrusive regulation. In the "middle," but it wasn't really a middle, sat the uncomfortable Millian, dismayed by the cavalier way in which both sides treated individual liberty.

The question we must ask, then, is not whether we like the left better than the right or the right better than the left. To portray this issue as one that pits the academic left against ordinary conservative folks is profoundly misleading.⁶ The question, instead, is whether, at the most basic level of our political organization, we believe that the fundamental political unit, the primary bearer of entitlements, is the person or the group. Does the individual have certain zones of freedom, certain rights, that cannot be taken away by the judgments of a collectivity, or does the collective interest always trump individual entitlement?

In the area of religion, America, far more than Europe, has consistently sided against collectivist values and in favor of a strong respect for the individual's zone of liberty. Most Americans are surprised and dismayed, for example, at the laws forbidding the Muslim headscarf or the Jewish yarmulke in certain parts of the public sphere (public schools, government employment) that are now common in many parts of Europe.⁷ In sexual matters, however, America and Britain have, on the whole, been more sympathetic than continental Europe to the collectivist position, favoring a good deal of public supervision of "morals," whereas continental Europe has been more protective of the individual. (All laws against consensual adult sexual activity were abolished in France, for example,

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early in the twentieth century—at a time when anal intercourse, whether heterosexual or homosexual, was still a capital offense in Britain.⁸) Americans have been deeply attached to liberty of conscience, but we haven't until much more recently been able to see sexual choices as issues of conscience, choices for the individuals involved, alone, to make.

Despite our distinctive history, however, the time seems to have come when we can all agree that some intimately personal matters are simply not matters for the police to control—or even to watch.

2. HISTORY: SODOMY LAWS IN THEORY AND PRACTICE

Sodomy laws are very old. They are part of the Anglo-American legal tradition, and at one time they were recognized, in some form, by every state in the United States. Until 1961, all fifty states outlawed sodomy under some description. At the time of *Bowers v. Hardwick* (1986), twenty-four states still had such laws.

Sodomy laws have had two distinct purposes. One has been the regulation of nonprocreative sexual acts, for heterosexuals as well as homosexuals: above all, anal and oral sex acts, although some statutes include mutual masturbation and penetration by a physical object. Here are a few samples of laws, unrestricted as to the gender of the parties, that were on the books at the time of *Bowers v. Hardwick*:

Maryland: Sodomy is a felony. Taking another person's sexual organ into one's mouth or placing one's sexual organ into another person's mouth, or committing any other unnatural or perverted sexual practice with any other person, is also a felony. In an indictment under this section, it is not necessary to set forth the particular manner in which such unnatural or perverted sexual practice was committed.

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Florida: Whoever commits an unnatural and lascivious act with another person is guilty of a misdemeanor. A mother's breast feeding of her baby does not violate this section.

Oklahoma: It is a felony to commit the detestable and abominable crime against nature. Any sexual penetration, however slight, is sufficient to complete the crime against nature.

Arizona: A person who knowingly and without force commits, in any unnatural manner, any lewd or lascivious act upon or with the body or any part or member thereof of a male or female adult, with the intent of arousing, appealing to, or gratifying the lust, passion, or sexual desires of either of such persons, is guilty of a misdemeanor.

Also of interest for its long laundry list of forbidden acts, though the context makes it clear that it is limited to same-sex actors, is this law from Missouri:

Deviate sexual intercourse means any act involving the genitals of one person and the mouth, tongue, or anus of another person, or a sexual act involving the penetration, however, slight, of the male or female sex organs by a finger, instrument, or object done for the purpose of arousing or gratifying the sexual desire of any person.

Such laws are as striking for their vagueness as for their intrusiveness. Presumably legislators wanted to avoid what they took to be offensive language; they also wanted to avoid giving people ideas. The result is a high degree of unclarity about what is forbidden. Officers of the law are allowed enormous latitude in construing such phrases as "lascivious," "unnatural," and the ubiquitous "any other." Maryland's statute even encourages vagueness in the indictment itself. Missouri's unusually clear law explicitly

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criminalizes use of a finger in the vagina or anus, as well as the use of any object for the purpose of sexual stimulation of another: but other statutes, including many of the sex-neutral ones, probably intend to include such conduct under the vague catchall rubric "any other." The extent of the laws' vagueness is marked by the striking Florida law, which feels the need to warn officers of the law against arresting breast-feeding mothers for an "unnatural sexual practice." If that was envisaged by legislators as a possible construal of the general language of the statute, one can see how vague it is.

Sodomy laws, then, though later targeted at homosexual acts, are originally a form of highly intrusive and highly general regulation of sexual practices in which millions of Americans engage. Similarly, the crime of "buggery" under British law, although limited to anal intercourse, included such intercourse between a man and a woman as well as between two men. Like the American laws, these early sodomy laws were clearly aimed at policing nonprocreative sexual relations, although in the nature of things they were enforced against married couples.⁹

A second purpose of such laws, which seems to have developed in Britain and, to a lesser extent, elsewhere in Europe late in the nineteenth century, and which is reflected in a minority of U.S. statutes at the time of *Bowers*, is the policing of homosexual acts in particular. British law seems never to have worried about lesbians, and their likely sex acts were never illegal.¹⁰ (Nor was Britain worried about oral sex or the use of objects between heterosexuals or between women.) For males, however, the offense of sodomy (the more modern name for "buggery") was thought not to sweep widely enough—although sodomy, a capital crime until 1861, remained punishable by a prison term of from ten years to life. A new law, which would criminalize a much broader group of homosexual acts, was proposed by Henry Labouchère and passed by Parliament in 1885, as an amendment to a popular bill designed to protect women

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against trafficking by raising the age of consent from thirteen to sixteen. The Labouchère Amendment provided that "[a]ny male person who, in public or in private, commits . . . any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable . . . to be imprisoned for any term not exceeding two years with or without hard labor."¹¹

By this time, legislators appeared not to be very worried about anal intercourse between men and women (although the distribution of contraceptives and contraceptive information remained a crime long after, the crime for which John Stuart Mill went to jail as a young man); and the British never worried about lesbians. A veritable hysteria about male homosexuality, however, led to numerous arrests and convictions, including the famous conviction of Oscar Wilde. Wilde had foolishly brought a libel action against the Marquess of Queensberry, who had left a note at Wilde's club saying that Wilde was "posing as a sodomite" (only he could not spell the word, and wrote "somdomite"). After Queensberry won the libel action on grounds of justification, Wilde was prosecuted—under the Labouchère Amendment, not the sodomy law, because Wilde preferred oral sex, and there was no evidence that he had ever had anal intercourse with any of his contacts. A first trial ended in a hung jury, but the second led to a conviction and the maximum prison sentence. Wilde's health was broken, and he died in France at the age of forty-six.

