Toxic Sexuality: How Disgust at the Thought of Gay Male Sexuality Threatens the Parental Rights of Gay Male Parents

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Psychologists have long known that gay male sexuality elicits feelings of disgust in a sizeable portion of the general population, and that individuals highly sensitive to disgust tend to evaluate gay males more harshly than individuals lowly sensitive to disgust. But while prior experimental studies have shown that this bias impacts support for LGBTQ+ related policies in the political arena, its impact on judicial decision making has not been fully explored. I focus on the judicial evaluation of gay male fathers during custody disputes, and I conduct a randomized controlled experiment, an observational case law analysis and semi-structured interviews to examine the issue. I conclude that disgust bias significantly threatens the parental rights of gay male fathers during custody adjudications. Specifically, I argue that judges highly sensitivity to disgust display a tendency to view gay male sexuality as more toxic to children than lesbian or heterosexual sexuality, and are therefore more willing to deny gay male fathers their custody rights than those other cohorts. I argue further that this bias presents not just normative but also formal legal concerns, as its operation runs counter to existing precedent in most U.S. jurisdictions. I conclude by suggesting that disgust bias should be viewed in a manner similar to implicit bias and suggest mitigation efforts.

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INTRODUCTION

In the late fall of 1998 Frederick J. Smith appeared before the North Carolina Supreme Court.[1] He appeared to defend the sole physical custody of his two young sons, rights that had been granted to him, via consent decree, seven years prior.[2] At issue was Frederick's newly acknowledged homosexuality.[3] Frederick had invited Tim Tipton, a male lover, to live at his home in 1994.[4] Upon learning of this development Frederick's ex-wife immediately filed a motion to modify their custody agreement, arguing that "the impact of the homosexual thing" justified a new decree shifting sole physical custody to her.[5] The trial court agreed, granting Frederick's former wife sole physical custody after finding that Frederick's new relationship exposed his two young sons to "unfit and improper influences," "embarrassment and humiliation in public," and the strong possibility of "emotional difficulties" in the future.[6]

The North Carolina Supreme Court upheld the trial court's ruling on appeal,[7] and while doing so they appeared uniquely concerned with the minute details of Frederick's sexual relationship. They noted: "Tim Tipton and the Defendant both . . . engaged in oral sex, in that Tim Tipton would about once a week place his mouth on the penis of the Defendant. The Defendant would also place his mouth on the penis of Tim Tipton."[8]

The court also appeared especially concerned about the physical proximity of this behavior to Frederick's children, even though they acknowledged that Frederick's sexual activity always occurred behind closed doors:[9]

> Tim Tipton and the Defendant engaged in [oral sex] while the minor children were present in the home. That the minor children share the same bedroom and the said bedroom of the minor children is directly across the hall from the bedroom occupied by the Defendant and Tipton. That the Defendant and Tipton would engage in [oral sex] while the children were a short distance away.[10]

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1. Pulliam v. Smith, 501 S.E.2d 898, 900 (N.C. 1998).
2. *Id.*; *see also* Pulliam v. Smith, 476 S.E.2d 446, 447 (N.C. Ct. App. 1996).
3. Smith, 476 S.E.2d at 447.
4. *Id.*
5. *Id.* at 448.
6. *Id.* at 449.
7. Smith, 501 S.E.2d at 899.
8. *Id.*
9. *Id.* at 903 ("Defendant-father and Mr. Tipton testified that both their bedroom door and the children's bedroom door were open at all times, *except when the two men engaged in sexual activity*." (emphasis added)).
10. *Id.* at 901.

The court even felt compelled to describe, in detail, ordinary displays of physical affection between Frederick and Tim Tipton: "Tim Tipton and the Defendant often kiss on the check [sic] and sometimes on the lips in front of the two minor children. That Tim Tipton and the Defendant would often hold hands in front of the two minor children."[11]

In the previous spring, another father, Mr. Eric Helff, walked into another North Carolina court.[12] Mr. Helff entered with the same objective as Frederick: to secure custody rights to his children.[13] He had divorced the mother of his two children some twelve months prior and then took up residence with his girlfriend approximately five months after that.[14] At the time Mr. Helff enjoyed "reasonable visitation rights" but his ex-wife soon objected to his non-marital cohabitation, arguing that "[t]he minor children should not be exposed to [Mr. Helff's] cohabitation with a person of the opposite sex."[15] She filed a motion to modify alleging changed circumstances and the trial court agreed[16]. The court allowed Mr. Helff to retain his visitation rights but prohibited his girlfriend from staying past midnight while the children were in residence.[17]

On appeal the appellate court vacated the trial court's order and remanded for further findings of fact.[18] The issue? While the trial court did find that circumstances had changed the trial court failed to consider the nature of those changes and how, or if, they impacted the children.[19] The trial court effectively skipped over the process of considering the details of Mr. Helff's cohabitation and then linking those details to harm. The trial court certainly did not discuss, at any level of detail, the particulars of Mr. Helff's sex life, its physical proximity to his children or his public displays of affection.

Consider another pair of cases. In 1989, a father approached the Missouri Court of Appeals to secure visitation rights to his young daughter.[20] This father divorced two years earlier and was now living with a long-term male lover.[21] As in Frederick's case, the father's homosexual relationship presented a problem for the father's ex-wife and she petitioned the court to

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11. *Id.*
12. Browning v. Helff, 524 S.E.2d 95, 96 (N.C. Ct. App. 2000). The trial court judgment was entered on July 7, 1998.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 97.
18. *Id.* at 99.
19. *Id.* at 98–99.
20. J.P. v. P.W., 772 S.W.2d 786, 786–87 (Mo. Ct. App. 1989).
21. *Id.* at 787.

remove father's modest visitation rights.[22] On appeal, once again, the minute details of father's sex life became an issue for the court: "He and his homosexual lover, Harry Reed, lived in an apartment . . . . They sleep in the same bed. He and Reed perform oral sex on each other approximately once or twice each week."[23]

The Missouri Court likewise concerned itself with ordinary displays of public affection between the Father and his lover: "The father and his homosexual lover have displayed homosexual activities by holding hands and kissing in the child's presence."[24]

And the Missouri Court appeared unwilling to characterize father's relationship as monogamous, despite direct testimony to that effect. Rather, the court placed the term "monogamous" in quotes, drawing an implied distinction between Father's monogamous relationship with Mr. Reed and a "true" monogamous relationship: "[Father] states their relationship is 'monogamous.'"[25]

Later that same year another father approached the Missouri Appellate Court, this time to contest an order transferring the custody of two of his three children to his ex-wife.[26] Prior to the ruling, this father had housed all three children, and his live-in girlfriend, in one house.[27] The appellate court ultimately affirmed the trial court's ruling, allowing the father to maintain custody of one child but refusing to reverse the transfer of the other two.[28] And while the appellate court did note that it was within the trial court's purview "to consider the morals and mode of living of the parties involved" no further mention of father's non-marital relationship was made.[29] The appellate court did not discuss the details of their sex life, the proximity of their bedroom to their children's bedrooms, or whether they kissed or held hands in public. There is no indication that the trial court troubled itself with these inquiries either.

Were these fathers treated equally before the law? Of course, given the innumerable variables separating these cases it is impossible to know for sure, but the inquiries made of the two gay male relationships, and the language used to describe those relationships, certainly suggests a disparate treatment. When evaluating a gay male relationship, these courts expressed concern over ordinary, everyday displays of physical affection (hugging, kissing and

22. *Id.* at 790.
23. *Id.* at 788.
24. *Id.* at 794.
25. *Id.* at 788.
26. Long v. Long, 771 S.W.2d 837 (Mo. Ct. App. 1989).
27. *Id.* at 838–39.
28. *Id.* at 841.
29. *Id.* at 840.

holding hands). They reported the minute, physical details of their sexual relations, and they expressed alarm at the proximity of those relations to the children at issue, even when those relations occurred safely behind closed doors. The courts ignored or simply failed to notice that the heterosexual relationships before the bench likely contained all of these elements as well.

Much has been made of the disparate treatment received by gay male fathers during the adjudication of custody rights. It has been observed that their parental fitness is frequently called into question for reasons that are rarely raised when heterosexual fathers are before the court: the fear that they might sexually abuse their children (absent any evidence that they are so inclined) or the fear that they may be diseased (absent any evidence that they are, in fact, diseased).[30] It has likewise been noted that they receive custody less often and find their visitation restricted more frequently than comparably situated heterosexual fathers.[31]

But less is known as to *why* these fathers are treated differently. Research on this topic often leaves the motivation for their disparate treatment undiscussed, with the implication being that it results from simple anti-homosexual sentiment. But while anti-homosexual sentiment is almost certainly to blame for a portion of their mistreatment, this article argues that another, more fundamental explanation may also be at work. This article argues that courts are often biased against gay male fathers because they are often *disgusted at the thought of gay male sexuality*, while they are typically not disgusted by the presence of heterosexual or lesbian sexuality.

Disgust is well known to dramatically alter human judgement.[32] It is well established that behaviors and individuals are judged more severely when the observer is in a disgusted state.[33] Likewise, it is well known that disgust

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30. Mark Leinauer, *The Moral Sex: How Policing the Moral Development of Daughters Harms Gay Parents in Custody Disputes*, 36 BERKELEY J. GENDER, L. & JUST. 1, 22 (2021); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 284, 286, 289 (2008).

31. Leinauer, *supra* note 30, at 10; Rosky, *supra* note 30, at 269; Kimberly D. Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285, 315–16 (2002); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 625 (1995); *see also* Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 889 (1978).

32. Daniel Kelly & Nicolae Morar, *Against the Yuck Factor: On the Ideal Role of Disgust in Society*, 26 UTILITAS 153, 158–59 (2014).

33. Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Emotions on Prejudice*, 9 EMOTION 585, 586–87 (2009); Elizabeth J. Horberg et al., *Emotions as Moral Amplifiers: An Appraisal Tendency Approach to the Influences of Distinct Emotions upon Moral Judgment*, 3 EMOTION REV. 237 (2011); Yoel Inbar et al., *Disgusting Smells Caused Decreased Liking of Gay Men*, 12 EMOTION 23 (2012); Simone Schnall et al., *Disgust as*

inducing individuals are judged more severely than non-disgust inducing individuals.[34] Gay males, moreover, are known to elicit disgust in a sizeable portion of the U.S. population, as is the thought of gay male sex.[35] Might disgust at the thought of gay males or gay male sex bias judicial decisions that concern gay males or gay male sex and, if it does, does that bias create normative concerns? In other words, *should* disgust at the thought of gay males or gay male sex result in the disparate judicial treatment of gay men? Does such a bias create formal legal concerns by violating existing precedent?

While the impact of disgust on the evaluation of gay men or policies related to gay men has been empirically explored in political science and psychology,[36] the law has, to date, largely ignored the empirical possibilities of such an impact. Legal scholarship has discussed the propriety of allowing disgust to bias legal decision making in the abstract,[37] but to date no study

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Embodied Moral Judgment, PERSONALITY & SOC. PSYCH. BULL. 1096, 1097 (2008); Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCH. SCI. 780 (2005).

34. Emily Cunningham et al., *Induced Disgust Affects Implicit and Explicit Responses Toward Gay Men and Lesbians*, 43 EUR. J. SOC. PSYCH. 362, 362 (2013); Dasgupta et al., *supra* note 33; Inbar et al., *supra* note 33.

35. Americans routinely list male homosexuality as a strong disgust elicitor. *See, e.g.*, Lorraine Guth et al., *Student Attitudes Toward Lesbian, Gay, and Bisexual Issues*, 41 J. HOMOSEXUALITY 137 (2001); Geoffrey Haddock et al., *Assessing the Structure of Prejudicial Attitudes: The Case of Attitudes Toward Homosexuals*, 65 J. PERSONALITY & SOC. PSYCH. 1105 (1993); Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. OF APPLIED SOC. PSYCH. 191 (2001). Studies have registered significant levels of disgust towards gay men. Catherine A. Cottrell & Steven L. Neuberg, *Different Emotional Reactions to Different Groups: A Sociofunctional Threat-Based Approach to "Prejudice,"* 88 J. PERSONALITY & SOC. PSYCH. 770 (2005). And priming male homosexuality has been shown to elicit the sensation of disgust. Molly Parker Tapias et al., *Emotion and Prejudice: Specific Emotions Toward Outgroups*, 10 GRP. PROCESSES INTERGROUP REL.'S 27 (2007).

36. L. S. Casey, *The Politics of Disgust: Public Opinion Toward LGBTQ People & Policies*, 2016 (Ph.D. dissertation, University of Michigan) (on file with Deep Blue Documents, University of Michigan), https://deepblue.lib.umich.edu/handle/2027.42/135744 [https://perma.cc/6JAF-8QFR]; Cunningham et al., *supra* note 34; Shana Kushner Gadarian & Eric van der Vort, *The Gag Reflex: Disgust Rhetoric and Gay Rights in American Politics*, 40 POL. BEHAV. 521 (2018); Inbar et al., *supra* note 33; Cindy D. Kam & Beth A. Estes, *Disgust Sensitivity and Public Demand for Protection*, 78 J. POL. 481 (2016); Travis N. Ray & Michele R. Parkhill, *Heteronormativity, Disgust Sensitivity, and Hostile Attitudes Toward Gay Men: Potential Mechanisms to Maintain Social Hierarchies*, SEX ROLES (2020).

37. *See generally*, Kathryn Abrams, *Fighting Fire with Fire: Rethinking the Role of Disgust in Hate Crimes*, 90 CAL. L. REV. 1423 (2002); Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409 (2013); Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1996); Renata Grossi, *Understanding Law and Emotion*, 7 EMOTION REV. 55 (2015); Dan M. Kahan, *"The Anatomy of Disgust" in Criminal*

has empirically examined the impact of disgust on judicial decision making. Nor has any study empirically examined the impact of disgust on the judicial evaluation of gay males.

I present novel research on the impact of disgust during the judicial evaluation of gay men. I examine an area of the law, the allocation of gay male custody rights, that appears ripe for such bias. As alluded to earlier, case law in this area can certainly suggest the presence of a disgusted bench. This area of the law is also, theoretically, an area where one would expect to find the biasing impact of disgust. Gay males and gay male sex are known to engender disgust in a sizeable portion of the U.S. population, and custody adjudications frequently provide both: the presence of gay male fathers and a discussion of their sex lives.

To examine this issue, I employ multiple methodologies: a randomized, controlled experiment, an observational case law analysis and semi-structured interviews. All three are designed to test the general hypothesis that judicial disgust at the thought of gay male sexuality threatens the adjudication of gay male custody rights. I report data that supports this hypothesis on all three fronts. I find that in a randomized, controlled experiment, individual disgust sensitivity predicts a willingness to remove custody from parents engaged in gay male sexual behavior, but not from parents engaged in heterosexual or lesbian sexual behavior. I further find that when the adjudication of gay male custody rights is before the bench, the electronically available case record reveals judicial behavior that specifically resembles known attributes of a disgust reaction. And finally, through a series of interviews, I find that gay male fathers who have adjudicated custody rights and the attorneys who have represented them report incidents that specifically resemble disgust bias. I argue that this bias presents not just normative but also formal legal concerns, because its operation is both unjust and runs counter to existing precedent. I then conclude by suggesting that disgust bias should be viewed in a manner similar to implicit bias and that mitigation efforts should proceed accordingly.

Law, 96 MICH. L. REV. 1621 (1998) (reviewing WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1997)); Dan Kahan, *The Progressive Appropriation of Disgust*, *in* THE PASSIONS OF LAW 63 (Susan A. Bandes ed., 2000) [hereinafter *Progressive Appropriation of Disgust*]; Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (1998); MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2009); Martha C. Nussbaum, *"Secret Sewers of Vice": Disgust, Bodies and the Law*, *in* THE PASSIONS OF LAW 19–63 (Susan A. Bandes ed., 1999); Martha C. Nussbaum, *Disgust or Equality? Sexual Orientation and Indian Law*, 6 J. INDIAN L. & SOC. 1 (2015); Carlton Patrick, *When Souls Shudder: A Brief History of Disgust and the Law*, RESEARCH HANDBOOK ON LAW AND EMOTION 80 (2021).

This article will proceed in three parts. Part One will situate this research within the relevant literature and demonstrate that a disgust bias in these cases contravenes both normative and formal legal barriers. Part Two will apply three methodologies to the general hypothesis of this article and then report the results. Part Three will discuss the implications of these findings and discuss mitigation strategies.

I. BACKGROUND

A. Disgust and Moral Judgment

Disgust is a strange emotion. Colloquially it is understood as both a noun and a verb. As a noun it refers to a strong sensation of disapproval or dislike, the feeling of revulsion or nausea that one experiences at the sight of something *disgusting*: feces on the street, an infected wound, rotting garbage ("When I saw urine on the bathroom floor I turned away in disgust"). As a verb it is understood as the process of producing that sensation ("doesn't the thought of eating raw meat disgust you?").[38]

But psychologists provide a much more exacting description. To a psychologist, disgust is an automatic affective reaction that evolved to protect us from objects that threaten bodily integrity: objects linked to parasites, germs and disease.[39] This conclusion flows from both the nature of disgust elicitors (predominately pathogenic threats like rotting food, corpses, feces, and blood) and the behavioral response produced: a momentary fixation on the disgusting object, immediate withdrawal from the disgusting object, contortions that protect the mucus membranes of the face, immediate removal of the disgusting object from the body and gastric activity that primes vomiting.[40]

In this, more technical, view disgust is a hard wired reaction that evolved because it promotes human fitness.[41] The human that recoils in disgust from

38. *Disgust*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/disgust [https://perma.cc/EKX7-L3PN].

39. Valerie Curtis & Adam Biran, *Dirt, Disgust, and Disease: Is Hygiene in Our Genes?*, 44 PERSP.'S IN BIOLOGY & MED. 17, 18, 22 (2001); Joshua M. Tybur et al., *Disgust: Evolved Function and Structure*, 120.1 PSYCH. REV. 65, 65–66 (2013).

