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Disgust, Hate, and the Law*

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1 Introduction

Hate crimes hold a pivotal position within contemporary criminal dogmatics. Despite their evident social significance, considerable disagreement remains regarding the most appropriate way to elucidate their nature and justify their punishment. The divergence in opinions on the justification of punishment for hate crimes is, to some extent, a result of the diverse range of events encompassed by this category – ranging from physical assaults to insults and discrimination in service provision. This diversity necessitates an exceptionally abstract foundation to systematically categorise them under the same type of criminal blame. Generally, within the framework of liberal criminal law, the justification revolves around the dignity of the human person.[1]

However, some authors argue that the common thread is not the dignity of human beings, as this normative feature fails to explain why it justifies aggravating some crimes over others. For instance, a hate-motivated homicide directly assaults the victim's dignity, but this alone is insufficient for it to qualify as a hate crime.[2] Another perspective is to view hate crimes as heinous crimes, provoking a special kind of disgust in society. Therefore, appealing to dignity or other liberal values is considered a self-delusion that obscures the primary evaluation of repulsion.[3] According to this approach, referencing disgust is compelling as it elucidates a heterogeneous phenomenon with crucial categories of practical philosophy, such as revulsion and indignation.

At first glance, the distinction between hate crimes and heinous crimes seems clear. The former requires that the emotion of hate determines the perpetrator's conduct, for example, an individual harbouring hatred toward a specific race. Thus, proof of these crimes is typically assimilated to other intentional crimes centred around the perpetrator's mental state or control throughout events. On the

* This title is an obvious wink of Martha Nussbaum's work: Martha C. Nussbaum, Hiding from Humanity: Disgust, shame, and the law (Princeton, N.J.; Oxford: Princeton University Press, 2004).

1 For example, according to the instructions of the Attorney General of Spain to interpret Art. 510 of the Spanish Penal Code, 'for a hate crime to occur, it will be necessary … that the action or omission can only be understood from contempt for the intrinsic dignity that every human being possesses'.

2 For this reason, it has been pointed out that hate crimes are a 'tailor box' where there is no genuine conversation about whether hate as an emotion was present in certain cases but about whether the judge identifies herself with the victim. Edward B Royzman et al., 'From Plato to Putnam: Four Ways to Think About Hate,' in *The psychology of hate* (Washington: American Psychological Association, 2005), 8.

3 Dan M. Kahan, '"The Anatomy of Disgust" in Criminal Law,' *Michigan Law Review* 96 (1998); Dan M. Kahan, 'The Progressive Appropriation of Disgust,' in *The Passions of Law*, ed. Susan A. Bandes (New York; London: New York University Press, 1999).

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contrary, heinous crimes are not characterised by individuals' emotions (i.e., emotion of hate) but rather by the community's reactions. While a heinous crime may involve hatred toward a specific group, the agent's emotion is not a prerequisite for heinous crimes. Therefore, it is asserted that a crime can be classified as heinous without exploring into the author's motivations.[4] So, heinous crimes must be perceived as disgusting. Indeed, as Reamer says, they are 'crimes so horrific that it shakes our collective conscience'; they 'take one's breath away'.[5] In such cases, the perpetrator is described as a 'monster', 'abnormal', or someone capable of committing abhorrent (inhumane) acts. Consequently, arguments in such cases primarily focus on the mental health of the perpetrators.

Beyond the author's culpability in heinous crimes, theoretical interest shifts from the perpetrator's emotions to the community's emotions, raising significant conceptual and justificatory questions. For instance, what renders certain crimes so repugnant and repulsive that we label them as heinous? Is our disgust justified in specific cases? Should we enhance punishment or diminish constitutional rights due to the disgust or repulsion a case provokes in the community? How can we distinguish between actions driven by hate and those resulting in hateful consequences? Is a hate crime always a heinous crime?

Understanding the answers to these questions is crucial for comprehending heinous crimes and their challenge to the liberal rationale for punishment. It is well-established that disgust holds a prominent position in Lord Devlin's writings.[6] According to this author, the disgust elicited by specific behaviours in most community members was sufficient ground to deem the action illegal, even if the conduct did not cause harm.[7] In contrast, it is essential to recall H.L.A Hart's paradigmatic liberal response to Devlin's perspective.[8] Nevertheless, in recent decades, the inquiry into the normative value of disgust has expanded, prompting consideration of its possible incorporation into a liberal justification framework. In this line of analysis, disgust is perceived as a form of harm, making it relevant for liberals who cannot overlook its significance. Due to the scope of this discussion, it is not feasible to explore into all the details involved. Therefore, following a brief characterisation of disgust, I will examine a specific perspective on disgust presented by Dan Kahan, aiming to demonstrate that assuming the normative value of disgust is compatible with a liberal theory. Contrary to Kahan, I highlight why disgust cannot be deemed a legitimate justification for criminal punishment.

4 Juan Alberto Díaz López, *El odio discriminatorio como agravante penal: Sentido y alcance del artículo 22.4 C.P* (Madrid: Civitas, 2013), 73.

5 Frederic G. Reamer, *Heinous crime: Cases, Causes, and Consequences* (New York: Columbia University Press, 2005), 4.

6 Patrick Devlin, *The Enforcement of Morals*, 11th. imp. ed. (Oxford-New York: Oxford University Press, 1989), 14.

7 With the same opinion, Leon R Kass, 'The wisdom of repugnance: Why we should ban the cloning of humans,' *Valparaiso University Law Review* 32, no. 2 (1997).