Wilde's sentencing provides a typical example of the politics of disgust. Mr. Justice Wills said:

Oscar Wilde and Alfred Taylor, the crime of which you have been convicted is so bad that one has to put stern restraint upon one's self to prevent one's self from describing, in language which I would rather not use, the sentiments which must rise to the breast of every man of honour who has heard the details of

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these two terrible trials.... It is no use for me to address you. People who can do these things must be dead to all sense of shame, and one cannot hope to produce any effect upon them. It is the worst case I have ever tried.

This is Devlin country, and though the justice chose not to describe his "sentiments," his violent repudiation of the defendants made his disgust amply evident. Indeed, we might say that his whole speech (which was much longer than this) is more like vomiting than like judicial argument. This judge had been on the bench for some time, dealing with homicides, rapes, and many other serious offenses. What had Wilde done to merit the label "worst case"? He had had oral sex with a sequence of male prostitutes (only one nonprostitute, and this one was in his twenties and sought out Wilde eagerly, so there is no issue of "corruption of the young"). He treated all his partners with the utmost kindness and generosity, giving them expensive gifts—items, such as engraved silver cigarette cases, that later helped to convict him. The sex took place in seclusion, usually in posh hotels, so there was no issue of direct offense to onlookers. It seems simple lunacy to call this a "worst case." And yet that was the way in which Victorian Britain as a whole regarded it—not without enormous hypocrisy, since male-male sex acts, as well as sadistic beatings, were the staple of life in elite male "public schools."

With heterosexual sodomy in Britain, then, we have stern policing, followed by gradual desuetude—but no violent public disgust. With homosexual acts, the politics of disgust carried the day and was not challenged until the Wolfenden Commission report in 1957 (the occasion for Devlin's famous defense of disgust).

Things were much the same in the United States: most early statutes criminalized a wide range of sexual acts, originally, it would appear, policing a wide and somewhat indeterminate range of

nonreproductive acts. As time went on, however, zealots focused obsessively on the policing of (especially male) homosexuality. The U.S. laws sweep far more broadly than the British laws ever did. Virtually all of them include oral and anal acts together; typically, they apply to lesbians as well as to heterosexuals and homosexual men; and many of them include a very wide range of common heterosexual acts. Some are so vague that they might be construed as applying to solitary masturbation (Arizona's, for example, doesn't require "another person," but only "a male or female adult"). Nonetheless, the likelihood that a solitary person or a married couple would be prosecuted under such laws was always slight, and even unmarried heterosexual couples would be prosecuted under them, typically, only as an extra offense added to a charge of adultery or fornication. As time went on and even the adultery and fornications laws fell into desuetude, the moralists' zeal focused intently, and increasingly, as in Britain, on same-sex acts—above all those performed by males.

The reasons for this shift are not altogether easy to discern. Victorian morality, like its American counterpart, was strict in all kinds of ways, and its special anxiety about same-sex acts between men is a little difficult to understand today. I can remember from my childhood the special disgusted shrinking with which the topic of male homosexuality was mentioned, at a time when oral sex between heterosexuals would have been no big deal; but, as with disgust generally, the reasons for this asymmetry, in Britain as in the United States, are hard to discern. Perhaps, however, it was the sheer dominance and prominence of men that gave rise to anxiety lest their sexuality express itself in nonreproductive and nonpatriarchal ways. (This interpretation finds support in the unusual zeal with which society went after men such as Wilde, who chose to lead openly "deviant" lives.¹²) And although continental Europe was less persecutory in many ways, Germany followed the trend, criminalizing

same-sex acts between men for the first time in 1871.¹³ (As in Britain, such acts between women were never illegal.)

Sodomy laws raise three distinct problems. First, they are intolerably, even absurdly, intrusive. What business does the state have telling me where I should put my finger, or, more generally, what acts I may perform with a willing partner? Most Americans today reject even the laws against adultery, although in that case a Millian could argue that a contract affecting the interests of the spouse is being violated. (Breach of contract, however, is a civil, not a criminal offense.) Certainly by now most Americans reject state policing of all consensual sexual behavior, and for a very long time they have rejected it where heterosexuals are concerned. Second, many of the laws are intolerably vague, leaving far too much to the discretion of the interpreting agents of government. Vagueness typically raises constitutional problems. Third, the statutes are either discriminatory on their face, criminalizing only the acts of homosexuals and leaving similar acts performed by heterosexuals untouched, or else they are discriminatory in application, enforced, in recent times at least, only against homosexuals. We might add that their intrusiveness is worse for homosexuals than for heterosexuals, because the prudent heterosexual can figure out a way to be a law-abiding citizen without giving up sex altogether, while the homosexual basically has to give up sexual relationships completely (although mutual masturbation is still allowed by most statutes, unless it is covered by expressions such as "any other unnatural or perverted sexual practice").

