

## Deconstructing Judicial Expressions of Disgust

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### Abstract

Though much has been written about judicial anger and other emotional displays from the judicial bench, comparatively little attention has been paid to disgust. This particular emotion does not seem to be expressed or reflected by judges as much as other negative sentiments or feelings; “disgust” also has an emotional resonance that we might not associate with things like anger and sadness, and exists in more than one form. Focusing on a sample of cases in which judges have used the term, the article questions what type of disgust is being shown (“core” disgust or “socio-moral” disgust), whether the emotion is experienced or articulated, and what the significance is of using the word “disgust” in the judicial narrative.

### Key words

Judges; law; emotion; disgust

### Resumen

Si bien mucho se ha escrito sobre la ira judicial y otras manifestaciones de emoción por parte de la judicatura, se ha prestado relativamente poca atención a la repugnancia. Parece que los jueces no suelen expresar o reflejar dicha emoción tan a menudo como otros sentimientos negativos; la “repugnancia” también tiene un eco emocional que, posiblemente, no relacionamos con la ira y la tristeza, y existe en varias formas. Centrándonos en una muestra de casos en los que los jueces han utilizado el término, en el artículo cuestionamos qué tipo de repugnancia se está mostrando (repugnancia “básica” o repugnancia “socio-moral”), si la emoción está siendo experimentada o articulada, y cuál es el significado del uso de la palabra “repugnancia” en la narrativa judicial.

### Palabras clave

Jueces; derecho; emociones; repugnancia

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## 1. Introduction

Law and emotion scholarship has consistently challenged the view that judges are dispassionate observers – what Maroney (2016) describes as the “normative judgment that judges should not feel emotion or allow such feelings to influence their decisions”. Much has been written about specific emotions that judges appear to exhibit most frequently: for example, judicial anger and whether this constitutes an appropriate emotional response to courtroom actors or events (O’Brien 2003, Maroney 2012), and whether empathy is acceptable or threatens judicial impartiality.<sup>1</sup> Yet relatively little attention has been paid to another emotional response which infiltrates the practice of judging to a potentially lesser but still significant degree: that of disgust.

The comparative lack of analysis is not the sole reason for focusing on disgust in a collection on the theme of *Judging, emotion and emotion work*. Compared to other negative sentiments, disgust appears to be conveyed much less frequently by judges<sup>2</sup> – something that the authors will argue is significant in itself. The term “disgust” also has an emotional resonance that we might not associate with things like anger and sadness; while the latter are powerful feelings, disgust denotes something which is stronger and more potent. As we shall see, psychologists describe disgust in terms of an intense feeling of displeasure or revulsion, triggered by an offensive or revolting object, person or behaviour (Rozin and Fallon 1987, Rozin *et al.* 1999, Chapman and Anderson 2012). Yet what makes disgust more unique as an emotion, and more interesting as a point of study, is that disgust has two distinct forms – we shall term these “core disgust” and “socio-moral disgust” – which respond to different triggers and elicit different emotional responses.<sup>3</sup> And it is these different characterisations which are central to our analysis.

This article explores disgust from a law and emotion perspective, focusing on a selected sample of judgments in which judges have used the term to describe particular situations, actions or conduct. In reviewing and categorising these cases, the article suggests what type of disgust is being articulated and the significance of expressing disgust in the context of these judicial narratives. It concludes by setting out some ideas for future research on the topic.

## 2. Deconstructing Disgust

To appreciate the inherent complexities of disgust as an emotional response requires an understanding of its origins and subsequent evolution.

### (a) Core Traits and Evolving Qualities

Disgust is a primitive response which is ingrained in the human psyche (Rozin and Fallon 1987, Chapman and Anderson 2012). Like other “basic” or “primary” emotions – such as anger, fear, and happiness – disgust is “innate and universal, automatic, and fast, and trigger[s] behaviour with a high survival value” (Rozin *et al.* 1999).<sup>4</sup> Psychologists trace its evolutionary roots in humans as being linked to food (the word itself has Latin and middle-French origins – *gusta* and *degouster* respectively, which relate to “taste”), with certain behavioural and physical traits exhibited when faced with the prospect of ingesting an offensive object (Philips *et al.* 1998). According to Rozin and Fallon (1987), disgust “has a characteristic facial expression (...), an

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<sup>1</sup> While many law and emotion scholars have argued that empathy is an essential judicial attribute which aids the decision-making process but does not cloud objectivity, others are less sure (Bandes 2009, Bergman Blix and Wettergren 2016).

<sup>2</sup> For reasons which we analyse in Part 5, we will be focusing on verbal expressions of disgust by judges as opposed to physical manifestations of disgust which others may witness in a judge’s demeanour within a courtroom setting.

<sup>3</sup> This two-fold distinction is adopted in most of the literature, and is employed here. The origins are discussed in Part 3.

<sup>4</sup> However, disgust’s categorisation as a basic emotion has been questioned (Panksepp 2007).

appropriate action (distancing of the self from an offensive object), a distinctive physiological manifestation (nausea), and a characteristic feeling state (revulsion)".

What is being described here is "core disgust" – the instinctive, visceral response to a revolting object or substance, which has sensory triggers and is driven by basic survival tendencies. Research indicates that there is little cultural variance in the standard elicitors, and that certain external stimuli will inevitably trigger core disgust with its associated actions and behaviours (Haidt *et al.* 1997). Yet, there is also an idiosyncratic element to this particular emotional response: although certain things are universally repulsive (e.g. faeces, vomit, maggots, rotting flesh), there are undoubtedly others (e.g. specific foods, tastes, smells, textures) that might disgust me but would not prompt the same response in you.<sup>5</sup>

