



**IN DEFENSE OF AUTONOMY: AN
ETHIC OF CARE**

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INTRODUCTION

Autonomy is often critiqued as egotistical. Critics call it the solipsistic justification of individualism: relying on one man standing alone. The autonomous individual is thought to be his own moral judge, without heed to the outside world or the needs of others. This article defends autonomy against that critique. Properly

understood, autonomy entails a mutuality of obligation. It requires care. As I shall argue, autonomy is a norm of civility.

The analysis relies on the development of Kantian concepts. Kantian autonomy is the capacity of a rational being to make universal laws. The existence of others is at the heart of the concept. Much more than knowledge of others' existence is at stake. Kantian autonomy is based on the rational being's capacity to legislate her maxims according to action that would be rational for others to perform. The autonomous being must define rational action according to universal laws.

The autonomous self must act, rationally, in a way that considers others on two levels: both considering how they themselves would reason in their actions (as rational beings), and also how that action treats others. The categorical imperative, a central concept in Kantian philosophy, requires one to act in a manner that respects other individuals' existences as ends in themselves, rather than merely as means to an end. A familiar concept similar to the categorical imperative is the adage: "do unto others as you would have them do unto you."

Kantian autonomy entails care in the treatment of others. "Care" can be understood in two different senses. Care signifies the feelings of affection, or love, shown from one to another. Yet care also is shown by treatment that is demonstrated in actions and conduct. The same term is used to indicate both ways in which care is evidenced, i.e., in feelings and in action.¹ Love, too, can be felt and/or shown in actions. The action-based element of care is present in the Kantian scheme.

Another source of critique of Kant is his supposed erasure of emotions from his moral scheme. For Kant, the morality of an action is not judged based on the inclination that brought it about, but on an analysis of duty. The morality of an action depends on whether the actor knows that the action is legislated under universal law. Yet while the feelings of the rational agent are not determinative of the

¹ Interestingly, in Hebrew the two significations are generally indicated by different terms. Care that is demonstrated by feelings is designated אהבה, דאגה, איכפתיות. Alternatively, care brought about by conduct is designated טיפול. It is the latter which is the subject of this article, even while the former—the emotional aspects of care—is touched upon and seen to be not necessarily excluded. For parallels from the debate on emotion and ethics to a debate in Jewish thought, see *infra* notes 141-42.

morality of his actions, under the Kantian model feelings are not excised—neither the feelings of the actor nor of those who are affected by the actor's actions.

Failure to recognize that feelings are not erased in Kant's model often gives rise to a debate about the conflict between ethical principles based on reason and on emotions. For example, Martha Nussbaum compares the Kantian approach with that of Greek tragedians and philosophers.² In this article I do not address the issue of the conflict of ethical principles. I do not deny that there can be conflicts between ethical requirements. I do, however, address the conflict between *emotion* and *ethics*³ that is sometimes associated with Kant. I believe that that conflict is not a necessary one within the Kantian system.

Additionally, I argue that the modern day concept of autonomy of expression can be seen as an extension of Kantian autonomy. Autonomy of expression is similar to, but wider than, the concept of free speech that grounds U.S. legal doctrine of free speech. As discussed below, autonomy of expression relates to the capacity for an exercise of an individual's will. I trace intellectual streams to show how the conception of autonomy has developed from its Kantian origins to the current notion of autonomy of self-expression.⁴ This historical and theoretical review responds to Onora O'Neill's critique of the claim that the current liberal conception of self-expression is of a Kantian pedigree. As shown in the analysis herein, the two cannot be divorced.

Indeed, the link between the current conception of autonomy of expression and Kantian autonomy ought to be strengthened: autonomy of expression must be understood to entail obligations.⁵

² MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (1986). Nussbaum discusses Kant's view of the inconceivability of a conflict between duty and obligation. *Id.* at 31, 428–29 nn.19–20.

³ The discussion herein does not distinguish between "ethics" and "morals." Generally, however, the former is used here as a relational concept and the latter is used in discussing dictates of individual conduct.

⁴ My use here of "self-expression" signifies expression by the individual self, and not necessarily expression of the innermost personality of the self. See *infra* note 268.

⁵ The discussion herein does not engage the distinction between obligation, duty and responsibility. Responsibility is, however, used with regard to rights. With respect to the distinction between obligation and duty, it is noted that for Kant the objective necessity of an action from *obligation* is called *duty*. IMMANUEL KANT, *GROUNDWORK*

The Kantian concept shows that autonomy depends upon an embedded, embodied being, whose very freedom is tied to others and who has obligations to others. Autonomy is not only correlative with duty on the part of the other, but consists of obligations on the part of the autonomous individual. The concept of autonomy of expression also must be understood to require consideration of the other. Autonomy does not support solipsistic individualism. Rather, it requires care. A proper view of autonomy recognizes the necessary relationship between rights and responsibilities.

This article, then, is a defense of autonomy. It defends both the Kantian model and the modern concept of autonomy of expression. Part I of this article develops and defends the Kantian concept of autonomy and contrasts it with conditional conceptions of autonomy. The critiques of autonomy introduced above are discussed and rejected. Part II analyzes the historical and theoretical development of the Kantian concept into the current concept of autonomy as expression. This concept should be understood as both autonomy *of* expression and autonomy *as* expression. Part II further reviews and responds to the critiques of autonomy, as that concept is understood today. It shows that the current concept of autonomy of expression is, too, an ethic of care.

The article does not attempt to justify autonomy or prove its truth. This analysis does not aim to prove that Kant is right. Instead, it will utilize his concept as a tool for interpretation. Whether or not Kant is correct is not at issue;⁶ the Kantian concept has become embedded in our culture and is often used in legal discourse to justify rights.⁷ This study builds upon and develops that use, rather than question or re-invent its foundations. Nor

OF THE METAPHYSICS OF MORALS § 4:439, in PRACTICAL PHILOSOPHY 41, 88 (Mary J. Gregor ed. & trans., 1996) (1785) [hereinafter KANT, GMM]; see also IMMANUEL KANT, THE METAPHYSICS OF MORALS § 6:222, in PRACTICAL PHILOSOPHY, *supra*, at 377 (1797) [hereinafter KANT, MM].

NOTE: All citations to the works of Kant are from the Cambridge University Press edition, except where indicated as to THE PHILOSOPHY OF LAW and the CRITIQUE OF JUDGMENT, see *infra* notes 192-93. As Kant's writing often has emphasis in the typescript, all cites will be as in the original.

⁶ See R.H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN L. REV. 875 (1994) (arguing that, even if the Kantian conception of the free will is not true, we ascribe to it and live by it, so it is descriptively so).

⁷ See *infra* note 19.

does the discussion engage the debate as to the value of autonomy.⁸ The Kantian deontological justification is used as a tool for interpretation. Whether my analysis, underscoring the centrality of obligations to autonomy, can be applied to other values and goals that autonomy may serve, is left for others to explore.

I. AUTONOMY AS FREEDOM OF THE WILL

In this first part of the article, I trace the tradition and history of the concept of autonomy and outline the Kantian concept. I show that autonomy entails the unconditional capacity of rational beings to control their will. The positive freedom of the autonomous being entails obligations to respect the autonomy of other rational beings. The unconditionality of autonomy necessitates that these obligations are unconditional. While rights to dignity and respect derive from autonomy, the concept centrally surrounds obligations.⁹ Understanding autonomy to be not only a right but also an obligation, defuses many of the critiques levied against autonomy.

A. THE TRADITION

Autonomy occupies an important place in Western liberal thought. It is a part of our law and our culture. The work of Immanuel Kant is central to that concept and the tradition that has grown up around it. Kant's theory of autonomy marked a "crucial step" in the development of freedom as the "central value of our culture."¹⁰

⁸ For various positions, *see, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 259-72 (1999); John Christman, *Introduction* to *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 3, 18-19 (John Christman ed., 1989). *See infra* Part II.B.5 for a discussion of the question of the good versus the right.

⁹ The discussion does not engage the debate as to whether rights-based or duty-based morality is prior, either conceptually or purposively. *See infra* note 121.

¹⁰ Charles Taylor, *Kant's Theory of Freedom*, in *CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY* 100, 100 (Zbigniew Pelczynski & John Gray eds., 1984); *see also* discussion *infra* Part II.A.

Scholars trace the roots of the Kantian concept of autonomy back to Plato and Aristotle. The Platonic idea of the capacity of the philosophical soul for rational self-rule,¹¹ and Aristotle's identification of choice and rational deliberation as elements of the virtues and the good life,¹² are elements reflected in Kant's model. In addition to these philosophers, the roots of Kant's theory of autonomy are found in works of religious thinkers,¹³ Renaissance humanists,¹⁴ and political thinkers, especially Rousseau.¹⁵

In departing from the works of his predecessors, Kant viewed autonomy as a moral idea.¹⁶ Today, the influence of Kant's concept is felt in many diverse fields, from philosophy¹⁷ to political theory.¹⁸ It is the Kantian concept of autonomy that is often cited as the basis for many of the fundamental rights in European, English, and U.S. law.¹⁹ Kant's political and legal theories are also relevant to

¹¹ PLATO, *THE REPUBLIC* bk. iv, 439d-e, at 129-38, bk. iv, 441d-e, at 139-43 (Francis MacDonald Cornford trans., 1970) (c. 360 B.C.E.); see also CHRISTMAN, *supra* note 8, at 4 (discussing related ideas held by Augustine and the Stoics). But see David A.J. Richards, *Rights and Autonomy*, 92 *ETHICS* 3 (1981), reprinted in *THE INNER CITADEL*, *supra* note 8, at 203, 205-08.

¹² ARISTOTLE, *NICOMACHEAN ETHICS* bk. 2, ch. 6, at 29-31, bk. 3, ch. 2, at 40-42 (Roger Crisp trans., 2000) (c. 384-322 B.C.E.). Whether on Aristotle's view deliberative choice as a virtue amounts to freedom, however, is less clear. Richard Mulgan, *Liberty in Ancient Greece*, in *CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY*, *supra* note 10, at 23; CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 156 (1979); see *infra* note 178.