Sodomy laws had a demonstrable connection to violence against lesbians and, particularly, gay men. By defining gay men as outlaws, they gave notice to people prone to violence that violence against that group was not going to be taken as seriously as violence against other citizens. Gary David Comstock, in his important study of antigay violence, concluded that the typical perpetrator in a

gay-bashing incident was not someone with a deep-seated hatred of homosexuals. It was, instead, someone (often young and drunk) eager for a fight, who believed, plausibly, that the police would look the other way if a gay man were the victim.¹⁴ Indeed, as his study showed, police were often themselves perpetrators. One anonymous policeman from a large city said that he had beaten up seventeen gay men during the past year alone. Officer Torick's zealous pursuit of Michael Hardwick, and his glee at being able to place Hardwick in an undignified and humiliating position, are not idiosyncratic. Nor is the beating that Hardwick subsequently received at the hands of three men who drove up to his house, tore all the cartilage out of his nose, kicked him in the face, and cracked about six of his ribs.¹⁵ What provoked the assault? The public knowledge that Hardwick had been charged with public drinking at a known gay bar, which identified him as a homosexual and (hence) an outlaw. In this case and in many others, sodomy laws have a lot to answer for.

3. LIBERTY, PRIVACY, AND THE FOURTEENTH AMENDMENT

The Constitution's Fourteenth Amendment states (in part): "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Added shortly after the Civil War, the amendment was aimed above all at ensuring that the southern states could not withdraw basic rights from the former slaves. Over the years, the amendment has become a pivotal device for protection of all individuals' fundamental entitlements, but particularly those of persons from marginalized or subordinated groups. Although at times during this history the "privileges and immunities" clause has

played an important role in this struggle, for our purposes the relevant clauses are the second and third, the Due Process and Equal Protection clauses. Thinking about these clauses and what they protect is complicated and more than a little confusing, since both clauses have been seen to protect fundamental liberties, and both also have a strong equality component.

As we saw in chapter 2, the Equal Protection Clause protects subordinated groups from laws that embody or further systematic hierarchy and subordination. In some cases, we saw, it has also protected citizens not in one of those recognized groups from a basic violation of their equal entitlements motivated by animus or fear. There is, however, another aspect to equal protection, because it has been that clause through which certain fundamental rights of citizens not enumerated in the Constitution—the right to vote, for example, and the right to travel—have been recognized and given constitutional standing. This aspect of equal protection will concern us no further in the present chapter, but it will become important in the following one, because *Romer v. Evans*, a major case involving the protection of gays and lesbians against discrimination, was initially argued with reference to that equal protection tradition.

For now, however, let us focus on the way in which substantive personal liberties have been protected through the Due Process Clause. There can be no doubt that the Due Process Clause protects citizens from procedural violations of their rights. What has been far more controversial is the question whether the clause protects substantive liberties. "Substantive due process" got a bad reputation during the Progressive Era, when justices hostile to legislation protecting workers used the clause to strike down a variety of progressive reforms, including minimum wage and maximum hours laws, on the ground that they interfered with the "liberty of contract." For many years after that, there was considerable reluctance to use the clause to protect substantive liberties—until

growing discontent with intrusive sexual regulation made the Court take a new look at that possibility.

The modern revival of substantive due process was triggered by a Connecticut law that made it a crime to use "any drug or article" to prevent conception and also, in a separate "accessory" statute, criminalized contraceptive counseling and the provision of contraceptive advice. The director of Planned Parenthood and its medical director had been convicted and fined under the accessory statute for giving advice on contraception and prescribing contraceptive devices, for married couples. (Thus the law was challenged only as it limited the rights of married people.) In 1965, the Supreme Court held that the law violated the Due Process Clause of the Fourteenth Amendment.¹⁶ Famously, the opinion by Justice Douglas recognized a "right to privacy," arguing that this right, though not specifically mentioned in the text of the Constitution, was implicit in the "penumbras" and "emanations" of other rights (such as the Fourth Amendment right to be free from unwarranted search and seizure).

Griswold v. Connecticut concerned an unenumerated right that might seem progressive, part of a movement toward "sexual liberation." (Of course, married couples had long used various means of artificial contraception, and the advent of the pill only made its use easier for both married and unmarried people.) The reasoning in the case, however, has nothing to do with "liberal" preferences. Suppose we imagine a law, like that once in force in China, that prohibited married couples from having more than one child: this law would be invalidated as unconstitutional under *Griswold*, and for similar reasons. As I've argued, the threat to the dignity and autonomy of the individual comes from both the right and the left, and *Griswold* stands for the idea that the person has basic rights to nonintrusion, even though these are not all enumerated.

Griswold has become the basis for a series of highly controversial "right to privacy" cases, prominently including *Roe v. Wade*,¹⁷ which

protected a (limited) abortion right. As often happens with controversy, key issues have become muddled, and it is sometimes suggested that the very fact that a right is not explicitly enumerated in the Constitution means that illicit politics is involved in its recognition. People believe this, however, only because they have been encouraged to consider the privacy right in isolation, rather than to look at the many ways in which unenumerated rights have been recognized. In fact, nobody should be surprised to find that the Constitution protects rights that are not enumerated in it. Some of our most cherished rights (the right to vote, the right to travel) have this status (being recognized as implicit in the Equal Protection Clause). Even the most conservative jurists do not contest these unenumerated rights. Nor, in fact, does any suggest that the Due Process Clause does not protect liberty rights that need further specification and definition. The opposition does not sweep this broadly: it confines itself to attacking the privacy right as itself illegitimate. I do not believe that the opposition has given good reasons why this right is not a legitimate one for judges to recognize, while the other long-familiar ones are.

The basic project in which Justice Douglas was engaging is not only not illicit, it is central to our constitutional tradition. Nonetheless, as a legal theory, Justice Douglas's account of "penumbras" has struck many scholars as murky. Many have also found the very concept of privacy unclear, and in certain ways misleading, and I shall agree with them. It is important, however, to distinguish two different questions: Does the Due Process Clause provide a basis for recognizing unenumerated liberty rights in the area of sexual choice? And: should we approve of the particular way in which Justice Douglas argued this?