Protecting the body from threats of physical contamination may explain the evolutionary origins of core disgust, but this is only part of what is now a much larger picture. Over time, core disgust has also undergone the cognitive equivalent of a preadaptation process, as potential sources of harm to humans have moved beyond the sensory to the associative through group and societal interactions. The result is "socio-moral disgust", an emotional response which is "unique to humans" and is triggered by another human being's "violation of social norms and moral values" (Chapman and Anderson 2012). From a psychological perspective, there is a significant body of literature dealing with socio-moral disgust and what it entails. Some of the offending transgressions can be linked to core disgust (for example, mutilation of dead bodies), but socio-moral disgust casts its net much wider and includes actions which "violat[e] the autonomy and dignity of others" (Simpson *et al.* 2006, 32) without invoking a core disgust response. Examples might include people who steal, lie, cheat, and harm others (Chapman and Anderson 2012), or those who exhibit racist, disloyal or hypocritical behaviours (Simpson *et al.* 2006). The stimulus triggers for socio-moral disgust are "extremely abstract (moral transgressions and those who commit them)" (Chapman and Anderson 2012, 62) and are not as homogenous as those for core disgust; while "every culture finds certain practices *morally* disgusting", the presence of "enormous cultural, historical and individual variability" in what any given society and its members deems repugnant is well-documented (Lee and Ellsworth 2011, 2). The behavioural tendencies also differ slightly; while nausea is not a common response here, studies suggest that socio-moral disgust does trigger similar facial reactions to those associated with core disgust, though the expressions are more nuanced and subtle (Chapman *et al.* 2009). Chapman and others suggest that distaste's characteristic "rejection impulse (...) may have been co-opted and expanded to reject offensive stimuli in the social domain" (Chapman *et al.*, 2009, 1225). In short, moral transgressions can leave a "bad taste", even if the bad taste is "abstract rather than literal" (Chapman *et al.* 2009, 1224-1225).

So, we have core disgust where the response is more instinctive and visceral, and socio-moral disgust which still denotes some sort of repulsion or distaste, even if the biological response is not quite so primal. While some theorists have argued that disgust is a single emotion (Lee and Ellsworth 2011, 3), the weight of opinion favours these two broad clusters and views them as "rather different emotional experiences" (Lee and Ellsworth 2011, 5). We will adopt this distinction in our analysis of judicial disgust; first, however, we examine some of the issues surrounding socio-moral disgust in particular.

#### *(b) "Socio-Moral" Disgust: A Cognitive Assessment*

As Chapman and Anderson (2012) have observed, disgust "offers cognitive neuroscientists a unique opportunity to study how an evolutionarily ancient response rooted in the chemical senses has expanded into a uniquely human social cognitive

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<sup>5</sup> The authors can cite personal examples: runny eggs (for Conway) and mashed potato (for Stannard).

domain" (Chapman and Anderson 2012, 62). Yet socio-moral disgust is undoubtedly the more complex of the two.

Some have questioned whether socio-moral disgust is actually a form of genuine disgust, or even a true emotion, as opposed to an expressive label used to admonish certain moral transgressions. For example, Lee and Ellsworth (2011) cite research which suggests that "the use of the word 'disgusting' [in this context] (...) is nothing but a metaphorical extension of the term as a means of expressing extreme disapproval or indignation" (Royzman and Sabini 2001, Nabi 2002), while Royzman and Kurzban (2011, 269) argue that "morally tinged disgust talk is but another exercise in metaphoric flourish".

Following on from this idea, a number of psychologists and behavioural scientists have argued that socio-moral disgust is simply a variant of, or alternative way of describing, other emotions, arguing that it "may just be anger in disguise" (Gutierrez and Giner-Sorolla 2007, Chapman and Anderson 2012, 6, Gutierrez *et al.* 2012) or another way of showing contempt for what we perceive to be morally offensive behaviour. Others, however, have argued that socio-moral disgust is a separate emotion, and one which is fully differentiated from its negative correlates (Hutcherson and Gross 2011). In particular, anger and disgust are closely associated, but each has distinct facial expressions and behavioural responses (Russell and Giner-Sorolla 2013, 329): disgust prompts distancing and "avoidance behaviour" while anger "tends to promote approach tendencies, in the form of attack" (Ekman 1999, 45, Hutcherson and Gross 2011, 720, Russell and Giner-Sorolla 2013). Meanwhile, contempt signifies disdain for someone who is denounced as inferior or unworthy, and is treated with less respect and consideration (perhaps even mocked) as a result (Haidt 2003, 858). Again, socio-moral disgust speaks to different ideas since the focus here is on denunciation and marginalisation: people who have "deep characterological flaws that make them unfit for participation in society are rejected and ostracized by the socio-moral disgust of their peers" (Rozin *et al.* 1999, 436).

### 3. A Dual Axes Model

Underpinning our analysis of disgust in this article is what we term a "dual axes model". The first has already been mapped out in the opening section, and treats core disgust and socio-moral disgust as two defined emotions operating across the same metaphysical feelings spectrum, but with shared traits reflecting the fact that socio-moral disgust emerged as an "extension or elaboration of basic, physical disgust through cultural development" (Lee and Ellsworth 2011, 4). The second axis separates disgust as an "experienced" emotion from disgust as an "articulated" emotion, and this distinction is also a crucial one.

It is trite but true that there is a world of difference between *feeling* something and *saying or articulating* that you feel something; simply put, something said may not actually reflect what is felt. This is especially true with disgust. Core disgust may not be a verbalised emotion: if I am experiencing core disgust, the contorted facial expression and accompanying feelings of nausea, combined with the overwhelming urge to retreat or turn away from the offending object, would often make it impossible to say "that's disgusting" (reflecting on the situation when safely removed from the contaminant, one would probably pass a comment to that effect). In contrast, when we move into socio-moral disgust, we are dealing with a verbalised emotion: we usually have to look for self-reported expressions of disgust not just because the visual markers are less apparent but because this particular emotion finds its expressive outlet in the public denunciation of moral transgressions. Linking disgust to a process of abjection (in other words, to casting something out or expelling it), Ahmed (2004) argues that "[t]he speech act, 'That's disgusting', can work as a form of vomiting, as an attempt to expel something whose proximity is felt to be threatening or contaminating". However, this is only effective where there is an external audience (Ahmed 2004, 94):

The speech act is always spoken to others, whose shared witnessing of the disgusting thing is required for the affect to have an effect (...). Such a shared witnessing is required for speech acts to be generative, that is, for the attribution of disgust to an object or other to stick to others (...). [T]he demand for a witness shows us that the speech act, 'That's disgusting', generates more than simply a subject and an object; it also generates a community of those who are bound together through the shared condemnation of a disgusting object or event.