¹³ GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 13 (1988). For Luther, freedom was from the body and its inclinations, as well as freedom to obey divine law. See HOWARD CAYGILL, *A KANT DICTIONARY* 88-89 (1995).

¹⁴ DWORKIN, *supra* note 13, at 13.

¹⁵ Allen Wood, *General Introduction* to *PRACTICAL PHILOSOPHY*, *supra* note 5, at xviii; CAYGILL, *supra* note 13, at 88-89; see generally J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY* 484 (1998); Taylor, *supra* note 10, at 102-03 ("Kant follows Rousseau in offering another theory of freedom as reconnected to morality . . .").

¹⁶ See KANT, *GMM*, *supra* note 5.

¹⁷ See, e.g., Richards, *supra* note 11; Fallon, *supra* note 6, at 878; Robin S. Dillon, *Introduction* to *DIGNITY, CHARACTER, AND SELF-RESPECT* 14 (Robin S. Dillon ed., 1995) (calling Kant's the most influential concept for ethicists).

¹⁸ See Taylor, *supra* note 10, at 119; see also ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 138 (1969) ("[T]he heart of liberal humanism . . . was deeply influenced both by Kant and Rousseau.").

¹⁹ See, e.g., Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 *DUKE L.J.* 383, 413-14 (1999); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334 (1991); Douglas W. Vick, *Deontological Dicta*, 65

modern law and legal theory.²⁰ Here I examine Kant's moral theory. In particular focus are the obligations that arise from Kant's concept of autonomy, and the implications of those obligations for the modern understanding of autonomy and rights.

B. THE CONCEPT

Autonomy is "self-rule." The word "autonomy" is derived from the Greek stems for "self" (*autos*) and "law" or "rule" (*nomos*) and means literally "the having or making of one's own laws."²¹ It is self-governance, and self-determination. For Kant, autonomy is the freedom of the will to choose. It is the capacity to act on rational principles and freely to exercise the moral reasoning will, through the freedom of choice.²²

The sections that follow explore the unconditionality and universality of Kantian autonomy. I distinguish other, conditional interpretations of autonomy. I discuss the relationship between autonomy and dignity and consider the duties of respect that autonomy entails.

1. Unconditional autonomy

Autonomy is "a property of the wills of all adult human beings insofar as they are viewed as ideal moral legislators, prescribing general principles to themselves rationally, free from moral determinism, and not motivated by sensuous desires."²³ Autonomy is a capacity of all rational wills. Kant writes that a free will "must . . .

MOD. L. REV. 279, 284 (2002); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 166-67 (1997). On equality, see *infra* note 128 and Part I.C.1.

²⁰ See, e.g., Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) (using Kantian analysis to understand the nature of private law and corrective justice); Wells, *supra* note 19 (using a Kantian analysis with respect to First Amendment jurisprudence).

²¹ 1 THE OXFORD ENGLISH DICTIONARY 807 (2d ed. 1989); JOEL FEINBERG, *HARM TO SELF* 27-28 (1989); DWORKIN, *supra* note 13, at 108.

²² KANT, *GMM*, *supra* note 5, § 4:412, at 65-66, § 4:440, at 88-89; see *infra* text accompanying notes 82-83 (exploring the term "choice").

²³ THOMAS E. HILL, JR., *AUTONOMY AND SELF-RESPECT* 44 (1991); see *infra* notes 66, 95 and accompanying text (discussing autonomy as an ideal).

be attributed to every rational being.”²⁴ It is therefore a capacity of all people: rationality is what defines us as people.²⁵ It is a universal capacity, and also unconditional. Autonomy is not a conditional description of the specific circumstances of one’s life. It is not empirically present or absent in varying degrees. Autonomy is universal and unconditional.

Other conceptions of autonomy are conditional and may be distinguished.

a. Liberty, privacy and independence, distinguished

Many analyses of autonomy pertain to liberty, privacy, or independence. These understandings of autonomy may be conditions for the exercise of autonomy in decision-making but are not its core. The unconditional capacity for choice is autonomy’s central conception.

Liberty and autonomy are often considered together.²⁶ Yet liberty, understood as freedom from political authority,²⁷ must be preceded by a philosophical conception of free will to justify it. J.S. Mill’s work is a case in point. At the start of his essay *On Liberty*, Mill distinguishes between the philosophical meaning of liberty as free will and liberty in the political, civil sense.²⁸ While Mill adopts the latter as his subject, he argues that this very political liberty is necessary for the development of individuality through the free

²⁴ GMM, *supra* note 5, § 4:448, at 96.

²⁵ Rational beings, as lawgiving beings, “for this reason are also called persons.” *Id.* § 4:438, at 87.

²⁶ STEVEN LUKES, *INDIVIDUALISM* (1973); Lois Shepherd, *Dignity and Autonomy after Washington v. Glucksberg: An Essay about Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL’Y 431 (1998); Michael Spence, *Passing Off and the Misappropriation of Valuable Intangibles*, 112 L.Q. REV. 472, 491-96 (1996); Wells, *supra* note 19, at 165 n.30. Rousseau treats the two together. See THOMAS E. HILL, JR., *The Kantian Conception of Autonomy*, in *DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY* 76, 81 (1992); see also DWORKIN, *supra* note 13, at 6, 13. Gerald Dworkin lists numerous ways in which autonomy has been characterized. *Id.* at 6. I submit that these terms can be categorized as liberty, independence, and privacy. Other features he describes are psychological or character traits, or are conditions of autonomy as exercised.

²⁷ See generally BERLIN, *supra* note 18; JOEL FEINBERG, *SOCIAL PHILOSOPHY* 63 (1973); FEINBERG, *supra* note 21, at 27-51 (discussing liberty as political freedom).

²⁸ JOHN STUART MILL, *ON LIBERTY* 3 (David Spitz ed., W. W. Norton & Co. 1975) (1859).

exercise of choice.²⁹ Despite Mill's ostensible distancing from philosophical freedom of the will, his account of political liberty is based on a vision of philosophical freedom. Freedom of will is, then, prior to political freedom. Isaiah Berlin acknowledges that political theory is a branch of moral philosophy.³⁰ Charles Taylor writes that "modern conceptions [of freedom] are linked with metaphysical views about the nature of man."³¹

Liberty, in the sense of political freedom, may well be a prerequisite to the *exercise* of autonomy.³² Yet liberty is not equivalent to autonomy, as the unconditional capacity for choice. Nor is the concept of right equivalent to autonomy. The similarities between the concepts of autonomy and right are discussed below.³³ While right is a recognition of a legal condition for the exercise of autonomy, it is a conditional conception. Like liberty as freedom from political authority, it is unlike the unconditional conception of autonomy as capacity.

Privacy, too, takes on a variety of meanings, and only some of these meanings are clearly related to the unconditional concept of autonomy. The difficulty of defining privacy is well known.³⁴ In legal-philosophical discourse, for example, there are divergent uses of "privacy." The first is related to the ideas of solitude, seclusion, and intimacy. In the U.S., privacy is used in the sense of seclusion under the state law tort of privacy. In their seminal article in 1890 calling for a right to privacy, Warren and Brandeis's concern was for keeping information out of the journalistic public eye.³⁵ In U.S. tort law, four privacy torts are recognized,

²⁹ *Id.* at 53-56. The capacity for free choice must precede its exercise, as seen below. Mill's view of choice is not instrumental; choice is not *for* the development of the self but comprises it. *See id.*

³⁰ BERLIN, *supra* note 18, at 120, 139. Indeed, philosophical notions of freedom underlie both positive and negative liberty.

³¹ Taylor, *supra* note 10, at 101; *see also id.* at 108 (contending that "Kant's theory of freedom is recognizably that of a modern . . . [and] linked to a metaphysical theory of what man is").

³² ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 27 (1993) (discussing the traditional view according to which autonomy stands in antipathy to authority).

³³ *See infra* text accompanying notes 113-16.

³⁴ *See* Raymond Wacks, *The Poverty of "Privacy"*, 96 L.Q. REV. 73, 75 (1980).

³⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

which defend the individual's interest in solitude, with protection from the gaze or intrusion of the outside world.³⁶ Mary Ann Glendon describes the U.S. approach as offering "a right to be barricaded against the world."³⁷ In the U.K., the Younger Committee understood privacy in this vein, as "seclusion" or "intimacy."³⁸ The House of Lords used this sense of privacy in *Campbell v. Mirror Group Newspapers Ltd.*, upholding Naomi Campbell's right to the privacy of certain information about her narcotics addiction—that is, the right to keep the information out of the public eye.³⁹ Privacy in this sense may be a condition for the exercise of autonomy.

Yet privacy takes on another meaning as well: privacy can mean autonomy in the sense of choice and control. It is this use of privacy that may be identified with autonomy.⁴⁰ The U.S. Supreme Court has used this sense of privacy in constitutional law, for example in *Roe v. Wade*⁴¹ and *Griswold v. Connecticut*.⁴² In the U.K., in

³⁶ RESTATEMENT (SECOND) OF TORTS § 652A (1979) (adopting William L. Prosser, *Privacy*, 48 CAL. L. REV. 338 (1960)) (defining four privacy torts as intrusion upon plaintiff's seclusion, appropriation of name or likeness, publicity, and false light).

³⁷ MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 62 (1991).

³⁸ HOME DEPARTMENT, REPORT OF THE COMMITTEE ON PRIVACY, 1972, Cmnd. 5012, at 33-34 (known as the "Younger Committee Report").

³⁹ [2004] UKHL 22.

⁴⁰ See Leslie Kim Treiger-Bar-Am & Michael Spence, *Private Control/Public Speech*, in HUMAN RIGHTS AND PRIVATE LAW: PRIVACY AS AUTONOMY, (Katja S. Ziegler ed., 2007).

⁴¹ 410 U.S. 113 (1973) (recognizing a constitutional protection for a woman's right to terminate a pregnancy). The other aspect of privacy is also present in abortion cases. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (identifying the abortion decision among the "most intimate and personal choices a person may make in a lifetime"). But see CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 99-102 (1987) (criticizing the legal use of the concept of privacy in *Roe* insofar as women do not have privacy but are defined as privacy).