The answer to the first question is "yes." Just as our tradition has recognized as implicit in the Equal Protection Clause certain unenumerated rights on which we rely every day, so too, our long-standing

tradition has affirmed that the Due Process Clause protects some unenumerated rights in the area of "liberty." Liberty, after all, is explicitly mentioned in the text, so what judges are doing is working out, as they must, what that term covers. This is the inevitable task of judicial interpretation, when the Constitution gives judges only a highly general notion, such as "the free exercise of religion," or, in this case, "liberty."

James Madison, chief architect of our constitution, was well aware that enumeration of certain rights in a Bill of Rights might be construed to deny the constitutional significance of other rights not so enumerated, and for this reason he proposed the Ninth Amendment, which states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Such unenumerated liberty rights had repeatedly been found in the Due Process Clause well before the controversial postulation of a "right to privacy." In 1923, in *Meyer v. Nebraska*,¹⁸ the Court invalidated a law that made it a crime to teach any modern language other than English in a public or private school. The Court recognized a broad range of liberty rights as implicit in the Due Process Clause:

Not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness.

Two years later, in *Pierce v. Society of Sisters*,¹⁹ the Court invalidated a law requiring all children to attend public, rather than private,

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schools, because it unconstitutionally interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control." This set of cases was summarized by Justice Brandeis in 1928, in a formulation that, although initially set out in a dissenting opinion, has again and again been cited as definitive of a long liberty tradition:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.²⁰

So the Due Process Clause has been understood to protect some rights in the general area of intimate association, including, but not limited to, rights involving the family. *Griswold* correctly relied on this line of cases in order to protect the use of contraception by married couples in the home.

Are these liberty rights limited to married couples? In 1972, in *Eisenstadt v. Baird*,²¹ the Court said that they were not. *Eisenstadt* concerned the distribution of contraceptive foam to unmarried women at a public meeting. It was argued under the Equal Protection Clause, not the Due Process Clause, but its conclusion is important for the understanding of due process liberty: "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike...since the constitutionally protected right of privacy inheres in the individual, not the marital couple." Rightly seeing that the Fourteenth

Amendment ascribes rights to the "person," not to groups or collectivities, not even to couples, *Eisenstadt* reasoned that the liberty rights found in *Griswold* and other related cases are individual rights of persons to make certain intimate choices for themselves. Once we see them that way, the Equal Protection Clause requires us (the Court held) to extend those rights to the unmarried.

[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

What should be clear, then, is that there is a long tradition of recognizing, under the Due Process Clause, a set of liberty interests in the area of intimate association. Some of these pertain to marriage and the family, but even those are understood to be decisional rights of individuals, and *Eisenstadt* explicitly stated that rights relating to sexual choice belong to unmarried as well as married individuals.

Griswold was right to invalidate the intrusive Connecticut law on due process grounds. But there is plenty of room to find fault with the way in which Justice Douglas argued, and especially with the notion of privacy that he invoked. Privacy is one of the most vague and confusing concepts in the law.²² It includes ideas of informational secrecy, modesty, seclusion, and decisional autonomy, in a potentially confusing way. In the area of sexual liberty, the idea of privacy suggests an idea of decisional freedom, the idea that certain choices (of intimate association, of childbearing and contraception) are for people to make on their own, with no supervision from the state. It also suggests an idea of seclusion, pertinent to the protection

of others from offense, and the idea of the home as privileged space, where government has no business. In *Griswold*, for example, Justice Douglas asks rhetorically, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"

The decisional component of privacy and the idea of the home as a protected place are not unrelated. They are connected through the idea of seclusion. If we return to the three categories of sexual behavior we distinguished earlier, we can see that it is plausible to believe that the decisions that are a person's own to make, those that should not be controlled by the state, are only those in our third category—decisions that involve only those who consent and not others who might be harmed by the choice. Acts that take place in seclusion, if fully consensual, are usually free from harm to nonconsenting parties. The home is one example of a place of seclusion—though far from the only example. If acts are performed in the home, and are fully consensual, then they are usually self-regarding in Mill's sense. Acts done in a public place are more likely to involve the interests of nonconsenting parties. But the Millian idea of self-regarding conduct is not equivalent to the idea of the home as a privileged space. Many actions in the home are not consensual and harm nonconsenting parties. The appeal to the (alleged) privacy of the home has all too frequently been used to protect child abuse, domestic violence, and marital rape from the law's scrutiny. Moreover, conduct may be self-regarding in Mill's sense even when it occurs outside the home: for it might take place in a hotel room, or a private club, or even a secluded outdoor spot.

What is unfortunate about *Griswold* and the line of cases descending from it is not, then, that it recognizes substantive liberty rights in the area of intimate association as implicit in the Due Process Clause, but the way *Griswold* and subsequent cases mix the decisional aspect of privacy with the spatial aspect, suggesting that

the domain of the home is a privileged place of decisional liberty, a kind of government-free zone.

A case that makes this move particularly clearly is *Stanley v. Georgia*,²³ in which the Court held that a person has a right to the private use of obscenity—in the home. The Court might have held that the personal possession and use of obscenity in seclusion, without direct offense to others, is protected by the Constitution. Instead, the Court muddied the waters by speaking of a “right to satisfy his intellectual and emotional needs in the privacy of his own home,” and by concluding that the states’ power to regulate obscenity “does not extend to mere possession by the individual in the privacy of his own home.” Had Stanley been reading his magazines in a hotel room, or in a cabin temporarily rented for a vacation, what then? Are the police authorized to search resorts, hotels, offices in a private place of business for evidence of possession of obscene materials? And why would those secluded places be deserving of less protection than the home? The Court’s appeal to “the home” is resonant rhetorically, but not very helpful analytically.²⁴

One more source of potential confusion must now be cleared away. The Due Process Clause has often been thought to be traditional, or backward looking, because two influential formulations describe the liberties protected by the clause as those that are “deeply rooted in this Nation’s history and tradition”²⁵ and “implicit in the concept of ordered liberty.”²⁶ Even if tradition were our only guideposts, however, there is still a genus-species problem: for, while it might be true that the right of homosexuals to engage in homosexual sodomy does not, as such, fit those descriptions, at a more general level our tradition does recognize a right of persons to choose to make intimate decisions about their sexual lives—most clearly for the married, but *Eisenstadt* extends that right to the unmarried. Furthermore, there are other formulations of due process that suggest a less tradition-based approach: for example, one

formulation insists that the inquiry should be whether a right "is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."²⁷ A right of intimate association, crafted so as to exclude acts that harm nonconsenting parties, meets this specification.