40. Hanah A. Chapman & Adam K. Anderson, *Things Rank and Gross in Nature: A Review and Synthesis of Moral Disgust*, 139 PSYCH. BULL. 300 (2013); Joshua M. Susskind et al., *Expressing Fear Enhances Sensory Acquisition*, 11 NATURE NEUROSCI. 843 (2008); Paul Rozin et al., *Disgust: The Body and Soul Emotion*, *in* HANDBOOK OF COGNITION AND EMOTION 429–445 (1999).

41. Curtis & Biran, *supra* note 39, at 28; Kelly & Morar, *supra* note 32, at 159; Tybur et al., *supra* note 39, at 66.

rotting food, feces and open wounds is less likely to become poisoned or sick. This "core" function of disgust is well understood and relatively non-controversial.

But disgust also exerts a powerful influence on moral judgment. People register significantly higher implicit bias, for example, against fictitious ingroups and outgroups after being exposed to disgust inducing images.[42] Likewise, individuals register significantly more critical moral assessments of recreational drug use, alcohol use and promiscuity[43] after watching a disgust inducing film.[44] Disgust induced through the introduction of a bad smell is known to increase the negative evaluation of sex between cousins, marriage between cousins and releasing a morally objectionable film,[45] while hypnotically induced disgust has been shown to significantly increase the moral condemnation of shoplifting, stealing library books, taking bribes and assuming the role of an "ambulance-chasing lawyer."[46]

People who are especially disgust sensitive are also known to render more negative moral assessments. These individuals register significantly more negative implicit evaluations of gay individuals,[47] and significantly more negative explicit evaluations of gay male sexuality[48]. Likewise, highly disgust sensitive individuals are more willing to convict in a simulated criminal trial, to describe criminal defendants as evil, to recommended longer criminal sentences, and to inflate local crime levels.[49]

B. The Propriety of Disgust as a Moral Heuristic

While the "core" function of disgust, the repulsion from pathogenic threats, is relatively non-controversial, disgust's impact on moral judgment

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42. Dasgupta et al., *supra* note 33, at 587.

43. E. J. Horberg et al., *Disgust and the Moralization of Purity*, 97 J. PERSONALITY & SOC. PSYCH. 963, 968 (2009).

44. Participants in the disgust condition were shown a clip from the 1996 film *Trainspotting* during which an individual submerges his head into a toilet bowl filled with feces. Participants in the control condition were shown an excerpt from the 1979 film *The Champ*, in which a son witnesses his father's death. *Id.*

45. Schnall et al., *supra* note 33, at 1098.

46. Wheatley & Haidt, *supra* note 33, at 781.

47. Inbar et al., *supra* note 36.

48. Bunmi O. Olatunji, *Disgust, Scrupulosity and Conservative Attitudes About Sex: Evidence for a Mediational Model of Homophobia*, 42 J. RSCH. PERSONALITY 1364, 1366 (2008). Olatunji utilized a measure of disgust sensitivity, the Disgust Scale Revised, that separates disgust sensitivity into three components: core, animal-remainder and contamination. Olatunji found that only core disgust sensitivity significantly predicted explicit negative assessments of gay male sexuality.

49. Andrew Jones & Julie Fitness, *Moral Hypervigilance: The Influence of Disgust Sensitivity in the Moral Domain*, 8 EMOTION 613 (2008).

is not. To understand the parameters of this debate it is helpful to recall Hume's distinction between "is" and "ought."[50] It is one thing to demonstrate the "is" of disgust's impact on moral judgment: the empirical reality of the bias, its severity and the variables that moderate it. It is quite another to conclude that disgust *ought* to bias our moral assessments. A correlated stream of literature has arisen to examine this question: should disgust be allowed to guide our moral judgments or should it be a natural impulse that we resist?

There is a strong trend within this literature to view disgust as an overly blunt evaluative instrument.[51] Scholars of this persuasion argue against affording disgust normative relevance because its evaluative impact frequently burdens the marginalized, is frequently misdirected, dehumanizes its targets, and restricts the mental flexibility required for rational assessment.

Of these four critiques, the most dominant is the claim that disgust's impact on moral evaluation is frequently used as a tool to burden the marginalized, and history is, in fact, replete with examples of disgust sharpening the edge against marginalized populations. Nazi propaganda, for example, routinely portrayed Jews as foul-smelling, sticky, and unclean. It also frequently compared Jews to germs, cancerous cells[52] and fungoid growths.[53]

Opponents of same-sex marriage utilized this same tactic. Pamphlets distributed in opposition to same-sex marriage once described gay male sex as a "medical horror story," replete with the exchange of saliva, feces, semen, blood, and the drinking of urine:

> The typical sexual practices of homosexuals are a medical horror story—imagine exchanging saliva, feces, semen and/or blood with dozens of different men each year. Imagine drinking urine, ingesting feces and experiencing rectal trauma on a regular basis. Often these encounters occur while the participants are drunk, high, and/or in an orgy setting. Further,

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50. DAVID HUME, A TREATISE OF HUMAN NATURE 469 (1888). Hume famously postulated that one cannot logically proceed from factual, "is," statements to normative, "ought," statements without calling upon additional, subjective premises. *Id.* I am also not the first to employ Hume's Guillotine to divide this literature. Kelly & Morar, *supra* note 32, at 153.

51. Kelly & Morar, *supra* note 32, at 168; Michael Kimberly, *Reevaluating Repugnance: A Critical Analysis of Leon Kass' Writings on Genetic Reproductive Technologies*, 5 PRINCETON J. BIOETHICS 8 (2002); Victor Kumar, *Foul Behavior*, 17 PHIL.'S IMPRINT (2017), https://philpapers.org/rec/KUMFB [https://perma.cc/993Z-L46J]. *See generally* MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010).

52. NUSSBAUM, *supra* note 51.

53. In a similar fashion Hitler is quoted as stating that "the Jew was a maggot inside a rotting body." *Id.*

> many of them occur in extremely unsanitary places (bathrooms, dirty peep shows), or, because homosexuals travel so frequently, in other parts of the world.[54]

A likeminded opponent of same-sex marriage cast gay males in a similar frame: "These are the people with the sores! The gaping sores! The sores that are pussy (sic) and gross."[55]

Disgust has also, of course, frequently been used to demean African Americans by portraying them as filthy, foul-smelling, and animal-like, associations that likely played some part in the nation's reluctance to share swimming pools and drinking fountains with black citizens.[56] Immigrants are also routinely portrayed as disease ridden, dirty, and insect-like,[57] and people characterized as "untouchable" in the Hindu tradition are routinely associated with cleaning latrines and corpse disposal.[58]

Science supports this concern. Laboratory measurements have shown that individual disgust sensitivity is highly correlated with "intergroup disgust sensitivity (ITG-DS)," a tendency to view outgroups as repulsive.[59] Disgust sensitivity has also been shown to correlate with explicit prejudice towards a range of historically marginalized outgroups, including Muslims, immigrants, ethnic minorities, foreigners, gay males, Jews, Blacks, Mexicans, and First Nations.[60] On the other side of the coin, disgust

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54. *Medical Consequences of What Homosexuals Do*, FAM. RSCH. INST., http://www.familyresearchinst.org/2009/02/medical-consequences-of-what-homosexuals-do/ [https://perma.cc/A23C-YC4Y]. This pamphlet was distributed by the Family Research Institute and is still available online.

55. *Pastor: 'I Would Smear Feces All Over Myself if My Son Married a Man,'* LGBTQ NATION (Nov. 13, 2015), https://www.lgbtqnation.com/2015/11/pastor-i-would-smear-feces-all-over-myself-if-my-son-married-a-man/ [https://perma.cc/7M8Q-DEGC]. This quote is attributed to Kevin Swanson of the Reformation Church in Elizabeth, Colorado. Kevin Swanson is both a pastor and a well-known Christian broadcaster. During this same speech, Pastor Swanson declared that he would rather smear himself with feces than attend a same-sex wedding. *Id.*

56. NUSSBAUM, *supra* note 51.

57. Annika K. Karinen et al., *Disgust Sensitivity and Opposition to Immigration: Does Contact Avoidance or Resistance to Foreign Norms Explain the Relationship?*, 84 J. EXPERIMENTAL SOC. PSYCH. 1, 1 (2019); Marta Zakrzewska et al., *Body Odor Disgust Sensitivity Is Associated with Prejudice Towards a Fictive Group of Immigrants*, 201 PHYSIOLOGY & BEHAV. 221, 221 (2019).

58. Joel Lee, *Disgust and Untouchability: Towards an Affective Theory of Caste*, 12 S. ASIAN HIST. CULTURE 310, 312 (2021); NUSSBAUM, *supra* note 51.

59. Gordon Hodson et al., *The Role of Intergroup Disgust in Predicting Negative Outgroup Evaluations*, 49 J. EXPERIMENTAL SOC. PSYCH. 195, 202–04 (2013).

60. *Id.*

sensitivity has been shown to positively correlate with support for entrenched hierarchical social ranking and resource inequities.[61]

From this angle, disgust is a poor moral heuristic because it tends to harshen our judgment of the vulnerable. For many scholars, that history alone is sufficient reason to severely doubt, if not censor, disgust's influence on our moral evaluations.[62]

The "misdirected" critique refers to disgust's odd tendency to irrationally contaminate non-disgusting targets. Disgust has long been known to operate by the "law of contagion" or "sympathetic magic," meaning that a disgusting object will make a non-disgusting object disgusting by mere physical contact, resemblance, or social interaction.[63] Water from a bedpan, for example, is disgusting even if that bed pan has been sterilized; food in the shape of feces is considered disgusting even if it is known to contain no feces.[64] Contact with disgusting behaviors contaminates as well; people are disgusted at the thought of wearing Adolf Hitler's sweater (even if it has been thoroughly dry cleaned). People are likewise repulsed at the idea of wearing the clothing of a notorious criminal.[65] Critics note that disgust's evaluative impact in these instances is "misdirected," inaccurate or irrational because disgust generated by an unrelated object, person, or behavior is allowed to negatively bias the assessment of a seemingly non-disgusting object, person, or behavior.

Sometimes the "misdirection" critique references what psychologists call "priming." In a priming scenario, some stimulus causes an observer to feel disgust (a disgusting smell, a disgusting image, etc.), and the disgust sensation causes that observer to evaluate an unrelated person or behavior more harshly. People are more condemning, for example, of sex between cousins if they are asked to evaluate the transgression after being exposed to a disgusting smell.[66] Likewise people judge the keeping of an untidy room more harshly after being exposed to a disgusting film,[67] and, importantly for

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61. Gordon Hodson & Kimberly Costello, *Interpersonal Disgust, Ideological Orientations, and Dehumanization as Predictors of Intergroup Attitudes*, 18 PSYCH. SCI. 691, 694–98 (2007); Roger Giner-Sorolla et al., *Emotions in Sexual Morality: Testing the Separate Elicitors of Anger and Disgust*, 26 COGNITION AND EMOTION 1208, 1219–1222 (2012).

62. DANIEL KELLY, YUCK!: THE NATURE AND MORAL SIGNIFICANCE OF DISGUST 11–13 (2011); Kelly & Morar, *supra* note 32, at 153–54; NUSSBAUM, *supra* note 51.

63. Paul Rozin et al., *Disgust: The Body and Soul Emotion*, *in* HANDBOOK OF COGNITION AND EMOTION 429–45 (1999); Kelly & Morar, *supra* note 32, at 163 n.20.

64. Paul Rozin et al., *Operation of the Laws of Sympathetic Magic in Disgust and Other Domains*, 50 J. PERSONALITY SOC. PSYCH. 703, 706–12 (1986).

65. Gordon Hodson and Kimberly Costello, *Interpersonal Disgust, Ideological Orientations, and Dehumanization as Predictors of Intergroup Attitudes*, 18 PSYCH. SCI. 691, 692 (2016); Rozin et al., *supra* note 63; Rozin et al., *supra* note 64.

66. Schnall et al., *supra* note 33, at 1099.

67. Horberg et al., *supra* note 43, at 970.

our purposes, people tend to evaluate disgust-relevant populations, such as gay men, more negatively after they have been exposed to an unrelated disgusting stimulus.[68]

In all of the above cases, critics note the misdirection or irrationality of disgust's impact on assessment and evaluation. Disgust is a poor evaluative instrument, they argue, because its impact on evaluation is frequently misdirected. Disgust towards X often irrationally contaminates the evaluation of an unrelated Y.

Disgust is also known to restrict the mental flexibility required for rational assessment.[69] Research indicates that disgust-influenced judgments appear immune to subsequent mitigating information.[70] Disgust-influenced judgments also appear to be weakly associated with situational appraisals and context, meaning that disgust tends to produce an automatic evaluation of "bad" absent any real consideration of the precise details.[71] Disgust-induced decision makers are also frequently unable to state any reason for their judgments in hindsight.[72] In a similar fashion, people give less elaborate reasons for disgust-based evaluations than they do for decisions based on other emotions, often relying on tautological explanations that reference disgust itself ("Pedophiles are disgusting because they are gross'').[73]

And finally, disgust is thought to "dehumanize" its human targets. The research of Harris and Fiske suggests that disgusting individuals are perceived as so strikingly different from non-disgusting individuals that they fail to fully activate the primary regions of social cognition in the medial pre-frontal cortex.[74] This has led several researchers to suggest that disgust correlates with an "othering" that effectively treats disgust-eliciting

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68. Inbar et al., *supra* note 33, at 23; Tapias et al., *supra* note 35, at 31–32; Dasgupta et al., *supra* note 33, at 587–89.

69. *But see* Kumar, *supra* note 51, at 1 (arguing that disgust is more flexible that critics often allow (though his examples are so narrow it is hard to accept his argument on broader terms)).

70. Pascale Sophie Russell & Roger Giner-Sorolla, *Bodily Moral Disgust: What It Is, How It Is Different from Anger, and Why It Is an Unreasoned Emotion*, 139 PSYCH. BULL. 328, 343 (2013).

71. *Id.*

72. Roger Giner-Sorolla & Lasana T. Harris, *The Negative Side of Disgust*, EMOTION RESEARCHER, http://emotionresearcher.com/the-negative-side-of-disgust/ [https://perma.cc/NP2R-9TK2]; Jonathan Haidt et al., Moral Dumbfounding: When Intuition Finds No Reason 10–11 (Aug. 10, 2000) (unpublished manuscript), http://theskepticalzone.com/wp/wp-content/uploads/2018/03/haidt.bjorklund.working-paper.when-intuition-finds-no-reason.pub603.pdf [https://perma.cc/DWR6-PMY4]. Jonathan Haidt refers to this phenomenon and "moral dumbfounding." *Id.* at 1.

73. Pascale Sophie Russell & Roger Giner-Sorolla, *Moral Anger is More Flexible than Moral Disgust*, 2 SOC. PSYCH. PERSONALITY SCI. 360, 361 (2011).

74. Lasana T. Harris & Susan T. Fiske, *Social Groups That Elicit Disgust are Differentially Processed in mPFC*, 2 SOC. COGNITIVE AFFECTIVE NEUROSCIENCE 45, 48–50 (2007).

individuals as something less complex and less social than full human beings, a tendency that may lead to less accurate assessments of those individuals and their actions.[75]

Defenders of disgust as a moral barometer typically concede the majority of these points, but they often argue that disgust plays a unique and necessary role in the evaluation of offenses that are, by their very nature, disgusting.[76] Dan Kahan, for example, argues that disgust is *indispensable* to the appropriate evaluation of extremely disgusting incidents:

> "It signals seriousness, commitment, indisputability, presentness, and reality" . . . "it marks out moral matters for which we can have no compromise" . . . . No other moral sentiment is up to the task of condemning such singular abominations as "rape, child abuse, torture, genocide, predatory murder and maiming" . . . .[77]

Kahan's argument touches upon a crucial distinction, the distinction between integral and incidental emotional effects. When someone experiences an integral disgust reaction, the disgust generated by an event or object influences their judgment about that same event or object. But when someone experiences an incidental disgust reaction, the disgust elicited by an event or object influences their evaluation of another, unrelated event, or object.[78] The instances of "misdirected" bias discussed above would fall in the incidental category.

Kahan and others who defend disgust as an evaluative instrument frequently concede the problem of incidental disgust but argue that disgust is necessary when faced with instances of integral disgust.[79] One cannot fully assess the horror of child rape, they would argue, without the negative punch of disgust.

But critics allege that even this, limited, argument has its shortcomings. For one, while disgust may on occasion be appropriate it is so frequently misdirected that many argue we should doubt its accuracy by default.[80] For another, Kahan's argument does nothing to allay the concern that disgust hinders the cognitive assessment that sophisticated moral evaluation demands (it appears to limit one's ability to reassess evaluations after the

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75. *Id.* at 48–50; Russell & Giner-Sorolla, *supra* note 73, at 362–63; Giner-Sorolla & Harris, *supra* note 72.

76. Kahan, *supra* note 37; Kahan & Nussbaum, *supra* note 37; MILLER, *supra* note 37.

77. Kahan, *supra* note 37, at 1628.

78. Jones & Fitness, *supra* note 49, at 623–25; Horberg et al., *supra* note 43, at 963.

79. Michael Hauskeller, *Moral Disgust*, 13 ETHICAL PERSPS. 571, 574 (2006); Kahan, *supra* note 37; *Progressive Appropriation of Disgust*, *supra* note 37; Kumar, *supra* note 51, at 1; MILLER, *supra* note 37.

80. NUSSBAUM, *supra* note 51; Kelly & Morar, *supra* note 32, at 153–54.

introduction of new evidence, and it appears to encourage tautological conclusions).[81]

And finally, there is another possible retort to Kahan's argument: disgust's tendency to disproportionately burden the marginalized means that even when it is applied in an integral fashion (i.e. when it is not misdirected) we should discount its impact because disgust tends to bias our evaluations of the marginalized more than our evaluations of the privileged. Disgust, from this perspective, is a "guilt enhancer" that violates our sense of fairness because it applies more powerfully to marginalized peoples even when it is accurately attached to the decision at hand.

