CHAPTER FIVE

DEFENDING DIGNITY

I will make a few notes in the margins of two large and seemingly unrelated developments that are of vital importance to the criminal law: a growing disaffection with the harm principle and the challenge of multiculturalism. The harm principle presents itself as a morally neutral standard that can set rational limitations on the scope of the criminal law. The disaffection results from a mounting recognition that the pretence of neutrality is specious, the limitations illusory, and that the principle fails to define and properly delimit criminal liability. This conclusion invites a search for an alternative. The difficulty of such a search is greatly compounded, however, by cultural diversity and its normative implications for national legal systems. The approach sought must be able to accommodate a wide range of creeds without slipping into a relativism that condones every atrocity as long as it is underwritten by some culture. This apparent dilemma has long haunted moral and legal philosophy, but its urgency is felt with particular force these days, as multiculturalism is becoming a more pressing and a more widely recognized reality.

The suggestion I consider is the replacement of the harm principle by what may be called the *dignity principle:* the view that the main goal of the criminal law is to defend the unique moral worth of every human being. Duly elaborated, the proposed principle may be able to meet the foregoing challenges: provide a more adequate criterion for criminality than the harm principle, and allow us to insist on law's enforcing a substantive morality while leaving ample yet not infinite room for cultural variation. I do not, however, attempt here the requisite elaboration, nor

do I present a comprehensive argument in support of this suggestion. I offer only some preliminary thoughts, and I pursue them using a method that is now more commonly practiced by lawyers than by philosophers, even though its origins are distinctly philosophical: attending to puzzle cases, *aporiae,* and constructing theoretical response to them. I will try to demonstrate that the idea of dignity helps account for our considered judgments in a number of test cases in which the idea of harm fails, and then explain how a dignity-based morality may be able to cope with cultural and moral diversity.[1]

It is important to emphasize at the outset that I do not pretend to invent the suggestion I here examine or draw it out of thin air. Quite to the contrary, the suggestion I explore is a move within a familiar dialectic that has characterized the development of liberal thinking in the recent past. On this view of the matter, replacing the harm principle with the dignity principle is the culmination of what can be schematically seen as a three-stage process. The harm principle was ushered in as part of the rise of utilitarianism.[2] The last thirty years or so have been marked by a mounting critique of utilitarianism and a deontological, mostly Kantian response to it. Much of the opposition between these views has focused on utilitarianism's aggregative approach, criticized by opponents as failing to pay sufficient attention to the separateness of persons or their individuality. But another aspect of the opposition, more relevant to my topic, concerns the basic values that the conflicting views respectively posit. These are ordinarily taken to be individual welfare on the utilitarian side and personal autonomy on the Kantian. The relationship between these two values has become a dominant theme in liberal discourse. However, even a casual reader of the legal and the philosophical literature will have noticed a subtle but significant shift from autonomy-talk to dignity-talk that has been shaping recently on the deontological side of the normative divide, with an increasing emphasis on respect for persons as the preeminent liberal value.[3] The following discussion is part reflection and part elaboration within the field of criminal jurisprudence of this trend.[4]

1. Beyond Harm

Liberal criminal law theory has long been dominated by the harm principle.[5] But the principle was contested from the start[6] and has come under increasing attack over the years. I will not attempt a final verdict, but will only illustrate the kinds of misgivings that motivate a continued search for an account of what criminal liability is essentially about. The harm principle is designed to define the legitimate scope of criminal

liability, so it is natural to test it by examining how well it performs this task. My starting points are two seminal articles by Professor Sanford Kadish in which he sounded the alarm against the perils of overcriminalization. Though I find both of these articles compelling, when seen side by side they appear to be pulling in opposite directions in ways that reveal strains in the harm principle. In the first of these articles Professor Kadish criticizes a category of offenses often referred to as *victimless crimes,*[7] which includes such things as consensual deviant sexual practices, gambling, and the use of narcotics, whereas in the second article he criticizes the use of criminal sanctions in enforcing economic regulations.[8] The articles thus present two large areas of criminality as objectionable departures from what is taken to be the legitimate core of criminal liability. What is this core? What makes the departures illegitimate? Kadish's answer to the first question is explicit and sound: "The central distinguishing aspect of the criminal sanction appears to be the stigmatization of the morally culpable."[9] What is wrong with the use of criminal sanctions in the service of economic regulation is simply the absence of moral culpability. But this diagnosis creates a tension with Kadish's criticism of the offenses discussed in the first article, offenses that are designed "purely to enforce a moral code."[10] The moral opprobrium that is fatally missing in the case of economic regulation appears to be the defining characteristic of these offenses; why are they an aberration of criminality rather than at the heart of it? The alleged immorality of offenses that fall in the first category does not seem to give them sufficient liberal credentials, nor does the mere presence of harm in the latter, economic types of offenses make them suitable for criminal prohibition. The challenge posed by Kadish's two articles is how the criminal law can retain a moral content without turning moralistic. We need, in other words, a criterion of criminality that is both *moral* and *critical:* one that can preserve the distinctly moral content of criminal liability without endorsing on purely conventional ground any strongly held popular belief. The harm principle seems unable to meet this challenge.