4. *BOWERS V. HARDWICK*: INTRUSION AND OBTUSENESS

Michael Hardwick, a gay man, was drinking a beer after work, in a gay bar where he had been helping friends install some insulation.²⁸ As he prepared to leave, he tossed the beer into the trash can by the front door of the bar. At this very moment, a police car drove by. Seeing Hardwick, the officer drove back and asked Hardwick where the beer was. Hardwick said he had thrown it into the trash. The officer made Hardwick get into the police car and asked what he had been doing at that bar. Hardwick said that he worked there, which identified him as a homosexual. The policeman asked Hardwick to show him the bottle that he said he had thrown into the trash, but the contents of the trash can could not be seen from the car, and Hardwick was afraid to get out of the car without explicit authorization. Eventually the policeman gave Hardwick a ticket for drinking in public, but the ticket was filled out erroneously, with two different court dates on two different parts of the ticket. When Hardwick didn't show up for the earlier one (because the later one was at the top of the ticket), a warrant was issued for his arrest. Two hours later, Officer Torick arrived at Hardwick's house. Usually it takes forty-eight hours to process a warrant, but Torick processed it personally, taking a zealous interest in the case.

When Torick arrived, Hardwick was not at home, but when Hardwick heard from a roommate that an officer had been there

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with a warrant, he went downtown and showed the two dates on the ticket to the clerk, who fined him \$50, which he paid. The clerk gave him a receipt and expressed surprise that Torick had personally processed the warrant. Three weeks later, Hardwick was beaten up by three young men in front of his house: word of his orientation had evidently spread.

Several days later, Officer Torick arrived at Hardwick's house. A visiting friend of Hardwick's, sleeping on the couch, answered the door. (By this time the warrant had been invalid for more than three weeks.) Torick came to the bedroom and opened the door. Hardwick remembers hearing a noise, but then thinking that it was just the wind. He went back to what he was doing, which was mutual oral sex with a male partner. Almost a minute went by before Officer Torick made his presence known and announced that Hardwick was under arrest. "I said, For what? What are you doing in my bedroom?" Torick said he had a warrant. Hardwick pointed out that the warrant was no longer valid. Torick said it didn't matter because he had been acting in good faith. After refusing to leave while Hardwick and his friend got dressed, he took them to the station house, told all the other prisoners that they were homosexuals (actually, he told guards and other prison officials that Hardwick was there for "cocksucking" and that he should be able to get plenty of that in prison). Hardwick was booked for sodomy. The Georgia law, enacted in 1816, said that "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another."

At this point, the American Civil Liberties Union took an interest in Hardwick's case and decided that it provided a good opportunity to challenge the sodomy law, since the sex was between two consenting adults and took place in seclusion. For a time, a heterosexual couple, the "Does," joined the challenge to Georgia's sodomy law, which was orientation neutral, but they were denied

standing by the district court because they faced no "immediate danger of sustaining some direct injury as a result of the statute's enforcement." Thus the state admitted that the statute, though neutral, was unequally enforced.

The state's strategy was to focus relentlessly on homosexual conduct rather than on the broader notion of forbidden sex acts. When the case was argued before the Supreme Court, Georgia Attorney General Bowers kept referring to homosexuality throughout his argument, and claimed in his brief that "homosexual sodomy leads to other deviate practices such as sadomasochism, group orgies, or transvestism, to name only a few." (Hardwick had never been associated with any of these practices.) Bowers repeatedly alluded to "gay baths" and suggested a link between the sodomy law and the state's interest in public health. Although Paul Cameron's most outrageous claims were not foregrounded, the state's general strategy was the Cameron strategy of disgust and fear—despite the fact that both the American Psychological Association and the American Public Health Association had emphasized the frequency of the outlawed practices among heterosexuals, including eighty percent of married couples. Harvard law professor Lawrence Tribe, arguing the case for Hardwick, attempted to get the Court to focus on the general issue of intrusiveness and the limits of government power, emphasizing the secluded and intimate nature of Hardwick's sexual activity in a way that argued for a more general human interest in noninterference.

On June 30, 1986, the Supreme Court upheld the sodomy law by a 5-4 vote. (The result later became even more controversial when it was divulged that Justice Powell had changed his vote at the last minute—only to regret his position later on and publicly admit that he had probably been wrong.²⁹) The crucial defect of the majority opinion (by Justice White) and the even harsher concurring opinion by Chief Justice Burger is a deficiency of human imagination—of "humanity" in the sense I have given that term.

Why, one might ask, do judges need to use their imaginations? Surely their job is to interpret the Constitution faithfully. Yes, to be sure—but this case, like many difficult cases that reach the Supreme Court, cannot be resolved by any purely technical argument. Instead, judges have to consider relevant similarities and differences, and this means that they have to try to understand human aims and interests. In order to determine whether the rights curtailed by the Georgia sodomy law are protected by the Due Process Clause, a judge must first figure out the relevant specification of those rights. Does this law threaten a right of all persons to consensual intimate association? So described, the right looks like one that is both fundamental and deep, and this description of what is at stake is naturally suggested by the text of the Georgia law, which applies to persons of all sexual orientations. To see whether that description of the right is pertinent, a judge would have to ask whether the liberty claimed by Michael Hardwick is relevantly similar to the decisional rights of individuals already recognized by the Court.

