

The Master Mediator / Part 1 of 2

Coming to Grips with Disgust

BY ROBERT A. CREO

- *There probably was a time when the idea of having a toilet inside a house was repulsive.*

—Mokokoma Mokhonoana

- *The greatest pleasures are only narrowly separated from disgust.*

—Marcus Tullius Cicero

- *There are people who in spite of their merit disgust us, and others who please us in spite of their faults.*

—François de la Rochefoucauld

Yuck! Disgusting! Revolting! Disgust is primal.

The basic emotion of disgust is considered one of the primary six or seven emotional sensations. It is experienced and reactive to stimuli, real or perceived, to the senses of smell, taste, hearing, and vision. It is primal and similar across cultures over time.

Disgust is hard-wired. Facial expressions vary little across cultures. Evolutionary biologists contend that disgust was a response to offensive or poisonous foods as a protective mechanism, and includes a hardwired reaction to animals and people who are diseased.

Disgust is the underlying basis of obsessive-compulsive disorder, better known as OCD, which is an anxiety phobia and con-

tamination fear. When examined with an MRI, some people diagnosed with major depression have displayed greater brain activation when confronted with the facial expressions of disgust of others.



Based upon studies started in the 1970s, Prof. Paul Ekman concluded that disgust is one of the six universal facial expressions of emotions that have distinct characteristics. Although there are variations, including among individuals, facial

expressions of disgust are easily recognized across cultures.

Facial disgust is a signal or warning, so a member of a group observing another reacting in disgust triggers comparable neural activity and potential reaction. This contagious element of disgust supports the evolutionary survival value for humans living in groups. Individual disgust is a cue which promotes pro-social behavior for group members.

The seminal Ekman research (see references in accompanying box on page 10) shows that a curled upper lip or pursed mouth, wrinkling or clenching of the nostrils, protrusion of the tongue, and slightly narrowed brows are the most universal ways disgust is expressed. This is also true for individuals born blind or deaf.

Making a face of disgust also increases the feelings of disgust, and even an unintentional wrinkling of the nose may invoke actual feelings of disgust. Interestingly, disgust is correlated with cardiovascular and respiratory changes, such as decrease in heart rate, blood pressure, and breathing. Anger, fear and sadness typically provoke the opposite biological responses.

Researchers contend that disgust provokes the natural instinct to withdraw and avoid, rather than engage in direct contact necessary for aggressive behavior. Avoidance is the first line of defense.

The evolutionary goal is to avoid potential pathogens to protect from unknown disease exposures and danger. Some research concludes that disgust is the basis for in-group attraction, and that those who are more sensitive to disgust have more negative attitudes toward other groups.

Some theorize that this is the evolutionary basis of racism.

THE DOMAINS

Disgust can occur in many areas, which social scientists call “domains,” including pathogen, sexual/mating, and morality.

Sexual disgust is motivated by a desire to maximize positive reproductive opportunities and to avoid reproductive costs of a poor choice of mates. Some studies have shown that women typically experience greater levels or prominence of disgust when compared to men exposed to the same stimuli.

Moral disgust is a cultural phenomenon. Social, communal, and cultural transgressions invoke disgust as a means of promoting group cohesion from bad actors and free riders. Disgust contributes to group action of shunning or ostracizing of bad actors, or social distance from some members of the community.

This can lead to dehumanization or demonization of individuals or groups, and can lead to a failure to attribute distinctively human traits to groups. This, in turn, can cause poor or savage treatment to group members motivated by feelings of disgust and rationalized morally on the platform of emotional disgust.

The cultural differences of disgust generally relate to social conditioning and communal values or spiritual norms. Many foods, objects, animals, and behaviors considered

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The Master Mediator

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disgusting are learned reactions or behaviors dependent on specific groups, cultures, normative systems, and morality expectations.

Eating the pet dog disgusts most Westerners, while some Middle Eastern or Asian cultures are revolted by eating pork or beef. People can change their own perspectives by learning or training, such as vegans, or eschew all animal food sources.

Individual negative experiences, especially when younger, may ingrain a disgust response in individuals in reaction to a traumatic event or unpleasant exposure. For example, as a college student, I became sick by drinking too much vodka; I have never touched it again. The mere sight, or recall, of objects associated with bad experiences may invoke emotional disgust signs.

Author and educator Robert Rawdon Wilson argued that contempt, although acted out on the basis of the visceral emotion of disgust and which stems disgust, is not identical with disgust. He contended that contempt is a “compound affect” that involves mental preparation, formatting, or theatrical techniques.