There is a second and related objection to the harm principle, put forward most recently by Professor Bernard Harcourt.[11] As originally conceived, the harm principle was a limiting principle, designed to stave off the heavy hand of the criminal law and to confine it within narrow and relatively secure bounds. But this no longer seems to be the principle's effect. The limitations it imposes are very feeble; it excludes little by way of conduct deemed to be immoral. In most of the areas in which criminalization on moral ground is debated, it has proved remarkably easy to dress up moral objections to various forms of conduct, such as prostitution or pornography, in their alleged harmful consequences. Moreover, far from limiting the reach of criminal law, the harm principle may have contributed to its expansion. By purporting to sever the connection

between morality and law, the principle unleashed criminal liability in broad areas that had been previously closed to it. Once the idea took hold that harm is the gist of criminality, every infliction of harm becomes a candidate for criminalization. Add to this the interdependency and density of modern life that make risk of harm ubiquitous, and you get the specter of an expanding criminal law, threatening to hold all of life in its coercive grip. As against this specter (the year 1984 is, after all, already in our past), some fundamental retrenchment seems needed. And, perhaps paradoxically, safe shelter may be found within morality itself: it may prove easier to contain the criminal law if it is recognized that its paradigmatic function is not the prevention of harm, but rather the enforcement of morality.[12]

But what morality? In moving beyond the harm principle it is important to note that objections to it of the kind I have so far mentioned tend to focus on gray areas at the periphery of criminal liability, while taking for granted that when it comes to core crimes, such as homicide, battery, or rape, the idea of harm predominates: in these cases harm to the victim is obvious and must play a decisive role. By demonstrating the difficulties the harm principle encounters even in these core crimes, we can get a clue as to the general direction in which to proceed. I consider a single, but I think compelling, example: rape by deception. It will help to focus on a specific case. In *State v. Minkowski,*[13] the defendant, a gynecologist, was accused of raping during their medical examinations a number of his female patients, who on recurrent visits had not realized what was going on. Everyone would agree, I suppose, that these women were indeed raped even before finding out about the violations, and this judgment would not be reversed even if the women were never to find out. The obvious difficulty is that in such a case, it would be hard to identify any harm to the women. Since no physical injury is alleged, the harm in this type of situation would ordinarily be psychological. But as long as the victims remain unaware of what had happened, it is plausible to assume that no adverse mental effects occurred either. Yet the difficulty of finding harm does not seem to weaken our conviction that the women were raped all the same. It is easy of course to condemn the defendant's conduct in these circumstances and justify his punishment on various obvious rule-utilitarian grounds. But doing so would miss the target. The crucial judgment I assume is that Minkowski's actions are reprehensible acts of rape all by themselves, and should be treated as such out of concern for the unsuspecting victims despite the fact that their ignorance protects these victims from a hurtful experience and quite apart from any likely future ramifications of condoning Minkowski's conduct.

The Kantian perspective offers here a familiar and attractive alternative to welfarism. Even in the absence of harm, the familiar story goes,

the women were wronged, because they were subjected to nonconsensual sex, in derogation of their autonomy. It is sometimes added here, mostly for good rhetorical measure, that rape offends against the victim's dignity as well. But such addition plays no substantive moral role, since implicit in it is the identification of dignity with autonomy: the failure to respect the victims' dignity just consists in the failure to respect their autonomy.[14]

Although such shift from welfare to autonomy, and correspondingly from harm-talk to wrong-talk, seems apt in this case, it will not always avail. Two examples will help make the point. Our attitude toward corporal punishment offers the first illustration. In *State v. Braxton*[15] the defendants were sentenced to thirty years imprisonment on charges of sexual misconduct, but were given by the trial court the option of undergoing surgical castration instead. They would have chosen castration, but the appellate court withdrew the option. Why was this option withdrawn? Since the individuals in question would have consented to the procedure, denying them the option compromises their autonomy rather than protecting it. But the court's paternalistic stance cannot be explained in terms of a concern for the defendants' welfare either: no one suggested that the defendants were mistaken in believing that diminished sexuality is preferable in this respect to thirty years in jail. More generally, we would probably not find *optional* flogging or amputation as forms of punishment much more appealing than mandatory. What considerations then override the defendants' express wishes in such cases?[16]

In my second example, *State v. Brown,*[17] the defendant habitually beat his wife when she drank alcohol, allegedly as part of an agreement to help her overcome her alcoholism. In convicting Brown, the court rejected a defense of consent. How are we to assess this decision? To be sure, it is easy to marshal in its support sound public policy arguments. There is, for example, good reason to be suspicious in general of agreements such as the one alleged. But here again, as in *Minkowski,* we must distinguish the generic offense to which such considerations pertain, from the specific token to which they may not. The judgment I assume is that even if we were to consider this case in isolation and be satisfied that in this particular instance the wife did consent, we would still conclude that the beating is unacceptable and ought not to be condoned. Why?[18]

2. From Autonomy to Dignity: The Case of Slavery

In order to answer this question I will first perform a short detour into neighboring and familiar territory. The institution of slavery has long served in the liberal literature as a stock antiutilitarian example and as

a demonstration of the merits of a deontological approach. But on a closer look, slavery threatens to embarrass the deontologist as much as the utilitarian. By revisiting the slavery conundrum we will be better able to assess the role of autonomy within the deontological perspective and see more clearly what elaboration of that perspective is needed to escape the embarrassments it potentially faces.

One way in which slavery serves as a counterexample to utilitarianism is by exposing and targeting its aggregative aspect: as long as enough people are sufficiently benefited by slavery, the institution is justified on utilitarian grounds, no matter how wretched the slaves' lives turn out to be. Utilitarianism is here castigated for its willingness to sacrifice some people in order to benefit others.[19] But slavery presents the utilitarian with an additional embarrassment, more pertinent to our present discussion, in the form of the specter of the happy slave. Here we focus on a particular slave who, we are asked to imagine, is quite happy with his lot. Can we raise any objection to his enslavement on utilitarian grounds?[20] This thought experiment highlights the utilitarian's impoverished conception of value. By limiting the normative inquiry to the slave's welfare, the utilitarian is bound to overlook a decisive moral factor, namely autonomy or freedom.[21] It is the utilitarian's blindness to such values that is responsible for her inability to appreciate the moral unacceptability of the happy slave's situation, giving a decisive moral edge to the Kantian perspective.