There are other scholars that take an even stronger position, arguing that disgust is not just a useful moral barometer in some cases but a useful moral barometer in all cases. This position generally holds that disgust is the expression of a deep wisdom that is beyond reason's ability to capture, often marking the moral boundaries essential to societal cohesion.[82] This position can clearly be seen in Lord Devlin's "disintegration thesis," put forward during his famous debate with H. L. A. Hart, in which disgust is said to highlight (and defend) normative positions so fundamental to society that their erosion would threaten society itself.[83] It can be seen in later theorists as well. Kass, for example, argues that disgust provides a useful moral heuristic by highlighting normative shifts that threaten something fundamentally important but beyond the comprehension of reason alone.[84]

But opponents counter that this position offers no mechanism by which to separate disgust functioning in moral error, as it is known to do when it misdirects, oppresses the marginalized, dehumanizes, or renders moral judgment inflexible, and disgust functioning as an expression of deep, yet inexplicable wisdom.[85] Others note that this position also falls victim to the naturalistic fallacy, by assuming that what is natural (x behavior is disgusting) is *per se* correct (x is therefore worthy of harsh judgment or moral condemnation) without any justification for doing so.[86] Kelly adds to this argument by noting that disgust is an amoral product of evolution designed

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81. Russell & Giner-Sorolla, *supra* note 73, at 361; Giner-Sorolla & Harris, *supra* note 72.

82. This position echoes the Durkheimian notion that certain core moral values are necessary for cohesion of even modern (organic) societies. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Steven Lukes ed., 3d ed. 2014).

83. Dworkin, *supra* note 37, at 990–92. *See generally* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965).

84. Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 686–88 (1997).

85. Kelly & Morar, *supra* note 32, at 153–54; Kimberly, *supra* note 51, at 8.

86. Kelly & Morar, *supra* note 32, at 153–54; Patrick, *supra* note 37.

to promote individual fitness, not to function as a moral heuristic. He concludes that we should therefore not expect it to function as such.[87]

In short, while disgust is known to powerfully bias moral judgments, there are strong reasons to reject disgust as a moral heuristic. Disgust is known, both historically and scientifically, to disproportionately burden the marginalized.[88] Disgust also frequently misdirects its biasing impact, resulting in the negative assessment of persons, objects or behaviors that are completely irrelevant to the disgust elicitor itself.[89] Disgust is known to dehumanize its targets by blocking our recognition of "disgusting people" as full and complex social entities.[90] And finally, disgust influenced judgments lack the mental flexibility required for accurate moral assessment. While there may be some merit in allowing disgust to aid our evaluation of some truly horrendous behaviors, as Professors Kahan and Miller suggest, given the known errors listed above and the history of disgust being utilized to burden the most vulnerable among us, it is difficult to assign it any normative value as a rule.

C. Disgust and Legal Decision Making

In the early twentieth century, legal scholars at Columbia and Yale birthed legal realism, the now commonplace notion that judges do more than simply apply the law to the facts when they adjudicate a case. Rather, the realists maintained that judges often allowed their explicitly held beliefs and policy preferences to color their decisions, if not outright dictate them.[91] Later these intuitions gained empirical support,[92] and soon birthed an entire branch of

87. Kelly & Morar, *supra* note 32, at 153–54.

88. KELLY, *supra* note 62. *See generally* Kelly & Morar, *supra* note 32, at 153–54; NUSSBAUM, *supra* note 51.

89. Dasgupta et al., *supra* note 33, at 585; Horberg et al., *supra* note 43, at 963; Inbar et al., *supra* note 33, at 23; Schnall et al., *supra* note 33, at 1096; Tapias et al., *supra* note 35, at 27.

90. Harris & Fiske, *supra* note 74, at 45.

91. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1930); Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave like Human Beings*, 80 U. PA. L. REV. 17, 17–53 (1931); Jerome Frank, *Are Judges Human Part 2: As Through a Class Darkly*, 80 U. PA. L. REV. 233, 233–67 (1931); LEON GREEN, THE JUDICIAL PROCESS IN TORTS CASES (1931); Karl N. Llewellyn, *A Realistic Jurisprudence–The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222–64 (1931); Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 71–76 (1928).

92. C. Herman Pritchett, *Divisions of Opinion Among Justices of the U. S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890, 890–98 (1941).

scholarship devoted to predicting and explaining judicial decisions based on judicial ideology,[93] specific policy preferences,[94] or institutional bias.[95]

The beginning of this century has witnessed a comparable revolution in the analysis of judicial decision making. While the first realists focused on judicial biases consciously held (a conscious preference for a policy outcome, a conscious preference for a political ideology), this "second wave" of realism has focused on judicial bias *unconsciously* held.

For example, the impact of implicit bias, the automatic, cognitive associations that "affect our understanding, actions, and decisions in an 'unconscious' manner,"[96] has become a dominant topic in the literature. Scholars have examined the impact of implicit bias on the perception of minority clients,[97] juror perception of criminal intent,[98] judicial racial bias,[99] juror racial bias in capital cases,[100] juror evaluation of criminal evidence,[101] the perception of a litigator's skill,[102] gendered assumptions about legal

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93. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 563–65 (1989); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

94. Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 583–611 (2001); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997); THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005).

95. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 734–49 (1984).

96. *See generally* CHERYL STAATS ET AL., KIRWAN INST., STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 3 (2015).

97. *See generally* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1539–56 (2003).

98. *See generally* Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How Legal Priming Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1075–76 (2004).

99. *See generally* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195, 1221–26 (2008).

100. *See generally* Jennifer L. Eberhardt et al., *Looking Deathworthy Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 385 (2006).

101. *See generally* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 204–08 (2010).

102. *See generally* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

careers,[103] and the overall presumption of innocence.[104] Courts have also instituted implicit bias training, as have police departments and bar associations.[105] In some instances, concern over implicit bias has even altered jury instructions.[106]

Academics have also explored the impact of more ordinary biases that might also flow below one's conscious awareness. Recent scholarship has explored the impact of common mental heuristics like anchoring, framing, egocentric bias, and hindsight bias on judicial decision-making.[107] Likewise, research has demonstrated that evidence ruled inadmissible still frequently biases judicial decisions, despite a conscious judicial effort to disregard it.[108]

The impact of disgust on judicial decision-making fits within this second wave and merits as much concern as the biases listed above, if not more. Disgust is well known to dramatically alter moral evaluations, evaluations that are critical in the legal decision-making process (sentencing, custody decisions, the overall assessment of guilt, etc.), even when the disgust elicitor is irrelevant to the evaluation at hand.[109] Disgust has also been shown to bias the evaluation of certain marginalized communities, including Muslims, immigrants, ethnic minorities, foreigners, gay men, Jews, Blacks, Mexicans, and First Nations.[110] And disgust is known to restrict the mental flexibility that due process demands by encouraging tautological decisions and hindering the ability to reassess upon the introduction of subsequent information. Such tendencies have significant repercussions for decision-making within the law.

But the law has largely ignored the empirical examination of this possibility. Very few experimental or observational studies have addressed

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103. *See generally* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010).

104. JENNIFER ELEK & ANDREA MILLER, THE EVOLVING SCIENCE ON IMPLICIT BIAS: AN UPDATED RESOURCE FOR THE STATE COURT COMMUNITY (2021), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911 [https://perma.cc/JV8P-GWRZ]; Levinson et al., *supra* note 101, at 204–08.

105. *See generally* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2011); Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017).

106. *See, e.g.*, Kang et al., *supra* note 105, at 1182.

107. *See generally* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

108. *See generally* James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207 (2019); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2004).

109. Dasgupta et al., *supra* note 33, at 585.

110. Hodson et al., *supra* note 59, at 199. Some entries on this list are debated. For example, recent research argues that Arabic populations are not a "disgust-relevant" population but rather an "anger-relevant" population. *See* Dasgupta et al., *supra* note 33, at 585, 589.

the question of when and to what degree disgust biases decision-making in the legal space. This is not to say that there have been no empirical efforts. For example, a series of studies have concluded that jurors are highly biased by evidence that contains disgusting imagery,[111] and a related study concluded that highly disgust-sensitive jurors are more willing to convict in a simulated criminal trial, describe those criminal defendants as evil, and recommend longer criminal sentences.[112] But all of these studies have been conducted by psychologists, and thus they fail to address the unique issues that disgust raises for legal decision-making. These studies do not examine the impact of disgust on the legal evaluation of marginalized populations, an impact that obviously involves equal protection concerns. Nor do they examine the impact of disgust on *judicial* decision-making.[113] They likewise fail to address whether the influence of disgust on specific legal decisions might violate standing precedent or constitutional side-constraints. Considerable work remains to be done.

What the law has focused on, at least to date, is the normative side of the debate. The question of "ought:" *Should* disgust be accepted as a heuristic in legal decision-making?

It should be noted at the outset that the legal version of this debate, while similar to the philosophical debate concerning the use of disgust as a moral heuristic more generally, is fundamentally different. The law is, after all, more constrained than general moral philosophy. It demands a more narrowly defined evaluative terrain, with rules, limitations and side-constraints that do not necessarily apply to moral evaluations on the whole. Our constitutional

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111. *See generally* David A. Bright & Jane Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY PSYCH. & L. 154 (2004); David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 L. HUM. BEHAV. 183 (2006); Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY PSYCH. & L. 110 (2006); Kevin S. Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 L. HUM. BEHAV. 485 (1997); Eduardo A. Vasquez et al., *The Animal in You: Animalistic Descriptions of a Violent Crime Increase Punishment of Perpetrator*, 40 AGGRESSIVE BEHAV. 337 (2014).

112. Jones & Fitness, *supra* note 49, at 616–23.

113. This lack of empirical focus may reflect a larger disinterest in emotions generally within the law. To be fair, the "Law and Emotions" field has grown exponentially over the last few decades. Grossi, *supra* note 37, at 55–56. But even scholars within the field argue that the study of emotion has been given short shrift within the legal academy. Largely this is attributed to the law's rational, positivist bias, which tends to stress the import of reason over emotion. Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions*, 94 MINN. L. REV. 1997, 1999 (2021). Perhaps it is also for this reason that the Law and Emotion literature tends to focus on the (worthwhile) goal of establishing the theoretical relevance of emotion in the law, rather than engaging in a positivist, empirical examination of its impact.

precommitments and system of legal authority create a framework of prescriptions that must be followed if an outcome is to be deemed "legal" or "constitutional." One can therefore conclude that disgust-moderated bias in a legal determination *ought not occur* if that bias contravenes precedent, equal protection, due process, or any other constitutional precommitment. In other words, the law provides the necessary premises to move across Hume's Guillotine from "is" to "ought."[114]

One of the earliest participants in this debate is Lord Patrick Devlin who, during his famous debate with H. L. A. Hart, argued that society depends upon the bonds of a common morality to survive.[115] To dissolve these bonds, therefore, would be to dissolve society itself, an idea later referred to as Devlin's "disintegration thesis":

> If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage.[116]

Devlin then argued that disgust "is a good indication that the bounds of toleration are being reached."[117] To put this position into the context of American law, Devlin argued that policing the bounds of disgust is a legitimate state interest that should, at the very least, pass rational basis review. He concluded that criminalizing gay male sex could be justified merely because society views that behavior with disgust.[118]

Other scholars have taken similar positions. William Kass argues that the state has a legitimate interest in banning human cloning merely because the concept tends to disgust us.[119] For Kass, disgust signals a "deep wisdom, beyond reason's power fully to articulate,"[120] and, like Devlin, he believes

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114. HUME, *supra* note 50, at 469.

115. This position echoes the Durkheimian notion that certain core moral values are necessary for cohesion of even modern (organic) societies. *See generally* DURKHEIM, *supra* note 82.

116. *See* DEVLIN, *supra* note 83, at 10.

117. *See id.* at 17.

118. *Id.*

119. Kass, *supra* note 84, at 686–89.

120. Technically, Kass uses the word "repugnance." *Id.* at 687 ("[R]epugnance is the emotional expression of deep wisdom, beyond reason's power fully to articulate it."). Repugnance and disgust, however, are deemed by this author to be sufficiently similar to advance the point.

that it is a legitimate state interest to prohibit behaviors merely because they elicit disgust.[121] One could refer to this thesis as a "Pandora's Box" perspective; societal disgust must signal something important and who knows what unforeseen harm will result if we ignore it.[122]

In addition to Devlin and Kass, a handful of scholars have argued that disgust, while flawed as a legal decision-making heuristic, nonetheless provides valuable insight in some limited legal situations. Kahan, for example, argues that the punch of disgust is necessary to properly evaluate truly horrific crimes (child rape, gruesome murders).[123] In a later article, Kahan went so far as to say that the law is "morally blind" absent the evaluative insight of disgust.[124]

But, as alluded to earlier, there are several reasons why disgust-moderated judgments appear to be incompatible with our legal system. First, the tendency of disgust to "misdirect" its negative bias often renders it unjust. It would certainly offend our sense of justice if an individual were judged more harshly because a disgusting smell wafted into court. Likewise, we would shrink at the notion of a person being judged more harshly because an action, behavior, or quality that was *unrelated to the decision at hand* elicited disgust in the decision maker.

Disgust's tendency to disproportionately burden the marginalized also creates obvious equal protection and footnote four concerns.[125] Our system demands that we assess all individuals equally, and it is especially protective of populations that routinely suffer discrimination and bias. Disgust appears to tilt in the opposite direction, negatively biasing evaluations of the marginalized (Muslims, immigrants, ethnic minorities, foreigners, gay men, Jews, Blacks, Mexicans, First Nations, etc.) more than the privileged.[126]

Disgust also appears to work at cross-purposes with the cognitive expectations of Due Process. Due Process demands rational assessment, while disgust tends to encourage tautological conclusions ("Pedophiles are disgusting because they are gross'').[127] Due Process also demands rational *reassessment*, especially when mitigating information is introduced, but disgust appears to inhibit the practice.[128]

And finally, research demonstrates that individuals who elicit disgust fail to fully activate the primary regions of social cognition in the medial

121. *Id.* at 686–89.
122. *Id.*
123. *Progressive Appropriation of Disgust, supra* note 37.
124. *Id.*
125. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
126. Hodson et al., *supra* note 59, at 199.
127. Russell & Giner-Sorolla, *supra* note 73, at 361.
128. *Id.*

prefrontal cortex, resulting in a "dehumanization" that effectively treats disgust eliciting individuals as something less complex and less social than other human beings.[129] Such bias, of course, creates very real issues for an officer of the court who is tasked with peering into the mind of another to weigh intent, motivation, heat of passion, honesty, and countless other mental states. An inability to appreciate the complexity of a disgust eliciting individual thus creates an obvious point of tension with the expectation that officers of the court will perform this function in an unbiased manner.

D. Disgust and the Judicial Evaluation of Gay Males

Gay males have long been identified as a "disgust relevant group" within the United States, meaning that gay males are known to elicit disgust in the United States and that disgust has been demonstrated to bias the evaluation of gay males within the United States.[130] Individuals with a high propensity for disgust, for example, report elevated levels of prejudice towards gay men,[131] and disgust sensitivity has been shown to correlate positively with both implicit and explicit negative attitudes towards gay men.[132] Likewise, induced disgust has been shown to negatively influence both the implicit assessment of gay men[133] and the explicit measure of warmth towards gay men.[134] And thoughts about gay men have been shown to elicit significantly more disgust than thoughts about activist feminists or fundamentalist Christians.[135]

In political science, the empirical realities of this relationship have been thoroughly explored. It has been concluded, for example, that disgust inducing political rhetoric can powerfully reduce public support for gay

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129. Harris & Fiske, *supra* note 75, at 48–50; Russell & Giner-Sorolla, *supra* note 73, at 361; Giner-Sorolla & Harris, *supra* note 70, at 346.

130. Tapias et al., *supra* note 35, at 29; Nilanjana Dasgupta, *Beyond the Black Box: The Behavioral Manifestations of Implicit Prejudice*, ANN. MEETING OF SOC'Y PERSONALITY SOC. PSYCH. SAVANNAH, GA. (2002); Cottrell & Neuberg, *supra* note 35, 777.

131. *See generally* Kurt E. Ernulf & Sune M. Innala, *The Relationship Between Affective and Cognitive Components of Homophobic Reaction*, 16 ARCHIVES SEXUAL BEHAV. 501 (1987); Jonathan Haidt et al., *Individual Differences in Sensitivity to Disgust: A Scale Sampling Seven Domains of Disgust Elicitors*, 16 PERSONALITY & INDIVIDUAL DIFFERENCES 701 (1994); Paul Van de Ven et al., *Measuring Cognitive, Affective, and Behavioral Components of Homophobic Reaction*, 25 ARCHIVES SEXUAL BEHAV. 155 (1996).

132. Inbar et al., *supra* note 33, at 23; Tapias et al., *supra* note 35, at 29.

133. Dasgupta et al., *supra* note 33, at 586–87.

134. Inbar et al., *supra* note 33, at 24; Cunningham et al., *supra* note 34, at 362.

135. Cottrell & Neuberg, *supra* note 35, at 777–78.

individuals in the military,[136] same-sex adoption,[137] same-sex marriage,[138] immigration rights for same-sex partners,[139] and LGBT anti-discrimination protections.[140] In addition, experimentally induced disgust has been shown to decrease implicit and explicit support for LGBT rights.[141] Individual disgust sensitivity has also been shown to correlate with normative positions that predict opposition to LGBT rights. Individual disgust sensitivity has, for example, been shown to correlate positively with a strong adherence to heteronormativity,[142] traditional sexual morality,[143] a fear of sin,[144] and a demand for policies that reflect traditional moral norms.[145]

But legal scholars have largely ignored the empirical possibilities of this connection. Rather, their analysis has focused on the theoretical, with a great deal of ink discussing the propriety of disgust influencing legal decisions generally as a normative matter.[146] To date there have been no experimental or empirical examinations of disgust's impact on the judicial evaluation of gay male litigants.