Justice White, however, considered the issue narrowly, as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” He then says that it is “evident that none of the rights announced in those [earlier privacy] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.” To claim Due Process Clause protection for such a right “is, at best, facetious.” Similarly, Chief Justice Burger, in a harsh concurring opinion, opines that “the proscriptions against sodomy have very ‘ancient roots,’” concluding: “To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”

These judgments get some things badly wrong on the facts. As we’ve seen, the special zeal to restrict homosexual activity under the

sodomy laws is of rather recent origin. Nor does the entire "history of Western civilization" show opprobrium directed at these acts. Same-sex acts between women have hardly ever been prohibited, and were not so even in England. Heterosexual "sodomy" was an approved practice in many ancient societies, including ancient Greece, where, as I've noted, anal sex often served contraceptive purposes. (In many societies, anal sex also served to preserve female virginity.) Same-sex relations between men were carefully scrutinized in Greece because of widespread disapproval of a citizen's playing a passive role, but some acts prohibited under later sodomy laws were publicly approved, and many more such acts were widely tolerated. Erotic attraction between men was regarded as normal and natural, and even the gods were imagined as having such love affairs. To move to modern times, all criminal penalties for consensual sexual acts were abolished in France by the early nineteenth century. Such historical and international facts may or may not be relevant to the judgments of a U.S. court, but because they were invoked, it is important to point out that they were invoked incorrectly.

History, however, is hardly the primary problem. These two opinions are morally obtuse in a way that shocks. Even at the time, when widespread animus and prejudice against homosexuals still existed in the United States, it should have been easy to see that what they were asking to be able to do legally bore not "no resemblance," but a very close resemblance to what heterosexuals often do legally. It had already been established by *Eisenstadt* that the rights associated with sexual intimacy are individual rights, and rights of the unmarried as well as the married; so the Court could not defend its obtuseness by saying that marriage is the only relationship that the Fourteenth Amendment protects. The ability to make decisions concerning one's sexuality had been held to be a fundamental individual right, and it doesn't take a leap of creativity, but only a rather ordinary step of imagination, to see that this was

what Michael Hardwick was seeking. What he was doing in his bedroom was exactly like what millions of heterosexuals, married and unmarried, were doing legally all over America.

How could someone in good faith conclude that that there was "no resemblance" between the rights invoked in his case and those recognized in others? We need, here, to think, again, about the politics of disgust: the way in which homosexuals were routinely portrayed as somehow not fully human, as something like the cockroach that crawls onto your kitchen floor. You sort of know it is there, but you don't want to admit it is there, so you don't look at it very hard. Years of stigmatization of gays and lesbians made it all too easy for judges, unaware that some of their friends and relations were gay and lesbian, to talk about them as a class of moral pariahs who are not like other humans. Bowers's oral argument strongly supported that way of thinking. The abhorrence expressed by the majority opinion and by Burger's concurrence inhabits the same world as Justice Wills's condemnation of Oscar Wilde, and shows the same unwillingness to try to see, from the point of view of the homosexual person, what is being sought and what its resemblance is to the actions and rights of heterosexuals.

Reinforcing the harshness of these opinions is their *Devlinesque* character: they allude to long-standing traditions as if those, by themselves, settle the matter of what rights individuals have under the Constitution. As we've seen, the appeal to disgust and a solidaristic conception of society are very closely linked in Devlin: it is the value of solidarity that makes the appeal to disgust legally relevant. These two opinions don't theorize in that way, but they do rationalize their stigmatizing by reference to tradition. As the dissenting opinion points out, however, the rights recognized in earlier cases were not (*Devlinesque*) rights of cohesive social collectivities; they were decisional rights of individuals involving intimate association and the personal pursuit of happiness. Such rights do not

cease to exist simply because a majority doesn't like them. The Court, however, could not see that Michael Hardwick was pursuing happiness like other people, because they focused on the unpopular and (allegedly) nontraditional category of "homosexual sodomy." The two sides in *Bowers* thus replay the Devlin-Mill debate, showing us clearly what is at stake in the choice between the two conceptions of society.

The dissenting opinion by Justice Blackmun makes interesting use of the religion analogy, arguing that a "necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices." Citing *Wisconsin v. Yoder*, which recognized that the distinctive nature of the religion of the Amish required respect and accommodation even though it was different, the dissenters write, "A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." So too here, they argue: the "fundamental interest all individuals have in controlling the nature of their intimate associations with others" cannot be abridged for a minority just because a majority doesn't like them.

Bowers was argued under the Due Process Clause, and it is primarily a case about liberty. Liberty, however, in our constitutional tradition, is closely linked to equality, because fundamental liberties (of speech, religion, etc.) are not secured to individuals unless they are secured on a basis of equality. In the law of religion, for example, it has long been recognized that defending religious liberty requires more than not persecuting people: it also requires making sure that the conditions of liberty are the same for all. Similarly, the issue in *Bowers* involved both liberty and equal liberty. As Justice Stevens pointed out in his dissenting opinion, the sodomy law can be defended only in one of two ways: either homosexuals have unequal liberty interests, or there is a reason why the state is

permitted to enforce a generally applicable law unevenly. The first defense is unacceptable because it violates the basic tenet of equality; the second because the state offers no argument "more substantial than a habitual dislike for, or ignorance about, the disfavored group." Similarly, Justice Blackmun makes the Millian point that "the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest" in the absence of "real interference with the rights of others."