But this standard Kantian response to utilitarianism's alleged failings is not as successful as it might first appear. To see this we must inquire more closely into how precisely slavery relates to autonomy. Two different moments should be distinguished. The first concerns the circumstances of enslavement. We ordinarily assume that enslavement itself is involuntary, foisted on the slave through brute force. But what about consensual enslavement?[22] To avoid the unwelcome conclusion that voluntary enslavement is morally sound, it must be maintained that through this exercise of one's autonomy one sacrifices more autonomy than one gains. I am not sure how convincing this argument is in its own terms. After all, every contract involves some restriction on freedom of choice, and yet, since the restriction is self-imposed, contracts are generally perceived as expressing autonomy and promoting it. Should each contract be made vulnerable to an assessment of its overall effects on the parties' autonomy?

Be this as it may, the entire onus of this response to the problem of voluntary enslavement rests on the second moment in the relation of autonomy to slavery: whether or not the slave agreed to the enslavement, the ongoing regime under which he lives is assumed to consist in a severe limitation of his freedom of choice. But here too we must tread carefully.

Is it really necessary that to be a slave one's choices must be severely curtailed? It should first be noticed that the question must be understood as inviting a comparative judgment: everyone's options are limited, so the slave's situation could be distinguished in this regard only if his options were more restricted than those of nonslaves. But that need not be the case. We can easily imagine a nonslave whose options are in fact fewer, say due to severe handicap, than those of a slave whose master, out of benevolence or enlightened self-interest, gives him considerable free rein. It may perhaps seem that the slave's predicament must still be understood in terms of limitations on choice if we focus on the reliability of those options rather than on their number: the nonslave's options, even if more numerous, are precarious since they can be withdrawn at any time at the master's whim. But this response will not do. First, it does not seem plausible to focus here exclusively on the reliability of having the options available to one without regard to their range and significance. If reliability is to be taken into account, it would more likely be part of a calculation of something like the expected value of one's overall choice-set, in which the number and significance of options is weighted by the likelihood that they will not be withdrawn. But if this is the more plausible measure of one's freedom, then we can easily make compensating adjustments in the scenario we imagine, such that the larger number of options available to the slave will be made to offset the greater reliability of the fewer options the handicapped nonslave enjoys. Second, the slave's options need not in fact be less secure than the nonslave's. We can posit a master whose firm, perhaps obsessive character makes it all but impossible for her to depart from her benevolent policy toward her slaves, while imagining the nonslave to be suffering from a progressive congenital disease, likely to bring all options to a terminal end at any time.

If autonomy is to be assessed, plausibly, in light of the actual range of options available to one, and if, also plausibly, the assessment must be comparative, then the foregoing considerations lead us to the specter of the autonomous slave. Just as the happy slave demonstrates that welfare is not the only value in this context, so does the autonomous slave show that neither is autonomy. But is an "autonomous slave" not a glaring oxymoron? Is not loss of autonomy the very essence of slavery? The answer depends on the distinction between *de facto* and *de jure* autonomy. My examples, if convincing, demonstrate that de facto autonomy or its curtailment is not essentially linked to slavery, leaving however the possibility that de jure autonomy is so linked. Someone who enjoys de facto freedom of choice may yet be enslaved de jure. This possibility removes the oxymoronic appearance of the "autonomous slave" figure we have imagined, but it does so by raising a different puzzle: if two people can enjoy in fact the same level of welfare and exercise the same

degree of choice, yet one of them be a slave while the other is not, wherein does the evil of slavery lie? Why is the mere de jure distinction important?

It is open to the reader to deny at this point the premise of these questions: since our imaginary slave is no worse off than his free counterpart, there is really no need for us to deplore his "enslavement." What makes slavery in general a heinous institution, the objection continues, is precisely the fact that real-world slaves are in fact deprived of both welfare and autonomy to a shocking degree: stipulate away these incidents, and you have removed those features that make slavery the paradigm of injustice. I think that this objection is misconceived. We view slavery as a paradigm of injustice precisely because its injustice is necessary or analytical rather than contingent and empirical. To describe someone as a slave is ipso facto to view him as the victim of injustice, rather than to invite an investigation into the actual circumstances of his life. Why?

3. The Morality of Dignity

There is an obvious answer, though its import is not always fully appreciated. What remains evil about slavery even in the case of the slave who is de facto free and content is the affront to human dignity: slavery is the paradigm of injustice because it denies people's equal moral worth and thus treats them with disrespect. If this conclusion is sound, then our discussion of slavery demonstrates three moral claims: the independence of dignity of both welfare and autonomy, its priority over these other values, and its meaning-dependence. Nothing short of a complete moral theory would suffice to substantiate and adequately defend these claims. But although such a theory cannot be provided here, its general shape and contours can be at least vaguely imagined if we think of it as a variant of Kant's moral theory. All I can do here is to make a few preliminary comments about each of the claims.[23]

Independence

The possibility of a free and happy slave demonstrates the independence of dignity from welfare and, more significantly, from autonomy as well: one may willingly live a life in which a sufficient range of choices is available, and yet be stripped of one's dignity. This observation runs up against a tradition of thought that closely links dignity to autonomy. Dignity, and the related ideas of equal human worth and respect, are all

familiar constituents of the deontological perspective.[24] But as I mentioned at the outset, the dominant trend in the deontological branch of liberalism has been to focus on autonomy. For the most part dignity, if mentioned at all, has been seen as a matter of deferring to people's autonomy, and thus has had no independent role to play.[25] Against this background, the independence claim appears revisionary, and my aim here is to dispel this impression, by relating the claim to Kant's own views.[26] Of course, *dignity* and *autonomy* are not Kant's registered trademarks, and their relationship can be discussed apart from his ideas. But as a matter of historical fact, the liberal deontological strand is heavily Kantian, as is more specifically the close association between dignity and autonomy this strand maintains. It is therefore of some interest to note that Kant's moral theory does not provide adequate support for this association. The appearance that it does results from a key feature of Kant's morality: he holds that human dignity is based on or derives from people's autonomy. It does not follow, however, that respecting people's dignity is just a matter of respecting their autonomy in the way the dominant liberal tradition came to maintain. I will make three points in this regard.