Prof. Wilson argued that there are many such “intellectual” compound affects—such as nostalgia and outrage—but that disgust is a fundamental and unmistakable element able to stand alone. He asserted that moral

Disgust may breed a sort of wisdom that allows us to process information in a way that is not obvious or done immediately through reason, logic or by executive brain functions.

disgust differs from visceral disgust because it is more conscious and complex, involving reflection.

He also contended that self-loathing is linked to shame and guilt, transformed in whole or part into self-disgust rooted in

Yuck, Multiplied

The emotion: Disgust.

The problem: It's present in life. It's present in mediation.

Addressing the distasteful: In the first of two parts, the Master Mediator looks at how disgust manifests itself. Next month, details on turning hard feelings into settlement steps.

self-consciousness. Wilson also noted that because individuals are familiar with disgust, with its unique characteristic gestures and expressions, they can easily imitate it.

See Robert Rawdon Wilson, *The Hydra's Tale: Imagining Disgust*, 281 (U. Alberta Press 2002).

Some research supports the contention that individuals possessing self-disgust, especially in its extreme form of self-loathing, find it difficult to condemn bad actors because they may feel they are also deserving of punishment. The physical and psychological reactions are integral to the social conditioning of the culture or individual.

WISDOM AND POSITIVE LAW

One perspective on disgust is that it expresses an intuitive knowledge which should be followed in guiding decisions, including in ADR and litigation.

This “wisdom of repugnance,” or the “yuck factor,” legitimizes decisions based upon any natural or “deep-seated” adverse reaction to an object, concept, or practice. Patricia Cohen, “Economists Dissect the ‘Yuck’ Factor,” *E1 N.Y. Times* (Jan 31, 2008)(available at <http://nyti.ms/2ggE17X>). The underpinning of the theory is that the human emotional reaction should be interpreted as evidence for intrinsic harm, danger, or evil character of that stimulus.

ADDITIONAL REFERENCES AND RELATED READING

1. Paul Ekman, *Emotions Revealed, Second Edition: Recognizing Faces and Feelings to Improve Communication and Emotional* (Holt Paperbacks 2007).
2. J. Haidt, P. Rozin, C. McCauley, S. Imada, *Body, Psyche, and Culture: The Relationship between Disgust and Morality*, 9 *Psychology & Developing Societies* 107 (March 1997)(available at <http://bit.ly/2g45lmT>).
3. Leon R. Kass, “The Wisdom of Repugnance,” *New Republic* 17 (June 2, 1997).
4. Daniel Kelly, *Yuck! The Nature and Moral Significance of Disgust* (MIT Press, 2011).
5. William Ian Miller, *The Anatomy of Disgust* (Harvard U. Press, 1997).
6. Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford U. Press 2010).
7. Hans J. Rindisbacher, *A Cultural History of Disgust*, 5:1 *KulturPoetik* 119 (2005) (available at <http://bit.ly/2gEg3ns>).
- Also, see the following *Alternatives* Master Mediator columns focusing on shame, revenge, emotions and decision making:
8. Robert A. Creo, *On Emotional Processes, and Anger*, in *Two-Part Harmony: Where Decisions Really Come From*, 34 *Alternatives* 149 (November 2016).
9. Robert A. Creo, *Embracing and Using Anger in Mediation*, 34 *Alternatives* 166 (December 2016).
10. Robert A. Creo, *On Emotions and Decisions*, 34 *Alternatives* 122 (September 2016) (available at <http://bit.ly/2gW7XCK>) (discussing the effect of participants' shame in mediation).
11. Robert A. Creo, *Getting the Feel of Feelings*, 34 *Alternatives* 99 (July/August 2016) (available at <http://bit.ly/2hCeR3Y>) (discussing how powerful emotions affect mediation session).
12. Robert A. Creo, *Getting Emotional: Where Closure May Mean Addressing Vengeance*, 31 *Alternatives* 145 (November 2013) (analyzing the effects of moves for revenge in mediation).

The belief is that this wisdom may manifest itself via disgust and process information in a way that is not obvious or performed immediately through conventionally accepted reason, logic or by executive brain functions.

The contention is that when sufficient numbers of community members feel the same way, or follow leaders espousing policies based upon common negative sentiments, then positive laws are enacted to reflect the majority view of the community beliefs and concerns.