⁴² *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding privacy in the sense of autonomy, with the rejection of a state ban on the sale of contraceptives). Justice Goldberg's concurring opinion in *Griswold* uses "privacy" in the sense of solitude. The Fourth Amendment right against unwarranted searches and seizures also arguably frames privacy in the sense of seclusion, although additionally it offers choice. See *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 967 (1978) (conceiving of the Fourth Amendment as a right to privacy and personhood); see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting).

*Douglas v. Hello! Ltd.*⁴³ the English Court of Appeal upheld the privacy, i.e., the right to control one's image, in protecting the plaintiff celebrities' choice of which of their wedding photos to publish. The European Court of Human Rights in *Pretty v. United Kingdom* found that underlying the protection of respect for private life set forth in Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) was the principle of autonomy "in the sense of the right to make choices about one's own body."⁴⁴

These two views of privacy are echoed in scholarly comment. Gavison understands privacy as secrecy, anonymity, and solitude.⁴⁵ Feldman characterises privacy as freedom of choice.⁴⁶ Commentators show the nonequivalence of the two terms "privacy" and "autonomy"⁴⁷ and counsel their disjunction.⁴⁸

The idea that autonomy and solitude must necessarily be associated is mistaken. Rather, Kantian autonomy recognizes necessarily the existence of and importance of others and others' ends. The autonomous being cannot be solitary, as discussed throughout. So too the current conception of autonomy as expression must be understood not to rely upon solitude. While privacy in the sense of

⁴³ *Douglas v. Hello! Ltd.* [2006] 1 Q.B. 125, *rev'd on other grounds*, O.B.G. Ltd. V. Allan [2007] UKHL 21. "Privacy" was also used to mean "seclusion" when the court noted that the wedding was not private. *Id.* at 159.

⁴⁴ *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155 at para. 66. The European Court of Human Rights in that case justified prohibitions on assisted suicide as necessary in a democratic society. *Id.* at para. 70-78.

⁴⁵ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 296-99 (1983) (describing both the tort and the constitutional right as addressing expectations of seclusion).

⁴⁶ David Feldman, *Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty*, 47 CURRENT LEGAL PROBS. 41 (1994); see also Haim H. Cohn, *On the Meaning of Human Dignity*, 13 ISR. Y.B. ON HUM. RTS. 226, 247 (1983); J.W. Harris, PROPERTY AND JUSTICE 229 (1996) (conceiving of privacy as a range of autonomous choice); James Michael, *Privacy*, in INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 265, 267-68 (Christopher McCrudden & Gerald Chambers eds., 1994) (conceiving of privacy as choice and control over the circulation of information).

⁴⁷ DWORKIN, *supra* note 13, at 104; Hyman Gross, *Privacy and Autonomy*, in PRIVACY 169, 181 (J. Roland Pennock & John W. Chapman eds., 1971); Wacks, *supra* note 34, at 79.

⁴⁸ Elizabeth L. Beardsley, *Privacy, Autonomy, and Selective Disclosure*, in PRIVACY, *supra* note 47, at 56; FEINBERG, *supra* note 21, at 84-91.

solitude may be a condition of autonomous decision-making,⁴⁹ the unconditional view of autonomy is prior.

Privacy bears another meaning as well, namely the development of personality. The European Commission, pursuant to Article 8, has interpreted the right to privacy as a right to pursue the development of one's personality,⁵⁰ similar to that provision in the German constitutional order.⁵¹ A variation of the conception of autonomy as self-development may be seen as concomitant. That view of autonomy is discussed below in Part II.B.

A third meaning given to autonomy is independence. The oldest use of the term "autonomy" is political independence, with respect to states and institutions.⁵² Uses in law of autonomy as independence abound.⁵³ Whether law is autonomous in the sense of independence from morals or social forces is a frequently debated topic.⁵⁴

Kantian autonomy indeed relies on independence in decision-making, namely independence from heteronomous factors.⁵⁵ Yet for Kant this is only the negative definition of autonomy, as negative freedom. Autonomy as positive freedom is the capacity to self-legislate, as discussed below. Moreover, while for Kant autonomy involves independence from factors other than reason, Kant's

⁴⁹ See, e.g., *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155; see also *supra* note 44.

⁵⁰ Michael, *supra* note 46, at 289 (citation omitted).

⁵¹ GLENDON, *supra* note 37, at 62, 71.

⁵² FEINBERG, *supra* note 21, at 27-28 n.1.

⁵³ *Id.* at 27-28. Feinberg lists independence among the correlates of autonomy. Feinberg continues with an analysis of four categories of senses of "autonomy," each of which he notes has parallels to senses of "independence." See also M. Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (2000).

⁵⁴ See, e.g., GEORGE, *supra* note 8.

⁵⁵ IMMANUEL KANT, *CRITIQUE OF PURE REASON* §§ A533-34/B561-62, at 533 (Paul Guyer & Allen Wood eds. & trans., 1998) (1781) [hereinafter KANT, *PURE REASON*] ("Freedom in the practical sense is the independence of the power of choice from necessitation by impulses of sensibility."); IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* § 5:33 (1788) in *PRACTICAL PHILOSOPHY*, *supra* note 5, at 166-67 [hereinafter KANT, *PRACTICAL REASON*] (Autonomy "consists in independence from all matter of the law (namely, from a desired object) That *independence*, however, is freedom in the *negative* sense, whereas this *lawgiving of its own* on the part of pure and, as such, practical reason is freedom in the *positive* sense.") (emphasis in original) (citation omitted); see *infra* discussion of positive and negative freedom, Part I.B.1.c.

reliance on reason is not shared by most conceptions of autonomy today. I submit that the current conception of autonomy need not be seen as one of independence.

As with liberty and privacy, so too independence (political,⁵⁶ psychological,⁵⁷ or economic⁵⁸) may be a condition for the exercise of autonomous choice. By contrast, I submit that the core of autonomy upon which liberty, independence, and privacy depend is autonomy understood as the capacity for choice.

The analysis here concentrates upon the conception of autonomy as unconditional freedom of will and explores the limitations and obligations it entails. The conditional conceptions of autonomy also may be seen to entail obligations. For example, liberty is limited by the harm principle, upon the recognition of the liberty of others;⁵⁹ privacy entails a duty of confidence; and independence is limited by duties of collaboration and cooperation. Yet those conceptions are not examined here.

b. Autonomy as ability or exercise, distinguished

Conceptions of autonomy may be conditional in other ways. Even where autonomy is understood as freedom of choice, it is sometimes viewed as the conditional *ability* to choose or the conditional *exercise* of choice. These views also must be distinguished from the Kantian view of autonomy as *capacity*.

The first variant of conditional autonomy as ability asks: can a particular individual function autonomously? On this account, autonomy is seen as dependent upon *external* conditions. For example, the ability to act autonomously depends upon an amenable political-legal situation and the extent to which socio-economic

⁵⁶ FEINBERG, *supra* note 21, at 27-28 n.1.

⁵⁷ ONORA O'NEILL, AUTONOMY AND TRUST IN BIOETHICS 23-24, 28 (2002).

⁵⁸ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (1990), reprinted in 19 U.C. DAVIS L. REV. 2, 8-11 (1985) (arguing that real property confers autonomy); William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 50-51 (Michael J. Meyer & William A. Parent eds., 1992); see also JOSEPH RAZ, MORALITY OF FREEDOM (1986).

⁵⁹ See *infra* Parts I.C.5 and II.D.5. (discussing the distinction between liberty and license).

conditions allow one to function with autonomy. These conditions recall liberty and independence, as seen above. Raz analyzes the options that necessarily must be open to someone for her to become autonomous as a “matter of degree.”⁶⁰ Raz indeed distinguishes his account of personal autonomy from moral autonomy.⁶¹

The ability to act autonomously also sometimes is seen as conditioned on factors *internal* to the individual’s make-up. Such factors may include an individual’s physical, mental, emotional, and/or intellectual state and abilities. As Hill writes, “autonomy is sometimes conceived as a sort of psychological maturity, which some have and others do not and which we attribute to people in various degrees on the basis of empirical evidence.”⁶² Autonomy is also internally conditional if it is associated with a feeling or a sense of one’s competence and control.⁶³

Another variant of conditional autonomy asks: do the actions of a particular individual demonstrate that she is exercising her autonomy? The query moves from “can she” to “does she act with autonomy?” When autonomy is exercised, we are said to act autonomously, and at other times not.⁶⁴

Kant does consider that autonomy may or may not be exercised effectively, but not in the way these variants do.⁶⁵ For Kant

⁶⁰ RAZ, *supra* note 58, at 154; *see also id.* at 204, 372-73 (arguing that autonomy is both the conditions which provide the ability to achieve an autonomous life and its achievement as exercised); Joseph Raz, *Right-Based Moralities*, in THEORIES OF RIGHTS 182, 191-92 (Jeremy Waldron ed., 1984). As to availability of options in order to exercise autonomy, *see* THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 255 (1999); LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 37 (1990); O’NEILL, *supra* note 57, at 48-50.

⁶¹ *See* RAZ, *supra* note 58, at 379.

⁶² HILL, *supra* note 26, at 77.

⁶³ Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1989); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 27-28 (1989) (the exercise of free speech is an emotional outlet that protects one’s sense of dignity).

⁶⁴ Hill recognizes this variant of autonomy. *See* HILL, *supra* note 26, at 82; Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. OF PHIL. 5 (1971), *reprinted in* THE INNER CITADEL, *supra* note 8, at 63; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972); John Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 ETHICS 109, 113 (1988).