To begin with, as others have noted, Kant links the idea of dignity to a rather specialized and restricted conception of autonomy, roughly the capacity for moral self-legislation. No special connection accordingly obtains on Kant's own view between dignity and autonomy in the broader sense that is of interest to political philosophers and that has to do with people's alleged right to make self-regarding choices by themselves.

Second, dignity does not coincide even with moral autonomy narrowly conceived. Even if moral autonomy is the ground of a person's dignity, it need not also define the subject of dignity or its scope, so that the respect demanded by dignity would be exclusively respect for a person's moral choices. We must be careful to distinguish here two different ideas conveyed by two different locutions: respecting a person's autonomy and respecting a person *for* or *by virtue of* her autonomy. To say that autonomy is the ground of dignity connotes the latter idea: the claim is that dignity is the value a person has by virtue of possessing a certain capacity or having a certain property, rather than that it is the value of the capacity or the property abstractly conceived. The real subject of dignity is the person, not her autonomy. Once pointed out, the difference between the two locutions is quite obvious, so it is instructive to observe why in Kant's own theory this distinction is effaced. The reason lies in Kant's metaphysical doctrine of the *noumenal self:* in the domain of things in themselves, a human being simply is a pure rational free will, and is thus characterized exhaustively by her moral autonomy. To respect the person and to respect her autonomy are, on this picture,

one and the same. One can, however, accept that a capacity for moral autonomy is the ground of dignity without buying into Kant's extravagant metaphysics. People can be believed to have dignity by virtue of possessing a rational free will without being thought to be metaphysically identical with such a will. If so, one must recognize that there is more to persons than moral autonomy, and correspondingly more to the idea of respecting a person than respecting her autonomy.

My third point is that the possibility of a conflict between dignity and personal autonomy is implicit in Kant's doctrine of self-regarding duties. One of the implications of the idea of dignity, according to Kant, is that one ought to respect not just others' humanity but one's own humanity as well. This gives rise to duties toward oneself, such as a prohibition against suicide. Since these self-regarding duties obviously constrain one's freedom of choice, they seem to manifest a clear conflict between dignity and personal autonomy. Once again, the metaphysics of the noumenal self and the specialized conception of autonomy avoid such conflict within Kant's own system. Moral autonomy consists in a rational will that is determined in accordance with correct moral principles. These principles, or maxims, supposedly take proper account of the agent's own dignity as well as that of everyone else. In the noumenal realm, complete harmony exists between the demands of dignity, including one's own, and one's autonomy. That in the real world we experience the moral promptings of the noumenal self as constraining, and hence as duties, only shows that our phenomenal self is motivated by what Kant calls "inclinations," the familiar paraphernalia of psychological forces that form no part of one's autonomy in the restricted Kantian sense. However, as soon as we depart from Kant's metaphysics, the picture changes radically. It becomes altogether possible for people to make self-regarding choices, and thus exercise their autonomy, in ways that fail to comport with their own dignity and moral worth.

Priority

The discussion of slavery illustrates not only the independence of dignity from welfare and autonomy, but also the priority it takes over them in case of conflict. But why should we be concerned with expressions of respect or perturbed by manifestations of disrespect apart from their effects on our welfare and autonomy? Separated from these apparently more robust values, dignity may seem rather pale, perhaps even vacuous.

I will make two brief observations in response. The first concerns a consideration that casts doubt on the intuition that individual welfare and autonomy are more likely and attractive foundational or basic moral

values. Even without attempting a general inquiry into what a foundational moral value is, it seems plausible to expect of such a value that it satisfy a rather weak condition: other things being equal, it ought to count in favor of an action or state of affairs that it includes or satisfies or increases that value. Welfare and autonomy do not satisfy this condition. Few would find moral merit in a mass murderer being rewarded with a Caribbean vacation, even when reassured that no negative consequences will follow (because the reward is secret, the murderer presents no future danger, etc.). Similarly, an intentional killing, which is therefore an expression of the perpetrator's personal autonomy, is for this reason morally worse, not better, than an accidental killing.

The second observation is that the value of welfare and autonomy seems most compelling when considered from the first-person perspective. When thinking about myself, it may make sense for me to take the view that as long as my autonomy and welfare are secure, I do not need your respect and do not care about disrespect either. But as soon as I turn to think about your case, autonomy and welfare lose the urgency they have in my own situation: your autonomy and welfare do not have the same appeal to me as my own. This thought need not bother me until I realize that our situation is symmetrical, and that my autonomy and welfare need not be of greater moment to you than yours are to me. It is at this point that the idea of our equal moral worth comes into play, providing a reason why our autonomy and welfare ought to be of reciprocal concern. So even if our engaging in moral reflection is prompted in the first place by our concern for our own autonomy and welfare, we realize in the course of such reflection that in order to secure these interests we must subscribe to a more fundamental value, dignity, whose content must be known not to be limited to the importance that each person assigns to his or her own interests. A recognition of the distinctive and supreme value of our common humanity appears to be a precondition of morality. This, indeed, is Kant's view. In his scheme, all morality derives from a single master principle—the categorical imperative—which by enjoining the treatment of persons merely as means rather than as ends, spells out the meaning or the implications of according dignity to people. Since all immorality consists at bottom in violations of the categorical imperative, it is also always a matter of offending against human dignity.