However, the essential verbalising of socio-moral disgust creates two potential problems that we must be mindful of.

First, studies have shown that there is a difference between the theoretical and the lay meanings of the word "disgust" and what using the term denotes (Nabi 2002, Gert 2015). As noted in the previous section, socio-moral disgust and anger are different emotions; yet both can be displayed in a given situation, and appraisal research suggests that self-reports of participants' responses to socio-moral disgust elicitors revealed a combination of the anger and disgust (Russell and Giner-Sorolla 2013).<sup>6</sup> As Chapman and others have pointed out, "verbal reports of 'disgust' in response to moral transgressions are suspect, because the word 'disgusting' is used in colloquial English to describe angering or irritating situations" (Chapman *et al.* 2009, 1222). This necessitates caution when inferring what someone who is not a psychologist or behavioural scientist actually means when they label something as "disgusting".

Second, labelling certain individuals or their behaviour as "disgusting" invokes powerful and highly symbolic language. We cannot simply assume that those who adopt the term are misusing it as a convenient colloquialism; given the condemning and marginalising functions of socio-moral disgust, the use of this particular label may be quite deliberate (even if the individual in question is not actually experiencing socio-moral disgust, either on its own or in isolation). The potency of the label, as a form of public denunciation, is significant and poses the question of whether there is a performative element to self-reported experiences of socio-moral disgust – a sense of targeting the external audience, so that certain moral transgressions are seen to be condemned –. In this context, it is also worth noting that expressions of socio-moral disgust can be exaggerated. Lee and Ellsworth, having identified the need for a specific agent as the targeted source of the wrong-doing in socio-moral disgust, summarise the position as follows (Lee and Ellsworth 2011, 7):

The social and personal norms by which agentic behavior is judged are generally value-laden, providing perceivers with a sense of justification and righteousness when they feel disgusted by immorality. In order to communicate their moral superiority and their support of community norms, people may be likely to exaggerate their expression of moral disgust. In contrast, physical disgust is less likely to provoke value-laden judgments and censure, because there is no clearly blameworthy human agent. There is no obvious reason for exaggerating the expression of physical disgust.

According to the authors, socio-moral disgust has a clear "communicative function"; exaggerating the extent to which it is felt not only condemns the individual and their actions, but "confirms one's membership in the moral community" (Lee and Ellsworth 2011, 13-14).

These are core themes that we return to below. However, before setting the scene for exploring judicial disgust and the research methods that we are using, it is necessary to mention briefly the role of disgust in the law.

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<sup>6</sup> The argument here is that non-bodily violations promote more anger than disgust, but that bodily violations will trigger the latter: see also Gutierrez *et al.* 2012.

#### 4. Disgust and the Law

Over the last fifty years or so there has been a significant debate around the proper role of disgust in the law and whether it is (or should be) a part of the legal process. This debate was triggered by the famous controversy between Herbert Hart and Lord Devlin concerning the decriminalisation of consensual homosexual conduct (Hart 1963, Devlin 1965) and has been continued in more recent years by Martha Nussbaum (1999) and Dan Kahan (1999) in Susan Bandes' seminal collection, *The Passions of Law* (Bandes 1999). In her essay Nussbaum was ready to concede that disgust was a deeply embedded human response, and might even be an essential part of the human psyche, but argued that its essential irrationality, coupled with its evil potential as an engine of group exclusion and subordination, rendered it a dangerous response in the legal and political context (Nussbaum 1999, 55, and 2004). Kahan, however, argued that while it would be a bad mistake to accept the guidance of disgust uncritically, it would be just as bad an error to discount it in all contexts, and that there were situations in which properly directed disgust was indispensable to a morally accurate perception of what was at stake in the law (Kahan 1999, 63). Since then other scholars have joined the discourse; thus for instance it has been argued by Kelly and Morar (2014) that by its very nature disgust is unsuited for any role in the legal or political context (Kelly and Morar 2014), whilst Plakias (2013) argues for a more nuanced view on the ground that disgust tracks invisible social contagions in much the same way as it tracks invisible physical contagions, thereby serving as a defense against the threat of socio-moral contamination.

Clearly, whatever side one takes in this debate will depend on a number of issues. The first of these is whether one is talking about what we have termed "core disgust" or "socio-moral disgust", and on whether the latter is really a manifestation of disgust at all. The second is the way the disgust functions in the legal context. Thus for instance, as Nussbaum (2004, 102-103) points out, it can itself function as a putative harm, as in cases of nuisance (*Camfield v US* 1897). Again, it can provide a basis for a defence to criminal liability, as in cases of provocation or loss of control (Nussbaum 2004, 126-134).<sup>7</sup> Finally, it can function as a positive criterion for criminalisation (Nussbaum 2004, 125-126) as argued for by Lord Devlin (1965, 13). The third is the extent to which Kahan (1999, 63-79) is correct in suggesting that the emotion of disgust can be harnessed in an appropriate way, so that instead of being disgusted at sexual deviancy and out-groups we learn to become disgusted at racism, cruelty and exploitation (Rozin *et al.* 2009). Needless to say, a full treatment of these issues is beyond the scope of this article. That said, such a treatment would certainly benefit from an understanding of the ways in which disgust is currently used in legal discourse, and it is to this second aspect of the matter that we shall now turn.