E. The Current Project

This research examines the impact of disgust on the judicial allocation of custody rights to gay male fathers. In these cases, the court evaluates the parental fitness of both parents, either pursuant to a divorce or pursuant to a motion to modify, and then allots custody and visitation rights accordingly.

In terms of disgust and its impact on judicial decision making, this is a particularly ripe area of concern for at least two reasons. First, these cases are

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136. *See generally* Kam & Estes, *supra* note 36.

137. *Id.*

138. *Id.*

139. Gadarian & van der Vort, *supra* note 36, at 536.

140. *Id.*

141. Casey, *supra* note 36, at 5; Cunningham et al., *supra* note 34, at 362; Inbar et al., *supra* note 33, at 23.

142. Ray & Parkhill, *supra* note 36, at 54.

143. Jarret T. Crawford et al., *Disgust Sensitivity Selectively Predicts Attitudes Toward Groups that Threaten (or Uphold) Traditional Sexual Morality*, 70 PERSONALITY & INDIVIDUAL DIFFERENCES 218, 218–23 (2014); Olatunji, *supra* note 48, at 1365–66.

144. Olatunji, *supra* note 48, at 1365.

145. *See generally* Kam & Estes, *supra* note 36.

146. *See, e.g.*, Kathryn Abrams, *Fighting Fire with Fire: Rethinking the Role of Disgust in Hate Crimes*, 90 CALIF. L. REV. 1423 (2002); Cahill, *supra* note 37; Dworkin, *supra* note 37; Grossi, *supra* note 37; *Progressive Appropriation of Disgust*, *supra* note 37; Kahan & Nussbaum, *supra* note 37; Kass, *supra* note 84; Kelly & Morar, *supra* note 32; DEBRA LIEBERMAN & CARLTON PATRICK, OBJECTION: DISGUST, MORALITY, AND THE LAW (2018); MILLER, *supra* note 37; NUSSBAUM, *supra* note 37; PATRICK, *supra* note 37; Russell & Giner-Sorolla, *supra* note 73.

precisely where one would expect to find the biasing impact of disgust. They involve the direct evaluation of a disgust relevant population, gay males. They involve a wide degree of judicial discretion and, because parental sexual behavior is also often relevant to the outcome of these cases, they frequently discuss gay male sex itself.

Moreover, there are hints from the case law that disgust is, in fact, biasing these decisions. Judicial descriptions of gay male fathers as "repugnant"[147] or "detestable"[148] are not infrequent in the record. Nor are over the top descriptions of gay male sex that appear to evince an almost visceral objection to the practice,[149] as well as literal concerns that gay male fathers might contaminate their children through bodily fluids or other physical contact.[150]

Second, if disgust is biasing these cases to the detriment of gay male fathers, then that bias creates both normative and formal legal concerns. Normatively, it almost goes without saying that a disgust bias would offend our sense of justice in these cases. Gay male fathers should not lose contact with their children merely because a judge finds their private, legal sexuality gross. More precisely, if two fathers and their sexual behavior are the same, save the gender of their respective partners, it should strike us as unfair to grant one father less access to his children than the other.

Legally the operation of disgust in these cases would also contravene binding legal precedent. While precise legal precedent varies slightly from state to state, the vast majority of U.S. jurisdictions apply the "Nexus Test" when gauging the impact of parental sexual behavior on the evaluation of parental fitness.[151] The Nexus Test requires a demonstrated nexus between a parent's sexual behavior and harm to the child before the parent's sexual

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147. Weigand v. Houghton, 730 So.2d 581, 590 (Miss. 1999) (McRae, J., dissenting) (quoting the lower court's findings).

148. *Id.*

149. *See* Pulliam v. Smith, 501 S.E.2d 898, 903 (N.C. 1998); J.P. v. P.W. 772 S.W.2d 786, 788 (Mo. Ct. App. 1998). *See also Weigand*, 730 So.2d at 584 ("[T]hey regularly engage in homosexual activities which include both oral and anal intercourse."); *In re* J.S. & C., 324 A.2d 90, 95 (N.J. Super. Ct. Ch. Div. 1974) ("They have been present with him at 'The Firehouse', a meeting hall for homosexuals, where one witness has testified he observed men, 'fondling each other, necking and petting."); *Ex parte* H.H., 830 So. 2d 21, 29–30 (Ala. 2002) (Moore, J., concurring) (quoting past decisions where homosexual conduct had been characterized as "abominable, detestable, unmentionable, and . . . disgusting" and "inherently inimical to the general integrity of the human person").

150. North v. North, 648 A.2d 1025, 1028–31 (Md. Ct. Spec. App. 1994) (considering the possibility that a gay male father might transfer disease to his child through unintentional contact with bodily fluids left on bedsheets). *See also* Stewart v. Stewart, 521 N.E.2d 956, 967 (Ind. Ct. App. 1988) (Conover, J., dissenting) (considering the possibility of a gay father transferring H.I.V. to a child during the extraction of the child's tooth).

151. Shapiro, *supra* note 31, at 635.

behavior can be deemed relevant to the evaluation of their parental fitness.[152] This test is intended precisely to eliminate mere moral disapproval from the court's calculus by "look[ing] not to moral systems, but to the interests of the child" and not classifying conduct as a "wicked sin" or "mere indiscretion" but only considering the effect, if any, the conduct has on the child.[153]

In these cases, if a judge restricts or denies a gay male father's custody rights merely because they are disgusted at the thought of gay male sexuality, that ruling would directly contravene precedent in all jurisdictions that apply the Nexus Test. To make this fact all the more clear, at least twenty-three jurisdictions have indicated that the evaluation of parental sexual behavior pursuant to the Nexus Test should be orientation agnostic.[154] Harm to the child is to be the only relevant factor, not moral disapproval, heteronormativity, or disgust at a parent's private, legal sexual conduct.

II. HYPOTHESIS TESTING

Part Two of this research examines the general hypothesis that judicial disgust at the thought of gay male sexuality uniquely threatens the adjudication of gay male custody rights. I employ three separate methodologies to address this hypothesis: (1) a randomized, controlled experiment; (2) an observational case law analysis; and (3) semi-structured interviews. These methods were chosen because their strengths compliment their weaknesses. The experimental analysis, conducted on a sample of lay citizens taking on the role of a judge, allows one to approximate when and to what degree an individual's disgust sensitivity causally influences the decision to deny custody. It also allows one to hold constant the influence of

152. *Id.* at 635–36.

153. Whaley v. Whaley, 399 N.E.2d 1270, 1275 (Ohio Ct. App. 1978).

154. *See* Anson v. Havron, 140 So. 3d 476, 480 (Ala. Civ. App. 2013); Nadler v. Superior Court of Sacramento Cty., 63 Cal. Rptr. 352, 354 (Ct. App. 1967); Jacoby v. Jacoby, 763 So. 2d 410, 415 (Fla. Dist. Ct. App. 2000); In the Interests of R.E.W., 471 S.E.2d 6, 9 (Ga. Ct. App. 1996); McGriff v. McGriff, 99 P.3d 111, 118 (Idaho 2004); Pryor v. Pryor, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999); *In re* Marriage of R.S., 677 N.E.2d 1297, 1303 (Ill. App. Ct. 1996); Maxwell v. Maxwell, 382 S.W.3d 892, 898 (Ky. Ct. App. 2012); Bezio v. Patenaude, 410 N.E.2d 1207, 1216 (Mass. 1980); Fulk v. Fulk, 827 So. 2d 736, 741 (Miss. Ct. App. 2002); J.A.D. v. F.J.D., 978 S.W.2d 336, 339 (Mo. 1998); Shipman v. Shipman, 586 S.E.2d 250, 256 (N.C. 2003); Damron v. Damron, 670 N.W.2d 871, 876 (N.D. 2003); Hassentab v. Hassentab, 570 N.W.2d 368, 372–73 (Neb. Ct. App. 1997); *In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974), Guinan v. Guinan, 477 N.Y.S.2d 830, 831 (N.Y. App. Div. 3rd Dept. 1984); State *ex rel.* Human Servs. Dep't., 764 P.2d 1327, 1330 (N.M. Ct. App. 1988); Inscoe v. Inscoe, 700 N.E.2d 70, 83 (Ohio Ct. App. 1997); Fox v. Fox, 904 P.2d 66, 69 (Okla. 1995); Massey-Holt v. Holt, 255 S.W.3d 603, 610 (Tenn. Ct. App. 2007); Tucker v. Tucker, 910 P.2d 1209, 1217–18 (Utah 1996); *In re* Marriage of Black, 392 P.3d 1041, 1050 (Wash. 2017).

potential confounds. But while the experimental method provides a high degree of internal validity, its results may lack external validity, meaning that they may or may not translate into the real world. It is quite possible, for example, that a judge deciding a real case might respond differently than a lay individual participating in a study. To account for this possibility, methods two and three are designed to provide a greater degree of external validity. Method two applies an observational analysis to the published case law, coding a sample of relevant decisions for indications of a disgust response. Method three provides an even deeper level of observational analysis through the use of semi-structured interviews with attorneys and litigants.

A. Randomized, Controlled Experiment

The experimental analysis is designed to determine if an individual's disgust sensitivity influences the decision to deny custody to a parent who is engaged in one of four conditions: a gay male liaison, a lesbian liaison, a heterosexual male liaison, or a heterosexual female liaison.

The scenario presented simulates a custody dispute that is all too common for gay male parents: an ex-wife files a motion to modify a custody agreement after learning that their former spouse is now engaged in a same-sex relationship.[155] Typically the movant in these cases expresses concern that exposing their child to a post-divorce, non-marital, same-sex relationship will damage their moral compass, cause confusion, or upset the child. These parents typically move the court for full custody or a restriction of the newly dating parent's custody. Of course, similar motions to modify arise in heterosexual and lesbian contexts as well. It is not uncommon for ex-wives or ex-husbands to object to their former spouse's post-divorce, heterosexual or lesbian, romantic activity, and there is no shortage of cases whereby such parents move to amend custody arrangements as a result of concerns related to that romantic activity.

The difference, of course, appears to lie in the adjudication of these disputes. I hypothesize that courts view exposure to gay male relationships to be more damaging to children than comparable exposure to lesbian or heterosexual relationships, and I contend further that disgust at the thought of gay male sexuality is a significant driver of this disparate treatment. Study One is designed to test that hypothesis.

Study Two uses the same data but isolates the impact of disgust sensitivity from the impact of moral traditionalism and sexual prejudice. This second

155. Leinauer, *supra* note 30, at 17; Shapiro, *supra* note 31, at 661.

study is conducted to verify that disgust sensitivity is truly the primary driver of this alleged bias to the exclusion of these competing normative concerns.

B. Materials and Methods

Participants. I recruited 381 English-speaking U.S. residents for an experimental survey through Amazon's Mechanical Turk (MTurk).[156] Twenty-two participants were excluded for failing a manipulation check.[157] A further fifty-two participants were excluded for failing an attention check built into the disgust sensitivity scale – revised.[158] Of the 307 participants that remained, 153 identified as male (49.8%), 153 identified as female (49.8%), and one identified as other (0.3%). They reported an average age of thirty-five years (*SD*=10.4).[159] Politically the sample leaned slightly liberal (*M*=3.2 on a seven-point scale). The sample reported a higher-than-average level of education (57% had completed at least a four-year degree),[160] and a habit of religious attendance that was less than the national average.[161]

The post-exclusion sample contained seventy-eight replies to the gay male liaison condition, seventy-seven replies to the lesbian liaison condition, seventy-four replies to the heterosexual male liaison condition, and seventy-eight replies to the heterosexual female liaison condition.[162]

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156. Approval for Human Research was granted on March 8, 2019, from the Committee for Protection of Human Subjects at the University of California Berkeley. Protocol ID#: 2018-08-11333.

157. Both analyses were also calculated without excluding participants who failed the manipulation check, and the results did not significantly alter any pertinent results on the dependent variable. *See* Appendix Tables A, A2.

158. Within-scale attention checks were utilized for this research, as suggested by the scale's authors. Jonathan Haidt, *The Disgust Scale Home Page*, (Oct. 16, 2012), https://pages.stern.nyu.edu/~jhaidt/disgustscale.html [https://perma.cc/X9HN-DUP2].

159. All respondents were required to be at least eighteen years of age.

160. According to the U.S. census, approximately 33.4% of Americans had at least a bachelor's degree as of 2017. *Highest Educational Levels Reached by Adults in the U.S. Since 1940*, U.S. CENSUS BUREAU (Mar. 30, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-51.html [https://perma.cc/3QBN-UGM9].

161. Only 19% of the sample reported attending religious services more than "a few times a year or less," while Pew estimates that 46% of the general population attends religious services more than "a few times a year or less." GREGORY A. SMITH ET AL., PEW RSCH. CTR., IN U.S., DECLINE OF CHRISTIANITY CONTINUES AT A RAPID PACE 14 (2019).

162. An a priori power analysis using G*Power 3 software indicated that eighty-two participants per condition were needed to detect a medium effect (ρ=.30) with adequate power (1-β=0.8). Actual power, after attrition from the attention and manipulation checks, was still sufficient to detect a medium effect (ρ=.31) with adequate power (1-β=0.8). *See generally* Franz Faul et al., *G*Power 3: A Flexible Statistical Power Analysis Program for the Social, Behavioral, and Biomedical Sciences*, 39 BEHAV. RSCH. METHODS 175 (2007).

Vignettes. All participants received one of four vignettes, each describing a dispute common to family courts: a motion to modify an existing child custody agreement that involves the evaluation of one parent's post-divorce sexual behavior. Participants were told that two divorced, opposite-sex parents shared the custody of their six-year-old child equally. Participants were next told that one parent is now engaged in a romantic liaison with a new partner and that this newly dating parent is kissing and hugging their new partner in front of the child.

Finally, participants were told that the non-dating parent believes that the newly dating parent's behavior is harmful and confusing to their child. The non-dating parent thus petitions the court for full custody of the child. Participants were then asked to decide the matter as if they were the judge overseeing the case. They were further instructed to decide the matter according to the child's best interest, not the parent's best interest, in accordance with the prevailing legal standard.[163]

The vignettes thus differed randomly on two variables, the orientation of the liaison (heterosexual or homosexual) and the gender of the newly dating parent (male or female). This study thus contained a between-subjects design with four conditions (heterosexual male liaison condition, heterosexual female liaison condition, gay male liaison condition and lesbian liaison condition).

Dependent Variable (Custody Removal). Participants were asked how likely they would be to grant the petitioning parent full custody of the child (removing custody from the newly dating parent) on a six-point Likert scale. A six-point scale was chosen to mimic the actual work of a judge, who cannot select a "middle option" but rather must make a binary choice.[164]

Diversionary Tasks. Participants next received two diversionary tasks designed to dissipate any state-level disgust that the vignette may have generated. Participants were asked to create at least three words from the letters in "sycamore," "postage," and "airplane." Participants were then asked to complete a simple word fragment task (completing five incomplete words).[165]

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163. Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 89 (2011).

164. Studies one and two utilize a binary measure of the dependent variable to better simulate the decision parameters of an actual court (1, 2 & 3 = remove custody. 4, 5, & 6 = do not remove custody).

165. These steps were taken out of an abundance of caution. The disgust sensitivity measure chosen for these studies, the disgust sensitivity scale revised, is not thought to reflect state-level disgust, and state-level disgust is thought to be short lived once the disgust elicitor is

A.N.E.S. Moral Traditionalism Scale. To assess adherence to traditional moral beliefs, all participants completed the four-item Moral Traditionalism Scale employed by the American National Election Study since 1986.[166]

Disgust Sensitivity Scale Revised*.* Disgust Sensitivity is next assessed via the Disgust Sensitivity Scale Revised (DS-R). The DS-R consists of twenty-five items and two attention checks.[167]

Sexual Prejudice Measure. Participants' sexual prejudice is assessed through the administration of the Attitudes Towards Lesbians and Gay Males scale (short version). This measure consists of ten items and assesses sexual prejudice towards both gay males and lesbian women on a seven-point scale.[168]

Manipulation Check*.* Next participants were presented with a manipulation check. The manipulation check asked for the name of the newly dating parent (Jason or Kathy). This check confirms that the respondent remembers the gender of the newly dating parent and, by extension, the orientation of the liaison.

C. Results

1. Study One

I hypothesize (H_1) that high disgust sensitivity will predict a greater willingness to remove custody rights from a parent who is engaged in a gay male liaison but not from a parent who is engaged in a heterosexual male, heterosexual female or lesbian liaison.

I employ 4 separate logistic regressions to assess the relationship between participant disgust sensitivity and the decision to remove custody from the newly dating parent across all four liaison conditions. The results support the hypothesis. Participants highly sensitive to disgust were nearly five times

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removed. Jones & Fitness, *supra* note 49, at 613; *see generally* Klaus R. Scherer & Harald G. Wallbott, *Evidence for Universality and Cultural Variation of Differential Emotion Response Patterning*, 66 J. PERSONALITY & SOC. PSYCH. 310 (1994).

166. Warren E. Miller et al., *American National Election Study (ANES) Series*, RES. CTR. FOR MINORITY DATA, https://www.icpsr.umich.edu/web/RCMD/series/3 [https://perma.cc/RX4K-WCT9].

167. Jonathan Haidt et al., *Individual Differences in Sensitivity to Disgust: A Scale Sampling Seven Domains of Disgust Elicitors*, 16 PERSONALITY & INDIVIDUAL DIFFERENCES 701, 708 (1994); Bunmi O. Olatunji et al., *The Disgust Propensity and Sensitivity Scale-Revised: Psychometric Properties and Specificity in Relation to Anxiety Disorder Symptoms*, 21 J. ANXIETY DISORDERS 918, 920 (2007).