Meaning Dependence

In what way, though, does slavery offend against the slave's dignity if in the particular instance it does not derogate from the slave's welfare

or autonomy? The answer I propose depends on the observation that dignity demand that our actions, practices, and institutions convey an attitude of respect to people. There are many ways in which respect can be conveyed, and correspondingly many ways in which it can be withheld. But the main point here is that whether an action, practice, or institution is consonant with dignity is a matter of that action's meaning.[27] How does such meaning accrue?

There are two answers to this question, and the case of slavery illustrates them both. First, an action, or in this case an institution, may offend people's dignity through its overt, explicit content. Slavery does so inasmuch as a complete articulation of the meaning of this institution would involve an explicit denial of the slaves' equal moral worth. But the disrespectful meaning of an action may also be conventional. The convention can be an arbitrary one, as is the case with many insulting gestures. But more likely the conventional meaning attaches to an action by virtue of certain empirical characteristics and consequences it typically has. Following Kant, we can say that the essence of disrespect is a failure to appreciate a person as a being whose value is independent of anyone or anything else, and who should therefore be treated as an end and not just as a means. Exploiting a person for one's own ends by inflicting on him harm or suffering with disregard for his own needs, interests, and desires is the paradigm violation of this imperative.[28] Now ordinarily slavery does just that. Given this record, it is not surprising that slavery should be associated in our minds with indignity. My present point is that although the association has an empirical basis, it need not be limited to those instances in which the empirical conditions obtain. The meaning that attaches to slavery as an insult to dignity is retained even in the situation we imagined, in which the typical derogatory effects on the slave's welfare and autonomy are stipulated away.

4. Dignity and Social Meaning

We can now return to the two puzzle cases, *Braxton* and *Brown,* we considered earlier. The prominent feature of both cases that must play a central role in any account is physical violence. Why is violence objectionable? As we saw, the two most obvious replies—that violence diminishes its victims' welfare and that it compromises their autonomy—are not available to us here, since the physical intrusions we consider involve neither. If these physical intrusions are to be condemned, a different ground for decrying violence must be found. Dignity provides such ground. The fact that physical violence does ordinarily hinder both welfare and autonomy is reason enough to render it a blatant manifestation

of disrespect. But as we saw in the case of the free and happy slave, the expressive meaning of violence can outrun the reasons for ascribing that meaning to it. Although for the most part their expressive significance is not attached to actions arbitrarily or at random, the connection between the reasons for ascribing to an action-type its symbolic significance as expressing disrespect and the tokens of that action need not be tight. Once an action-type has acquired a symbolic significance by virtue of the disrespect it typically displays, its tokens will possess that significance and communicate the same content even if the reason does not apply to them. Think in analogy of an onomatopoeic expression such as *buzz* or *crunch*. Such an expression does not denote what it does by virtue of the resemblance in sound, nor is its extension limited by such resemblance. Rather, denotation and extension are a matter of the expression's conventional meaning, even though that meaning accrued to it in the first place due to the phonetic similarity of the expression to at least some of the sounds it came to denote. The relative independence of the expressive component of disrespect I described, and the linguistic analogy I just drew, lead to the following conclusion. As long as certain actions are generally considered to express disrespect, one cannot knowingly engage in them without offending against the target's dignity, no matter what one's motivations and intentions are. One does not have any more control over the meaning of one's violent behavior than Humpty Dumpty had over the use of words.[29]

These observations explain our judgment that the castration proposed in *Braxton* and the beating inflicted in *Brown* involve an affront to the subjects' dignity despite their consent and enhanced relative or long-term welfare: when it comes to the expressive meaning of these actions, the typical case of violence casts its shadow over the exceptional. But this explanation is incomplete. A further question remains to be answered: how widely is that shadow cast? To appreciate the urgency of this question, consider some analogous situations to these two cases. The same surgical castration proposed in *Braxton* could be performed as part of some medical treatment or a sex-change operation. No one, I assume, would then impugn the surgery as involving any insult to the patient's dignity. What distinguishes these medical procedures from the *Braxton* case? After all, the redeeming features of castration in these instances are that it advances the patient's welfare and is done with his consent. If these factors are not sufficient to remove the stain of indignity in *Braxton,* why do they seem to suffice in the medical situation? Why do the negative connotations of physical mutilation not cast their shadow over the meaning that certain medical procedures have? A similar question arises with regard to the *Brown* case as well. Here the most suitable comparison seems to be competitive sports, specifically

wrestling and boxing, in which the level of permissible violence far exceeds the level, if any, that would be tolerable in a *Brown*-type scenario. Why, again, does the nasty record of the typical case of violence define the meaning of the beating in *Brown,* but not that of, say, pugilistic violence?[30]

The answer in both instances is quite straightforward. How far the shadow of a typical case will reach in defining the meaning of an atypical one depends in the first place on the way we conceptualize, categorize, and individuate the relevant social practices. The difference between the *Brown* case and boxing is first and foremost a result of the generic distinction we recognize between wife beating and boxing. A "benign" case of wife beating is still a case of wife beating, and it draws its offensive meaning from the typical, nasty cases. But that meaning does not carry over to what we recognize and label as "boxing." Moreover, since within boxing violence is not demeaning to the participants, no disrespect will be conveyed by a boxer's punches even if the individual boxer holds the opponent below contempt and harbors the most degrading attitude toward him. Similarly, the crucial distinction in the *Braxton* case is between the practice of criminal punishment and that of medical treatment. The meaning we attach to the same medical procedure—castration in this case—will radically differ depending on which of these practices provides the interpretive template. The negative connotations with regard to human dignity of physical mutilation extend to even such unusual punitive circumstances as those presented by *Braxton,* but they do not extend to the very different practice of medical treatment.[31]

5. Dignity and Culture

The cases I have discussed so far call for moral assessment within a single culture or moral community. But as I have indicated at the outset, the law increasingly confronts situations that require cross-cultural moral assessment. Within criminal law the issue comes up most pointedly in the debate concerning the *cultural defense* to criminal liability.