⁶⁵ KANT, GMM, *supra* note 5, § 4:429-30, at 79-81, § 4:440-41, at 88-90.

autonomy is an ideal—its exercise is towards realization.⁶⁶ Yet such exercise derives from the primary unconditionality of the capacity that is held universally by all. Whether or not free will exists “in fact” as an empirical matter is of no concern, as Kant’s project is a metaphysical analysis.⁶⁷ While the exercise of a good will is an achievement and may be a matter of degree, the essence of autonomy is the unconditional capacity that allows its exercise.⁶⁸

c. *Unconditional autonomy revisited*

The distinction between unconditional capacity and conditional exercise is illuminated by Kant’s discussion of two aspects of the will, namely the *Wille* and the *Willkür*. Freedom of *Willkür* Kant identifies as independence from inclination⁶⁹ and from the determining causes of the sensible world, namely, events occurring in space and time.⁷⁰ It is free will in the “practical and phenomenological sense.”⁷¹ This is negative freedom.

While *Willkür* is negative freedom of the will, by contrast, *Wille* is freedom of the will in the positive sense.⁷² *Willkür* is freedom from external, heteronomous constraints; *Wille* is freedom to self-legislate.⁷³ Choice by *Willkür* is directed by the rational will, the *Wille*.⁷⁴ The *Willkür* is the executive function of the will and *Wille* is

⁶⁶ The third formulation of the categorical imperative, expressed as a kingdom of ends, Kant writes is “admittedly only an ideal.” *Id.* § 4:433, at 82-83; see also Fallon, *supra* note 6, at 892-93 (characterizing Kantian autonomy as “ascriptive,” since we “ascribe” to ourselves free will); HILL, *supra* note 26, at 84 (a normative ideal); Taylor, *supra* note 10, at 108-09 (contending that the ideal for Kant lies in the kingdom of ends, but being free is recognizing that this is our ideal); see also *infra* text accompanying notes 186-88 on the teleological nature of Kantian theory.

⁶⁷ See KANT, GMM, *supra* note 5, §§ 4:387-92, at 43-48.

⁶⁸ Dillon, *supra* note 17, at 15.

⁶⁹ KANT, GMM, *supra* note 5, § 4:412, at 65-66.

⁷⁰ *Id.* § 4:416, at 68-69.

⁷¹ LEWIS WHITE BECK, A COMMENTARY ON KANT’S CRITIQUE OF PRACTICAL REASON 196, 198 (1960).

⁷² KANT, GMM, *supra* note 5, § 4:412, at 65-66, § 4:446, at 94.

⁷³ Compare CAYGILL, *supra* note 13, at 388-89, with BERLIN, *supra* note 18 (describing concepts of positive and negative liberty).

⁷⁴ KANT, MM, *supra* note 5, § 6:214, at 375-76, § 6:226, at 380-81; BECK, *supra* note 71, at 177, 180 n.10.

the legislative function.⁷⁵ The will of the *intelligible* being gives laws for the maxims of actions of the *sensible* being.

Both *Wille* and the *Willkür* are unconditional capacity: *Wille* the capacity to legislate and *Willkür* the capacity to choose good or evil. The *Wille*, however, cannot fail to be free and autonomous and legislate morally, however ineffective it may be in controlling the *Willkür*.⁷⁶ Even a will that chooses evil retains unconditional autonomy through self-legislation.⁷⁷ Even a slave, whose exercise of will is surely constrained, possesses autonomy as an essential unconditional attribute.⁷⁸

While autonomy requires both negative and positive freedom,⁷⁹ autonomy is centrally the freedom of the *Wille*.⁸⁰ Autonomy is "the will's property of being a law to itself."⁸¹ The fundamental Kantian notion of autonomy as the moral will is *Wille*, the attribute of all rational beings for moral self-legislation. Autonomy is the will's determination of choice by the giving of universal law.⁸² The discussion will now turn to explore the nature of the *Wille*'s positive freedom and its moral, universal legislation.

2. *Autonomy as positive freedom: the categorical imperative*

To Kant, autonomy as positive freedom signifies a person's capacity for self-legislation. It is the ability to see oneself as the author of a moral law by which one is bound. This section looks at the nature of that law and the obligations it entails.

⁷⁵ BECK, *supra* note 71, at 201-02.

⁷⁶ *Id.* at 203.

⁷⁷ *Id.* at 227; see HILL, *supra* note 26, at 79. Because a will can self-legislate and even choose evil, autonomy is freedom rather than enslavement to the dictates of reason and morality. See *infra* note 165 and accompanying text.

⁷⁸ DWORKIN, *supra* note 13, at 14, 105-06; Thomas E. Hill, Jr., *Making Exceptions Without Abandoning the Principle: Or How a Kantian Might Think About Terrorism*, in DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY, *supra* note 26, at 196, 201-02 (discussing the Kantian concept whereupon a slave has dignity).

⁷⁹ See KANT, GMM, *supra* note 5, § 4:416, at 69 (defining freedom of the will negatively and positively); HILL, *supra* note 26, at 82, 84-86.

⁸⁰ BECK, *supra* note 71, at 202; RALPH C. S. WALKER, KANT: THE ARGUMENTS OF THE PHILOSOPHERS 148 (1978).

⁸¹ KANT, GMM, *supra* note 5, § 4:447, at 94-95.

⁸² KANT, PRACTICAL REASON, *supra* note 55, § 5:33-34, at 30-31.

The principle of autonomy is the categorical imperative. Kant explains that will is what causes us to act. Its causality must have a law. The free will gives law unto itself. As a law, it must be universal. The law must be to act on no maxims other than those that can be universal laws. Positive freedom dictates that individuals follow the categorical imperative of choice, namely "to choose only in such a way that the maxims of your choice are also included as universal law in the same volition."⁸³ Hence a free will is a will under moral law. Kant writes:

[T]he proposition, the will is in all its actions a law to itself, indicates only the principle, to act on no other maxim than that which can also have as object itself as a universal law. This, however, is precisely the formula of the categorical imperative and is the principle of morality; hence a free will and a will under moral laws are one and the same.⁸⁴

Such a principle is only possible on the presupposition of freedom of the will.⁸⁵ Moreover, it is only possible where the will acts upon reason.⁸⁶ "[T]he will is a capacity to choose *only that* which reason independently of inclination cognizes as practically necessary . . ."⁸⁷ It is opposed to heteronomous principles. Such principles are from inclination rather than from reason and yield

⁸³ KANT, GMM, *supra* note 5, § 4:440, at 88-89.

⁸⁴ *Id.* §§ 4:446-47, at 94-95.

⁸⁵ *Id.* § 4:461, at 106-07. Kant has been accused of using circular reasoning. Murdoch writes that Kant assumes freedom because of the existence of the moral law, and then proves the reality of the moral law through the concept of freedom. IRIS MURDOCH, *METAPHYSICS AS A GUIDE TO MORALS* 437-38 (1992); *see also* WALKER, *supra* note 80. Whether Kant successfully resolves that circularity will not be addressed here. *See* KANT, GMM, *supra* note 5, § 4:450, at 453.

⁸⁶ Acting rationally, i.e., according to reason, is universal in the following sense as well: a rational being justifies actions with reasons, which can be explained to others. DWORKIN, *supra* note 13, at 59-60; CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 363 (1989). This could be another way to understand Kantian autonomy as social. *See infra*, Part I.C.3.

⁸⁷ KANT, GMM, *supra* note 5, § 4:412, at 65-66 (emphasis in original).

only hypothetical imperatives—"I ought to do something *because I will something else*."⁸⁸

Another of Kant's formulations of the categorical imperative is as follows: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."⁸⁹ Kant explains that an "end is an *object* of free choice."⁹⁰ As O'Neill writes, "To use another as [a] mere means, as Kant sees it, is to act on a maxim that the other *cannot* also adopt."⁹¹ John Rawls uses a similar notion of the obligations of the categorical imperative arising from autonomy: the principles that would be adopted by autonomous, namely free and equal rational beings in the original position, are the principles "which everyone accepts and knows that the others accept the same."⁹² The categorical imperative requires you to do unto others as you would have others do unto you: you would have others treat you as an end, as being able to make choices for action.

A third formulation of the categorical imperative is that morality consists in actions relating to the making of laws whereby a kingdom of ends is possible.⁹³ A kingdom of ends is a systematic union through common law whereupon every rational being regards himself as giving universal laws through maxims of his will.⁹⁴ The kingdom of ends arises from Kant's vision of autonomy as an ideal.⁹⁵ Kant sees these three versions as formulations of the same law.⁹⁶

⁸⁸ *Id.* § 4:441, at 89-90 (emphasis in original).

⁸⁹ *Id.* § 4:429, at 79-80.

⁹⁰ KANT, *MM*, *supra* note 5, § 6:384, at 516-17 (emphasis in original); *see also id.* § 6:381, at 514-15.

⁹¹ ONORA O'NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 138 (1989).

⁹² JOHN RAWLS, A THEORY OF JUSTICE 454 (1971). Rawls' original position can be seen as a procedural interpretation of Kant's conception of autonomy and the categorical imperative within the framework of an empirical theory. *See id.* at 252-57. On Rawls' theory, autonomy also gives rise to obligations of respect. *See id.* at 179, 519; *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 150-183 (3d ed. 1977).

⁹³ KANT, *GMM*, *supra* note 5, § 4:435-36, at 85-86.

⁹⁴ *Id.* § 4:433, at 83.

⁹⁵ *Id.*; *see supra* note 66.

⁹⁶ *See* WALKER, *supra* note 80, at 159 (writing that the formulations are "essentially equivalent"). Wright notes that one version of the categorical imperative (universal-

3. Dignity and Respect

Two important results of the analysis above relate to dignity and respect for dignity. The autonomy that affords the capacity to self-legislate is the ground of a rational being's dignity. It is therefore the basis for an individual's necessary receipt of respect. Moreover, autonomy has a further relationship to dignity and respect: the self-legislation of the autonomous rational being lends positive freedom, which entails obligations to respect other autonomous beings. Autonomy thus grounds both the dignity of autonomous beings and their obligation to respect the dignity of others. These two facets of autonomy are treated in turn below.

a. Dignity

For Kant dignity is "absolute inner worth,"⁹⁷ i.e., "unconditional, incomparable worth."⁹⁸ On some conceptions of autonomy, autonomy and dignity are equivalent.⁹⁹ The Kantian concept, however, proposes a different relationship between autonomy and dignity. "[T]he dignity of humanity consists . . . in [the] capacity to give universal law,"¹⁰⁰ namely, autonomy.