8 H. L. A. Hart, *Law, Liberty and Morality*, 1st ed., Harry Camp lectures, (Oxford-New York: Oxford University Press, 1982); H. L. A. Hart, 'Social Solidarity and the Enforcement of Morality,' *University of Chicago Law Review* 35, no. 1 (1967): 2.

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Finally, although explaining the emotion of hate is an essential issue in a complete analysis of hate crimes[9], such a reconstruction far exceeds the limits of this work. Fortunately, this is not central to the problem I intend to highlight here: the justification for considering hate as an aggravating circumstance in certain crimes. In this respect, subsequently, I assume that the emotion of hate must be rooted in an evaluative belief oriented to a specific group of individuals, and the evaluative belief consists of attributing to the group a certain moral undesirability, a particular evil or a similar trait, accompanied of the evaluation of danger and the feeling of helplessness; a kind of disgust, contempt or aversion and some desire linked to the destruction of the hated object.[10]

2 On the Notion of Disgust

In practical and social philosophy, disgust is a nuanced phenomenon determined by naturalistic and social dimensions. For the sake of simplicity, I will adopt Martha Nussbaum's characterisation of disgust. Following Rozyn, Nussbaum points out that disgust is:

> ... revulsion at the prospect of (oral) incorporation of an offensive object. The offensive objects are contaminants; that is, if they even briefly contact an acceptable food, they tend to render that food unacceptable.[11]

Firstly, disgust entails a complex cognitive content that revolves around the concept of contaminants. It is essential to underscore the differentiation between objects considered disgusting and dangerous and those that elicit a sense of distaste.

Objects deemed contaminants are often associated with animals and their by-products, based on the notion that incorporating them reduces us to a feral state. Furthermore, the concept of disgust is intricately tied to decomposition and waste, such as corpses and faeces, as they underscore our mortality dimension and connect to our inherent animal nature.[12] This association between disgust and nature serves as a potent tool for social education, as societies utilise the teaching of disgust and its objects to instil attitudes regarding our animal condition, sexuality, and gender.[13]

While this exploration of disgust sheds light on its natural and social dimensions, it falls short of explaining its relevance to moral and criminal law debates. To address these limitations, there's a temptation to establish a connection between disgust and transgression, reinforcing the belief in punishing actions that evoke

9 See, for example, Royzman et al., 'From Plato to Putnam: Four Ways to Think About Hate'.
10 Agneta Fischer et al., 'Why we hate,' i10 (2018), no.4, https://doi.org/10.1177/1754073917751229, https://journals.sagepub.com/doi/abs/10.1177/1754073917751229.
11 Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 87.
12 Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 87 ff.
13 Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 96.

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disgust. However, as Nussbaum aptly notes, this association is only possible because the core concept of disgust as a physical contaminant is expanded to encompass other objects through the 'psychological contamination' tool.[14]

Two rules contribute to this type of contamination. Firstly, the 'contagion rule' dictates that objects in contact with a contaminant substance become contaminated themselves. Nussbaum elucidates, stating: 'The extension of contamination is mediated by social boundary-drawing, with the result that the disgusting is only what transgresses these boundaries.'[15]

Secondly, there is the law of 'similarity', which posits that 'if two things are alike, the action taken on one (e.g., contaminating it) is taken to have affected the other'.[16] The underlying intuition here is that we perceive disgusting things as incompatible with human nature. Hence, if a reprehensible crime occurs, our reaction may characterise the perpetrator as acting, for instance, 'like an animal, a monster, or a beast'. While the core meaning of 'disgust' may seem distant from moral and criminal law discussions, the transformation rules (contagion and similarity) enable us to extend the concept's meaning to situations where disgusting elements, such as heinous crimes, expose a divide between 'us' and 'them' – between those who maintain their humanity by avoiding contaminated transgressions and those engaging in wild behaviours more suited to an animal narrative.

Despite disgust being rooted in our species' natural (animal) traits, its manifestations in the social environment are subject to various historical and social circumstances. In other words, disgust exhibits contextual sensitivity. As communities evolve in their beliefs and convictions, things that disgust us at time one might not evoke the same reaction at time two, and vice versa.[17]

Although there is a significant disagreement about the place that disgust should occupy in our morality, even those who strongly support it recognise that:

> … The rhetoric of disgust is called on to justify caste and class divisions, cruelty, exploitation, pogroms, ethnic cleansing, genocide, and war. Such problems persist globally because the old tricks still work. The anti-gay politician or anti-abortion religious leader whips up disgust at an out-group; the implied disease threat then causes the in-group to close ranks. The effect is particularly visible at election times, when intercommunal violence peaks, as does the

14 Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 93.
15 Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 94.
16 Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 94.
17 My objective is to formulate a descriptive statement referring to the diversity of social practices as influenced by social, cultural, and ethnic distinctions. An illustrative instance is the varying perspectives on female genital mutilation in Europe, where it is commonly regarded as a repugnant practice. However, divergent viewpoints exist among groups adopting an internalised perspective on this practice. It is imperative to note that acknowledging this diversity does not suggest an endorsement or genuine justification for the practice or its internal perspectives.