It is generally assumed that three different stances are open to the law in such situations: *imperialism, relativism,* and *tolerance*. By imperialism I mean the stance of an assessing culture that makes the assessment exclusively in terms of its own norms, ignoring as irrelevant the different norms of the assessed culture. Relativism is the opposite stance, in which the assessment is conducted in terms of the norms of the culture being assessed. Tolerance is an intermediate stance that arises in the relation between assessment and action: the assessing culture may still

conduct its assessment in terms of its own norms, but it will not act on its (negative) assessment out of a belief (whatever its source) that the assessed culture has "a right to be wrong."

The difficulties raised by each of these stances are well known, and I will not rehearse them here. My aim is to point out that a morality of dignity opens up a fourth possibility. Moral assessment of actions that take place within a different culture can proceed on the basis of *our* moral views and yet crucially depend on the meaning assigned by that culture to those actions.[32] Acknowledging this form of dependence is no more a matter of relativism or tolerance than is our going along with the fact that, say, Italians use the phonetic equivalent of the English word *my* to designate "never" rather than the first-person possessive pronoun.[33]

A comparison between two types of cases will illustrate this general point. The first concerns members of minority groups who have sought to defend themselves against charges of violence toward their wives by invoking cultural norms that allegedly permit or encourage such violence.[34] It should be obvious that a dignity-based morality will not support such a defense: the norms relied upon by such defendants embody the subjugation and oppression of women in the respective cultures. The victims' dignity is accordingly trampled by such acts of violence, and whatever the possible relevance of the defendants' cultural background, this background does not mitigate the affront to dignity that the violence involves. Contrast these instances with the controversy surrounding the practice, or rather set of practices, of female circumcision.[35] The social meaning of these practices is not at all clear, is not uniform, and is central to the debate. This social meaning, which determines the practices' bearing on the women's dignity, can be intelligibly assessed only in terms that are internal to the particular cultures concerned.

But such deference to the foreign meaning of an otherwise objectionable action or practice is bound to raise the following worry. Given the foundational role dignity plays within a Kantian morality, it would seem that once we are reassured that the cultural meaning of an action or a practice involves no offense to dignity, we no longer have any moral grounds for complaint, no matter how detrimental to people's welfare or how restrictive of their autonomy the action or the practice may be. Female circumcision is a case in point. Perhaps even more acute examples concern deviant beliefs and practices of some American moral or religious communities. The Jehovah's Witness who denies his sick child a life-saving blood transfusion and the Christian Scientist who chooses for a dying spouse prayer over surgery do not display disrespect for their relatives, so on the proposed account we have no basis for morally condemning these actions despite their catastrophic consequences. But

if we cannot morally condemn these actions and practices, are we not then bound to condone them?

There are two reasons why this conclusion does not follow. The first is this. The recognition that an action has an inoffensive meaning within the actor's group does not entail that a municipal legal system must accept this meaning as dispositive. Another cluster of considerations arises, analogous to those that come up in the dispute about bilingualism, that concern the desirability of cultural homogeneity within a state. Such "melting pot" issues are altogether separate from the moral assessment of the disputed actions and practices. Those who insist on English as the dominant language in the United States do not thereby imply that there is something amiss with French or Spanish as such. By the same token, one can consistently maintain that certain practices are inoffensive to their objects within their respective cultures and yet be opposed to such practices in this country. I have nothing to say here about the merits of this position, other than to point out that so viewed, the matter is converted from one of moral philosophy to one of political philosophy.[36]

The second reason is of greater importance. The worry I have mentioned assumes that unless we can morally condemn an action or a practice, we must condone it. However, our options are not in fact so limited. For example, we are greatly distressed by natural disasters though no immorality is involved. So also in the cases I have mentioned: they distress us and may call for remedial action without involving moral criticism. In the Jehovah's Witness and Christian Scientists cases, the parents' or spouses' erroneous beliefs are, morally speaking, on a par with the disease itself: we ought to rescue the sick dependents from their disease as well as from their relatives' wrong-headedness without ascribing to either negative moral significance.

What kind of "ought" is this, however? It may be felt that by portraying the actions whose consequences we are anxious to avert as not being themselves immoral, my account drains our reaction of moral significance as well. Since by being refused proper medical treatment by their relatives the patients in my examples are not being morally mistreated, it may seem a matter of moral indifference whether we save them or not. But here too, the analogy to natural disaster is helpful. Though a natural disaster has no moral significance, being in a position to assist its victims has, since unlike the disaster itself, our subsequent actions and omissions can convey an attitude of respect or disrespect to those victims. Similarly, in the situations I mentioned, distinctly moral grounds exist for preventing actions or disrupting practices that are not themselves immoral. The potential victims' dignity comes into play for the first time, and correspondingly moral considerations arise for

the first time, only when we have the opportunity to prevent the harm, rather than when the harm is initially threatened or inflicted. In other words, a doctrine of *negative responsibility*[37] can here fill the normative gap opened up by the expressive conception of dignity I advocate.

What difference does it make that the label *morality* attaches only to our intervention or failure to intervene rather than to the harmful actions or practices that provoke it? For example, what difference does it make that given its social meaning in the culture in which it is practiced, clitoridectomy cannot be deemed immoral, if we may have a duty to prevent it all the same, and be ourselves guilty of moral failure if we do not? Diagnosing the situation the way I propose has at least three significant consequences. First, whether we judge the harmful action to be immoral, that is, disrespectful of its objects' dignity, is likely to affect our assessment of the severity of the harm itself. A blow to the head is likely to involve greater psychological harm if intentionally inflicted by another human being than if caused by a falling stone. Second, the duty to avert immoral action is probably more stringent or weighty than the duty to prevent amoral harm. Finally, intervention in such matters always involves harming in some fashion the perpetrators of the alleged harm, at a minimum by frustrating their desire to engage in the harmful activity, but quite often by doing them greater damage than that. The extent to which such secondary harm is permissible will obviously depend, among other things, on whether or not we hold the perpetrators of the harmful actions we seek to prevent to be morally culpable as well.