Kant taught that autonomy is the ground of dignity:

[T]he *share* . . . a rational being [has] *in the giving of universal laws* . . . makes him fit to be a member of a

ising maxims) is the supreme principle of Right, and one is the supreme principle of Virtue (not to treat others as means but only as ends). Richard Wright, *Right, Justice and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 159, 163 (David G. Owen ed., 1995). *But see* Hillel Steiner, *Working Rights*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* 281-82 (Matthew H. Kramer, N.E. Simmonds & Hillel Steiner eds., 1998) (arguing that the two formulations of the categorical imperative are not equivalent; an action can conform to one and not the other).

⁹⁷ KANT, *MM*, *supra* note 5, § 6:435, at 557-58.

⁹⁸ KANT, *GMM*, *supra* note 5, § 4:440, at 88-89.

⁹⁹ *See infra* note 254.

¹⁰⁰ KANT, *GMM*, *supra* note 5, § 4:436, at 85-86. The sentence continues: "though with the condition of also being itself subject to this very lawgiving." *Id.* That condition will be discussed *infra*. Hill underscores that while Kant might be appearing to suggest that only the morally good have dignity, "other passages make clear that humanity in each person has dignity." Thomas E. Hill, Jr., *Humanity as an End in Itself*, in *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY*, *supra* note 26, at 38, 47.

possible kingdom of ends . . . [and makes him] free with respect to all laws of nature, obeying only those which he himself gives and in accordance with which his maxims can belong to a giving of universal law [T]he lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth *Autonomy* is therefore the ground of the dignity of human nature¹⁰¹

Dignity is unconditional. As rational beings' autonomy is unconditional, so too the dignity it grounds is unconditional. By contrast, on some views dignity is seen as conditional—as either present or absent. Such is the case where dignity is understood as self-respect, as a feeling, a sentiment.¹⁰² On Goodin's view, dignity as self-respect is conditional insofar as it is created when respect is present.¹⁰³ Kant has a notion of conditional dignity as well; for Kant dignity is grounded both in the capacity for autonomy and the realization of this capacity.¹⁰⁴ Kant writes that there is "a certain sublimity and *dignity* in the person who fulfils all his duties."¹⁰⁵ Yet as with autonomy, the exercise derives from the capacity. The unconditionality of dignity—as with unconditional autonomy—is central to the concept's core.

Dignity is acknowledged by others' respect.¹⁰⁶ The autonomous being's dignity is unconditional, and hence respect must be given to that autonomous being unconditionally. Respect may be *awarded* conditionally by degrees to those deemed more or less worthy. Moreover, respect as *experienced* is conditional insofar

¹⁰¹ KANT, GMM, *supra* note 5, §§ 4:435-36, at 85; *see also id.* § 4:428, at 78-79 (on worth); Dillon, *supra* note 17, at 15 (arguing that, for Kant, autonomy grounds dignity because autonomy is the source of morality).

¹⁰² Feldman, *supra* note 46, at 54-56. On Kantian moral feeling, *see infra* notes 107, 155.

¹⁰³ Robert E. Goodin, *The Political Theories of Choice and Dignity*, 18 AM. PHIL. Q. 91, 97 (1981).

¹⁰⁴ KANT, PRACTICAL REASON, *supra* note 55, § 5:78 at 67; Dillon, *supra* note 17, at 15.

¹⁰⁵ KANT, GMM, *supra* note 5, § 4:440, at 88-89.

¹⁰⁶ *Id.* §§ 4:434-36, at 83-86.

as it describes a sentiment,¹⁰⁷ attitude,¹⁰⁸ and behavior.¹⁰⁹ Yet as with autonomy and dignity, the core of the concept is unconditional. The obligation of respect is, thus, universal. Hill writes, "Kant typically treats autonomy as an all-or-nothing trait that grounds a basic respect due to all human beings, as opposed to a variable respect earned only by the most conscientious."¹¹⁰ The Kantian concept of respect "is one of the cornerstones of his most influential ethics."¹¹¹

b. Duties of Respect

Respect is integral to autonomy in two ways: every rational being both owes and is owed respect. The categorical imperative entails both that a person is due respect and also, or even primarily for Kant, imposes upon a person the duty to respect others. The duty to show respect is not only a social *implication* of Kantian ethics; it is at the very heart of Kantian autonomy.

Duty is the key to Kant's moral theory of autonomy.¹¹² Autonomy is practical reason, which necessarily dictates the categorical imperative. The categorical imperative in turn requires, indeed consists in, the obligation to respect others as ends and not means. Autonomy does not merely lead to or imply duty. Rather, the duty to respect is intrinsic to autonomy.

This understanding of the relationship between autonomy and obligation can illuminate the relationship between rights and duties. While not equivalent,¹¹³ the concepts of right and autonomy

¹⁰⁷ Even Kant is described as having a notion of respect as a feeling. Dillon, *supra* note 17, at 16, 19. Yet it is a *moral* feeling derived from reason. See *infra* note 155 and accompanying text.

¹⁰⁸ Stephen L. Darwall, *Two Kinds of Respect*, in DIGNITY, CHARACTER, AND SELF-RESPECT, *supra* note 17, at 181, 181-84; Feldman, *supra* note 46, at 55-56; Diana T. Meyers, *Self-Respect and Autonomy*, in DIGNITY, CHARACTER, AND SELF-RESPECT, *supra* note 17, at 221, 224 (arguing that the subjective component of respect is attitude).

¹⁰⁹ DAWN OLIVER, COMMON VALUES AND THE PUBLIC-PRIVATE DIVIDE 64 (1999) (arguing that law can enforce respect by requiring considerate action).

¹¹⁰ HILL, *supra* note 26, at 79. As seen above, for Kant even a slave, or someone we think is immoral, has dignity. See *supra* text accompanying notes 77-78.

¹¹¹ Dillon, *supra* note 17, at 14.

¹¹² O'NEILL, *supra* note 57, at 83, 73-95; ONORA O'NEILL, A QUESTION OF TRUST 32-35, 96 (2002); O'NEILL, *supra* note 91, at 81-165.

¹¹³ See *infra* text accompanying notes 32-33.

bear similarities. On the will theory of rights, a right involves choice, similar to autonomy.¹¹⁴ For Kant, right is the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.¹¹⁵ Moreover, a right is a freedom in accordance with the universal moral law. Autonomy gives us the categorical imperative, and the concept of right can be derived from the categorical imperative.¹¹⁶ Kant's discussion of legal right is not analysed here; rather it is Kant's moral philosophy which is under examination. Yet the implication of the instant analysis for rights theory is briefly discussed here and again below with regard to autonomy of expression.

Many commentators address the missing social dimension of rights. A shift has been urged to see "*relationships* between obligation bearers and right holders, including institutionally defined relationships, as central."¹¹⁷ Glendon laments the absence of language of responsibility with rights.¹¹⁸

Indeed, as autonomy consists in obligation, so too rights should be seen as consisting in duties. Rights are widely seen as correlative to duties on the part of the other: X's right entails Y's duty to

¹¹⁴ H. L. A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162, 192 (1982) (arguing that the characterization of a right as a choice respected by the law is however not a sufficient one); PETER JONES, *RIGHTS* 26 (1994); N.E. SIMMONDS, *CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS* 146 (1st ed. 1986); N.E. Simmonds, *Rights at the Cutting Edge*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES*, *supra* note 96, at 113, 218 (on Hart's identification of rights with choice); Steiner, *supra* note 96, at 262-83; Jeremy Waldron, *Introduction to THEORIES OF RIGHTS*, *supra* note 60, at 1, 9. The will theory of rights is associated with Kant.

¹¹⁵ KANT, *MM*, *supra* note 5, § 6:230, at 386-87. A legal right, however, may be seen as a legal condition for the exercise of autonomy, as with political liberty. *See supra* Part I.B.1.a.

¹¹⁶ KANT, *MM*, *supra* note 5, § 6:232, at 388-89 (asserting that a right is the reciprocal coercive consciousness of obligation in accordance with the law); *id.* § 6:231, at 387-88, 6:237, at 392-93; Wright, *supra* note 96, at 164.

¹¹⁷ O'NEILL, *supra* note 57, at 82 (emphasis in original).

¹¹⁸ GLENDON, *supra* note 37. *But see* Wells, *supra* note 19, at 164-65 (arguing that the Supreme Court's First Amendment jurisprudence conceptualizes autonomy in a Kantian fashion, which embodies both rights and responsibilities). Wells, however, analyses Kantian political theory, rather than relying on his moral theory, as I do here. *See id.* at 166 n.32 and cites therein. A distinction between responsibility and duty is not explored in the instant analysis.

respect that right. Yet here we see that rights are correlative to duties upon the rights-holder. *X*'s right entails *X*'s duty to respect *Y*.

Thus autonomy and dignity have aspects both individual and social. Autonomy is often said to be narcissistic and individualistic. Glendon¹¹⁹ and Robert Post¹²⁰ unfairly portray Kant this way. Yet autonomy entails not only the requirement of respect for the autonomous agent, but that autonomous agent's respect for the other. Ronald Dworkin correctly places Kant on the side of duty-based morality,¹²¹ even while Kantian thought is understood to ground the priority of the right over the good. The critiques often leveled against Kantian autonomy are countered by the necessarily social duties that positive freedom imposes, as discussed in the next section.

C. THE RESPONSE TO THE CRITICS: OBLIGATIONS OF RESPECT

Autonomy is often given the bad name of self-centered individualism. One critical view characterizes the Kantian man as an individualistic super-hero, believing he can make all moral decisions on his own: "a moral superstar alone on a rock of rational will power . . . isolated, non-social, and ahistorical."¹²² Iris Murdoch writes:

We are still living in the age of the Kantian man, or Kantian man-god . . . who confronted even with Christ turns away to consider the judgment of his own conscience and to hear the voice of his own reason . . . free, independent, lonely, powerful, rational,

¹¹⁹ GLENDON, *supra* note 37, at 71.