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> discussion of immigration. By labelling the outsider as dirty and diseased, racists and nationalists find that they can also, to some extent, recruit morality to their side … This is the dangerous downside of disgust.[18]

3 The Expressive Approach to Hate Crimes

Three primary theoretical frameworks proffer competing rationales for the aggravating nature of hate in criminal law. Firstly, one conceptualisation centres on the subjective component of the agent's behaviour, resembling a distinct *mens rea* indicative of evil intent. Secondly, an objective approach hinges on the augmented damage – physical, mental, or vicarious – occasioned by the agent's conduct. Thirdly, an 'expressive conception' endeavours to establish the severity of hate crimes predicated on communicative foundations. Succinctly, the identification of a hate crime is contingent upon the 'message' conveyed by the agent's actions to the community, irrespective of whether the act transpired under the influence of hatred.[19]

Generally, philosophers of criminal law debate whether which of those theories are appropriate justifications for hate crimes in liberal criminal law, but my specific target is the expressive conception. This last approach transmutes hate crimes into what may be designated as 'heinous crimes'.[20] Nevertheless, such a transformation engenders a distortion and potential peril. The distortion emanates from a deliberate or accidental shift in focus, redirecting the locus of augmented punitive measures from (i) the emotional state influencing the offender's actions to (ii) the emotional impact elicited in the community.

This distortion may implicitly operate, underlying specific interpretative techniques to apply relevant normative provisions. Even if judges say that they take seriously into account the motivational set that determined the criminal action, they operate with the presumption that a horrendous crime can only be perpetrated with hate. Thus, that which must be *proved* as true is presupposed.

18 Valerie Curtis, *Don't Look, Don't Touch, Don't Eat: The Science Behind Revulsion* (Chicago-London: The University of Chicago Press, 2013), 195-96.

19 For critical views and development of these three conceptions, see Heidi M. Hurd and Michael S. Moore, 'Punishing Hatred and Prejudice,' *Stanford Law Review* 56, no. 5 (2004), http://www.jstor.org/stable/40040174. For an expressivist-subjectivist view, Antony Duff and Sandra Marshall, 'Criminalizing hate?,' *Minnesota Legal Studies Research Paper*, no. 15-34 (2015). There is also a profound debate about how to incorporate this type of crime into our legislation. The discussion revolves around the alternative between the animus and discriminatory selection models. Although they are generally seen as an exclusive alternative, I do not believe that the discriminatory selection model, correctly interpreted, avoids the allusion to the agent's motives as intended. I will not focus on this issue here.

20 I am not considering the characterisation of heinous crimes by some particular legal systems (e.g. Brazil or the). Still, I understand them in a way more linked to natural language and to those facts that produce a deep disgust. Disgust as a response and not as an elicitor. Daniel Kelly and Nicolae Morar, 'Against the Yuck Fctor: On the ideal role of disgust in society,' *Utilitas* 26, no. 2 (2014): 18.

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The attendant peril resides in the transformation of hate crimes into a form of 'tailored box', where the attribution of the label no longer functions as a descriptive-explanatory element of the offender's conduct. Instead, it signifies a form of empathy with the victim, as appraised by those adjudicating the defendant's actions.[21] Once this distortion takes root, the common denominator of these crimes no longer rests in the agents' experience of hatred towards the victims; instead, the crux becomes the repugnance or disgust that the agents' behaviour incites in the community.

A consequential ramification of this distortion lies in its obviation of the normative factor underpinning heightened punitive measures, which ceases to be anchored in the subjective motivations of the accused (e.g., the perpetrator's hatred). Instead, it shifts focus to the 'emotions of the community', specifically the disgust experienced toward the author's behaviour, presenting a severe predicament.

Preliminary deductions from this exposition suggest that the nexus between hate and disgust may precipitate the categorisation of crimes that evoke disgust as hate crimes, thereby introducing distortion into our paradigmatic practices of attribution of criminal responsibility. In this scenario, any grievous crime may be categorised as a 'hate crime' merely by its horrendous nature, irrespective of the perpetrator's motives, emotions or intentions towards the victim.[22] However, why should the community's disgust be considered the foundational rationale for the normative relevance of disgust?

The ensuing section considers some answers advanced in the contemporary discourse.

4 The Reawakening of Disgust

In the 1990s, Ian Miller made noteworthy contributions with two seminal studies on moral emotions, emphasising the pivotal role of disgust in shaping our moral attitudes.[23] Miller posited that disgust is crucial in structuring our social practices, particularly in comprehending responses to malevolent or wrongful behaviours. This perspective posed a challenge to the liberal tradition. In response to this challenge, Martha Nussbaum has significantly influenced contemporary discourse with her work.

21 See Royzman et al., 'From Plato to Putnam: Four Ways to Think About Hate,' 8.

22 This appears to be clear in the majority vote in the Sacayan Case in Argentina. In this instance, the murder of Diana Sacayán, a prominent Argentine activist leader in an LGTBI group, was categorized as a 'hate crime' through a superficial examination of the evidence.

23 William Ian Miller, *The Anatomy of Disgust* (Cambridge Mass.-London: Harvard University Press, 1998); William Ian Miller, *Humiliation and other essays on honor, social discomfort, and violence* (Ithaca; London: Cornell University Press, 1993).