#### 5. Research Challenges and Chosen Methodology

In any legal contest, there are different vectors of emotion: that of the judge, those of the lawyers, those of the litigants (in civil law cases), and those of the victims and the defendants (in criminal law cases). Expressions of disgust in the legal context can take a variety of forms; the term can be used by a variety of legal actors, and in a number of different contexts (for example, as a self-reflective assessment of oneself, or as a castigation of the behaviour or actions of others). Thus a witness in a case may express his or her disgust at something seen or heard (*J20 v Facebook Ireland Ltd* 2016 at [34], *Agouman v Leigh Day (a Firm)* 2016 at [51], *East Sussex County Council v SV and others* 2017 at [88]) victims of a sexual offence may say that it left them feeling a sense of self-disgust (*R v TC* 2016 at [7], *R (Gopalakrishnan) v General Medical Council* 2016 at [41], *A-G's Reference (No 31 of 2016)* 2016 at [11]); a

<sup>7</sup> A typical instance of this is the so-called "Portsmouth Defence", or "Guardsman's Defence" where the perpetrator of a homicide seeks to excuse himself (it normally is a him) on the basis of an overwhelming feeling of disgust occasioned by a homosexual advance on the part of the victim: *R v McCarthy* 1954, *Commonwealth v Carr* 1990.

speech in mitigation may indicate that the offender is disgusted with what he or she has done (*R v Murchison (Romaine)* 2016 at [8], *R v Malik (Abdul)* 2016 at [10], *R v Makin (Kelly Elaine)* 2017 at [7]); and so on. However, the focus of this paper is on *judicial* disgust. By this we imply two requirements. One is that the expression of disgust must come from the bench in the course of oral or written judgments. The other is that this must represent the judge's own views on the matter, rather than being a mere restatement of someone else's.<sup>8</sup>

Such manifestations can at least in theory be mapped onto the two axes referred to above, namely as between core and socio-moral disgust on the one hand, and experienced and articulated disgust on the other. So how is this to be done? As with any type of social and psychological research, there are a number of challenges both in relation to the collection of the data and in interpreting it once it has been collected (Richardson 1996, Elmes *et al.* 2012, Howitt and Cramer 2014), and emotions research is no exception (Flam and Kleres 2015). However, the inherent complexities of disgust as an emotional response and its different manifestations pose a distinct set of challenges. Two basic problems can be identified, which shape the nature of our inquiry and consequent choice of methodology.

The first is ontological; that is to say, it involves the very nature of disgust. As identified earlier, the concept of disgust is used in two senses, one being physical revulsion and the other moral disapproval. Though the two of these may sometimes coincide, this is not necessarily the case. Some activities – for instance, eating vomit – would repulse most people, but involve no moral element. On the other hand, where the victim of a wrong expresses “disgust” at the way in which he or she has been treated, the notion of physical revulsion may be totally absent. When judges refer to certain behaviours as disgusting, we suspect that they may sometimes be using the term to denote socio-moral disgust – an idea that we return to below –. But it all depends on context; and, since we cannot look into the heads or minds of judges, we need to be wary of labelling statements as one category or the other. This distinction between core disgust and socio-moral disgust may be difficult to untangle, and is something that we need to be mindful of: physical disgust often makes no moral claim, and vice versa, yet the two are not always mutually exclusive.

The second is epistemological – that is to say, the problem of detecting disgust in others –. Unless there is a witness present who can testify that the person concerned showed signs of disgust – perhaps by retching, or flinching from the situation – one has to rely on the self-report of that person that he/she was experiencing disgust. And while these particular behavioural traits might point towards core disgust, we should not ignore the fact that socio-moral disgust has certain observable (albeit less apparent) facial traits as well.

Bearing all this in mind, what possible approaches could one adopt? One option would be to observe judges in the courtroom, and might be based on an agreed pattern of verbal and visual cues. This would be a very good way of distinguishing experienced from articulated disgust, and could yield some interesting results on whether or not a demonstrated “disgust response” influenced courtroom behaviour or even judicial impartiality (Mack and Roach Anleu 2010). Of course, such observational research would require a degree of skill in the coding of words and interpretation of body language; this is not an insurmountable problem, but any solution is complicated by having two distinct categories of disgust which can nevertheless intersect. Given that disgust tends to be less frequently observed or articulated than other emotional tropes, this approach would also take a longer time to yield any usable data and be more labour-intensive than similar studies which monitor judges.

The second would be by interviewing individual judges. There is certainly precedent for this, as other articles in this collection reveal, and it might get us some way

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<sup>8</sup> However, we have included cases where one judge has quoted another judge, or expressed his or her agreement with a relevant sentiment uttered by another person.



towards the elusive goal of revealing judges' feelings. Other law and emotion scholars, while highlighting the value of such research in revealing "backstage" emotion and judges' own emotional experiences, have identified certain challenges as well: in particular, in gaining access to the judiciary, and maintaining confidentiality around individual responses (Roach Anleu *et al.* 2015). On the subject of judicial disgust, questions would have to be skilfully designed, and there is always the danger that such interviews would reveal what judges say about disgust rather than what they actually felt (though shedding some light on why a judge decided to use this particular descriptor would be an extremely useful exercise).

A more straightforward approach – and one which allows immediate access to usable data – is to analyse what judges say by looking at judicial opinions in case law. We are conscious of the fact that this is the "tried and trusted" approach of the academic lawyer, and that there are inherent limitations in researching judicial opinions (Sisk *et al.* 1998, Hunter *et al.* 2008). Judgments reveal little or nothing about courtroom interactions and the language used in legal hearings (with all its emotional content); reported cases tend to be from higher courts, which limits the material available to the researcher; and there is always the danger of getting side-tracked by "judges' normative, case specific reasoning" (Hunter *et al.* 2008, 80) and of reading too much into every seemingly emotional nuance in the judgment. In the context of the present article, the very nature of the exercise also means that we can only look at articulated disgust as opposed to experienced disgust, though without doubt such articulation is important in itself. However, case law analysis has a role to play here – and not just for reasons of convenience –. Looking at judicial expressions of disgust in written judgments enables us to bring in new data about the situational context in which actions and behaviours are labelled "disgusting"; to identify specific clusters or groupings of cases; to suggest what these cases actually reveal in terms of patterns and broader outcomes; and to speculate on the reasons why judges feel impelled to use such an emotionally-laden term.