¹²⁰ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

¹²¹ DWORKIN, *supra* note 92, at 172. As stated above, *see supra* note 9, the priority of right- or duty-based morality will not be explored in the current analysis. As to that debate, *see id.* at 171-72; J.L. Mackie, *Can There Be a Right-Based Moral Theory?*, in THEORIES OF RIGHTS, *supra* note 60, at 168; O'NEILL, *supra* note 57, at 78-82; ONORA O'NEILL, BOUNDS OF JUSTICE 198-99 (2000) (priority of obligations); RAZ, *supra* note 58, at 166-71, 184-86, 203; Raz, *supra* note 60.

¹²² Jane Kneller, *The Aesthetic Dimension of Kantian Autonomy*, in FEMINIST INTERPRETATIONS OF IMMANUEL KANT 173, 174-75 (Robin May Schott ed., 1997). Kneller later corrects the misconception. *See infra* note 147.

responsible, brave, the hero of so many novels and books of moral philosophy. . . . Kant . . . has provided Western ethics with its dominating image . . . his alienation is without cure. . . . It is not such a very long step from Kant to Nietzsche, and from Nietzsche to existentialism¹²³

This passage raises a number of points of criticism. Each point is controverted in turn.

1. *Reason is both universal and individual*

Murdoch critiques Kant's reliance on rationality in his moral system. Kant is attacked for theorizing that right action where motivated by inclination or emotion, rather than duty derived from reason, is lacking in moral worth.¹²⁴ Feelings and emotions are discussed in relation to the embodied individual, in the next section. Here, rationality is discussed, and it is seen that it is the key to the solution. Rationality is not only individual, but universal. L.W. Beck does not think the paradox of individuality and universality is destructive of Kant's theory, but rather that is the nature of the human predicament.¹²⁵

Kantian autonomy is individual in the sense that it derives from the self: Kantian autonomy sets the self as the source of autonomous rational decision-making.¹²⁶ Yet individuality is twinned with universality. Because it derives from human rationality,

¹²³ IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 78 (2d ed. 2001). *But see infra* text accompanying note 157.

¹²⁴ ROBIN WEST, *CARING FOR JUSTICE* 41-45 (1997); *see infra* text accompanying notes 154-55; *see also* NUSSBAUM, *supra* note 2.

¹²⁵ BECK, *supra* note 71, at 201. Whether Kant successfully coheres the transcendental and phenomenal self is a matter of debate. *Id.* at 210; HILL, *supra* note 23, at 44-47; ROBERT C. SOLOMON, *CONTINENTAL PHILOSOPHY SINCE 1750: THE RISE AND FALL OF THE SELF* (1988). Democracy also involves weaving through this paradox, whereby representatives promote both the collective good, and individual interests. *See, e.g.,* RAWLS, *supra* note 92, at 227 (representatives are not their constituents' agents).

¹²⁶ *But see* O'NEILL, *supra* note 57, at 85 (arguing that the "self" in "self-legislation" for Kantian autonomy is not the individual being, with the self as subject, but is a reflexive referral back to legislation, *i.e.* legislation that legislates itself). *See infra* text accompanying note 280 for my critique of that view.

autonomy is a universal attribute.¹²⁷ On Kant's view, autonomy is a universal attribute of all people. Autonomy grounds dignity. It is thus from rationality that universal autonomy and dignity arise.

Autonomy as the special gift of the super "man-god" is not Kant's vision; we are all autonomous. The universality of Kant's theory has been and continues to be central in developing notions of equality.¹²⁸ It is Kant's offer of pure self-activity that awoke the modern aspiration to liberation.¹²⁹

2. *Autonomy entails embodiment*

A communitarian¹³⁰ and feminist¹³¹ critique characterizes the Kantian autonomous being as unencumbered and disembodied. Bernard Williams puts the critique thus:

[T]he Kantians' omission of character is both a condition of their ultimate insistence on the demands of impartial morality, and also a reason for finding inadequate their account of the individual . . . Kantian moral philosophy treating persons as

¹²⁷ Moreover, as seen below, because of rationality, autonomy requires the caring for others; and because of rationality, autonomy is bounded, in contrast with existentialist freedom or license.

¹²⁸ Robin May Schott, *Feminism and Kant: Antipathy or Sympathy?*, in *AUTONOMY AND COMMUNITY: READINGS IN CONTEMPORARY KANTIAN SOCIAL PHILOSOPHY* 87, 89-92 (Jane Kneller & Sidney Axinn eds., 1998); Nedelsky, *supra* note 63, at 7-8 (arguing that feminism "simultaneously demands a respect for women's individual selfhood and rejects the language and assumptions of individual rights").

¹²⁹ Taylor, *supra* note 10, at 107-08. Kantian epistemology is also derived from the self, such that the forms of consciousness and understanding derive from the (abstract) human subject.

¹³⁰ See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (critiquing the Rawlsian notion, derived from Kantian conceptions, of theoretical figures behind a veil of ignorance); TAYLOR, *supra* note 86, at 514 (critiquing the modern atomistic "disengaged subject").

¹³¹ See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); Jean Rumsey, *Re-Visions of Agency in Kant's Moral Theory*, in *FEMINIST INTERPRETATIONS OF IMMANUEL KANT*, *supra* note 122, at 125. Robin West notes that the disconnected individual who "prides himself on his autonomy and on his self-chosen life projects" is other than the individual celebrated by classical liberals, who is both connected and seen as subject to hierarchical impediments. WEST, *supra* note 124, at 4-5; see also FEINBERG, *supra* note 21, at 94.

abstractions is a misrepresentation, since it leaves out what both limits and helps to define moral thought.¹³²

Yet the Kantian individual is a very real one. It is an individual with attachments and commitments.

The Kantian moral agent is situated, constituted by needs, interests, beliefs, and connections.¹³³ Kantian autonomy requires *impartiality*, but not impersonal detachment.¹³⁴ It is an *attached* person that acts on universalizable maxims.¹³⁵ Kant's theory does not deny empirical, phenomenological man, but recognizes it in his theory; the negative freedom of *Willkür* is necessary for the exercise of the positive freedom of the *Wille*.¹³⁶ The phenomenal and noumenal can perhaps be reconciled thus, with the *attached* person acting on universalizable maxims.

Moreover, emotions are not banished from the Kantian scheme. Compassion, for instance, is a universalizable maxim.¹³⁷ Acting upon kindness to one's family is something one would reason that everyone ought to do. Kant also writes of love and sympathy.¹³⁸

¹³² Bernard Williams, *The Identities of Persons*, in RIGHTS AND AUTONOMY IN THE IDENTITIES OF PERSONS 210, 215 (Amelie O'Rorty ed., 1976).

¹³³ BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT 203-07 (1993).

¹³⁴ See Richards, *supra* note 11, at 215.

¹³⁵ THE CAMBRIDGE COMPANION TO KANT 322-23 (Paul Guyer ed., 1992); Schott, *supra* note 128, at 92-94, 97.

¹³⁶ See *supra* Part I.B.1.c. The relationship is complex. Abstracting with impartiality is meant to be used in debating general moral principles, not as an ideal for action when facing the moral choices of daily life. Philosophers, including Kant, sometimes conflate these two ideas. HILL, *supra* note 23, at 45; see also ROBERT C. SOLOMON, HISTORY AND HUMAN NATURE 234 (1979) (indicating that Kant distinguishes between the transcendental ego, which is universal, and the empirical self of everyday life).

It is a matter of debate to what degree Kant resolved the functioning together of the *Wille* and *Willkür*, and the noumenal and phenomenal realms. Walker analyses Kant's discussion in the CRITIQUE OF PRACTICAL REASON of the difficulties of the path from a priori knowledge to a posteriori application in the context of the moral law as a determining factor in an individual's conduct, i.e. an incentive to action, or what it effects in the mind. See WALKER, *supra* note 80; BECK, *supra* note 71, at 210. Rawls defines his project as a reformulation of Kantian dualisms, including that between noumena and phenomena, within the scope of an empirical theory. RAWLS, *supra* note 92, at 256-57.

¹³⁷ HILL, *supra* note 23, at 51.

¹³⁸ See KANT, GMM, *supra* note 5, § 4:423, at 74-75.

Virtues for Kant are amiable character habits. They may lead to moral action only by chance, if they are not led by practical reason.¹³⁹ The virtues, while not equivalent to moral duties, expressly include benevolence.¹⁴⁰

As discussed in the introduction to this article, I do not here address conflicts of ethical principles, such as those discussed by Nussbaum. Nor do I deny that those conflicts can exist. Yet I reject the necessity of one conflict: I argue against the view that there is a necessary conflict between the Kantian concept of autonomy, on the one hand, and care and emotions, on the other.

Nussbaum discusses the coinciding of ethics and emotion in Greek tragedies and philosophy. Also in Jewish thought, the moral system includes both divine commandments and acts of loving kindness. While a radical view takes the former as supreme¹⁴¹—analogous to Kant's taking moral reasoning and the categorical imperative as supreme—in Jewish law "gemilut hasadim," deeds of kindness, are one of the three things upon which the world stands.¹⁴² For autonomy on the Kantian model and the concept as it has developed, I do not believe that emotions are excluded. Indeed, care is fundamental to the system.

Where emotions are seen to determine morality not as the basis of partial rather than impartial judging, but rather insofar as they inform our moral reasoning, Nussbaum's position is perhaps not radically far from the concept of autonomy based on Kantian theory.¹⁴³ Also the contextualization said to be necessary for morality, for instance by Alisdair Macintyre, may be seen in the Kantian

¹³⁹ HERMAN, *supra* note 133, at 70-72.

¹⁴⁰ KANT, *MM*, *supra* note 5, §§ 6:448-52, at 568-72.