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In 1996, Martha Nussbaum and Dan Kahan explored two perspectives on emotions.[24] They sought to ascertain the compatibility of an evaluative view of emotions with a liberal theory; in contrast to a mechanical view that focuses on how emotions causally dictate actions, the evaluative (or cognitive-evaluative) standpoint posits emotions as reasons for evaluating these actions. Nussbaum and Kahan pondered whether these evaluations could seamlessly integrate into a liberal criminal law theory. The core of their analysis raises the question:

> "We ask only how such questions of value should be handled when they arise in our dealings with people who, by general consensus, have committed a criminal act. The question is whether at that point we need to ask, or ought to ask, about the quality of the evaluations exhibited in the emotion with which the act is done. The answer, we believe, must be yes, because it simply could not be otherwise."[25]

They also state:

> "We believe, then, that no reasonable liberalism can be neutral about the good to the extent and in the ways that would be promoted by the dominance of the mechanistic view (which, as we have said, is in any case only pseudo-neutral). And no regime of law remotely like ours could survive such pseudo-neutrality."[26]

The steadfast adherence to the evaluative conception of emotions doesn't suggest that every emotion warrants justification for criminal punishment. Indeed, in her subsequent works, Nussbaum asserts that disgust should never serve as the basis for criminalising conduct or altering the severity of criminal punishment. In a statement provided to the University of Chicago, Nussbaum articulated this perspective:[27]

> "Disgust is an inevitable part of human life, and no doubt it often serves a useful role, steering us away from many types of danger. If, however, we understand its connection to thoughts about contamination and purity that are ubiquitously mixed up with prejudice and stigmatisation, we will not agree with Devlin and his contemporary successors that disgust is a sufficient reason to make a practice illegal. We will confine legal regulation to cases of genuine harm, and we will not honor the claim that simply thinking about what people do in their private space is a harm worthy of legal regulation."[28]

24 Dan M. Kahan and Martha C. Nussbaum, 'Two Conceptions of Emotion in Criminal Law,' *Columbia Law Review* 96, no. 2 (1996), https://doi.org/10.2307/1123166, http://www.jstor.org/stable/1123166.

25 Kahan and Nussbaum, 'Two Conceptions of Emotion in Criminal Law,' 359-60.

26 Kahan and Nussbaum, 'Two Conceptions of Emotion in Criminal Law,' 362.

27 Martha Nussbaum, 'On Disgust as Cause of Action,' (Chicago: The University of Chicago/The Law School, 2004), https://www.law.uchicago.edu/news/nussbaum-disgust-cause-action.

28 Martha Nussbaum, 'On Disgust as Cause of Action,' https://www.law.uchicago.edu/news/nussbaum-disgust-cause-action.

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However, from 1998 to 1999, Dan Kahan advanced the perspective that a liberal theory should not dismiss disgust or overlook its normative significance.[29] Contrary to the conventional perception of disgust as an inherently anti-liberal emotion, Kahan argued that, when interpreted accurately, it becomes essential in comprehending the underlying stakes in law. I will expound upon his ideas in the subsequent section.[30]

5 The Normative Value of Disgust: Dan Kahan's conception

5.1 Two main theses

The social function of disgust is to construct and reinforce the status level in a community. Stating that certain people, convictions, and states of affairs disgust us, we highlight a hierarchy in a group. Those states do not deserve value or esteem but aversion and contempt. In brief, disgust establishes the moral status (positive or negative) of the members and conducts of a particular community.[31]

For Kahan, ignoring the normative value of disgust is not only impossible but also self-defeating.[32] In his conclusions of the chapter published in 1999, he confronts traditional liberalism, which insists on leaving aside disgust and emphasises the importance of a neutral discourse. He points out that those who suppress disgust from moral and legal language to maintain liberal categories are self-deluded.

Kahan structures his work and the normative ground of disgust around several theses proposed by Miller[33] and applies them to criminal law. Two theses from Miller are especially relevant to the purpose of this article.

A) *The Thesis of Moral Indispensability*. Disgust is crucial in punishing certain heinous events by illuminating our most profound and ingrained moral commitments. To exemplify this, Kahan scrutinises features of the Beldotti case, seeking to establish that disgust is both a necessary and sufficient condition for explaining and evaluating the immorality of specific actions and individuals. Dennis Beldotti received a life sentence for the sexually motivated murder of a woman. Among the items discovered in his home were photographs depicting the sexual abuse of his victim, pornographic magazines featuring children and tortured women, and sexual toys employed in the torment of his victims. Following the trial, Beldotti insisted that these materials be returned to his representative outside the prison. The Massachusetts Court rejected this request, reasoning that

29 Kahan, '"The Anatomy of Disgust" in Criminal Law.'; Kahan, 'The Progressive Appropriation of Disgust'.
30 Following Kahan's groundbreaking contributions, the theoretical discourse on disgust has witnessed intense and extensive development. Nevertheless, I centre my attention on Kahan's article, not only due to the clarity of his arguments but also because he presents the most comprehensive articulation of the normative value inherent in disgust. In a similar vein, Kelly and Morar's work, 'Against the Yuck Factor: On the ideal role of disgust in society', also merits consideration.
31 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1633.
32 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1653.
33 Miller, *The Anatomy of Disgust*.

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the devolution of such material would incite rage, disgust, and disbelief within the community. In this respect, Kahan claims:

> "My guess is that this decision will strike nearly everyone as indisputably correct. What I want to argue is that there is in fact no viable basis for that intuition other than the one the court gave – namely, the disgustingness of Beldotti's request."[34]

B) *The Conservation Thesis*. Despite the changing targets of disgust over time, every community utilises disgust as a tool to assess what behaviours, individuals, or objects warrant being labelled as valuable or not, good or bad. Consequently, social groups deemed lower in status seek to co-opt, rather than eliminate, the language of disgust. This appropriation climbs the social hierarchy and elucidates why disgust is central to political discourse.[35]

Through a concise analysis of 'The Lindberg Case', Kahan illustrates the breadth of this thesis. Gunner Lindberg, a white supremacist, brutally attacked a Vietnamese-American teenage boy near his high school, stabbing him approximately fifty times on the body and neck. Lindberg became the first individual to receive a death sentence for a racially motivated crime in California. Unanimous agreement on the punishment emerged, even among those typically opposed to the death penalty, as they believed the sanction symbolised the community's collective disgust for Lindberg's heinous act. Thus, following the conservation thesis, the community appropriates the language of disgust to underscore the gravity of Lindberg's murder.[36]

Having thoroughly considered the indispensability and conservation theses, Kahan crafted a robust response to liberal objections against disgust. The liberal stance, in principle, is deemed flawed. Liberal neutrality asserts that distinctions based on gender, race, or social status should be eschewed. Nonetheless, Kahan contends that liberals persist in classifying states of affairs, actions, and other entities as worthy or unworthy, good or bad. Even egalitarians, he notes, withhold esteem from individuals such as paedophiles and sadists, not necessarily due to the potential harm they might cause, but because 'their values reveal them to be depictable'.