168. Gregory M. Herek, *Heterosexuals' Attitudes Toward Lesbians and Gay Men: Correlates and Gender Differences*, 25 J. SEX RSCH. 451, 454–55 (1988).

more likely to remove custody in the gay male liaison condition than participants lowly sensitive to disgust, a statistically significant differential (*p*=0.02, *OR*=4.77, 95% CI: 1.29 17.65, *n*=56). Significant results were not returned for any of the remaining three conditions. In other words, respondents highly sensitive to disgust were no more likely than respondents lowly sensitive to disgust to remove custody rights after evaluating the lesbian, heterosexual male, or heterosexual female liaison conditions (Table 1).[169]

Table 1. Summary of separate logistic regressions. Impact of high disgust sensitivity on decision to remove custody in each liaison condition.

	Independent Variable	**Odds Ratio**	***p***	**[95%**	**CI]**
Gay Male Liaison	**High Disgust Sensitivity**	**4.77**	**0.02**	**1.29**	**17.65**
	Constant	**0.15**	**0.00**	**0.05**	**0.44**
Lesbian Liaison	**High Disgust Sensitivity**	**1.18**	**0.80**	**0.33**	**4.17**
	Constant	**0.4**	**0.06**	**0.16**	**1.03**
Heterosexual Male Liaison	**High Disgust Sensitivity**	**2.25**	**0.31**	**0.47**	**10.76**
	Constant	**0.13**	**0.00**	**0.04**	**0.43**
Heterosexual Female Liaison	**High Disgust Sensitivity**	**1.83**	**0.31**	**0.57**	**5.87**
	Constant	**0.42**	**0.04**	**0.18**	**0.96**

2. Study Two.

A reasonable objection could be raised to the above analysis: perhaps disgust sensitivity simply correlates with traditional moral concerns or sexual prejudice? Both state level disgust and disgust sensitivity are known to correlate with traditional moral beliefs, beliefs that might independently

169. Highly sensitive here refers to respondents who scored in the upper third of disgust sensitivity scores. Lowly sensitive refers to respondents who scored in the lower third of disgust sensitivity scores. Results do not meaningfully change for either study one or study two, however, when the entire spectrum of disgust sensitivity scores are taken into account. *See* Appendix Tables B, B2.

explain an increased willingness to remove custody from a parent engaged in a gay male liaison.[170] Disgust sensitivity is likewise known to correlate with sexual prejudice.[171] It is possible, therefore, that disgust sensitivity simply operates as a confound in the previous analysis, with the true driver of the bias resting at the feet of traditional moral beliefs or simple sexual prejudice.[172]

To account for this possibility, I conduct a modified version of the analysis above. I again employ four separate logistic regressions to assess the relationship between participant disgust sensitivity and the decision to remove custody across all four liaison conditions. But this time I also control for the adjudicator's traditional moral beliefs and sexual prejudice. This analysis therefore holds the impact of these additional variables, traditional moral beliefs, and sexual prejudice, "constant," and thus highlight the impact of disgust sensitivity on the dependent variable after the impact of the adjudicator's moral traditionalism and sexual prejudice has been removed.

I hypothesize (H_2) that the adjudicator's disgust sensitivity will continue to predict custody removal only in the gay male liaison condition, even after controlling for the adjudicator's moral traditionalism and sexual prejudice.

Once again, these results supported the hypothesis. When controlling for moral traditionalism and sexual prejudice, participants highly sensitive to disgust were nearly nine times more likely to remove custody in the gay male liaison condition than participants lowly sensitive to disgust, a statistically significant difference (*p*=0.04, *OR*=8.78, 95% CI: 1.10 69.86, *n*=56). Significant results were not returned for any of the remaining three conditions. In other words, respondents highly sensitive to disgust were no more likely than respondents lowly sensitive to disgust to remove custody rights after evaluating the lesbian, heterosexual male, or heterosexual female liaison condition, even after controlling for the adjudicator's traditional moralism and sexual prejudice (Table 2).

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170. Ray & Parkhill, *supra* note 36, at 50; Crawford et al., *supra* note 143, at 218–19; Olatunji, *supra* note 48, at 1365–66; Kam & Estes, *supra* note 36, at 489.

171. Crawford et al., *supra* note 143, at 222; Olatunji, *supra* note 48, at 1366.

172. These data do show significant, though weak, positive correlations between disgust sensitivity and both moral traditionalism and sexual prejudice. *See* Appendix C.

Table 2. Summary of separate logistic regressions. Impact of high disgust sensitivity on decision to remove custody in each liaison condition while controlling for the impact of moral traditionalism and sexual prejudice.

	Independent Variable	Odds Ratio	*p*	[95%	CI]
Gay Male Liaison	High Disgust Sensitivity	8.78	0.04	1.10	69.86
	Moral Traditionalism	1.62	0.00	1.20	2.19
	Sexual Prejudice	0.99	0.84	0.91	1.08
	Constant	0.00	0.00	0.00	0.05
Lesbian Liaison	High Disgust Sensitivity	0.94	0.93	0.25	3.60
	Moral Traditionalism	1.10	0.42	0.88	1.38
	Sexual Prejudice	1.03	0.54	0.93	1.14
	Constant	0.10	0.02	0.02	0.67
Heterosexual Male Liaison	High Disgust Sensitivity	2.22	0.32	0.46	10.79
	Moral Traditionalism	1.02	0.90	0.73	1.42
	Sexual Prejudice	1.00	0.98	0.87	1.16
	Constant	0.11	0.02	0.02	0.72
Heterosexual Female Liaison	High Disgust Sensitivity	1.94	0.31	0.54	6.93
	Moral Traditionalism	1.22	0.08	0.98	1.51
	Sexual Prejudice	0.94	0.21	0.84	1.04
	Constant	0.14	0.02	0.03	0.77

D. Observational Case Law Analysis

Experimental methods allow one to examine the causal relationship between disgust and the evaluation of parental sexuality in a controlled, randomized setting; but asking a sample of lay respondents to decide a simulated custody dispute is meaningfully different from deciding an actual

custody dispute. There are pressures and institutional constraints that accompany real life custody decisions that can never be fully replicated in an experiment. Moreover, actual custody adjudications are decided by a sitting judge, and there is some evidence that judges are better at cabining their biases than the public at large.[173] Thus, while the experimental results demonstrate that disgust sensitivity uniquely biases the adjudication of gay male custody rights in controlled conditions, questions of external validity remain: does disgust actually bias the adjudication of gay male custody rights in the real world?

To examine this question, I first conduct an observational case law analysis to look for evidence of judicial disgust in the opinions themselves. Judicial opinions are usually muted affairs, typically aiming to convey the operation of reasoned, measured thought, and thus one should not expect to find an outright admission of disgust at a gay father's sexuality. But disgust reactions do produce an automatic, universal behavioral response. Disgusted observers fixate on the disgusting entity and then immediately attempt to distance themselves from it.[174] Disgust also produces a series of physical reactions designed to limit one's exposure to pathogenic threats, indicating a mental association between disgust and concerns of toxicity or contagion.[175] And, finally, it is known that the brain "dehumanizes" individuals who elicit disgust, processing them as "others" with less social and personal complexity than fully recognized human beings.[176]

Given that these responses are universal, it stands to reason that a judge disgusted at the thought of gay male sexuality might demonstrate some or all of these responses during the adjudication of matters that concern gay male sexuality. They might fixate, for example, on the physical contact between two male lovers. They might demonstrate an almost reflexive impulse to distance children from the presence of a gay male, or a reflexive concern at their close proximity. They might dehumanize the gay male litigant, dismissing the complexity of their desires and relationships. And finally, they might frame the gay male litigant as if they are toxic or contagious. It is towards this possibility that this case law analysis turns.

173. Guthrie et al., *supra* note 107, at 826.

174. Chapman & Anderson, *supra* note 40, at 305–06; Kelly & Morar, *supra* note 32, at 155; Rozin et al., *supra* note 40, at 12; Susskind et al., *supra* note 40, at 847.

175. Chapman & Anderson, *supra* note 40, at 305–06; Kelly & Morar, *supra* note 32, at 164; Rozin et al., *supra* note 40, at 14; Susskind et al., *supra* note 40, at 847.

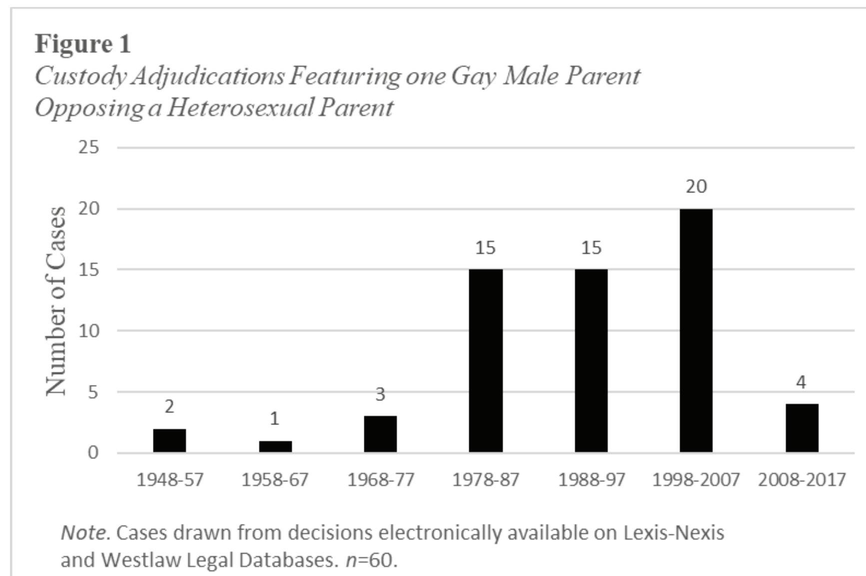
176. Harris & Fiske, *supra* note 75, at 46; Kelly & Morar, *supra* note 32, at 164; Giner-Sorolla & Harris, *supra* note 72.

E. Materials and Methods

Case analysis is based on a dataset featuring every published custody case featuring a gay male father opposing a heterosexual mother through 2017. This dataset was compiled by using Westlaw and LEXIS legal research software. Search queries were run on both using the key words "custody," "visitation," "divorce[d]," "homosexual[ity]," "gay," "bisexual," and "bi-sexual." Related studies were also consulted to identify cases that may have eluded the text-based search.[177]

Because the evaluation of parental fitness is here at issue, cases that did not rule on this issue were excluded (cases focused solely on the division of marital property, alimony, maintenance, unrelated legal errors or standing issues). Cases involving two gay male parents were also excluded as those cases failed to present the court with an opportunity to select against the non-heterosexual parent.

This selection criteria resulted in a population of sixty cases, spanning a temporal period from 1951 to 2015. The vast majority of these cases post-dated 1980 (*n*=51) (Figure 1).



Once assembled, these data were loaded into a qualitative data analysis program (Atlas-Ti) for qualitative coding. They were then coded for judicial

177. Richman, *supra note* 31; Rivera, *supra* note 31; Rosky, *supra* note 30; Shapiro, *supra* note 31.

reasoning that resembles known aspects of a disgust reaction.[178] Specifically these decisions were coded for the following:

Proximity Concerns. As stated earlier, a disgust reaction produces an automatic impulse to distance oneself from the disgusting object.[179] In the instant case, one would expect a judge disgusted at the thought of gay male sexuality to express alarm at the thought of a child being in close, physical proximity to a gay male. Accordingly, judicial concerns about the child's physical proximity to gay males were coded as "proximity concerns."

Contagion Concerns. When individuals are disgusted by an object they react as if that object is contagious or toxic.[180] Accordingly, instances whereby a judge describes a gay male father as a toxic threat or as a harm to the child's overall fitness were coded as "contagion concerns." A broad lens was used for this measure, coding not only for judicial fears of disease transfer, but also judicial concerns that the father's presence might "infect" the child with a homosexual orientation or a non-traditional gender expression.

Dehumanization. Studies demonstrate that when an individual elicits disgust they are perceived as so strikingly different from non-disgusting individuals that they fail to fully activate the primary regions of social cognition in the medial pre-frontal cortex.[181] This has led several researchers to note that disgust correlates with a "dehumanization" or an "othering" that effectively treats disgust eliciting individuals as something less complex and less social than other human beings.[182] Accordingly, instances in which a judge minimizes the humanity of a gay male father were coded as "dehumanization."

Fixation on Physical Contact. And finally, disgusted individuals are known to immediately fixate on the disgusting object.[183] In this case, unusual attention paid to the physical details of gay male intimacy were coded as "fixation."

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178. Note that this analysis specifically focuses on judicial reasoning. In other words, text merely recounting the testimony of witnesses or litigants was excluded, unless the bench specifically endorsed those sentiments.

179. Chapman & Anderson, *supra* note 40, at 305–06; Kelly & Morar, *supra* note 32, at 155; Rozin et al., *supra* note 40, at 22; Susskind et al., *supra* note 40, at 847.

180. Chapman & Anderson, *supra* note 40, at 305–06; Kelly & Morar, *supra* note 32, at 164; Rozin et al., *supra* note 40, at 14; Susskind et al., *supra* note 40, at 847.

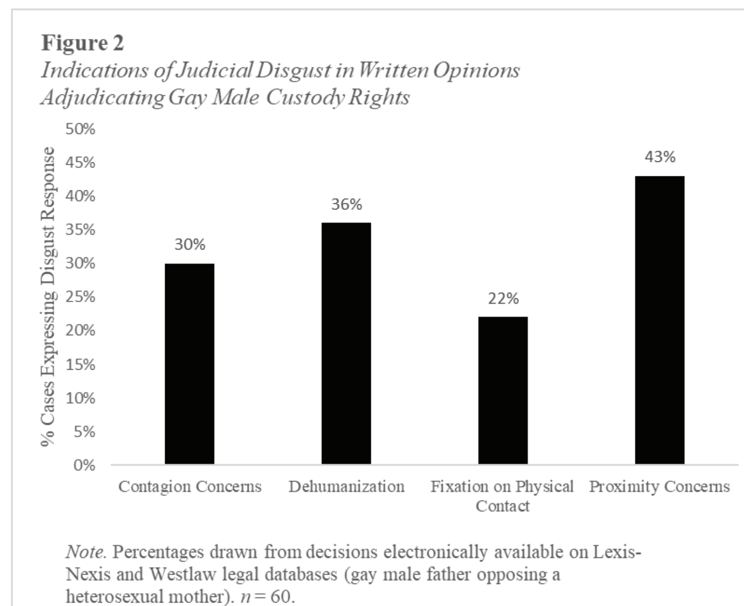
181. Harris & Fiske, *supra* note 75, at 50.

182. *Id.*; Russell & Giner-Sorolla, *supra* note 73; Giner-Sorolla & Harris, *supra* note 72.

183. Chapman & Anderson, *supra* note 40, at 305–06; Kelly & Morar, *supra* note 32; Rozin et al., *supra* note 40; Susskind et al., *supra* note 40, at 847.

F. Results

When one reviews these cases with knowledge of the disgust response in mind, one uncovers clear indications of a disgusted bench. Behavioral responses associated with the disgust response become obvious and one realizes that the logic of disgust is frequent throughout (Figure 2). In addition, oddities in these cases that have puzzled academics for decades—the frequent obsession with gay male hugging and kissing,[184] odd concerns about bedroom location,[185] and the reduction of gay male intimacy to the mechanistic acts of sex[186]—take on a new meaning when viewed through the lens of disgust.[187] What were once examples of simple anti-homosexual bias become something much deeper: the predictable expression of an automatic disgust response.



Fixation on Physical Contact. Scholars of orientation bias in judicial decision making have long noted an odd fixation on gay male physical contact. Rhonda Rivera, one of the earliest scholars to approach anti-homosexual bias in the law, wrote at length about this tendency as far back

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184. *See* Roe v. Roe, 324 S.E.2d 691, 693 (Va. 1985); *In re* Marriage of Wicklund, 932 P.2d 652, 655 (Wash. Ct. App. 1996).

185. Pulliam v. Smith, 476 S.E.2d 446, 448 (N.C. Ct. App. 1996).

186. *Id.*

187. William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 631 (1999); Rivera, *supra* note 31, at 799–800; Rosky, *supra* note 30, at 257–58; Shapiro, *supra* note 31, at 631–32.

as the late 1970s.[188] In her analysis of *Singer v. U.S. Civil Service Commission*, Rivera noted with disbelief the outsized attention given to a simple gay male kiss.[189] She was likewise perplexed that the U.S. Civil Service Commission described that simple display of affection as "flaunt[ing] [one's] homosexuality" and then held that this "flaunting," at least in part, justified the termination of his employment.[190] In that same article, Rivera was also puzzled by the unusually detailed focus upon gay male physical contact during the judicial review of liquor license revocations: "In almost all of these cases, there are lengthy descriptions of the homosexual activity found to constitute disorder. Usually the activity includes same sex dancing, same sex kissing, same sex hugging . . . . Because of the repetitiveness of the testimony, it has not been detailed here."[191]

Modern scholars, of course, have noticed this fixation as well. Julie Shapiro has written at length about the odd judicial tendency to focus on holding hands, hugging or kissing when gay male parents are before the court.[192] Likewise, Suzanne Kim noted that physical expressions of gay male affection are simply more salient to the judiciary, thus allowing such expressions to appear over the top when they are, in fact, equivalent to many heterosexual expressions that are considered mundane.[193] Gayle Rubin echoed this observation by noting that physical displays of gay male affection simply attract more judicial condemnation than comparable heterosexual displays.[194]

The cases in this dataset prove no exception to this trend. These courts focused on the physical contact between gay male fathers and other men in 22% of the cases explored. While some physical contact between lovers is certainly inappropriate when one is a parent, especially if it occurs within eyesight of a small child, in these cases one finds unusual attention paid to ordinary, everyday displays of physical affection. Innocuous loving gestures like hugging, kissing, and holding hands, behaviors that would scarcely raise

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188. Rivera, *supra* note 31, at 799–800.

189. *Id.* at 822–25; *see* Singer v. U.S. Civil Serv. Com., 530 F.2d 247, 249 (9th Cir. 1976).