¹⁴¹ See, e.g., the debates inspired by the position of Yeshayahu Leibowitz. See YESHAYAHU LEIBOWITZ, ON JUST ABOUT EVERYTHING: TALKS WITH MICHAEL SHASAR 110-113 (1987) (in Hebrew).

¹⁴² "Gemilut hasadim" גמילות חסדים is discussed in "Pirkei avot" פרקי אבות. PIRKEI AVOT (Samson Raphael Hirsch trans., 1979); see also JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN (Lawrence Kaplan trans., 1983); EFRAIM ELIMELECH URBACH, THE SAGES (Israel Abrahams trans., 1979).

¹⁴³ See Owen Fiss, *The Irrepressibility of Reason*, in THE LAW AS IT COULD BE (2003) (interpreting Nussbaum's thesis).

concept of autonomy and also in the concept of autonomy of expression that has developed.¹⁴⁴

3. *The autonomous being is social*

In addition to being embodied and attached, the autonomous being is also social. The Kantian autonomous rational being cannot be lonely and solitary. She is not an isolated, atomistic unit in a vacuum, but is very much a part of humanity. This social aspect of Kantian autonomy and morality arising from duty is to be distinguished from the social reading of *conditional* autonomy. Such a view is offered, for example, by Jennifer Nedelsky, whereupon the self is constituted in a social context: self-determination of autonomy, and devising our own rules, requires interdependence.¹⁴⁵ It is, rather, a necessary facet of autonomy.

Kant essentially integrates the free subject into the community of men. . . . If to be free is to follow the moral law, and to act morally is to see that the maxim of my action could be willed universally, then freedom requires that I understand myself as a human among other humans.¹⁴⁶

Kant writes that, like trees, if people grow in isolation from each other they grow stunted, bent, and twisted.¹⁴⁷ A number of

¹⁴⁴ Macintyre argues that morality is not all about abstract universal reason, but rather is contextualized. See ALISDAIR MACINTYRE, *AFTER VIRTUE* (1984). Rawls comes to adopt that position. See Fiss, *supra* note 143 (discussing reactions to Nussbaum's work).

¹⁴⁵ Nedelsky, *supra* note 63, at 32. Also for Paul Roberts, autonomy is "nourish[ing], and in turn . . . nourished by relations with other people." Paul Roberts, *Privacy, Autonomy, and Criminal Justice Rights*, in *PERSONAL AUTONOMY, THE PRIVATE SPHERE, AND CRIMINAL LAW* 49, 62 (Peter Alldridge & Chrisje Brants eds., 2001).

¹⁴⁶ Taylor, *supra* note 10, at 108. Taylor likens Kant in this respect to Rousseau, for whom also, we are only truly free as citizens of the republic (thus recovering the ancient Greek view of republican freedom) through the concept of the general will. *Id.* at 103, 110-12.

¹⁴⁷ Jane Kneller, *Introducing Kantian Social Theory*, in *AUTONOMY AND COMMUNITY: READINGS IN CONTEMPORARY KANTIAN SOCIAL PHILOSOPHY*, *supra* note 128, at 7 (citing Immanuel Kant, *Idea for Universal History with a Cosmopolitan Purpose*, in *KANT'S GESAMMELTE SCHRIFTEN* § 8:22, at 46).

authors have emphasized the social nature of Kantian ethics, citing Kant's argument that individuals have a duty to promote the highest good and arguing that this duty is inherently a social one.¹⁴⁸ For Kant, rational beings have a duty not only to better themselves morally but to bring about the highest moral good on earth. "Genuine human society is characterized as a community of individuals united for the purpose of constituting a moral commonwealth."¹⁴⁹

4. *Autonomy requires obligations*

Autonomy entails obligations towards others. The categorical imperative requires individuals to respect one another and to treat one another as ends rather than as means. It is one's obligations that place one squarely in community. Kant goes further. Kantian autonomy requires the promotion of others' ends. For Kant, every rational being has a duty not only to avoid "intentionally withdraw[ing] anything" from the happiness of others, but also to "tr[y] . . . to further the ends of others."¹⁵⁰ Kant writes of the duty of assistance. He reasons that it is impossible to will that a principle of cheating and non-assistance hold everywhere: "a will that decided this would conflict with itself, since many cases could occur in which one would need the love and sympathy of others and in which, by such a law of nature arisen from his own will, he would rob himself of all hope of the assistance he wishes for himself."¹⁵¹

Kant's moral doctrine leads "to an ethic of mutual respect and self-esteem," as Rawls writes.¹⁵² The Kantian-Aristotelian tradition involves "moral and legal obligations to respect and care for the humanity in others as well as oneself."¹⁵³ Kant's ethic is not an

¹⁴⁸ *Id.* at 1; see also Kneller, *supra* note 122, at 178-79 (O'Neill's account of practical reason as requiring community). In addition to Kant's moral theory, Kantian political theory is also seen to require community. See generally Waldron, *supra* note 20.

¹⁴⁹ Kneller, *supra* note 147, at 11 (citation omitted).

¹⁵⁰ KANT, GMM, *supra* note 5, § 4:430, at 80-81. Hill sees implied in the categorical imperative a duty of mutual aid. THOMAS E. HILL, JR., *The Kingdom of Ends, in DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY*, *supra* note 26, at 58, 61-62.

¹⁵¹ KANT, GMM, *supra* note 5, § 4:423, at 74-75.

¹⁵² RAWLS, *supra* note 92, at 256.

¹⁵³ Richard Wright, *The Standards of Care in Negligence Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 96, at 149; see also Wright, *supra* note 96, at 255.

ethic of care in the sense of feeling: the Kantian obligations of positive freedom are fulfilled when acts are done not by inclination but by moral duty.¹⁵⁴ The obligation of respect, however, is a *moral* feeling, self-wrought by reason.¹⁵⁵ Here the analysis returns to reason: it is the rationality of positive freedom that leads the categorical imperative to constitute an ethic of care. It is through reason that Kantian man comes to be required to care for others.

5. *Far from existentialist freedom*

Thus in contrast with the slide from Kantian autonomy to existentialism that Murdoch describes, the two are far apart. Unlike radical freedom or license, where anything goes, autonomy is bounded. Existentialist freedom is an exercise of *Willkür*, without *Wille*. By contrast, on Kant's view, it is the *Wille* which gives the choices made by the *Willkür* their intelligibility, and their morality. While radical existential freedom is *independence* from morality, Kantian autonomy *constitutes* morality.¹⁵⁶ Indeed Murdoch recognizes in another essay that Kant was not an existentialist, "nor is his man . . . totally unguided and alone."¹⁵⁷

Dictates of reason restrain autonomous choice, and necessitate the moral strictures of the categorical imperative. Kantian autonomy is self-legislation, and specifically the duty to legislate laws that can be universalised.

Liberty too is sometimes likened to radical freedom, termed "do-as-you-like."¹⁵⁸ Yet distinctions have been made by philosophers between desire or wish-fulfilment on the one hand, and

¹⁵⁴ KANT, GMM, *supra* note 5, § 4:398, at 53-54, § 4:434, at 83-84. Regarding emotions, see *supra* text accompanying notes 2, 137-44.

¹⁵⁵ KANT, GMM, *supra* note 5, § 4:401, at 55; KANT, PRACTICAL REASON, *supra* note 54, at §§ 5:76-80 at 65-68; KANT, MM, *supra* note 5, § 6:399, at 528-29; see also Kneller, *supra* note 122, at 174-79 (Kant's aesthetic theory acknowledges and praises feelings); MURDOCH, *supra* note 85.

¹⁵⁶ See HILL, *supra* note 26, at 80 (distinguishing Sartrean from Kantian autonomy); Wright, *supra* note 96, at 159, 162.

¹⁵⁷ MURDOCH, *supra* note 123, at 30. *But see id.* at 54 (Kantian moral choice is a balance between "a pure rational agent and an impersonal mechanism," as is much existentialist philosophy).

¹⁵⁸ Shepherd, *supra* note 26.

choice or freedom on the other: Mill,¹⁵⁹ Aristotle,¹⁶⁰ and Berlin¹⁶¹ are included among them. Ronald Dworkin writes that if liberty is license, or having things we want or have an interest in, there is no general right to liberty—or it would include a right to vanilla ice cream.¹⁶² Harry Frankfurt distinguishes between the agent who *acts* freely, i.e., does what he wants, and the agent whose *will* is free.¹⁶³

For Kant autonomy is more “do as we must” rather than “do as we like.” It is the bounds of reason on freedom that lead to the critique of Kantian autonomy that it is not freedom at all but in effect slavery to objective morality.¹⁶⁴ Kant overcomes this quandary, insofar as the *Willkür* indeed may choose evil, as discussed above.¹⁶⁵

Thus the picture of the Kantian individual sometimes drawn is a caricature. In contrast with the critique of Kantian autonomy showing it as too individualistic and supporting individualistic rights conceptions too strongly, the Kantian concept is, rather, duty-based. It is an ethic, based on relationships in a community.

Kantian autonomy involves obligations of care. The communitarian and feminist critiques may be resolved through an understanding of the nature of Kantian positive freedom and its concomitant obligations. Positive freedom locates autonomy in obligations to respect the other. Indeed, the categorical imperative requires respect of others’ autonomy and dignity. It requires relational attachment and action. It is an ethic of care.

As shall be argued, the current conception of autonomy as expression shares much of the theoretical backdrop of Kantian

¹⁵⁹ H.J. McCloskey, JOHN STUART MILL: A CRITICAL STUDY 104-05 (1971); see also G.W. Smith, *J.S. Mill on Freedom*, in CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY, *supra* note 10, at 182, 184-85.

¹⁶⁰ See ARISTOTLE, *supra* note 12, bk. 3, ch. 2, at 40-42.

¹⁶¹ BERLIN, *supra* note 18, at xxxix.

¹⁶² DWORKIN, *supra* note 92, at 266-72.

¹⁶³ Frankfurt, *supra* note 64, at 70.

¹⁶⁴ See RAZ, *supra* note 58, at 370 n.2; FEINBERG, *supra* note 21, at 35-36.