Kahan argues that disgust is not a mechanical trigger of human behaviour; instead, it is an evaluative emotion that can be assessed rationally. Consequently, the logical conclusion for liberals should be that disgust cannot be disregarded but must be appropriately channelled. The target of disgust should be recalibrated and valued, aiming to discern what is *genuinely high* and depict what is *genuinely low*.[37] In essence,

34 Kahan, 'The Progressive Appropriation of Disgust,' 67.
35 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1633.
36 Kahan, 'The Progressive Appropriation of Disgust,' 69-70.
37 Kahan, 'The Progressive Appropriation of Disgust,' 70-71.

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> "Erecting a liberal counter regime of disgust, I've tried to show, is exactly the aim behind 'hate crime' laws, which seek to make the proponents of illiberal species of hierarchy the object of our revulsion."[38]

The attempt to discard disgust and uphold neutrality is self-deluding and self-defeating. From a political standpoint, it is naive to entrust the stabilisation and control that disgust inherently generates to reactionary forces. Reactionaries, driven by their agenda, are unlikely to be swayed by disagreements on moral principles or evaluations. An alternative approach to counteract reactionary regimes perpetuating structural inequalities is constructing a liberal regime of disgust. This would empower the most vulnerable to amplify their voices in the social arena, thereby rebalancing the scales in favour of social equality. As Massaro asserts, 'Revulsion, disgust, and shame are wholly compatible with liberal virtues.'[39]

According to Kahan, this constitutes the most robust response to the liberal critique of disgust. Additionally, there exists a weaker or more strategic response to liberal challenges regarding disgust. This position does not deem the liberal analysis flawed in principle but instead views it as self-deluding and self-defeating in practice. I expound upon this idea in the following section.

5.2 The Strategic Critique of Liberalism

According to Kahan, criminal theories attempting to sidestep disgust 'do nothing in reality to mute its influence. They merely disguise it, and in so doing, prolong the life of outmoded and illiberal norms in the law.'[40] The theories propounded by voluntarists in criminal law pivot on the capacity of choice in an action. Excuses are contingent on the intensity of the impulse driving the action. As action determinants, emotions contribute to assessing the author's mental health. Decision-makers often label individuals deserving of sympathy as 'sick', ranging from cuckolded individuals to battered women. Despite this, there is significant scepticism in excusing heinous crimes, even when committed by seriously unbalanced individuals. However, it is our disgust sensitivity that compels us to perceive the perpetrator of a heinous crime as 'sick', a 'monster', or a 'beast', necessitating separation from the community to prevent contamination.[41]

In the consequentialist theory of punishment, disgust is concealed within inquiries concerning the risk of recurring harmful consequences. Excuses are linked to the perceived dangerousness of the offender. Yet, in Kahan's view,

> "… if disgust sensibilities tell the decision maker that homosexuals are worth little, then that decision maker will predictably see the killing of one as a

38 Kahan, 'The Progressive Appropriation of Disgust,' 71.
39 Toni M. Massaro, 'Show (Some) Emotions,' in *The Passions of Law*, ed. Susan A. Bandes (New York; London: New York University Press, 1999), 94.
40 Kahan, 'The Progressive Appropriation of Disgust,' 71.
41 Kahan, 'The Progressive Appropriation of Disgust,' 72.

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> "one-time tragedy," committed by an otherwise normal person who the decision maker can be "confident … w[ill] not kill again"."[42]

In short, the criminal law theories associated with modern liberalism do not genuinely purge the law of disgust. They only push disgust down below the surface of law, where its influence is harder to detect.[43]

Two cases scrutinised by Kahan offer insights into his perspective on the limits of liberalism and the influence of disgust in heinous crimes.

A) *Stephen Roy Carr case*. Carr trailed two hikers and, while they were engaged in intimate activity in the woods, shot them eight times. Rebecca Wright tragically lost her life, while Claudia Brenner managed to seek help at a police station three miles away from the site of the incident. During Carr's arrest and trial, his defence claimed that witnessing those women engaged in sexual activity disgusted him, leading to an inability to control his actions. He sought to establish that the disgust stemmed from suspicions about his mother's sexual orientation. The Pennsylvanian Court rejected his argument, asserting that the law does not recognise homosexual intercourse as a provocation to diminish culpability. Furthermore, the court emphasised that a reasonable person would have ceased observing and left the scene.[44]