190. Rivera, *supra* note 31, at 824–25.

191. Rivera, *supra* note 31, at 919 n.743. Rivera was discussing the following cases: Benedetti v. Dep't of Alcoholic Beverage Control, 187 Cal. App. 2d 213 (1960); Morell v. Dep't of Alcoholic Beverage Control, 204 Cal. App. 2d 504 (1962); Stoumen v. Munro, 219 Cal. App. 2d 302 (1963).

192. Shapiro, *supra* note 31, at 648.

193. Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 22 (2012).

194. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* SOCIAL PERSPECTIVES IN LESBIAN AND GAY STUDIES 143, 159 (PM Nardi & BE Schneider eds., 1984).

an eyebrow in the heterosexual context, are regularly discussed with great concern when gay fathers are before the court.

For example, in *J.P. v. P.W*, the Missouri Appellate Court mentioned on three separate occasions that a gay father had been known to "kiss and hold hands" with his partner.[195] In a similar fashion, the trial court in *Roe v. Roe* discussed at length the fact that a gay father's friends had been observed "hugging" and occasionally "patting [each other] on the behind."[196] The court in *Pulliam v. Smith* noted on several occasions that a gay father was seen "holding hands" and "kissing [his partner] on the lips,"[197] and in *Marriage of Wicklund*, a Washington trial court went so far as to condition a gay father's custody rights on the requirement that he refrain from "participating in displays of affection (hand-holding, kissing, etc.) with [his] partner" while in his child's presence.[198]

To put this fixation into context, a simple text search revealed that courts discussed gay male fathers "kissing," "hugging" or "holding hands" in 18% of the cases reviewed and yet these same courts never discussed "kissing," "hugging" or "holding hands" in relation to the heterosexual mothers they opposed.[199] In other words, while ordinary physical conduct between gay males drew focused judicial attention, such matters likely passed without notice in the heterosexual context.

But while the focus on gay male "hugging," "kissing" and "holding hands" is noteworthy, nothing suggests the "fixation" of disgust more than the judicial attention directed towards the physical acts of gay male intimacy.

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195. J.P. v. P.W., 772 S.W.2d 786, 793 (Mo. Ct. App. 1989). "They kiss and hold hands." *Id.* at 788. "[F]ather and Reed held hands and kissed in the child's presence." *Id.* at 793. "The father and his homosexual lover have displayed homosexual activities by holding hands and kissing . . . ." *Id.* at 794.

196. Roe v. Roe, 324 S.E.2d 691, 693 (Va. 1985). The *Roe* Court even pondered whether "patting on the behind" could be read as an appropriate (heterosexual) expression of masculine bonding, noting that "football players are sometimes seen to do such things." *Id.*

197. Pulliam v. Smith, 501 S.E.2d 898, 903 (N.C. 1998). "[T]he two men demonstrate physical affection, including kissing each other on the lips." *Id.* "Tim Tipton and the Defendant often kiss on the check [sic] and sometimes on the lips in front of the two minor children. That Tim Tipton and the Defendant would often hold hands in front of the two minor children." *Id.* at 901.

198. *In re* Marriage of Wicklund, 932 P.2d 652, 655 (Wash. Ct. App. 1996). To be fair, in *Wicklund* the trial court did also enter an order binding the heterosexual mother from similar conduct, though one suspects that it was the gay father's public affection that garnered the primary interest of the Court. *Id.*; *see also In re* J.S. & C., 324 A.2d 90, 95("[O]ne witness has testified he observed men, fondling each other, necking and petting.").

199. To be fair this is not an "apples to apples" comparison because it is safe to assume that the majority of these cases were brought because of the gay male father's dating or sexual behavior, not the heterosexual mother's dating or sexual behavior. That said, it speaks volumes that the electronically available record is devoid of cases brought by gay male fathers concerned about the "kissing" and "hugging" of their former spouse.

Consider again the almost clinical focus on the minute details of a gay father's lovemaking in *J.P. v. P.W*: "He and his homosexual lover, Harry Reed, lived in an apartment . . . . They sleep in the same bed. He and Reed perform oral sex on each other approximately once or twice each week."[200]

Or the court's almost lurid description of gay male intimacy in *Pulliam v. Smith*: "Tim Tipton and the Defendant both testified that they engaged in oral sex, in that Tim Tipton would about once a week place his mouth on the penis of the Defendant. The Defendant would also place his mouth on the penis of Tim Tipton."[201]

The *Pulliam* court even discussed gay male kissing with an odd, anatomical precision: "That Tim Tipton and the Defendant often kiss on the check [sic] and sometimes on the lips."[202]

Other courts likewise felt compelled to describe, precisely, the intimate acts of gay male fathers.[203] Again, one does not see this level of fixation directed towards heterosexual sex.

In short, a meaningful percentage of the cases within this set demonstrate a judicial fixation on the physical acts of gay male intimacy that one would expect if the bench was disgusted by gay male sexuality. There is a precise, almost clinical description of gay male physical contact, a minute attention to detail, and an especial focus on contact that involves the exchange of bodily fluids (kissing on the lips, oral sex) or germs (holding hands, hugging).

Dehumanization. As stated earlier, disgust inducing individuals fail to fully activate the primary regions of social cognition in the medial pre-frontal cortex, which results in a simplification of their motives and emotional states.[204] A judiciary disgusted at the thought of gay male sexuality, therefore, might dehumanize gay males by minimizing their physical intimacy to the base mechanics of sex or by demeaning gay male relationships as something less complex or less fulfilling than traditional human relationships.

Unfortunately, this "dehumanization" was clearly apparent in the cases reviewed, with 36% of the cases in this dataset demonstrating a striking simplification of gay male intimacy and emotional commitment. Most common was the judicial tendency to demean gay male intimacy through the

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200. J.P. v. P.W.,772 S.W.2d 786, 788 (Mo. Ct. App. 1998).

201. Pulliam v. Smith, 501 S.E.2d 898, 901 (N.C. 1998).

202. *Id.*

203. *See, e.g.*, Weigand v. Houghton, 730 So.2d 581, 584 (Miss. 1999) ("[T]hey regularly engage in homosexual activities which include both oral and anal intercourse."); *In re* J.S. & C., 324 A.2d 90, 95 (N.J. Super. Ct. Ch. Div. 1974) ("They have been present with him at 'The Firehouse', a meeting hall for homosexuals, where one witness has testified he observed men, 'fondling each other, necking and petting.'").

204. Giner-Sorolla & Harris, *supra* note 72; Harris & Fiske, *supra* note 75, at 48–50; Russell & Giner-Sorolla, *supra* note 70, at 361.

liberal use of quotation marks that, when read in context, makes clear that the court intended to separate gay male intimacy from real, true intimacy. Note the dehumanizing use of quotation marks in *Weigand v. Houghton*: "[T]he fact that the Plaintiff and his 'life partner' engage in sexual activity which include both oral or anal intercourse is repugnant to this Court."[205]

Or this court's use of quotation marks, signifying a refusal to grant gay male romantic partners the status of lovers: "[T]he father admitted to sexual relations . . . with two men whom the father characterized as 'lovers' . . . ."[206]

Or this court's use of quotation marks to question the legitimacy of an exclusive, romantic commitment: "[Father] states their relationship is 'monogamous.'"[207]

In some cases, the court's dehumanization went even further, adopting an almost anthropological tone when describing gay male intimacy, as if the bench had observed the mating behaviors of some primitive tribe. Consider this description of a gay male relationship in *Woodruff v. Woodruff*: "[T]hat the plaintiff admitted having homosexual tendencies and experienced a feeling of love for a male person named Don Hall."[208]

The *Pulliam* court then described the couple's daily interaction thus: "[T]he two men demonstrate physical affection, including kissing each other on the lips. This activity took place in the home in front of the children as the 'provider' of this couple prepared to leave for work."[209]

In both instances the court employed an odd dehumanizing distance. In the first the plaintiff did not simply love his partner, he "experienced a feeling of love" for his partner. Moreover, the plaintiff did not love Don Hall, he loved "a male person named Don Hall." In the second the couple's physical affection is dissected in a clinical manner, and then quotation marks are used to indicate that while one member of the couple may provide for his partner his contribution is somehow a pale copy of a provider in an authentic, human relationship.

Courts also routinely reduced gay male intimacy to the mechanical acts of sex, depicting these intimate moments as mere physical acts rather than expressions of human love. Once again, the court's description of gay male intimacy in *J.P. v. P.W.* proves instructive: "He and his homosexual lover, Harry Reed, lived in an apartment. They kiss and hold hands. They sleep in

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205. Weigand v. Houghton, 730 So.2d at 590 (McRae, J., dissenting) (quoting the findings of the lower court).

206. J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 866 (Mo. Ct. App. 1982).

207. J.P. v. P.W., 772 S.W.2d 786, 788 (Mo. Ct. App. 1989).

208. Woodruff v. Woodruff, 260 S.E.2d 775, 776 (N.C. Ct. App. 1979) (quoting the findings of the trial court).

209. Pulliam v. Smith, 501 S.E.2d at 904.

the same bed. He and Reed perform oral sex on each other approximately once or twice each week."[210]

As does the equally reductive description of gay male intimacy in *Pulliam v. Smith*: "[Plaintiff] would about once a week place his mouth on the penis of the Defendant. The Defendant would also place his mouth on the penis of [the Plaintiff]."[211]

And finally, these decisions contained at least one case that dehumanized both a gay father's religious beliefs and the sanctity of his same-sex commitment. In *J.L.P.(H.) v. D.J.P.* a Missouri Appellate Court affirmed a visitation restriction that prohibited a gay male father from taking his child to the church of his choice because, in the Court's opinion, it "aggressively promote[d] the practice of homosexuality" and "recognize[d] a 'holy union' between homosexuals as the equivalent of marriage."[212]

Proximity Concerns. One of the primary indications of a disgust response is the instinctive desire to withdraw from the disgusting object, to place physical distance between the object and the human of concern. In these cases, one might expect a bench disgusted by gay male sexuality to express alarm at a child's close proximity to a gay male father, or to other gay males of his acquaintance.

Taken literally, one does see this concern in 43% of the cases reviewed here.[213] Numerous cases express alarm at a gay male father hugging, kissing, or holding hands "in the presence" of or "in front of" the child(ren) at issue.[214] Others express concern at the mere thought of a child being "in the presence" of gay males regardless of their behavior.[215] And while one can find some of these concerns in heterosexual cases as well (proximate exposure to inappropriate romantic behavior can be prohibited in heterosexual cases too), they are rarely invoked when the activities proximate to the child are as commonplace as hugging, kissing, or gathering with friends.[216] It also seems unlikely that these concerns are expressed in nearly half of the traditional heterosexual cases before the courts.

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210. J.P. v. P.W., 772 S.W.2d at 788.

211. Pulliam v. Smith, 501 S.E.2d at 901. *See also* Weigand v. Houghton, 730 So. 2d 581, 584 (Miss. 1999) ("[T]hey regularly engage in homosexual activities which include both oral and anal intercourse.").

212. J.L.P.(H.) v. D.J.P., 643 S.W.2d at 872; *see also In re* Marriage of Wicklund, 932 P.2d 652, 656 (Wash. Ct. App. 1996) ("The trial court thought its restrictions were necessary in order to protect the children from the conflict between homosexuality and their religion."); J.P. v. P.W., 772 S.W.2d at 786–93.

213. *See supra* Figure 2.

214. *See Wicklund*, 932 P.2d at 654–56; J.P. v. P.W., 772 S.W.2d at 786–93.

215. *See* Boswell v. Boswell, 701 A.2d 1153, 1155 (Md. Ct. Spec. App. 1997).

216. Rivera, *supra* note 31, at 870; Shapiro, *supra* note 31, at 625–26.

More evidence of this disparity can be seen in the restrictions placed on gay male custody. While it is certainly nothing new for a court to make visitation contingent upon a parent agreeing to keep their significant other away from their child (if the significant other poses some harm to the child), these cases suggest a far higher incidence of such orders when gay male fathers are before the court. In 30% of the cases in this dataset, either an appellate or a trial court issued an order stating that a gay male father must keep his male partner(s) away from his children.[217] In comparison, courts in these cases issued such restrictions upon opposing heterosexual mothers in only one of the cases examined here (2%).[218]

In some cases, the court's desire to keep children physically distanced from gay men went even further.[219] A Maryland court, for example, ordered a gay father's visitation rights contingent upon his willingness to keep his children physically distanced from *all males* who have "homosexual tendencies or . . . persuasions."[220] On review the appellate court noted, correctly, that complying with this order was functionally impossible—it required the father to ascertain the sexual orientation of all men that the child might come into contact with, whether in public or in private.[221] In a similar fashion, the trial courts in both *Marriage of Dortsworth* and *J.L.P.(H.) v. D.J.P* prohibited gay fathers from taking their children to churches that were known to cater to gay men,[222] and a gay father in *In re J.S. & C.* was prohibited from taking his child to a meeting hall that catered to gay men.[223] In an even more extreme case, a gay father was allowed visitation only in locations devoid of *all* "*unrelated male[s]*."[224]

There are also cases in this dataset that express truly unusual proximity concerns. For example, in *Pulliam v. Smith* the trial court made a point of highlighting the fact that a gay father's bedroom is directly across the hall

217. Data on file with the author. Collected from the study conducted by the author as has been outlined in this article.

218. *Wicklund*, 932 P.2d at 655.

219. While the restrictions discussed in this paragraph pose obvious hardships for the gay male fathers involved, they can pose other, not so obvious hardships as well. For example, in Birdsall v. Birdsall, a gay male father was ordered to remove all "friend[s], acquaintances or associate[s] who are known to be homosexual" from any location used for visitation hours. This created a unique hardship for this father because he lived with two roommates who also happened to be gay men. *In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 288 (Cal. Ct. App. 1988).

220. *Boswell*, 701 A.2d at 1155.

221. *Id.* at 1157–58.

222. *See In re* Marriage of Dorworth, 33 P.3d 1260, 1261 (Colo. App. 2001); J.L.P.(H.) v. D.J.P., 643 S.W.2d at 866.

223. *In re* J.S. & C., 324 A.2d at 95.

224. Roberts v. Roberts, 489 N.E.2d 1067, 1068 (Ohio Ct. App. 1985) (emphasis added).

from his child's bedroom ("Both Tipton and the defendant are gay. They sleep in the same bed which is located in a bedroom across the hall from the children's bedroom").[225] On review, the North Carolina Supreme Court reiterated this concern and added the additional detail that the two bedrooms were a mere three feet apart: "The evidence further tended to show that the door of the bedroom occupied by defendant-father and Mr. Tipton was directly across the hall and approximately three feet from the door to the children's bedroom."[226] Both the appellate and trial courts made these precise observations despite uncontroverted testimony that the father's door was never open during sexual activity.[227]

In a similar fashion, the court in *Weighland v. Houghton* felt compelled to note that the father and his male partner slept in a bed next to the child's bed on family trips: "While on vacation trips with his father and Wayne, Paul slept in the same hotel room with the two, sleeping in his own bed while David and Wayne slept in the adjacent bed."[228] Again, the court made this observation without any indication that sexual activity, or anything else improper, occurred on these trips. Rather it was the mere proximity to the sleeping couple that seemed to alarm the court.[229]

Contagion concerns. The core function of disgust is to repulse humanity from objects or individuals that might present a pathogenic threat.[230] A judge who is disgusted at the thought of gay male sexuality might view a gay male father in a similar light, as an object of toxicity that is to some degree contagious. In 30% of the cases in this dataset, the courts discussed gay male fathers in language that suggested such a view.

First and foremost are the handful of cases that depict gay male fathers as literal pathogenic threats. For example, the dissenting opinion of an Indiana appellate court that affirmed the denial of a gay father's custody rights was based primarily on the rather far-fetched argument that H.I.V. could be transferred during the extraction of his child's tooth:

> [I]t is theoretically possible for a parent to infect a child with the AIDS virus while extracting a child's tooth. Under these circumstances, a parent "might" infect his child with AIDS. Because the statute clearly invests the trial court with a broad discretion in this area, I believe the trial court did not

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225. Pulliam v. Smith, 476 S.E.2d 446, 448 (N.C. Ct. App. 1996).

226. Pulliam v. Smith, 501 S.E.2d 898, 903 (N.C. 1998).

227. *Id.*

228. Weigand v. Houghton, 730 So. 2d 581, 584 (Miss. 1999).

229. *See id.*

230. Curtis & Biran, *supra* note 39, at 17–31; Kelly & Morar, *supra* note 32, at 158–59; *see* generally Tybur et al., *supra* note 39.

> manifestly abuse its discretion by denying appellant his visitation rights under these circumstances.[231]

Likewise, a Maryland trial court considered the possibility that the "residue" of a gay male father's bodily fluids might transfer disease to his child. The court then chided this father for dispensing communion wafers at church after discovering that he was H.I.V. positive, implying that by touching the wafers he might infect others.[232]

To be fair, in both cases these fathers did have a contagious disease (H.I.V.), but in both cases the courts entertained rather implausible infection risks, arguably reflecting a biased tendency to view the gay male father as a contagious threat.

Courts also employed the logic of contagion when discussing the sexual orientation of gay male fathers, framing homosexual orientation, literally, as something that might transfer from the parent to the child.[233] For example, in *In re J.S.C.*, the trial court relied on testimony that that the father's orientation, through mere exposure, could transfer to the son:

> [T]he father's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development . . . . [I]t is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development.[234]

In *Marlow v. Marlow*, an Indiana appellate court put forward a similar concern, worrying openly that a gay father might "orient [his] children to the gay lifestyle . . . by taking them to gay religious services and ceremonies, gay social events and gay artistic performances."[235] In a similar fashion the court

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231. Stewart v. Stewart, 521 N.E.2d 956, 967 (Ind. Ct. App. 1988) (Conover, J., dissenting).