A contrary view has been advocated by University of Chicago Law School Prof. Martha Nussbaum and others opposing the platform of a disgust-based morality. She has extensively studied the relationship of disgust and shame to a society's laws and legal system. Her perspective is that under majoritarian rules, the "politics of disgust" is essentially an unreliable emotional reaction with no inherent wisdom.

This is in contrast to the "Harm Principle" espoused by John Stuart Mill as the proper

basis for positive law, in which society may act against a person against his or her will only to prevent that person from harming others.

Prof. Nussbaum contends that the Harm Principle is based upon legal concepts of consent of the governed that protects the privacy and humanity of citizens. These "politics of disgust" result in laws of oppression, denigration, or displacement of minority groups—the history of U.S. laws on segregation, women's rights, Native Americans, immigrants, Japanese internment, and other laws targeting specific ethnic or religious identities.

Disgust has justified legal actions promoting or protecting discrimination of the disabled, anti-Semitism, sexism, homophobia, and other unpopular groups. See Martha Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* (Princeton University Press 2004). The late author Stephen Jay Gould stated that "our prejudices often overwhelm our limited information. [They] are so venerable, so reflexive, so much a part of our second

nature, that we never stop to recognize their status as social decisions with radical alternatives—and we view them instead as given and obvious truths." See Stephen Jay Gould, *Full House: The Spread of Excellence from Plato to Darwin* (Belknap Press reprint edition 2011).

Robert Rawdon Wilson examines the claims of several jurists and legal scholars—such as William Ian Miller—that disgust must underlie positive law. "In the absence of disgust," he observed, stating their claim, "... there would be either total barbarism or a society ruled solely by force, violence and terror."

The moral-legal argument, he remarked, "leaves much out of account." His own argument turns largely upon the human capacity to learn how to control, even to suppress, strong and problematic effects and, over time, for entire populations to abandon specific disgust responses.

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Next month: Disgust at the bargaining table. 

ADR Briefs

TELLING TALES: AN ARBITRATOR'S MISREPRESENTATIONS GET AN AWARD OVERTURNED

BY KSENIA KORIUKALOVA

The U.S. Court of Appeals for the Ninth Circuit in San Francisco has held that an arbitral award could be vacated under the Federal Arbitration Act in a case where a tribunal chair falsely claimed that he was a licensed attorney.

In *Move Inc. v. Citigroup Glob. Mkts.*, 840 F.3d 1152 (9th Cir. Nov. 4, 2016)(available at <http://bit.ly/2hgEe87>), the plaintiff online real estate company initiated a Financial Industry Regulatory Authority arbitration against Citigroup in 2008 over alleged mismanagement of investment funds.

The case was heard by a panel of three FINRA arbitrators selected from the industry regulatory organization's list. In 2009, the arbi-

trators unanimously decided the case in favor of Citigroup.

But more than four years later, Move, which is owned by Rupert Murdoch's News Corp., learned from a news report that the tribunal chairman wasn't a licensed lawyer. According to the Ninth Circuit opinion, it is "undisputed" that the chairman, "who is 'James Hamilton Hardy Frank,' was impersonating retired California attorney 'James Hamilton Frank'"—a different person with a similar name. The chairman had claimed multiple bar admissions.

The opinion says that "[b]ecause the dispute involved a complex securities issue, it was important to Move that the person selected as chairperson be an experienced attorney."

FINRA confirmed that the arbitrator had "lied about his qualifications," which had been provided in its "Arbitrator Disclosure Report," and removed him from the institution's roster, according to the opinion.

In June 2014, Move initiated litigation to vacate the arbitral award on the basis of the chairman's misrepresentations. Citigroup filed

a motion to dismiss, arguing that the claims were time-barred, and also that the vacatur was not justified on the merits.

Although the plaintiff missed FAA § 12's three-month deadline for filing a motion to vacate, the district court found that equitable tolling was available. But the lower court was not satisfied that there were grounds for vacating the award under the FAA. Move appealed the district court judgment.

The Ninth Circuit found that Move's claims were not time-barred due to the application of the equitable tolling doctrine. According to the unanimous opinion drafted by Senior Circuit Judge Dorothy W. Nelson, the Ninth Circuit had not, before this case, decided on the applicability of the equitable tolling doctrine to the FAA.

The circuit court referred to the "rebuttable presumption that limitations periods are subject to equitable tolling" described in *Young v. U.S.*, 535 U.S. 43 (2002), and concluded that "neither the text, nor the structure, nor the purpose of the FAA is inconsistent with equitable tolling."

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The author was a CPR Fall 2016 legal intern.