B) *Richard Lee Bednarski case*. Bednarski was convicted of murdering two individuals as he and an accomplice set out to harass individuals in the LGBTQ+ community. Specifically targeting Oak Lawn, a city district known for its gay nightlife, they accepted a ride from two gay men. Once in a wooded area, Bednarski demanded the men undress, and upon their refusal, he shot and killed them both. The judge's decision reflected a particular empathy with Bednarski's disgust towards homosexuals. Despite the prosecutor seeking a life sentence, Judge Hampton imposed a thirty-year sentence for voluntary manslaughter. Judge Hampton equated homosexuals and prostitutes, asserting that, in his view, if the victims had not sought to engage with teenagers, they would not have met their tragic fate. He expressed, 'I don't much care for queers cruising the streets [picking up teenage boys]. I've got a teenage boy.'[45]

According to Kahan, the tension between the two decisions arises from the legal debate regarding the significance of the defendant's homophobia, often referred to as 'homosexual panic'. Consistently drawing upon Miller's framework, Kahan employs the hierarchy and conservation theses to elucidate the nature of hate crimes.[46] So, he claims:

42 Kahan, 'The Progressive Appropriation of Disgust,' 72.
43 Kahan, 'The Progressive Appropriation of Disgust,' 72.
44 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1620-22.
45 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1620-22.
46 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 16239.

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> "Clearly, offenders who kill (or assault) on the basis of "homosexual panic" are disgusted by their victims. Under the evaluative thesis, what would be distinctive about their aversion wouldn't be its physiological intensity – a mechanistic notion – but rather its embodiment of the offenders' appraisal of gays and lesbians as inferior and contaminating."[47]

Furthermore, Kahan posited that homophobia is contingent upon specific evaluative beliefs rooted in one's membership in a social group that ascribes status based on the members' social roles within a community. Homosexuality, in this context, may be perceived as a threat because individuals with homophobic views believe that gays contravene rules considered essential to their identity. Consequently, Judge Hampton reduced the sentence, asserting that the defendant's feelings of disgust towards his victims' homosexuality were justified. In doing so, the judge avoids relying on a mechanical theory of emotion. In mitigating the punishment, the judge effectively endorses the rules that underpin homophobia.[48]

The ruling in the Carr case, which refused to lessen the sentence, is similarly rooted in an evaluative thesis. In essence, the decision does not focus on whether the defendant could control his impulse but instead assesses the reasonableness of his emotion. Kahan contends that these rulings, as illustrated by the conservation thesis, relegate homophobia to a lower social status due to its 'aberrant disgust sensibilities'.[49] He stated:

> "Laws that enhance the penalty for bias-motivated crimes, however, unambiguously seek to appropriate and redirect disgust. Supporters of such laws want the public to understand not just that the "hate" killers are wrong to be disgusted by their victims, but that they themselves are "twisted", "warped", "sick", and "disgusting", and as a result properly despised as outsiders."[50]

According to Kahan, this elucidates the stringent sanctions imposed by criminal law in such cases. Moreover, vulnerable groups (e.g., women, homosexuals, black individuals, etc.) perceive these measures as a means to reclaim the status that violence against them seeks to deny.[51] The author contends that this insight explains the intensity of the political discourse surrounding hate crimes. He suggests that liberals should not disavow disgust but rather reorient the focus of the discourse.

47 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1635.
48 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1636-37.
49 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1637.
50 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1638.
51 Kahan, '"The Anatomy of Disgust" in Criminal Law,' 1638.

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6 Kahan and the Normative Value of Disgust

6.1 Lines of Critique to the Strong Thesis

Kahan's robust critique of liberalism relies on empirical generalisations about the indispensability thesis of disgust, its role in conveying fundamental evaluations of community members, and the dynamics of social hierarchies in discourse. However, it is important to note that these empirical generalisations can, and indeed have been, subject to challenges.[52] Furthermore, Kahan's examples open the door to alternative reconstructions, highlighting the significance of other emotions, such as outrage, which may not always be easily distinguishable from disgust in everyday discourse.[53]

I will set aside these arguments and hone in on Kahan's primary challenge: 'I want to suggest that renouncing the guidance of disgust in criminal law altogether would, in fact, defeat, rather than advance, liberal ends'.[54] However, his analysis leans more towards expressiveness than conclusiveness. Its appeal lies in the political and normative rhetoric that permeates its empirical and conceptual analyses.

Kahan's viewpoint appears precarious. A straightforward reconstruction of his ideas reveals a fallacy: that disgust is valuable, and liberals should embrace it to justify punishment because, in practice, liberals also employ disgust in their evaluations. This presupposes what should be demonstrated. Contrary to Kahan's assertion, it could be argued that a liberal, in principle, must discard distinctions and hierarchies that cannot be rationally defended in neutral and impartial situations, such as under the veil of ignorance. When liberals grapple with their sensibilities, they must not rely on disgust as the basis for assigning blame, even if a substantial portion of the community shares those sensibilities. Liberals cannot punish a racist simply because they find them disgusting; rather, the rationale for punishment must stem from the specific harm produced by the racist's actions.

For Kahan's argument to align with liberalism, he should reinterpret disgust as a form of harm. Thus, he could invoke harm, even when the object of disgust, such as a racist, has not acted in any way. This necessitates introducing a category like 'merely constructive disgust'. However, in such cases, the positions of liberals and non-liberals, as Devlin asserts, would become indistinguishable.[55]

52 To counter the empirical thesis in his work, consider, for instance, the arguments presented by Kathryn Abrams, 'Fighting Fire with Fire: Rethinking the role of disgust in hate crimes,' *California Law Review* 90, no. 5 (2002). For a more comprehensive and thorough critique of Kahan's ideas, refer to Kelly and Morar, 'Against the Yuck Fctor: On the ideal role of disgust in society.'