These last observations lead back to our point of departure. Criminal law trades in blame and guilt as well as in suffering and violence. If the dignity principle were to replace the harm principle, all offenses would be defined in terms of conduct that is disrespectful of someone's equal moral worth. Given the facts of multiculturalism and moral pluralism, this would create a gap between actions deemed immoral and actions that need to be curbed because of their harmfulness, though no immorality be involved. To properly respond to these realities, a line would have to be drawn between criminal punishment with its attended notions of blame and guilt on the one side, and responses that do not carry such nasty connotations, on the other. In trying to coordinate and accommodate a multiplicity of cultures and creeds, an indiscriminate use of the criminal law as guided by the harm principle often adds gratuitous insult to the inevitable injury.

Notes

1. Even if successful in its own terms, the suggestion I explore would leave out some contested zones of morality, and correspondingly of criminality, such as those concerning the treatment of animals and the environment. I do not touch on these issues, but it should be noted that the harm principle does not directly engage them either.

2. Specifically at the hands of John Stuart Mill, in *On Liberty,* in *Utilitarianism, Liberty, Representative Government* (Everyman edition), 158.

3. See, for example, Charles Larmore, "The Moral Basis of Political Liberalism," *Journal of Philosophy* 96 (1999): 599. Ronald Dworkin uses the phrase "equal concern and respect" to describe liberalism's defining commitment: see, e.g., *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 180–83, and 272–78. For another recent variant on this general theme see Avishai Margalit, *The Decent Society* (Cambridge: Harvard University Press, 1998).

4. The idea of human dignity plays a central role in German criminal jurisprudence, though not quite the same role I explore here. For a recent survey see Otto Lagodny, "Human Dignity and its Impact on German Substantive Criminal Law and Criminal Procedure," *Israel Law Review* 33 (1999): 575.

5. The most comprehensive exploration and critique of the principle is by Joel Feinberg, in his four-volume magnum opus, *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984–88).

6. James Fitzjames Stephens, *Liberty, Equality, Fraternity,* ed. R. J. White (Cambridge: Cambridge University Press, 1873, 1967).

7. "The Crisis of Overcriminalization," in Sanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* (New York: Macmillan, 1987), 21.

8. "The Use of Criminal Sanctions in Enforcing Economic Regulation," ibid., at 40.

9. Ibid., 51.

10. Ibid., 22.

11. Bernard Harcourt, "The Collapse of the Harm Principle," *Journal of Criminal Law and Criminology* 90 (1999): 109.

12. See Gerald Dworkin, "Devlin Was Right: Law and the Enforcement of Morality," *William and Marry Law Review* 40 (1999): 927, and responses by Jeffrie G. Murphy, "Moral Reasons and the Limitation of Liberty," ibid., 947, and by Lawrence C. Becker, "Crimes against Autonomy: Gerald Dworkin on the Enforcement of Morality," ibid., 959; Michael Moore, "A Non-exclusionary Theory of Legislative Aim: Taking Aim at Moral Wrongdoing," in *Placing Blame: A Theory of Criminal Law* (New York: Oxford University Press, 1997), 639.

13. 204 Cal. App. 2d 832; 23 Cal. Rptr. 92 (1962).

14. Compare Carolyn M. Shafer and Marilyn Frye, "Rape and Respect," in *Feminism and Philosophy,* ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, N.J.: Littlefield, Adams, 1977), 333, in which the authors diagnose the evil of rape as a matter of disrespect, and view respect as an attitude that relates to the victim's autonomy: "The morally appropriate attitude upon encountering another person is one of respect: recognition of its domain, and deference to its rightful power of consent," 339. For an attempt to construct a comprehensive autonomy-based Kantian theory of criminal law see David Richards, "Human Rights and the Moral Foundations of Substantive Criminal Law," *Georgia Law Review* 13 (1979): 1395.

15. 326 S.E. 2d 410 (S.C. 1985). The eponymous defendant in this case is Brown; I refer to the case by the name of the second defendant (Braxton) to avoid confusion with the other case entitled *State v. Brown* I discuss next.

16. All the court says in explaining withholding the option of castration is that such punishment would be in violation of the state's constitutional prohibition against cruel and unusual punishment. No mention is made of the possible relevance of the defendants' preference in the matter.

17. 364 A.2d 27 (N.J. Super. Ct. Law Div. 1976), aff'd, 381 A.2d 1231 (N.J. Super. Ct. App. Div. 1977).

18. For a related discussion of puzzles to which victims' consent can give rise see Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (Chicago: University of Chicago Press, 1996), 145–57.

19. See, e.g., R. M. Hare, "What Is Wrong with Slavery," *Philosophy and Public Affairs* 8 (1979): 103.

20. Compare Don Herzog, *Happy Slaves: A Critique of Consent Theory* (Chicago: University of Chicago Press, 1989), preface, where the author raises some of these issues, but eschews the use of the kinds of thought experiments I indulge in favor of an historical study of the idea of consent in liberal theory.

21. The equivocation is deliberate since neither term has a single well-defined meaning. I go on to talk about *autonomy*, using the term in the sense in which it is most commonly used in this context, namely as having to do with choice opportunities among adequate options, though elsewhere in this volume, in chapter 4, I express some misgivings about this conception of autonomy. These misgivings, and the conception of autonomy I elaborate there, would not affect my present point.