## 6. Judicial Expressions of Disgust

Drawing on Richard Weisman's (2016) work on remorse, when he looked at 160 cases to see how remorse was characterised and identified, we have decided to dip our proverbial toe in the water by analysing expressions of disgust in a raft of reported English cases. As we have already seen, there are limits to this approach; in particular the cases will have been reported for extraneous reasons, and most of them will be appellate decisions on points of law, where expressions of disgust are less likely to manifest themselves. Nevertheless, we took the Westlaw database site as our source, and looked for cases involving the use of the word "disgust" and its variants. The overall number was relatively small, and this infrequency of use is worth noting given the comparatively common use of "disgust" in the lexicon of everyday language. A total of 1,350 cases was thrown up, and though most of these did not involve disgust by the judge, we decided to analyse one hundred of those cases that did, beginning with the most recent and then working back in time.<sup>9</sup>

Broadly speaking, these cases fall into three categories. As stated above, all of them by the nature of the exercise involve articulations of disgust, though of course this does not exclude the possibility that the relevant emotion or emotions will also have been experienced by the judge in question. If one imagines disgust lying on a spectrum ranging from purely visceral disgust to purely socio-moral disgust, the first category of cases lies towards the visceral end, the second towards the socio-moral end, and the third somewhere in the middle.

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<sup>9</sup> For reasons of space it is not proposed to cite these cases *en masse*, but reference will be made to them as required below.

(a) *Visceral Disgust*

The ten cases in the first category all involve comments by a judge on the dirty state of certain premises. In three of these cases we see the judge quoting another judge, while in the remainder the expression is at first hand.

Four of the cases come from the Family Court, and relate to the custody of children. Thus, for instance, in *CB (Adoption Order)* (2015) we see the judge quoting a finding of fact from the Supreme Court to the effect that the mother left the child at home in a “disgusting” condition.<sup>10</sup> Another comes from the Court of Protection, where premises occupied by the person concerned were described by the judge as “clearly disgusting and a health hazard” (*Norfolk CC v PB* 2014).

Then we have three cases involving criminal matters. In *R v Naris* (2008), a judge sentenced the defendant for storing food in “disgusting and unsanitary conditions”, whilst in *R v Moody* (2010), a case of child neglect, similar comments were made in relation to the state of the child’s bedroom. The third case was in the context of an appeal against conviction for kidnapping, where the judge was commenting on evidence given as to the state of the place where the alleged victim was held in captivity (*R v S* 2016).

Finally we have a case from the Tax Tribunal relating to the state of licensed premises (*Carr v HMRC* 2017), and a comment by a Scottish judge in the context of judicial review proceedings concerning the practice of “slopping out” in Barlinnie Prison (*Napier v Scottish Ministers* 2005).

Given the context of these cases, one can surmise that all of them involve an element of core disgust, though in none of them can the possibility of socio-moral disgust be ruled out entirely.

(b) *Socio-Moral Disgust*

In the second category we have thirty-eight cases that fall towards the other end of the spectrum. In all of these cases the context would seem to indicate socio-moral rather than core disgust.

Twenty-eight of these were criminal cases, and the remainder civil cases; fifteen involved a direct articulation by a judge in the case reported, whilst the remainder involved a second hand quotation of another judge.

All of the criminal cases involved sentencing, either at first instance or in the context of an appeal against sentence. Thirteen of these involved serious crimes of violence. The most serious of these was *R v Dobson and Norris* (2012), a racially motivated murder, where the judge described the “disgusting and shocking scenes” recorded on a CCTV camera. Five others involved robbery, including *R v AW* (2005), involving an attack on an elderly victim by two young boys (“an appalling offence which disgusts ordinary decent people”), and *R v Hume* (2011), a case involving a crime committed against an old lady, in which the judge remarked that a more disgusting and low offence could not be imagined.<sup>11</sup> Similar to these was *R v Denton* (2005), a “disgusting and outrageous” case of aggravated burglary committed to feed the defendants’ drug addiction. Then we have six other cases of grievous bodily harm with intent, including *R v Norman* (2004), where the judge remarked that the defendant’s behaviour, if it were described as “behaviour of the farmyard”, would be

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<sup>10</sup> See also *Re ZO’C (Children)* 2014 (state of home “disgusting”); *A Local Council v B* 2017 (home “disgusting and unsuitable for children, animals and adults to live in”); *Kent CC v A* 2017 (“disgusting conditions”).

<sup>11</sup> See also *R v K* (2006) (“a disgusting way to treat another human being”); *R v Khan* (2007) (sentence imposed to “reflect the disgust of society”); *R v Bell* (2011) (“abhorrent and disgusting” attack on elderly man).

an insult to animals; it was quite “disgusting and depraved”.<sup>12</sup> Similarly, in *R v Montgomery* (2007), a case of violent disorder involving a racial attack on the home of an Angolan family, the judge remarked that nobody could fail to be moved by “dismay and disgust” by the conduct of those involved.

Other cases involve violence of a lesser degree. In *Attorney-General’s Reference (No 94 of 2007)* (2007), a case of racially aggravated assault, the judge said that he might have been tempted to pass an immediate custodial sentence in order to reflect his disgust at the offence, but decided not to do so. Five other cases involved assault occasioning actual bodily harm. One particularly striking example was *R v March* (2002), a case involving a campaign of harassment conducted against a family with learning difficulties, described by the judge as the most disgusting case he had ever dealt with, in which the defendants had “behaved like animals”.<sup>13</sup> Another case, *R v H* (2004), involved a conviction for false imprisonment in which the victim was subjected to a “disgusting and humiliating” ordeal by a gang of bullies. Finally we have *Attorney-General’s References (Nos 143 and 144 of 2015)* (2016), a case of harassment involving a “disgusting” racial confrontation directed against a Muslim family in a public park.