232. North v. North, 648 A.2d 1025, 1028–31 (Md. Ct. Spec. App. 1994).

233. The idea that one might "catch homosexuality" is, of course, a trope in anti-homosexual discourse, usually presented through the application of two common homophobic stereotypes: the "recruiting" stereotype and the "role modeling" stereotype. Leinauer, *supra* note 30, at 15. The "recruiting" stereotype depicts gay men and women as individuals who actively recruit children to homosexuality. This charge was a favorite of Anita Bryant in the 1970s." ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY (1st ed. 1977) ("As a mother, I know that homosexuals cannot biologically reproduce children; therefore, they must recruit our children."). The "role modeling" stereotype alleges that gay individuals merely influence the sexual orientation of children by passive example. Rosky, *supra* note 30, at 295. This latter stereotype has also been advanced, as an affirmative claim, by well-known academics. Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RSCH. 752, 752–70 (2012); *see generally* Lynn Wardle, *The Potential Impact of Homosexual Parenting on Children*, U. ILL. L. REV. 833 (1997).

234. *In re* J.S. & C., 324 A.2d at 96.

235. Marlow v. Marlow, 702 N.E.2d 733, 737 (Ind. Ct. App. 1998).

in *Marriage of Cabalquinto* expressed concern that frequent contact with a gay male father might "lead" his children to a homosexual "preference."[236]

The frame of contagion can also be seen in simple word choice. Throughout these cases courts frequently expressed concern that a child might be "exposed" to a gay male father.[237] While use of the word "expose" can be explained away as a simple editing preference, it does frame the gay father as a harmful contagion. Consider, for example, the court's framing of expert testimony in *In re J.S. & C.*: "The first question broached by these experts was whether exposure to the father's homosexuality might be deleterious to the children. They all agreed that homosexuality was not *per se* a mental disorder and that a balanced exposure would not be harmful to the children."[238]

While the testimony recounted was from others, the word choice of its summation was the court's, and the court chose to frame their first question as "whether *exposure* to the father's homosexuality might be deleterious to the children."[239] The court then reported that a "balanced exposure" would not be harmful to the children, framing the father's sexual orientation as something akin to a poison rendered inert by a full stomach.[240]

Use of this "exposure framing" was common in the cases explored, with the father's sexual orientation or the father's acceptance of non-heteronormativity described, if taken literally, as a contagion. For example, in *In re J. S. & C.*, the court prohibited a gay father from "expos[ing]" his child to "any activities or publicity concerning the homosexual civil rights movement."[241] The contagion, therefore, was the push for orientation equality. In *Marriage of Dortworth*, the court determined that it was not in the child's best interest to be "exposed" to the father's "gay lifestyle."[242] The

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236. *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) ("In his oral opinion, the trial judge expressed a strong antipathy to homosexual living arrangements. He expressed the view that 'a child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality].'").

237. *See, e.g.*, Boswell v. Boswell, 701 A.2d 1153, 1157 (Md. Ct. Spec. App. 1997) ("[O]ur narrowly focused consideration of whether the evidence supports a finding that Ryan and Amanda are adversely affected by such exposure."); Hogue v. Hogue, 147 S.W.3d 245, 247 (Tenn. Ct. App. 2004) ("[H]e . . . is RESTRAINED, pending a final hearing in this cause, from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle.").

238. *In re* J.S. & C., 324 A.2d at 94 (emphasis added).

239. *Id.* (emphasis added).

240. *Id.*

241. *Id.* at 92.

242. *In re* Marriage of Dorworth, 33 P.3d 1260, 1261 (Colo. App. 2001); *see also Hogue*, 147 S.W.3d at 247 ("[H]e . . . is RESTRAINED, pending a final hearing in this cause, from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay

contagion, in this case, was the very lifestyle of existing as a gay man. In a similar fashion the court in *Boswell v. Boswell* inferred that exposure to a gay male father's "present or future . . . sexual relationships" would be "*per se* harmful to the children by virtue of the relationship's inherently 'inappropriate' nature."[243] The contagion thus being the mere acquaintance with a gay male relationship.

In all of the above cases the court depicted the gay male father as a contagious threat, either literally in the pathogenic sense, or normatively in the cultural sense. Through both logic and word choice one can see a judiciary viewing gay male fathers as a contagion, as one would expect if the bench found the thought of gay male sexuality disgusting.

G. Semi-Structured Interviews

And finally, I conducted semi-structured interviews to obtain detailed information from attorneys and gay male fathers who have dealt with these cases first-hand. These interviews supplement the experimental results with an extra measure of external validity, and they do so in an open ended, conversational format that allows for greater nuance than the observational case analysis.

1. Materials and Methods

I recruited gay male parents who adjudicated custody disputes and the attorneys who represented them for the interview portion of this research.[244] I contacted known lawyers and applicable parents, in addition to organizations with an interest in these matters, to identify potential respondents. The final interview pool contained thirty respondents: twenty lawyers and ten gay male parents.[245] All respondents had firsthand experience with at least one gay male custody dispute.[246]

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lifestyle."); *In re* Marriage of Walsh, 451 N.W.2d 492, 493 (Iowa 1990) (expressing relief that a gay male father refrained from "expos[ing]" his child to his "lifestyle").

243. Boswell v. Boswell, 701 A.2d 1153, 1169 (Md. Ct. Spec. App. 1997).

244. The survey obtained Institutional Review Board approval from the [Redacted] on June 16, 2017 (FWA#00006252).

245. Four of the attorneys in this set were also clients, meaning that they suffered through their own divorces as gay male fathers in addition to serving as lawyers who regularly handle such cases. To avoid double counting they are simply listed as "attorneys" here, though they were questioned about their experience as clients as well.

246. All respondents were asked the same questions (over the phone), but conversation and follow-up questions were allowed to flow from their initial responses.

2. Results

As expected, a sizeable 23% percent of respondents believed that judicial disgust did, in fact, bias their proceedings.[247] Of note is the fact that all of these respondents were attorneys, likely due to the fact that all but one of the incidents reported occurred within chambers, well out of the client's eyesight.

Most of these attorneys reported a general feeling that the judge found their client's sexuality, and especially the specifics of their client's sex lives, gross. Consider the comments of these two attorneys:

> With some judges, usually you know the older ones, when I came in [to chambers] with a gay client they would look uncomfortable. Like "no one wants to get into this but here we go."[248]
>
> Yeah I would say with the gay dads, when you had to talk about their sex lives, the judges usually made clear that they just didn't want to hear it—at least not in detail. Because—like you said, disgusting. Just the facts and quickly. You don't get this with other clients.[249]

On the more specific side of the spectrum, three attorneys recounted actual instances of communication, through facial gestures, of what appeared to be a disgust response. One attorney recounted a knowing eye-roll.

> One judge in particular, and this was a few years ago . . . if we ever talked about sex stuff or a new relationship, he would kind of roll his eyes like "this again." I definitely think he was repulsed, and I think he assumed I was as well.[250]

While two others recounted judicial facial expressions that closely resembled the "gape face," a known disgust response that mimics the facial expression that precedes vomiting:[251]

> [W]hen their relationships came up, they would, you know, crinkle their faces up.[252]
>
> I noticed the judge curling up his face [when testimony regarding a same-sex affair was presented].[253]

As stated above, none of the gay male fathers reported instances of disgust from the bench, but several did recount expressions of disgust from other

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247. Qualitative Telephone Interviews with Anonymous Participants (Aug. 8th, 2017).

248. *Id.*

249. *Id.*

250. *Id.*

251. Paul Ekman, *Are There Basic Emotions?*, 99 PSYCH. REV. 550, 551 (1992); KELLY, *supra* note 62, at 64.

252. Interviews with Anonymous Participants, *supra* note 247.

253. *Id.*

court personnel. While not directly relevant to the specific focus of this article (judicial decision making), these stories do support the broader hypothesis that disgust towards gay males biases the adjudication of their custody rights. One respondent, for example, reported a court appointed home inspector that was unwilling to look him in the eye, a behavior that he interpreted as an expression of disgust with his current (same-sex) relationship.[254] Another recounted similar treatment during a court appointed parenting class:

> Yeah, so, in classes, they won't look at us. They won't acknowledge anything that we say. They'll physically turn their bodies away from us when we are participating in classes and they will not acknowledge any of the thoughts and ideas that we share.[255]

This father likewise attributed this response, at least in part, to disgust.[256]

But while only 23% of respondents claimed instances of judicial disgust in their own proceedings, a full 73% believed that there was an issue with disgust towards gay male fathers more generally. As one attorney put it:

> Every attorney in this area knows that a lot of judges get turned off by it. They don't want to think about these men as sexual beings. It disturbs them. Usually you try to avoid the topic.[257]

The gay male fathers in the sample echoed a similar sentiment. They were told by friends or support groups that judicial disgust can play a real factor in custody proceedings ("I've heard stories sure. Judges looking at you like you're the scum of the earth or contagious"),[258] even if they could not recount any expressions of judicial disgust in their own cases.

In fact, the general acknowledgment that judicial disgust impacted these hearings spurred many in the sample to adopt strategies specifically designed to lessen its impact. The most common strategy pursued was simple "judge avoidance," the practice of striking judges that they suspected were less comfortable with gay males in general.[259] Attorneys also exercised judicial avoidance by simply timing their motions. In many jurisdictions judges at the trial level "rotate," moving (after a certain period of time) from the criminal

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254. "[T]here was one [home inspector] that would not meet our eyes. And [she] would look at other people." *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. Consider the following response: "Right, because I think like most courts, each attorney has one, the ability being to strike one judge. So, yeah. I've got my little list of . . . it's usually the same judges [that] I'm not gonna bring an LGBT case [to]." *Id.*

docket to the civil docket and so forth. Lawyers hoping to file for divorce can thus wait for a "gay friendly judge" to rotate onto the family docket ("Our lawyer was waiting for who she felt would be a good judge for us"),[260] or file quickly before a friendly judge rotated off ("We picked [that day] because that was the judge's last day on the bench before he was gonna rotate to a different docket").[261]

Attorneys occasionally avoided bias by picking the forum itself. In cases where the proper forum was up for debate attorneys could occasionally argue for the forum that they perceived to have the least bias, or the forum that offered more control over the choice of judge:

> [B]ut I do think that I did some cases in the city where they probably should have been done in the county because there was a little more control over it. In the county there's, I don't know, fifteen judges or twenty judges or something that you could get, and in the city, it's basically two. If you didn't like the one, you [inaudible] choose for the other one. There was a lot more control over what you could do. And if you knew that Judge [redacted] was gonna be there, you knew whether that was gonna be an issue or not.[262]

Many of the attorneys sampled also attempted to avoid judicial disgust by keeping their client's sexuality out of mind. In these instances, the orientation of the gay father was known to all parties but their lawyers made every effort to suppress references to their sexuality. Normal sexual activity or instances of sexual intimacy were recast in platonic terms. One lawyer described this strategy as an effort to "de-sex" his client:

> I think a way of handling . . . [these] issues is to try to de-sex them as much as you can, both sexual activity, and also in terms of gender roles. Which is interesting, I'm just talking out loud here, you'd think in some ways, you would want to make it sound more like, "Well, this is just like a heterosexual family." But I think instead of that, I tend to say, "Well, this is more like a friendship, or more like a . . ." I think it's that fear of getting into sex with judges, or having them think about it.[263]

One attorney even admitted that he would occasionally settle matters quickly in order to avoid discussing his client's sexuality in court:

260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* It should be noted that the attorney responding here was discussing perceived disgust-like bias against *both* gay male fathers and lesbian mothers.

> Yeah, it may be better to settle a case on not the greatest terms, rather than have a judge hear about the sexual allegations, so that would be a way of avoiding it altogether or as much as you could.[264]

These interviews also provided indirect evidence of judicial disgust, descriptions of judicial behavior that resembled a known disgust response even if that connection was not made by the respondents themselves. For example, both attorneys and their clients described instances of clear judicial dehumanization which is, again, a known reaction to individuals that elicit disgust.[265] To take a particularly disturbing example, two respondents noted that their judge appeared unable to take reports of their domestic abuse seriously. Consider this revealing statement from an attorney.[266] His description depicts a courtroom that viewed the physical abuse of his client as something less complex and emotionally scarring than "ordinary" domestic abuse, to the point where it appeared to be viewed as amusing rather than problematic:

> Being abused by a straight white guy. You know, that I usually get an eye roll. Like, "Of course, of course that's happening." This was more like the eye roll of, "Yep, silly faggots doing silly faggot stuff." You know, it seemed very derogatory, the look that I had in the courtroom that day from some of the people who were there. And I will tell you, even on that day in particular, more people stayed in the courtroom to watch that drama play out than normal . . . So I think that was probably the thing that was minimized the most.[267]

In a similar fashion, numerous respondents reported that judges appeared unable to view gay fathers as both "fathers" and "sexually active gay men" at the same time, as if membership in the latter category eliminated the possibility of being a full social being with complex emotional commitments:

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264. *Id.*

265. Harris & Fiske, *supra* note 75.

266. This particular respondent's lawyer was also interviewed, and he agreed with his client's view of the matter ("[I was] like, 'What? This is not right.' . . . 'Oh this is typical, you've got the old guy and the young guy and they're lovers and now they have a lover's quarrel.' I don't know . . . definitely [there were] some looks . . . not the typical looks I get when I have an abused woman . . ."). Interviews with Anonymous Participants, *supra* note 247.

267. *Id.* This reaction may also reflect ingrained notions of masculinity, a notion that males are less scarred by interpersonal violence than females. But human behavior is rarely the result of just one motivating variable. Even after acknowledging the likely role of gender norms one can still suspect the causal influence of disgust.

> She just couldn't hold this image that they managed to create of a sexually active gay man and dad in her mind at the same time. That really is what it felt like. I've done workshops with gay fathers where I've raised this issue and it definitely has resonated.[268]

One attorney even reported that his judge refused to refer to either of the two fathers before the court as "dad" because he found it confusing:

> [W]hen they were giving testimony it would sort of refer to the dads and the judge did not want to identify them as dads. He said, "You know what, we're not gonna call them dads in this courtroom because that's confusing me and I need to not be confused here." And I remember that, I remember that the guys looked pretty sad about that.[269]

Still other respondents reported a fixation on gay male sexuality that one would expect if the judge overseeing the case found the concept of gay male sexuality disgusting. One respondent, a lawyer who had represented several gay male fathers in custody matters, even claimed that "ordinary" sexual activity could be colored by this bias:

> He would watch pornography and masturbate while the babies were asleep . . . You know, shit like that would come out and we're like, "What is this even?" I mean, how many parents do that if they're on the telephone, right? You know, it felt like it was just really . . . and it felt so messed up and inappropriate. We were sort of relying on the fact that the judge would see it for what it was. And instead, like I said, it worked. But it was that kind of thing.[270]

And finally, one respondent, an attorney, reported that judges often framed her gay male clients as contagious threats, as one would expect if the bench viewed these fathers with disgust:

> So the combination either of that they were a disease that would infect the kids, or that . . . it's a crossover of sort of homophobia and disability discrimination, is that you can't raise a kid if you yourself are sick and it would be unfair to

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268. *Id.* ("I think that the court system still is having some difficulty embracing the concept of gay men being parents. Not in the abstract, but in reality and fact.").

269. *Id.* Of course referring to both parents as "dad" can actually be confusing in a simplistic sense. But that is a level of confusion that a court should be able to overcome, especially when the refusal to do so results in the litigants feeling dehumanized, as they apparently did here.

270. *Id.*

> the kid to place them with a sick parent. So we dealt with that a lot too.[271]

III. Discussion

The data collected here strongly suggest that judicial disgust at the thought of gay male sexuality significantly threatens the parental rights of gay male fathers during custody disputes. Interviews with gay male fathers and their attorneys report that judicial disgust negatively impacts the evaluation of gay male parental fitness, and observational analysis of relevant decisions likewise demonstrates trends and frames that are consistent with a disgust response. These observational studies provide a great deal of external validity to the experimental data obtained, which found that individual disgust sensitivity predicts a greater willingness to remove custody from parents expressing gay male sexuality but not from parents expressing heterosexual or lesbian sexuality. It should also be noted that these experimental data are consistent with literature from psychology and political science that likewise demonstrate a significant, causal relationship between disgust and the negative evaluation of gay men.[272]

A. Legal Implications and Proposed Mitigations

First and foremost, it must be stressed that the impact of disgust on the adjudication of gay male custody rights violates both normative and formal legal constraints. Normatively, it almost goes without saying that judicial disgust at the thought of legal, private sex should not result in gay male fathers losing contact with their children. This evaluative impact would be an instance of "misdirected" or incidental disgust, because disgust at the thought of legal, private sexual activity is influencing the judicial evaluation of something completely unrelated to that disgust elicitor: the parental fitness of a gay male father. Even supporters of disgust's influence on legal decision making concede that it is a moral error to allow instances of incidental disgust

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271. *Id.*

272. Numerous psychological studies have demonstrated a link between disgust sensitivity and the negative evaluation of gay males. *See generally*, Cottrell & Neuberg, *supra* note 35; Inbar et al., *supra* note 33; Tapias et al., *supra* note 35. Psychological studies have also demonstrated a link between induced disgust and the negative evaluation of gay men. *See generally*, Cunningham et al., *supra* note 34; Dasgupta et al., *supra* note 33; Inbar et al., *supra* note 33. Studies in political science have likewise demonstrated this connection for both disgust sensitivity and induced disgust. *See generally*, Casey, *supra* note 36; Crawford, et al., *supra* note 143; Kam & Estes, *supra* note 36; Ray & Parkhill, *supra* note 36.

to impact legal decision making.[273] As a moral matter such results should offend our sense of justice, regardless of the legal formalities involved.

Formally, in these particular legal decisions the influence of disgust also violates standing precedent in a majority of U.S. jurisdictions. As discussed earlier, the majority of U.S. states apply the "Nexus Test" when evaluating the impact of a parent's sexuality on their parental fitness, and this test requires a nexus between a parent's sexual behavior and harm to the child before that sexual behavior can be deemed relevant to a parental evaluation.[274] When a judge allows mere disgust at the thought of gay male sexuality to bias the evaluation of parental fitness, without first linking that sexuality to a clear harm to the child, that judge is failing to apply the Nexus Test as precedent demands.