Because the dissenters raise the issue of equality, one might ask whether the case should have been argued under the Equal Protection Clause, rather than the Due Process Clause. Justice Blackmun expresses sympathy for such an approach and cites the case overturning the antimiscegenation laws as pertinently similar. Some scholars have felt that an equal protection argument is intellectually more compelling—in part because the Equal Protection Clause is progressive, not backward looking and traditionalist, as has sometimes been said of the Due Process Clause. But the Due Process Clause should not be seen as backward looking, particularly if rights are understood at a reasonable level of generality. Nor is equality the only pertinent issue here: in light of the history of equal-time repression, the liberty interest itself needs to be vindicated strongly for all.³⁰

Bowers is a low point in recent Supreme Court jurisprudence. Its result and the harshness of the majority and concurring opinions not only left vital liberty interests unaddressed but also gave comfort to the idea that gays are outlaws. In its restriction of fundamental individual rights in the name of majority prejudice, the case resembles such ugly cases from the past as *Plessy v. Ferguson*,³¹ which upheld the constitutionality of racial segregation, and *Bradwell v. Illinois*,³² which upheld an Illinois law forbidding women to practice law. A famous concurring opinion in the case cited widespread moral judgments about the proper role of women in society. Perhaps even more

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uncannily similar is *Minersville v. Gobitis*,³³ which upheld a compulsory flag-salute law against a challenge from Jehovah's Witnesses, who refuse the salute on religious grounds. The suggestion that Witnesses were outlaws and subversives (if they obeyed their conscience) let loose an ugly torrent of violence against them across the nation.³⁴ That violence, together with the general condemnation of the opinion, led to a reconsideration only three years later.³⁵ Gays and lesbians had to wait a lot longer.

5. LAWRENCE V. TEXAS: TOWARD A REGIME OF EQUAL LIBERTY

The political struggle now moved to the states. By 1996, more than half of the states that had sodomy laws at the time of *Bowers* had repealed them. The number of states with such laws declined to sixteen by the time they were all invalidated, in 2003. These repeals were part of a general change in social attitudes. Americans were becoming more aware of gays and lesbians as full human beings—in families, in the workplace, in churches, in the media, in every part of the fabric of American society. The closet had enabled the politics of disgust, making it possible to portray gays and lesbians as unlike ordinary citizens. Coming out, together with the daily operations of imagination, concern, and friendship, had a large effect on people's views.

On September 17, 1998, John Geddes Lawrence, a medical technologist, age fifty-five, was having consensual anal sex with Tyron Garner in Lawrence's Houston apartment. Unbeknownst to him, a neighbor, Robert Royce Eubanks, who had earlier been accused of harassing Lawrence and Garner, and who had a romantic relationship with Garner, phoned in a complaint of a "weapons disturbance" in Lawrence's home, saying that a man with a gun was "going crazy." (Eubanks later admitted that he had been lying and served fifteen

days in jail for filing a false police report.) When the police arrived, they entered the unlocked apartment with weapons drawn and arrested the two men. They were held overnight in jail and charged with violating Texas's sodomy law. Pleading no contest, they were convicted by a justice of the peace, but they then exercised their right to a new trial and asked the court to dismiss the charges against them. They cited both equal protection grounds (given that Texas's law prohibits sodomy only between same-sex partners) and Due Process liberty grounds. In December 2002, the Supreme Court agreed to hear the case. On June 26, 2003, by a 6-3 vote, the Court found in favor of Lawrence and Garner, overruling *Bowers v. Hardwick* and invalidating all the extant state sodomy laws.

For Justice O'Connor, who wrote a concurring opinion, the salient issue was equality. Justice O'Connor, who had voted with the majority in *Bowers*, did not express a view on the question of whether a neutral sodomy law would be unconstitutional on due process grounds; she argued that this issue need not be decided, since the Texas law was plainly unconstitutional on Equal Protection grounds. Citing *Cleburne* as a precedent, she argued that the state may not single out a class of citizens for special disadvantages simply because many people disapprove of or dislike them. "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection clause."

Justice O'Connor's opinion shows us both the promise and the limitation of an equal protection approach: it suffices to invalidate the law in question, and perhaps it would also suffice to invalidate neutral laws if it were shown that they were unequally enforced. But it does not address the more fundamental issue of intrusiveness and decisional liberty.

The majority, however, decided that the time had come to articulate boldly the nature of the liberty interest in intimate association. *Bowers*, they held, "was not correct when it was decided, and

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it is not correct today." The *Bowers* majority had framed the liberty interest wrongly and narrowly. Correctly seen, *Lawrence*, like *Bowers*, involves the government's role in intimate personal relationships. "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.... Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Justice Kennedy's opinion for the Court argues that private and consensual conduct is within the liberty of all persons to choose without being branded as criminals.

This is a correct and powerful interpretation of the liberty interests protected by the Due Process Clause. Justice Kennedy is also on strong ground when he observes that due process liberties have an equality aspect, and also that the equality interest cannot be well served by a narrow approach through the idea of equal protection alone.³⁶ Only a robust protection of liberty for all will eliminate the stigma inflicted by sodomy laws.

Equality by itself, without appeal to protected areas of liberty, is insufficient, because government can infringe on vital liberties with an even hand. Laws that say, for example, that no couple, married or unmarried, can have more than one child; laws that prohibit marriage between people of different religions; laws that prohibit masturbation: such laws probably don't offend against the Equal Protection Clause, but they are offensive. The core idea of a protected area of liberty is independent of and not fully explained by the idea of equal treatment: we need an account of which liberties are protected, before we say that liberties are protected equally for all.

Lawrence articulates well the relevant notions of liberty and equal liberty. Nonetheless, the resonant opinion suffers from the salient defect of some of its predecessors: it relies unduly on the murky notion of privacy. At least *Lawrence* recognizes that privacy

has two aspects, the decisional and the spatial. After initial references to "a dwelling or other private places" and "the home," Justice Kennedy immediately writes that the case "involves liberty of the person both in its spatial and more transcendent dimensions," and he grants that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." Even with this distinction stated, however, the opinion goes on to rely on the spatial notion of privacy at key moments, thus suggesting a constitutional approach that is both overprotective and underprotective. The state does, of course, have a role in the home—when harm is in the offing. Nor is it clear why the fact that the sex act performed by Lawrence and Garner was in "the home" should be relevant. Surely, the relevant issue is one of the interests of other parties: no nonconsenting party's rights are being violated, and, because the conduct took place in seclusion, no nonconsenting party is being subjected to direct offense.