There are other criminal cases in this second category that do not involve any element of violence at all. Two of them involved fraud on elderly victims, one being *R v Hamilton* (2008) (“disgusting offences”) and the other *R v Strongman* (2010) (need for sentence to “reflect public disgust”). Another two involved drug abuse, the remarks of the judge here being directed at the drug trade in general.<sup>14</sup> Then we have *R v Palin* (2010), a case involving the burglary of a British Legion club for military veterans, the sentencing judge remarking that the theft of money intended for injured soldiers would cause “disgust, revulsion and disdain by members of the community”. *R v Armstrong* (2012) involved the illicit retention of secret documents by a serving army officer, the judge remarking that anyone would have been “shocked, dismayed and disgusted” at the defendant’s grave criminal misconduct. Last but not least we have *R v B* (2005), in which a soldier serving in Iraq took insulting photographs of prisoners in military custody, described by the judge as of a “gross and disgusting” nature.

The ten civil cases in this second category present a mixed bag. Three of them involved family proceedings; in *Local Authority v KAB* (2010) the judge expressed her disgust at the language used by a child, and in *RS v SS* (2013) similar sentiments were expressed at that used by the mother; whilst in *Re X (a Child)* (2017) the President of the Family Division was quoted as having expressed his “shame and disgust” at the lack of proper provision for children with mental health problems. Another three cases concerned asylum and deportation. In *R (Limbuella) v Home Secretary* (2004) the judge drew a distinction in the human rights context between the “disgusting” nature of suffering caused by violence and other suffering. In *A v Secretary of State (No 2)* (2004) the reference was to torture, whilst in *Czako v Hungary* (2013) it was to observations made about the Roma community. Two other cases arose in the context of professional misconduct proceedings, one involving a doctor (*Vaghela v General Medical Council* 2013) and another a dentist (*Bamgbelu v General Dental Council* 2015), the reference in both cases being to allegations made by the subject of the complaints. In *Ryder-Large v King* (2007), the reference was to the “disgusting” conduct of a tenant resisting eviction, and in *Musa v Holliday* (2012)

<sup>12</sup> See also *R v Saleem* (2007) (“what a disgust”); *R v Whitehurst* 2010 (“disgusting” racial insult); *R v Grubb* (2011) (“prolonged, vicious and disgusting” vigilante attack on a suspected paedophile); *R v Harwood* (2017) (“disgusting” attack on ex-partner).

<sup>13</sup> Other examples are *R v H* (2008) (“despicable and disgusting” attack by three brothers); *R v Mahmood* (2010) (“drunk and disgusting” domestic violence); *R v Parkins* (2011) (“disgusting, nasty and vicious” incident involving a gang of girls); *R v Taplin* (2016) (“disgusting” attack on a shop owner”).

<sup>14</sup> *R v Roberts* (2005) (“disgusting trade”); *R v Sharif* (2005) (“dark and disgusting world”).

a judge said that she could not express her disgust strongly enough at the actions of someone implicated in a plot to murder a family member.

Various aspects of the incidents in question seem to have prompted the remarks of the judge in question; relevant factors seem to have included the high degree of violence used (*R (Limbuella) v Home Secretary* 2004, *A v Secretary of State (No 2)* 2004), the oppressive and insulting nature of the attack (*R v H* 2004, *R v B* 2005), the vulnerability of the victim (*R v AW* 2005, *R v Hamilton* 2008, *R v Palin* 2010, *R v Strongman* 2010, *R v Bell* 2011, *R v Hume* 2011), the fact that a number of people were involved (*R v H* 2004, *R v Saleem* 2007, *R v Bell* 2011, *R v Parkins* 2011), and the presence of racial and religious hostility (*Attorney-General's Reference (No 94 of 2007)* 2007, *R v Montgomery* 2007, *R v Whitehurst* 2010, *R v Dobson and Norris* 2012, *Czako v Hungary* 2013, *Attorney-General's References (Nos 143 and 144 of 2015)* 2016).

The fact that few of the cases in question seem to have included any factor likely to arouse core disgust suggests that what we have here is socio-moral disgust. That said, the cases do not indicate any necessary connection between the articulation of such disgust and the outcome; indeed, in no less than ten of the criminal cases an articulation of disgust (either at first or second hand) was followed by a lenient sentence by a judge at first instance (*Attorney-General's Reference (No 94 of 2007)* 2007, *Attorney-General's References (Nos 143 and 144 of 2015)* 2016), or even a reduction in sentence on appeal (*R v March* 2002, *R v Norman* 2004, *R v AW* 2005, *R v Denton* 2005, *R v Sharif* 2005, *R v Khan* 2007, *R v Montgomery* 2007, *R v Parkins* 2011).

#### (c) Hybrid cases

Finally, we have fifty two cases which seem to straddle the divide between the two varieties of disgust mentioned. All of these, with only seven exceptions, are from the criminal courts, and all, with only two exceptions, have a sexual element.

Taking the criminal cases first, there are no less than thirty-three cases involving children. Seventeen of these were cases of child pornography. For instance, in *Attorney-General's Reference (No 36 of 2013)* (2013), the sentencing judge described a collage of young female children and adult males engaged in sexual activity as "truly disgusting"; in *R v Waplinton* (2017) the material concerned was described by one judge as "sickening" and by another as "of the utmost depravity", and in *R v Colgate* (2016) as "horrible".<sup>15</sup> There are also several cases involving other sexual conduct against children. Four of them involve rape; as in *Attorney-General's Reference (No 55 of 2008)* (2008), where the defendant was convicted of a "horrible" and "disgusting" rape of a baby, and *R v Wilson* (2012) ("disgusting acts of oral rape").<sup>16</sup> Two others involve sexual assault, one being *R v O'Hara* (2017), where the defendant committed a "catalogue of seriously disgusting sexual behaviour" against young girls, and the other *R v Lemmon* (2005), where the defendant ordered his nephew to lick his anus as a punishment, an act described by the judge as a "disgusting" act of bullying despite the lack of sexual motive involved. Other cases involved general acts of indecency against children, one example being *R v H* (2005), where the defendant had urinated on the victim, and *R v Cain* (2006), a case of abuse