But these conclusions, of course, simply raise the question: what is to be done? Fortunately, there are a variety of mitigations to consider and a good number of them have already been attempted to combat the influence of another "unconscious" bias on judicial decision making: implicit bias.

The most obvious mitigation to consider is mandatory training, and we have a solid template from which to start. California's Assembly Bill 242 from the State's 2019 legislative session requires all court staff (including judges) to attend implicit bias training every two years.[275] It likewise orders the State Bar to include implicit bias training and the promotion of bias-reducing strategies within its mandatory continuing legal education program.[276] A similar bill could add additional training for affective biases (including disgust), and possibly other "unconscious biases" that have been shown to impact legal decision making, biases like anchoring, framing, egocentric bias, and hindsight bias.[277] In short, expanding mandatory training beyond implicit bias to include instruction on "unconscious bias" more generally would better prepare our legal decision makers to combat the full range of biases that they likely possess unwittingly.

Will such training bear fruit? In terms of reducing bias generated by disgust there are some reasons to be hopeful. Recall the research on the dehumanizing aspect of disgust conducted by Harris and Fisk. In a series of experiments, they demonstrated that disgust eliciting individuals failed to

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273. Kahan, for example, acknowledges that it would be a "horrible" mistake to "accept the guidance of disgust uncritically," and concedes that "improperly directed disgust" is a moral error. Kahan, *supra* note 37, at 63, 69. Likewise Miller acknowledges that to condemn someone merely because a morally irrelevant trait disgusts us is normatively improper. MILLER, *supra* note 37, at 21, 198.

274. Shapiro, *supra* note 31, at 635.

275. Cal. Gov. Code § 68088.

276. Cal. Bus. & Prof. Code § 6070.5(a).

277. *See generally* Guthrie et al., *supra* note 107 (listing unconscious biases).

activate the medial prefrontal cortex (mPFC), a region strongly associated with social cognition. They concluded that this led to a dehumanization of the disgust eliciting individual, a perception of the individual as less complex and social than full human beings.[278] In subsequent experiments they attempted to mitigate that effect by asking respondents to infer a unique individuating trait of the disgust influencing individual (in this case, their favorite vegetable). They found that when observers considered the unique traits of a disgust eliciting individual they did in fact activate the medial prefrontal cortex, implying that they were once again engaging with the observed individual as a full, complex, social being.[279]

In a related study researchers concluded that "cognitive reappraisal," reappraising "an emotion-eliciting situation or event in a way that diminishes the intensity of the emotional experience," can mitigate the biasing impact of disgust on decision making.[280] Specifically, when individuals were asked to evaluate the morality of a disgusting but harmless activity those that spent several moments considering the emotion invoked and how it related to their moral evaluation demonstrated a significantly more deliberative moral evaluation than those who did not.[281] They were also significantly less likely to find the disgusting but harmless activity immoral than those respondents who did not engage in the reappraisal exercise.[282]

Both of these findings suggest that intentional mental exercises might be able to lessen the bias associated with disgust and perhaps mitigate its impact on legal decisions where its influence is inappropriate or formally barred. While more research is certainly needed there is reason to suspect that mandatory training, especially training that includes instruction in bias reducing strategies, could mitigate problematic disgust bias in the law.

There are also a variety of courtroom mitigations that should be considered, and once again the law's response to implicit bias can serve as a model for these efforts.[283] For example, Judge Milton Souter in Alaska is known to instruct jurors to "race switch" when considering criminal cases

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278. Harris & Fiske, *supra* note 75, at 48–50.

279. *Id.*

280. Matthew Feinberg et al., *Liberating Reason from the Passions Overriding Intuitionist Moral Judgments Through Emotion Reappraisal*, 23 ASS'N PSYCH. SCI. 788, 789–90 (2012).

281. Specifically, participants were asked to write five sentences in response to the following question: "What happened in your head from the first moment you felt the emotion until the moment you decided whether this action was right or wrong?" *Id.* at 790–91.

282. *Id.*

283. For a thorough discussion of these court room mitigations, see generally Kang et al., *supra* note 105; Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835 (2016). These authors deserve credit for many of the examples listed here.

that seems vulnerable to the impact of race related implicit bias. Jurors are instructed to conceptualize the case with the race of the defendant "switched," from African American to White for example, and then consider if this switch would impact their verdict.[284] In a related manner Judge Louis Trosch Jr. of North Carolina holds hearings that appear vulnerable to implicit bias in the morning because research suggests that stress and time constraints increase the likelihood of cognitive error (including implicit bias).[285] And Judge Mark Bennet, one of the judiciary's leading advocates for implicit bias mitigation in the law, instructs juries on the perils of implicit bias, discusses the topic during *voir dire* and routinely instructs jurors to pledge that they will make every available effort to expunge bias from their decision making.[286]

Similar efforts could assist the mitigation of impermissible disgust bias as well. While research on their efficacy for that purpose is certainly called for, many of these interventions appear sufficiently similar to the "cognitive reappraisal" discussed above to merit some hope that they may prove effective in this application as well.

And finally, activists, litigators and academics should pool resources to develop a "best practices" resource for attorneys and judges who are struggling with the biasing impact of disgust. Similar efforts are already in place to assist the mitigation of implicit bias and they would likely bear fruit when directed toward this bias as well.[287] As reported in the interview portion of this research, litigators who routinely handle gay male custody cases have already developed, on their own, strategies to minimize disgust related bias. A formal pooling of experience and relevant research could provide the opportunity to develop other techniques and provide both attorneys and judges with less experience in these matters an opportunity to learn from the experience of others.

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284. James McComas & Cynthia Stout, *Combating the Effects of Racial Stereotyping in Criminal Cases.*, CHAMPION 22 (1999).

285. Roberts, *supra* note 283, at 870.

286. Kang et al., *supra* note 105, at 1181–83. ("I pledge . . . [that] I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.").

287. The American Bar Association established a task force to develop and make available jury instructions designed to mitigate implicit bias. Jennifer Elek & Paula Hannaford Agor, *Can Explicit Instructions Reduce Expressions of Implicit Bias? New Questions Following a Test of a Specialized Jury Instruction*, NAT'L CTR. STATE COURTS (Apr. 2014), https://papers.ssrn.com/abstract=2430438 [https://perma.cc/C48J-UESX]; *see also Implicit Bias Initiative*, A.B.A. SECTION LITIG., https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/ [http://perma.cc/YRG3-DJSJ]; *Gender and Racial Fairness: Resource Guide*, NAT'L CTR. STATE COURTS, https://www.ncsc.org/information-and-resources/archived-items/access-and-fairness/gender-and-racial-fairness/resource-guide [http://perma.cc/X83C-U2V6].

B. Academic Implications

The data gathered here should also serve as a clarion call for legal scholars to more fully embrace what this article has termed the "second wave" of legal realism: the study of unconscious biases, mental heuristics, implicit associations and, yes, affective biases that impact legal decision making. On the specific bias of disgust there is clearly more work to be done. The impact of disgust on the evaluation of gay males is likely not limited to custody hearings. There are also other "disgust relevant" populations that may suffer similar bias from either the bench or other legal agents. There is evidence, for example, that homeless individuals and intravenous drug users elicit disgust.[288] Disgust related bias might significantly impact their treatment from the bench or from officers on the street. Within Hindu culture certain castes have been found to elicit disgust, and that fact may be relevant to certain employment discrimination cases (discrimination across caste lines is a known problem in Silicon Valley, for example).[289] Additional work on this specific bias, particularly empirical work focused on problems specific to the law, is clearly needed.

The lens of disgust can also provide a deeper view into legal rationales that were once considered simple expressions of anti-homosexual bias or, at best, unfortunate incidents of offensive framing. Consider, for example, *Gay Lib vs. The University of Missouri*.[290] Gay Lib was a gay student organization at the University of Missouri whose stated purpose was to "develop an understanding of the homosexual" and "alleviate the unnecessary burden of shame felt by the local homosexual population."[291] The University refused to grant Gay Lib formal recognition, arguing that doing so would "cause latent or potential homosexuals who become members to become overt homosexuals."[292] The University's refusal was deemed unconstitutional by the 8th Circuit and the University applied to the Supreme Court for review.[293]

The University's rationale, of course, framed homosexuality as a contagion, a framing that strongly hints at disgust motivated logic. But more importantly for our purposes is the reaction of Justice Rehnquist to the University's application for certiorari. Justice Rehnquist dissented from a

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288. Harris & Fiske, *supra* note 75, at 47.

289. Priya Kamath, *Outcast(e): The Case for Recognizing Caste Under U.S. Anti-Discrimination Law* (Mar. 25, 2021) (unpublished comment, Harvard Law School), https://papers.ssrn.com/abstract=4026180 [https://perma.cc/U8HG-99LC]; Lee, *supra* note 58; at 312; s*ee also generally* NUSSBAUM, *supra* note 51.

290. *See generally* Gay Lib v. Univ. of Mo., 558 F.2d 848 (8th Cir. 1977).

291. *Id.* at 851.

292. *Id.* at 851 n.7.

293. *Id.* at 856– 57.

decision to deny review, and in so doing he not only accepted the frame of homosexuality as a contagion but offered his own analogy to further solidify that frame. In fact, he specifically analogized student homosexuality to an outbreak of measles:

> [the question of whether Gay Lib should be recognized was] akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle [sic] sufferers be quarantined.[294]

Was Justice Rehnquist's view shaped by disgust at the thought of gay male sexuality? The framing he adopted certainly suggests that it was. Should that matter to the legal scholar? I maintain that it should. A deeper understanding of how Rehnquist framed homosexuality provides greater insight into not only his work on this case but potentially his work on numerous others.

Consider another, more well-known example. The Court in *Bowers v. Hardwick* famously reduced Michael Hardwick's desire for legal, same-sex intimacy to a base request to engage in the physical motions of same-sex sex ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy").[295] The dehumanization of this framing, the reduction of human intimacy to a simple sexual transaction, is, of course, consistent with the dehumanization that occurs when a human brain encounters an individual that it finds disgusting.[296] It was also a focus of Justice Kennedy's rejection of *Bowers* twenty-three years later:[297]

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.[298]

Again, our understanding of this interplay takes on a deeper meaning when one considers the potential impact of disgust. Did disgust inhibit the majority from seeing Michael Hardwick's desire for sexual intimacy to be more than a mere desire for physical sex? Might the majority in *Bowers* have seen the matter differently if they took some effort to question their own reaction to the thought of gay male sexuality? One can never know for sure, but a

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294. Ratchford v. Gay Lib, 434 U.S. 1080, 1279 (1978) (Rehnquist, J., dissenting).
295. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).
296. *See* Harris & Fiske, *supra* note 75, at 48–50.
297. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
298. *Id.* at 567.

consideration of their motivations and biases paints a fuller picture of the majority's view. It allows for greater understanding of the case, and possibly a greater understanding of other cases upon which these justices played a part.

Exploring the impact of affective bias can also provide some clarity to strange fixations in the case law. As stated earlier in Part Two of this research, the lens of disgust provided at least a partial explanation for several odd judicial tendencies found within the case law adjudicating gay male custody rights: the recurring fixation upon ordinary physical contact like hugging, kissing, and holding hands,[299] the overdetailed, almost lurid descriptions of gay male sex,[300] the recurring concern that children might be too close to gay males,[301] the consistent framing of gay male fathers as a contagion,[302] and the dehumanization of gay male intimacy.[303] The lens of disgust provides a deeper understanding of these tendencies. Exploring the impact of disgust and other possible affective biases on the law,[304] from both an empirical and a theoretical perspective, should be a project embraced by legal academics.

CONCLUSION

Beyond this study's important contribution to our understanding of disgust's role during the evaluation of gay male custody rights, these findings also demonstrate the need to empirically test the fallibility of human judgment within the law more generally. Early realists alerted legal scholars to the perils of conscious bias within legal decision making, and now we have become increasingly aware of the role that unconscious, affective, and implicit biases play as well. Empirical research is needed to determine the extent of these fallibilities, especially when they threaten decision making that violates our constitutional pre-commitments or binding precedent.

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299. *See* Roe v. Roe, 324 S.E.2d 691, 692–93 (Va. 1985); In re Marriage of Wicklund, 932 P.2d 652, 655 (Wash. Ct. App. 1996).

300. *See* Pulliam v. Smith, 476 S.E.2d 446, 448 (N.C. Ct. App. 1996); J.P. v. P.W., 772 S.W.2d 786, 787 (Mo. Ct. App. 1989).

301. *Pulliam*, 476 S.E.2d at 449.

302. *See* Stewart v. Stewart, 521 N.E.2d 956, 967 (Ind. Ct. App. 1988).

303. *See* Pulliam v. Smith, 501 S.E.2d 898, 921 (N.C. 1998); *J.P. v. P.W*, 772 S.W.2d at 788.

304. The impact of anger, for example, might prove to be a particularly fruitful avenue for empirical legal research. To take just one example, Dasgupta et. al. found incidental (misdirected) anger to significantly bias the evaluation of Arab citizens. Dasgupta et al., *supra* note 33, at 589.

IV. APPENDIX

Table A. Summary of separate logistic regressions. Impact of disgust sensitivity on decision to remove custody in each liaison condition when manipulation check is not utilized to exclude participants.

	Variable	Odds Ratio	*p*	[95%	CI]
Gay Male Liaison	High Disgust Sensitivity	4.77	0.02	1.29	17.65
	Constant	0.15	0.00	0.05	0.44
Lesbian Liaison	High Disgust Sensitivity	1.18	0.80	0.33	4.17
	Constant	0.4	0.06	0.16	1.03
Heterosexual Male Liaison	High Disgust Sensitivity	2.25	0.31	0.47	10.76
	Constant	0.13	0.00	0.04	0.43
Heterosexual Female Liaison	High Disgust Sensitivity	1.92	0.27	0.60	6.15
	Constant	0.40	0.03	0.18	0.91

Table A2. Summary of separate logistic regressions without removing participants who failed the manipulation check. Impact of high disgust sensitivity on decision to remove custody in each liaison condition while controlling for the impact of moral traditionalism and sexual prejudice.

	Variable	Odds Ratio	*p*	[95%	CI]
Gay Male Liaison	High Disgust Sensitivity	8.78	0.04	1.10	69.86
	Moral Traditionalism	1.62	0.00	1.20	2.19
	Sexual Prejudice	0.99	0.84	0.91	1.08
	Constant	0.00	0.00	0.00	0.05
Lesbian Liaison	High Disgust Sensitivity	0.94	0.93	0.25	3.60
	Moral Traditionalism	1.10	0.42	0.88	1.38
	Sexual Prejudice	1.03	0.54	0.93	1.14
	Constant	0.10	0.02	0.02	0.67
Heterosexual Male Liaison	High Disgust Sensitivity	2.22	0.32	0.46	10.79
	Moral Traditionalism	1.02	0.90	0.73	1.42
	Sexual Prejudice	1.00	0.98	0.87	1.16
	Constant	0.11	0.02	0.02	0.72
Heterosexual Female Liaison	High Disgust Sensitivity	2.02	0.28	0.57	7.18
	Moral Traditionalism	1.22	0.07	0.98	1.52
	Sexual Prejudice	0.93	0.20	0.84	1.04
	Constant	0.13	0.02	0.03	0.70

Table B. Summary of separate logistic regressions. Impact of disgust sensitivity, utilizing the continuous measure of disgust sensitivity, on the decision to remove custody in each liaison condition.

	Variable	Odds Ratio	*p*	[95%	CI]
Gay Male Liaison	Disgust Sensitivity	1.04	0.02	1.01	1.08
	Constant	0.04	0.00	0.00	0.29
Lesbian Liaison	Disgust Sensitivity	1.01	0.63	0.97	1.05
	Constant	0.34	0.28	0.05	2.40
Heterosexual Male Liaison	Disgust Sensitivity	1.02	0.32	0.98	1.06
	Constant	0.09	0.03	0.04	0.43
Heterosexual Female Liaison	Disgust Sensitivity	1.02	0.15	0.99	1.05
	Constant	0.15	0.02	0.03	0.70

Table B2. Summary of separate logistic regressions. Impact of disgust sensitivity, utilizing the continuous measure of disgust sensitivity, on the decision to remove custody in each liaison condition while controlling for the impact of moral traditionalism and sexual prejudice.

	Variable	Odds Ratio	*p*	[95%	CI]
Gay Male Liaison	Disgust Sensitivity	1.06	0.04	1.00	1.11
	Moral Traditionalism	1.48	0.00	1.16	1.90
	Sexual Prejudice	1.00	1.00	0.92	1.09
	Constant	0.00	0.00	0.00	0.03
Lesbian Liaison	Disgust Sensitivity	1.00	1.00	0.96	1.04
	Moral Traditionalism	1.08	0.41	0.91	1.27
	Sexual Prejudice	1.04	0.33	0.96	1.11
	Constant	0.15	0.10	0.02	1.35
Heterosexual Male Liaison	Disgust Sensitivity	1.02	0.35	0.98	1.06
	Moral Traditionalism	1.10	0.43	0.87	1.06
	Sexual Prejudice	0.95	0.37	0.86	1.06
	Constant	0.07	0.04	0.01	0.84
Heterosexual Female Liaison	Disgust Sensitivity	1.02	0.18	0.99	1.05
	Moral Traditionalism	1.21	0.04	1.01	1.45
	Sexual Prejudice	0.94	0.19	0.86	1.03
	Constant	0.05	0.00	0.01	0.36

Table C. Descriptive Statistics and Correlations for Study Variables.

Variables	n	M	SD	1	2	3	4
1. Disgust Sensitivity	307	51.29	15.83	1.00			
2. Moral Traditionalism	307	9.08	4.33	0.19***	1.00		
3. Sexual Prejudice	307	14.41	9.75	0.24***	0.75***	1.00	
4. Custody Removal	307	2.54	1.59	0.22***	0.34***	0.29***	1.00

Note. * $p<0.05$, ** $p<0.01$, *** $p<0.001$