That is all that needed to be said. "The home" is a red herring. Bill Baird (of *Eisenstadt v. Baird*) gave contraceptives to undergraduates at a public meeting. What was important was that he violated nobody's rights and inflicted no damage on unwilling bystanders. More generally, countless contraceptive acts protected by the Fourteenth Amendment take place outside the home, in public places—every time, for example, a woman takes her pill with lunch or dinner in a restaurant, or goes to a public restroom to insert a diaphragm. For that matter, even in *Griswold*, where the marital home is mentioned as salient, the plaintiffs were practitioners who had prescribed contraceptives and offered contraceptive advice in their medical offices. The relevant issues are consent and offense, not location.

As for actual sex acts, where there is always the potential for a type of harm. Suppose that Lawrence and Garner had had sex in a hotel room instead of Lawrence's home. In this case, because of the

room's homelike character, most people will immediately see that it should be similarly protected. The relevant issues, again, are consent and seclusion (removing the possibility of harm). Sex in a crowded hotel ballroom would not be protected. But what if they had had sex in a private club, either in a secluded room in that club, or in a room where nobody who did not want to watch was present? What if they had had sex in a secluded area in the woods? These questions will occupy us in chapter 6.

On these important questions, *Lawrence* offers no guidance. We don't even know whether the spatial component is meant to be a necessary element of the protected liberty interest or just one option; that's how unclear the opinion is. The references to liberty in general suggest that protection extends beyond "the home," but how far beyond, and on what principle, is left utterly unclear. And yet there was a principle readily available: Mill's idea of self-regarding conduct, which could have clearly demarcated protected intimate association from both harmful and offensive conduct.

Lawrence's great achievement, then, was not conceptual clarity or sharp practical guidance, but a cast of mind, a judicial approach to liberty interests. In essence, it consists in a rejection of the politics of disgust so amply evident in *Bowers*, together with the Devlinesque conception of society as dominated by tradition and solidarity, in favor of a politics of humanity that is the heir of John Stuart Mill both in its zealous protection of individual liberty and in its reliance on the ability to imagine a variety of human purposes. Instead of being treated as a class of outlaws condemned by the wisdom of the ages, gays and lesbians took their place, in the judicial mind, as equal citizens and "adult persons," with interests like those of other people "in deciding how to conduct their private lives in matters relating to sex." That's an achievement of the moral imagination. Because law is inseparably bound up with the moral imagination, it is also an achievement in law.

FROM DISGUST TO HUMANITY

NOTES

1. From the interview with Hardwick in Peter Irons, *The Courage of Their Convictions* (New York: Free Press, 1988), 396.
2. Mill thought of all animals as subjects of justice: thus any activity that harms existing animals was potentially regulable. His principles can easily be extended to future humans and animals. It is less clear whether a Millian principle can support the protection of endangered species, or environmental degradation that does not harm humans or animals. See my discussion in Nussbaum, *Frontiers of Justice* (Cambridge, MA: Harvard University Press, 2006), chap. 6, where I agree with Mill that the issue of justice is pertinent only to sentient creatures, but argue that other principles—intellectual, aesthetic, scientific—could justify laws protecting species and the environment. Although Mill did not write about sex with animals, we may use his principle to justify laws against bestiality—on the grounds that the animal never consents in a way that is relevant to the best legal notions of consent in sexual assault doctrine. If we once agree that sex with animals is a type of harm, however, we will be led to ask what other conduct toward animals deserves the same stricture: another reason why a politics based upon harm is more probing, whereas a politics based on disgust short-circuits the search for reasons.
3. See the discussion of nuisance law in Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2004), chap. 3.
4. Runners often apply this principle when the city of Chicago locks the public restrooms adjacent to the running paths for winter to save money involved in cleaning them. A common practice is to use the area just behind the locked restroom, thus indicating that one would have used the restroom had it not been stupidly locked.
5. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991). Notice that, although the majority opinion rested on purely Devlinesque considerations, Justice Souter's concurrence argues that nude dancing is not purely self-regarding, because it creates an atmosphere of exploitation and criminal activity. His analysis of this case is similar to Mill's argument (tentative) that keepers of gambling houses might possibly be proper subjects of legal regulation.

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6. Justice Scalia has repeatedly done this, not least in this area of law.

7. France is well known for its ban on large or conspicuous religious articles of dress in public schools; but individual cities in Belgium and the Netherlands have also been passing related laws—forbidding government employees to wear such articles, for example.

8. In order to express his attitude about this difference, Mill insisted on being buried in France.

9. Statutes against “buggery” remain in force in some former parts of the British empire; in Hong Kong, for example, both same-sex and opposite-sex “buggery” laws are still on the books, despite having been found unconstitutional in 2005.

10. However, cross-dressing and using a dildo were considered fraud: see Louis Crompton, “The Myth of Lesbian Impunity: Capital Laws from 1270 to 1791,” *Journal of Homosexuality* 6 (1980), 22–26.

11. The initial proposal was a one-year maximum, but legislators demanded a harsher penalty.

12. Wilde, however, was in fact married and had two children.

13. The history of Paragraph 175 is complicated by the fact that some German states had had, and repealed, sodomy laws earlier (one reason for the national legislation); the more tolerant character of Germany is shown by the fact that the Social Democratic Party almost immediately sought repeal of Paragraph 175, and a wide range of both gay and straight artists and intellectuals (including Thomas Mann, Martin Buber, Rainer Maria Rilke, Herman Hesse, and many others) publicly joined the prorepeal movement. Wilde, by contrast, had virtually no nongay defenders (apart from a couple of prominent women), and no political party ever dreamed of defending him. Paragraph 175, though strengthened by the Nazis, was rewritten as a simple age of consent law in East Germany in 1957 and in West Germany in 1969. All legal distinctions between heterosexual and homosexual acts were abolished in the East in 1988 (including differences in age of consent), and, since Reunification in 1994, this uniformity extends to all Germany.

14. Gary David Comstock, *Violence against Lesbians and Gay Men* (New York: Columbia University Press, 1991).