<sup>15</sup> See also *R v Avery* (2004) ("disgusting and deplorable"), *HMA v T* (2005) ("revolting"), *R v Love* (2005) ("disgusting"), *R v Sharrock* (2005) ("disgusting trade"), *R v W* (2005) ("habitual abuse of the most disgusting nature"), *R v Green* (2006) ("disgusting"), *R v S* (2008) ("a despicable thing to do and one which would disgust any decent person"), *R v Smith* (2010) ("will disgust and appall right-thinking people"), *R v Davies* (2011) ("disgusting"), *R v G* (2011) ("disgusting"), *R v Harris* (2011) ("loathing and disgust generated in the community"), *R v Sturgess* (2011) ("disgusting child pornography"), *R v Simpson* (2014) ("depravity and disgusting interest on your part").

<sup>16</sup> See also *R v Rawlins* (2008) ("quite horrific"), *R v Boyes* (2012) ("horrendous, painful, abusive and disgusting").

of children in care, where the judge remarked "I cannot summon up the words that I feel that I want to say to you to express my disgust".<sup>17</sup>

We then have nine other criminal cases of a sexual nature not involving children. Two of these involved rape, namely *R v Cooper* (2006), a case described by the judge as "brutal and disgusting" and *R v Cakmak* (2010), in which the victim was subjected to a "frightening and disgusting" ordeal. *R v IP* (2004) was a case of voyeurism in which the defendant admitted placing a hidden camera to film his stepdaughter in the shower, and in *Rose v DPP* (2006) the conduct of the defendants in having sex in a bank foyer was held sufficiently "disgusting" to amount to an outrage against public decency. Three cases involved pornography, most notably *R v PW* (2012) where the defendant was found in possession of "offensive and disgusting" videos of sex with horses, dogs, goats, chickens and other fauna,<sup>18</sup> and another bestiality, namely *R v Squires* (2010), a case involving the "disgusting, distressing and worrying" buggery of a donkey by the defendant. Then we have one case with no sexual element, namely *R v Evans* (2016) where the defendant was convicted of an assault on a police constable by spitting, conduct described by the judge as a "disgusting and dangerous act".

This brings us on to the civil cases. Four of these have a criminal flavour, all of them involving disciplinary proceedings within a profession or within the employment sphere. One of these relates to the possession of child pornography (*Rumbold v General Medical Council* 2007), another to sexual harassment (*Arunachalam v General Medical Council* 2018), another to sexist text messages (*R (Chief Constable of Wiltshire) v Police Appeals Tribunal* 2012), and the fourth to a sexist cartoon circulated in the workplace (*Weeks v Newham College* 2012). Of the last three cases, one relates to deportation proceedings (*SU (Bangladesh) v Secretary of State* 2013), one to an election petition (*Erlam v Rahman* 2015) and one to the custody of children (*Re CTL (Children)* 2013). Then in *Bramley v Bramley* (2007) a judge referred to "disgusting abuse of a sexual nature" directed by the defendant to his ex-wife, whilst in *C v MGN Ltd* (2012) the reference was to an allegation of child abuse, something to which the public "would have been bound to react with a mixture of horror and disgust".

Given that the subject matter of the comment in all of these cases can be seen to have merited some measure both of core and of socio-moral disgust, it is not easy to tell on the face of it the extent to which these are reflected in the judge's comments. However, in some of the sentencing cases we again see the phenomenon commented on in the previous discussion, whereby a judicial expression of disgust appears alongside a reduction in sentence or a more lenient disposal in the context of disciplinary proceedings (*R v IP* 2004, *R v Lemmon* 2005, *R v Broughton* 2007, *R v PW* 2012, *R v Wilson* 2012, *R v Colgate* 2016, *R v Evans* 2016, *Arunachalam v General Medical Council* 2018). Once again, this suggests at least that there is no necessary connection between an expression of disgust and the eventual outcome of the case.

<sup>17</sup> See also *R v Broughton* (2007) ("disgusting behaviour"), *R v Greaves* (2007) ("disgusting" abuse of children in defendant's care), *R v Jones* (2007) ("sick", "perverted" and "disgusting" conduct), *R v M* (2008) ("disgraceful and disgusting sexual activity"), *Young v Heatly* (1949) ("disgusting" comments by teacher to pupils), *R v BC* (2010) (reference to child defendants exposed to pornography of a "disgusting and grotesque" kind), *R v Eller* (2014) ("unspeakably vile" procurement of offences against children "even more disgusting" when done for profit), *Preston v Murphy* (2015) ("disgusting, abhorrent and shocking" message on chatline).

<sup>18</sup> See also *R v Nanson* (2008) ("obscene and disgusting"), *R v Burns* (2012) ("disgusting" images of women engaged in sexual acts with animals).

## 7. What These Cases Reveal: An Initial Analysis

What then are we to make of all this? Clearly, the rudimentary nature of this exercise makes it unwise to try to draw firm conclusions, but some tentative observations would be in order, together with some suggestions for future research in this area.

The first point to note about these cases is that they are there in the first place. In so far as there is an assumption that judges should not feel or express emotion, it does not seem to prevent judges at least expressing disgust when they consider it appropriate. The fact that one can find examples of this even in the appellate courts would tend to suggest that a more targeted approach – for instance, one that included more cases at first instance and cases in the magistrates' courts – would turn up far more articulations of judicial disgust.

The second point relates to the nature of the disgust expressed in these cases. We have spoken above about the two axes of disgust, namely as between experienced and articulated disgust on the one hand and as between core and socio-moral disgust on the other. As previously stated, any analysis based on written judgements can only by the nature of it reveal articulated disgust, but as noted above the cases we have analysed above seem to straddle the whole length of the latter axis.