53 Martha Nussbaum, 'Secret Sewers of Vice. Disgust, bodies and the law,' in *The Passions of Law*, ed. Susan A. Bandes (New York-London: New York University Press, 1999), 19-62.

54 Kahan, 'The Progressive Appropriation of Disgust,' 70.

55 See, Nussbaum, *Hiding from Humanity: Disgust, shame, and the law*, 158-71. Where she discusses if disgust without harm could ground punishing nuisance.

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Indeed, one might adopt Kahan's political reasons and model justifications for criminal law with disgust as a reason for punishment. While these political reasons offer grounds to adapt our institutions in alignment with a desired world, they do not, by themselves, furnish a justificatory basis and may lead us away from the traditional liberal program. The appropriate conclusion is not that liberals are self-deluded when they withhold value regarding disgust but rather that Kahan is self-deluded in believing that this attribution aligns with liberalism.[56]

6.2 Challenging the strategic thesis

The response to Kahan's strong thesis necessitates complementing it with a consideration of his strategic thesis. In this context, Kahan's perspective is not centred on demonstrating the compatibility between liberalism and the normative value of disgust. Instead, his ideas seek to convince us that disgust plays a fundamental role in justifying specific judicial decisions. Moreover, how this role is articulated within liberal theories obscures its significance, making it more challenging to analyse the expressive functions of punishment.

A comprehensive response to the strategic thesis requires delving into distinctions and details that cannot be fully explored here. Therefore, I will emphasise certain elements overlooked by Kahan but essential to the discussion.

Firstly, Kahan utilises specific cases, such as the Carr case, to illustrate his thesis that a liberal supporting a voluntarist theory conceals their disgust, veiling the rationale for their decision in rhetoric about control and the impulse to action. This is coupled with a mechanical conception that prevents them from recognising how emotions genuinely provide reasons to act. However, this explanation is subject to challenge. For example, in Carr's case, the defence argued that the defendant perceived the homosexual relationship between Wight and Brenner as a provocation that triggered uncontrollable disgust and rage in Carr. Yet, provocation is an unjustified action under a justified emotion. As Gardner points out, 'as a condition of a successful provocation plea, there must have been something intelligible as a provocation'.[57] According to this argument, women engaging in sexual activity in a remote wooded area were, in any case, *provoking* Carr. Therefore, the contention is that it becomes irrelevant whether he might lose control over his actions.

Secondly, Kahan does not sufficiently consider the distinction between justifying a decision in a criminal case and justifying punishment in general. In the latter scenario, it is legitimate to discuss the appropriate institutional design for incorporating emotions – namely, which emotions and why they are justified to have a place in our criminal system. Conversely, in the former case, the justification of the decision hinges on applying relevant rules to the specific case. Consequently,

56 This argument may be an adding point of what Kelly and Moran claim that Kahan's view forget an alternative positions about what to do with disgust, even if it is an inevitable emotion and we are stuck to it. Kelly and Morar, 'Against the Yuck Factor: On the ideal role of disgust in society,' 22 ff.

57 John Gardner, *Offences and Defences: Selected essays in the philosophy of criminal law* (Oxford: Oxford University Press, 2007), 162.

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we can differentiate between 'right decisions' and 'fair decisions' that align with evaluations or morally relevant emotions.

A comprehensive response to the strategic thesis emerges from a more nuanced understanding of the role of emotions in justifying judicial decisions and rejecting the notion that emotions serve as justificatory reasons do not preclude recognising their significance in discerning other people's emotions. Understanding how an individual experiences those emotions is crucial for them to be an effective judge, which is akin to stating that a good judge must identify the principles informing the law, rules, wishes, or beliefs of others. As highlighted by González Lagier:

> "To make accurate decisions and articulate the reasons justifying her rulings, the judge requires information that empathy, defined as the capacity to apprehend or infer the mental states of others, provides. Acquiring and honing this ability may be useful, or perhaps necessary, through the experience of emotions of this nature. However, it is not imperative for judges, in the moment of decision-making or during their thought process, to actively feel emotions induced by empathy – this would be sympathetic. While such emotional engagement may enhance the overall quality of decisions, it doesn't contribute substantively to justifying those emotions."[58]

For instance, in the Richard Bednarski case, Judge Hampton opted for convicting the defendant of voluntary manslaughter instead of murder and openly expressed his alignment with the defendant's disdain for gay people. While the judge empathised with Bednarski, the question arises: does this emotion justify his decision? Moreover, if the intricacies of the case can only be discerned through certain appropriate emotions, individuals lacking those emotions would be unable to perceive those intricacies. In essence, this specific knowledge fails to function as public and objective (or intersubjective) reasons, which are the most relevant traits of justifying reasons.

Leaving aside this overarching issue, the answer remains negative when considering whether disgust is a suitable or desirable emotion for someone evaluating behaviour. This is not only because, as mentioned earlier, within a liberal framework, we should not rely on disgust as a foundation for reproach but also because the emotion of disgust inherently dichotomises the world into 'us' and 'them', establishing social hierarchies that are incongruent with liberal principles of protection and equality.[59]

> "Because humans have a tendency to equate gross with wrong, this means that disgust is often weaponized and – ... – used to demonize other people and groups. Just as storytellers adorn their villains with repulsive traits, those

58 Daniel González Lagier, *Emociones sin sentimentalismo. Sobre las emociones y las decisiones judiciales* (Lima: Palestra, 2020), 120.