22. The locus classicus of this discussion is in John Stuart Mill, *On Liberty*. For a critical commentary of Mill's argument, see Chin Liew

Ten, *Mill on Liberty* (New York: Oxford University Press, 1980), 117–23.

23. The term *dignity*, with its disturbing connotation of (often differential) social status and misleading proximity to *honor*, is an unhappy one. It would be better to speak about *moral worth*, but *dignity* is probably too entrenched. Moreover, the historical, if not philosophical, connections among these ideas apparently run deep and may be hard to disentangle. For an excellent historical study that issues a powerful caveat along such lines see James Q. Whitman, "Enforcing Civility and Respect: Three Societies," *Yale Law Journal* 109 (2000): 1279.

24. There is a rapidly growing literature on dignity as a legal value. Some important essays are collected in Michael Meyer and W. A. Parent, eds., *The Constitution of Rights: Human Dignity and American Values* (Ithaca, N.Y.: Cornell University Press, 1992).

25. But the tradition has not gone unchallenged. On the independence of dignity from the value of choice, see Robert Goodin, "The Political Theories of Choice and Dignity," *American Philosophical Quarterly* 18 (1981): 91; on the independence of dignity from consent, see R. George Wright, "Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively," *Boston University Law Review* 75 (1995): 1397.

26. See mainly his *Groundwork of the Metaphysic of Morals*, trans. H. J. Paton (New York: Harper and Row, 1964). For a commentary that stresses the role of dignity in Kant's thought, see Thomas E. Hill Jr., *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca, N.Y.: Cornell University Press, 1992). I focus here on Kant's *moral* theory, which has exerted the greatest influence on contemporary liberal thinking and is directly relevant to the question of criminalization. I do not deal accordingly with Kant's political writings and specifically with the (possibly less attractive) role that the idea of dignity plays in them. On the latter see for example Michael Meyer, "Kant's Concept of Dignity and Modern Political Thought," *History of European Ideas* 8 (1987): 319.

27. A considerable legal-philosophical literature has grown in recent years discussing some or all of the four interrelated notions mentioned in this paragraph: dignity, expressive value, respect, and meaning. For some salient examples see the following: Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge: Harvard University Press, 1993), 17–43; Anita Bernstein, "Treating Sexual Harassment with Respect," *Harvard Law Review* 111 (1997): 445; Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review* 62 (1995): 943; Cass Sunstein, "The Expressive Function of Law," *University of Pennsylvania Law Review* 144 (1996): 2021; Richard L. Abel, *Speaking Respect, Respecting Speech* (Chicago: University of Chicago Press,

1998); Richard Pildes and Elizabeth Anderson, "Slinging Arrows at Democracy: Theory, Value Pluralism, and Democratic Politics," *Columbia Law Review* 90 (1990): 2121. Particularly pertinent here is the view advanced by Professor Benjamin Sendor as an account of the *mens rea* requirement in criminal law. According to Sendor, the point of the requirement is "to acknowledge the importance of the meaning a person conveys to other people through conduct. The meaning relevant to criminal law is the respect a person shows for legally protected interests of other people or the community by acting in a way that avoids injuring those interests." "Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime," *Georgetown Law Journal* 74 (1986): 1371.

28. But there may be other ways in which the imperative can be violated. For some interesting suggestions see Martha Nussbaum, "Objectification," *Philosophy and Public Affairs* 24 (1995): 249.

29. "'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" Lewis Carroll, *Through the Looking-Glass* (New York: St. Martin's Press, 1977), 131. On variations in the social meaning of violence see Dov Cohen and Joe Vandello, "Meanings of Violence," *Journal of Legal Studies* 27 (1998): 567.

30. Though the court recognizes that the participants' consent is a defense in the case of sports such as football, boxing, or wrestling, no convincing explanation is given as to what distinguishes these cases from the instant case.

31. Like many other concepts in this area, the concept of harm is elastic and can be stretched to cover the violations of dignity I distinguish. Indeed the idea of "dignitary harm" has taken hold in the law, especially in tort. Still, there is a natural understanding of harm that ties the term to a diminution of welfare. This is also the sense of harm within the harm principle in light of the principle's utilitarian origins. Insisting on this more restricted use of *harm* serves clarity and specifically helps pose the question of whether welfarism provides an adequate moral basis for criminal law. For a lucid discussion of the various issues that are involved in a welfare-based moral theory see L. W. Sumner, *Welfare, Happiness, and Ethics* (Oxford: Oxford University Press, 1996).

32. The "our" here simply refers to those who subscribe to the morality of dignity to which I allude.

33. For a suggestion along similar lines see Thomas E. Hill Jr., "Basic Respect and Cultural Diversity," in *Respect, Pluralism, and Justice: Kantian Perspectives* (New York: Oxford University Press, 2000), 59.

34. E.g., *People v. Chen,* no.87-774 (N.Y. Sup. Ct. Dec. 2, 1988); cited in Doriane Lambelet Coleman, "Individualizing Justice through

Multiculturalism: The Liberals' Dilemma," *Columbia Law Review* 96 (1996): 1093, at 1102–3.

35. Or *genital mutilation*, or *clitoridectomy*—even the terminology here is highly contested. Some of the voluminous literature on this subject is cited ibid. at 1111–13.

36. And becomes highly charged. For one heated exchange see Coleman, "Individualizing Justice through Multiculturalism," at 1098, and Leti Volpp, "Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism," *Columbia Law Review* 96 (1996): 1573, esp. at 1594–1600.

37. But the doctrine would have to be elaborated and qualified in ways that take account of the well-known critique of such a doctrine in the context of utilitarianism by Bernard Williams, "A Critique of Utilitarianism," in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1963, 1991), 93–118. It should be noted, however, that the objections raised by Williams do not apply for the most part to the case in which the government's negative responsibility is concerned, which is the central case of interest to us here in discussing the limits of criminal law.