Connected with this is the third point, namely the significant number of cases with a sexual element, most notably those involving children and child pornography in particular. This is of course an area where one might expect to see both core and socio-moral disgust, and one question well worth exploring would be the extent to which in the judicial context the former might have an influence on the latter.

The fourth point is the significant number of cases involving sentencing. Without a larger and more targeted sample it is not possible to say how often sentencing judges come out with expressions of disgust, but what is clear is that they do so in some cases. This would therefore be a very good starting point for future research in this area.

Last but not least there is the issue of outcome. Exploring expressions or even experiences of disgust by judges is an interesting task in itself, but one also needs to take into account their practical impact, not least on the decisions they make. In this context it is interesting to note the cases above where expressions of judicial disgust in the sentencing context, either at first instance or even in the appellate courts, seem to have an inverse relationship to the severity of the penalty imposed at the end of the day. Does the expression of disgust here have a performative role, designed to assure the audience that the leniency of the sentence does not reflect an attitude of indifference by the court as to the seriousness of the conduct involved?

This performative aspect is interesting in itself, and raises interesting questions about socio-moral disgust in particular. Going back to the difference between an emotion being felt and being articulated, we have no way of telling which we are dealing with here. As the risk of sweeping generalisations, we assume self-reflective expressions of disgust are real when uttered by the victim of a crime; with the defendant in a criminal case, questions would rightly be asked as to whether saying "I am disgusted by my actions" is genuinely felt or is simply uttered in the hope of attracting a lower sentence. With judges, it is more difficult to say whether or not the judge is "telling the truth" and actually feeling disgusted. In some instances, this will undoubtedly be the case, and "disgust" accurately conveys what the judge feels at that particular time; but the articulation of the emotion by a judge (regardless of whether or not it is felt) is important here because of its performative value. Most of the cases in our sample involve socio-moral disgust; because it is reflected in verbal speech, it has a communicative element which requires an external audience. Studies have shown that vocal patterns and acoustic cues in a vocaliser's speech not only reveal particular emotions, but have important signalling functions for those listening: as Bachorowski and Owren (2008) have pointed out, "vocal expressions of emotion are not displays of vocalizer states as much as they are tools of social influence" used to make an

impression on others and shape their behaviour. Emotionally laden terms can be used as part of the lexicon of the law and of judging, to connote something specific; judges may also be conscious of the fact that they wield significant power and that there is a pressure on them to speak in a certain manner (Mellinkoff 1963, Solan 2010). Thus specific words and language can have a strong signalling function, and in the emotional arena, “disgust” – with its condemning and marginalising functions – has a particular symbolic resonance. This effect is, perhaps, more marked in written judgments, when labelling someone’s behaviours or actions as disgusting – even though care may be taken not to apply the label to the person concerned – is a deliberate word placement which carries added potency and reaches a much wider external audience (we move beyond the courtroom actors and participants, to those who read the judgments). But, in terms of symbolic quality, judicial expressions of disgust are important because, regardless of whether or not they actually feel a sense of repulsion or moral outrage, judges are acutely aware of the potency of publicly labelling something as disgusting. Disgust is a strong emotion, and the use of the term may often be used to give an “extra edge” in the public denunciation from the judicial bench: there is socio-cultural consensus that certain things are wrong and repulsive and should be condemned as such, and judges are reflecting this. The performative aspect of socio-moral disgust – as well as its potential for exaggeration – assumes a major role here in marking out and censuring those who violate society’s moral codes.

## 8. Conclusion

Much has been written by Terry Maroney and others on the topic of emotion regulation in the judicial sphere (Maroney 2011, Maroney and Gross 2014, Roach Anleu *et al.* 2015), and attempts to promote this skill would clearly benefit from a sound evidential underpinning. The methodological approach chosen here may be a crude one, but has been useful a starting-point for exploring disgust as a basic emotion though one which receives less attention in law and emotion discourse.

Identifying and analysing judicial expressions of “disgust” in a chosen sample of law reports gives us initial insights into how judges articulate and signal disgust, how frequently they do so, and in what specific contexts. Whether the individual utterance can be categorised as core disgust or socio-moral disgust, or as reflecting a combination of the two, is not an exact science (nor should we expect it to be); but an appraisal of the factual circumstances of the particular case and the context in which the statement was made points towards more examples of socio-moral disgust than core disgust. Of course, socio-moral disgust is more interesting as a point of intellectual inquiry here, because of how it categorises and admonishes certain human behaviours, and what this might mean within the discourse of judging. Yet, this is not to disregard the significance of core disgust with its primal, visceral qualities as well (Wistrich *et al.* 2014). In this article, we have also been working on the basis that what judges say about disgust as an expression of emotion – and regardless of whether or not that emotion is also actually *experienced or felt* – is interesting and worth investigating for reasons we have outlined.

In attempting to deconstruct judicial expressions of disgust, our initial investigations have raised as many questions as they have provided answers, and we have outlined a number of themes to look at in moving forward with our research. Other things that would be interesting to explore are whether disgust attenuates or lessens with experience (compare Wistrich *et al.* 2014), and whether expressions of judicial disgust are gendered. In particular, given that studies suggest that there are variations in disgust responses between the two sexes (Al-Shawaf *et al.* 2018) it might be worth investigating whether there are any discernible differences between expressions of disgust by male and female judges, who tends to use the term more frequently, whether this is replicated across the judiciary, and whether cultural

variations in what elicits disgust, and socio-moral disgust in particular,<sup>19</sup> appear in the practice of judging. In the same way, one might ask whether “disgust” tends to be directed more to the actions and behaviours of males than females (or vice versa) in the courtroom setting. More research and in-depth analysis would be needed to test any of these ideas. For now, however, we hope to have persuaded the reader of the value of looking at disgust from a law and emotion perspective.

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<sup>19</sup> As discussed in Part 2.



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