59 Martha Nussbaum, 'Secret Sewers of Vice. Disgust, bodies and the law,' 51.

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> looking to rouse negative sentiment towards an outside group frequently paint those groups with descriptions that rouse disgust."[60]

However, perhaps someone might argue that this emotion compels us to evaluate facts more accurately and ensures the punishment of individuals who commit crimes. They could posit that judges or juries, motivated by this emotion, would make better decisions regarding acquittal or conviction and in the assessment of received evidence, the qualification of facts, or the application of a standard of proof. Unfortunately for such proponents, some studies demonstrate just the opposite.

In 'Emotional Evidence in Court', Phalen, Salerno and Nadler scrutinise how specific emotions impact juries.[61] While all the experiments were conducted with mock jurors, with certain reservations, their findings could potentially extend to actual judges. Notably, these experiments unveiled that emotions like disgust engender a heightened inclination to convict and impose more severe punishments for the committed act. For instance, research indicates that a jury experiencing this emotion is likelier to find the defendant guilty, leading to elevated conviction rates and harsher penalties when disgust is a prevailing factor, i.e., there are higher conviction rates and more significant penalties if the jury is disgusted.

> "Anger and disgust are associated generally with a need to punish, which in a capital trial can translate to a greater likelihood of imposing a death sentence (compared to jurors who did not feel the same level of anger and disgust) – despite all mock jurors hearing the same evidence."[62]

According to these authors, the underlying reason is that under the influence of this emotion, individuals tend to feel more confident in their own opinions. This heightened confidence, in turn, leads to a suboptimal evaluation of the evidence presented in court and a biased estimation of the information provided, manifesting as confirmation bias. This biased cognitive process contributes to a predisposition towards condemnation and a propensity for harsher punishments.[63]

They also conducted studies regarding the perception of specific means of proof. While presenting vivid evidence may enhance the jury's (or judge's) memory of reported data, it can also give rise to biases. The authors emphasise that displaying distressing photographs triggers emotions like disgust in the decision-maker, making it more likely for the accused to be convicted and, once convicted, receive a harsher punishment. Correspondingly, based on similar findings, Patrick Carlton recounts a study wherein two groups of jurors were provided with identical

60 Carlton Patrick, 'When souls shudder: A brief history of disgust and the law,' in *Research Handbook on Law and Emotion*, ed. Susan A. Bandes et al. (Cheltenham: Edward Elgar Publishing, 2021), 87.
61 Hanna J. Phalen et al., 'Emotional Evidence in court,' in *Research Handbook on Law and Emotion*, ed. Susan A. Bandes et al. (Cheltenham: Edward Elgar Publishing, 2021).
62 Phalen et al., 'Emotional Evidence in court,' 291.
63 Phalen et al., 'Emotional Evidence in court,' 291-93.

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information, differing only in the emotional charge of the event's description, using terms like 'brutal injuries', 'brutally tortured', and 'disfigured face'. The group exposed to this emotionally charged description more readily condemned the accused. In another experiment resembling the impact of unpleasant photos, when asked to impose sanctions, those exposed to this emotionally charged description imposed more severe penalties than those who had not heard such emotionally charged information.[64]

In conclusion, when present in the person who evaluates, disgust taints the decision with an aura of suspicion, which is inappropriate for those who must aspire to the truth in adjudication.

7 Hate Crimes and Disgust – A Conclusion

In this article, I have discussed an analytical strategy that leads to the collapse of the distinction between hate crimes and heinous crimes. Dan Kahan presents this strategy to justify the normative value of disgust in attributing criminal responsibility. This author asserts that liberals are self-deluded when they refuse to acknowledge the justificatory force of appealing to disgust as a basis for reproach. Thus, liberals allegedly hide the impact of this emotion in abstract and complex categories. I have argued that it is not liberals who are self-deluded but rather that Kahan is self-deluded in thinking he aligns with liberal principles. Moreover, among other things, his view presupposes a conception of the role of emotions in the justification of judicial decisions that require further analysis and grounding.[65]

Given the time and space constraints, several of Kahan's ideas have been challenging to analyse thoroughly in this article. I hope to explore and challenge them in future works. Specifically, certain empirical generalisations about the incidence of disgust in the hate crimes debate and the assertion that marginalised groups appropriate the discourse of disgust have remained unexamined. Additionally, it is worthwhile to delve into the theory of human action that an expressivist theory of punishment, such as Kahan's, presupposes. Lastly, as a future project, exploring the implications of adopting an expressivist position on the moral foundation of punishment is crucial. Beyond the disgust discussion, the question arises: Can Kahan maintain this conception of punishment and still claim to be a liberal? This question is significant because, for an expressivist, if the agent's action is carried out through actions that could resemble those of someone who hates the victim, the crime will be similar to a hate crime.

> "And according to this conception of social meaning, appearances are everything. That is, a crime that *looks like* a hate/bias crime will, on this *be a*

64 Patrick, 'When souls shudder: A brief history of disgust and the law,' 87-88.

65 Of course, I have not justified that emotions cannot be justificatory reasons. For a development of this idea, see: González Lagier, *Emociones sin sentimentalismo. Sobre las emociones y las decisiones judiciales*.

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> hate/bias crime – for example, a crime expressing a hateful social message. But now let us ask our normative question again: Would the conformity of a criminal action to the conventions of hateful/biased expression make criminal action deserving of greater punishment?”[66]

How can an expressivist like Kahan believe that this appearance is sufficient to justify punishment and still consider himself a liberal? Liberalism encompasses a broad spectrum of ideas, but a central tenet of this moral theory is that individuals should be punished for their actions and not merely for how they might be perceived.

66 Hurd and Moore, ‘Punishing Hatred and Prejudice,’ 1105.

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