¹⁶⁵ See *supra* text accompanying notes 75-78; WALKER, *supra* note 80, at 148.

Another response to this critique is Taylor’s analysis that Kantian autonomy as freedom is acting according to our true nature as rational beings. TAYLOR, *supra* note 86, at 363. Yet this paternalistic solution has concurrent dangers of despotism. See generally BERLIN, *supra* note 18 (critiquing positive freedom on this ground); see also T.M. Scanlon, *Rights, Goals, and Fairness*, in THEORIES OF RIGHTS, *supra* note 60, at 141.

autonomy, and also must be understood as consisting in both rights and duties.

II. AUTONOMY AS SELF-DEVELOPMENT AND EXPRESSION

I submit that the concept of autonomy developed by Kant has widened to encompass individual self-expression. The Kantian concept can be used effectively to understand the contours of the current concept of autonomy as expression. Onora O'Neill believes that Kant would not have found autonomy related to self-expression.¹⁶⁶ She criticizes contemporary versions of autonomy for claiming a lineage to Kantian autonomy.¹⁶⁷ I see coherence between the conceptions. This section traces the historical and theoretical lineage.

Understanding the roots of the current conception of autonomy of expression in Kantian thought, and the coherence between the concepts, fills out important features of the contemporary view. Kant showed that autonomy gives rise not only to rights to respect for dignity, but also to obligations. Those obligations include duties of respect for the dignity of others in a necessary community. The same obligations of respect must apply to the modern conception of autonomy as expression. The historical and conceptual understanding of the Kantian roots of autonomy of expression benefits legal accounts as well. The importance of this added richness can be seen with regard to the doctrine of freedom of expression, as discussed below.

What is attempted here is a construction of what the concept has become. What autonomy has become is a function of philosophy, but also "a function of actual history," as Bernard Williams has written.¹⁶⁸ Indeed, our culture has absorbed principles of the Kantian tradition and used them together with the current conception of autonomy as expression.

¹⁶⁶ O'NEILL, *supra* note 57, at 83. I greatly appreciate my discussions with Onora O'Neill on these issues and on the Kantian concept.

¹⁶⁷ Onora O'Neill, *The Inaugural Address: Autonomy: The Emperor's New Clothes*, 77 ARISTOTELIAN SOC'Y (SUPP. VOLUME) 1 (2003); see also Onora O'Neill, *Autonomy and the Fact of Reason in the Kritik der Praktischen Vernunft*, in IMMANUEL KANT, KRITIK DER PRAKTISCHEN VERNUNFT 81 (Otfried Höffe ed., 2002).

¹⁶⁸ Bernard Williams, *From Freedom to Liberty: The Construction of a Political Value*, 30 PHIL. & PUB. AFF. 3, 4 (2001) (discussing political freedom).

A. COHERENCE BETWEEN CONCEPTIONS

Two modern conceptions of autonomy can be identified. One conception analyzes autonomy of, and indeed as, rational deliberative choice.¹⁶⁹ Rational reflection and deliberation is seen to determine choice of action. Frankfurt has explored this conception of autonomy. Rawls's theory of the original position draws heavily on Kant.¹⁷⁰ (These views nonetheless evidence other departures from Kant.¹⁷¹) It may be argued that the conception of autonomy as rational deliberative choice is the only modern conception that is tied to Kant, and that the modern conception of autonomy of expression is more distant from the Kantian concept.

However, the conception of autonomy of, and indeed as, expression is arguably the more common one.¹⁷² In this conception, the element of reason has been displaced and autonomy has become identified with self-expression.¹⁷³ Autonomy as choice need not be a choice between alternative options, but is a choice of expression of self. The Oxford English Dictionary details how the term "to choose" has taken on the meaning "to will": "the notion of a choice between alternatives is often left quite in the background, and the sense is little more than an emphatic equivalent of to will . . ."¹⁷⁴

Moreover, convergences between the two modern views can be brought out. Both modern conceptions of autonomy reflect visions of the defining feature of humanity itself. Autonomy is seen as based on rational choice when reason is considered the essence of humanness. It is seen as about self-development and self-expression when that process is considered to be what makes us human. Isaiah Berlin saw that "conceptions of freedom directly derive from views

¹⁶⁹ See Frankfurt, *supra* note 64.

¹⁷⁰ RAWLS, *supra* note 92; John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980); see *supra* note 92, *infra* notes 179, 225.

¹⁷¹ O'NEILL, *supra* note 121, at 32-36 (calling these views empiricist).

¹⁷² Christman, *supra* note 64, at 109, 115.

¹⁷³ FRIEDMAN, *supra* note 60, at 35; TAYLOR, *supra* note 86, at 368.

¹⁷⁴ 3 THE OXFORD ENGLISH DICTIONARY, *supra* note 21, at 162. Regarding the difference between "choice" and "will," see the discussion of *Wille* and *Willkur*, *supra* Part I.B.1.c.

of what constitutes a self."¹⁷⁵ The two may both be seen to define humanity, with reason dependent upon expression: Coleman and Murphy write that to thwart expression is to thwart the essential humanity of a person, for "it is through discourse, dialogue, and argument that we reveal ourselves as thinking, rational, and (in Kant's sense) autonomous beings."¹⁷⁶

Autonomy on both conceptions is a vision of morality as well. Gerald Dworkin writes: "The capacity to make choices 'grounds our idea of what it is to be a person and a moral agent.'"¹⁷⁷ This is certainly the case for Kant.¹⁷⁸ Rawls's use of the reasoning of individual wills in the original position takes rational deliberative choice to be determinative of moral rule-making.¹⁷⁹ So too with autonomy as expression, autonomy is defined in accordance with a moral understanding. Regardless of its content, expression itself is a moral act. Whether a particular expression is moral, immoral, or amoral, nevertheless the choice of expression is an exercise of the moral will.¹⁸⁰ Taylor writes that the current ideal of autonomy as self-expression is a moral ideal – that of being true to oneself.¹⁸¹

Here I do not wish to deny or deflate the modern conception of autonomy based on reason. My aim is rather to apply the Kantian analysis to the current concept of autonomy of expression. While the liberal view of autonomy does not circumscribe it by the

¹⁷⁵ BERLIN, *supra* note 18, at 134. Berlin cites the freedom to choose as "an inalienable ingredient in what makes human beings human." *Id.* at ix, (without naming reason as a necessary element for autonomy); *see also* Smith, *supra* note 159, at 185-91.

¹⁷⁶ JULES L. COLEMAN & JEFFRIE G. MURPHY, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 88 (revised ed. 1989).

¹⁷⁷ DWORKIN, *supra* note 13, at 80; *see also* Fallon, *supra* note 6, at 878-89; FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 54-55 (1982).

¹⁷⁸ *See* KANT, *GMM*, *supra* note 5, § 4:439, at 88; KANT, *PRACTICAL REASON*, *supra* note 55, at 5:33 at 30. It was the case for Aristotle as well. For Aristotle, morality was to be found, *inter alia*, in reasoning, in that moral virtue is found in deliberative choice of the mean. *See, e.g.*, ARISTOTLE, *supra* note 12, bk. 2, ch. 6, at 29-31 ("Virtue, then, is a state of character concerned with choice, lying in a mean, i.e., the mean relative to us, this being determined by a rational principle, and by that principle by which the man of practical wisdom would determine it."); *see also id.* bk. 2, chs. 5-6, at 28-31, bk. 3, chs. 2-3, at 40-44.

¹⁷⁹ RAWLS, *supra* note 92.

¹⁸⁰ Also for Kant, the will that chooses evil is still autonomous, due to its capacity for choice. *See supra* text accompanying note 77.

¹⁸¹ CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 15, 28-29 (1991).

dictates of reason, it is "recognisably Kantian in that the critical determinant of individuals' rights remains their status as autonomous beings."¹⁸² Nor is it inconsistent to acknowledge the link between Kantian thought and current notions of autonomy without adopting the full Kantian "machinery of causal indeterminism, noumenal and phenomenal worlds, and the like,"¹⁸³ as, for example, Richards has done.

B. FROM KANT AND THROUGH TO TODAY

A development can be traced from *self-governance* to *self-determination*, on to *self-actualization* and to *self-development*, and then to *self-expression*. Kant can be seen to support the conception of autonomy of expression as well. The historical and theoretical development of the concepts is shown below. Traces of Kantian thought can be seen throughout. The current conception of autonomy will be explored. Its roots will be traced and the obligations that must be seen as concomitant with the current notion will be presented.

1. Kant

Kantian autonomy is self-governance through self-legislation. The rational being is capable of legislating moral action for herself. This capacity allows for self-determination: "in the human being there is a faculty of determining oneself from oneself."¹⁸⁴ The self-development of one's capacities¹⁸⁵ is on a teleological projection describable as self-actualization. It is an actualization of humanity's essence.¹⁸⁶ Kant writes of these concepts with a sense of teleological pursuit of perfection.¹⁸⁷

This actualization can be seen for Kant specifically with respect to expression. For Kant, expression and communication are a

¹⁸² JONES, *supra* note 114, at 129.

¹⁸³ See David A.J. Richards, *Autonomy in Law*, in THE INNER CITADEL, *supra* note 8, at 246, 253; see also JONES, *supra* note 114, at 129.

¹⁸⁴ KANT, PURE REASON, *supra* note 55, § A534/B562, at 533; see also Taylor, *supra* note 10, at 108.

¹⁸⁵ See KANT, GMM, *supra* note 5, § 4:423, at 74-75 (positing that a rational being wills to develop his capacities); see also BERLIN, *supra* note 18, at 153.

¹⁸⁶ See *supra* text accompanying notes 175-76. Yet even while teleological, it is not consequential. See *infra* text accompanying notes 249-51.

¹⁸⁷ See KANT, GMM, *supra* note 5, § 4:430, at 80-81.

person's natural end: the human being has a "natural purposiveness," an "inner end," to fulfill the speaker's capacity to "communicate his thoughts."¹⁸⁸ As it is his end, so then is "communicating his thoughts" a man's innate right.¹⁸⁹

The protection afforded a book follows. In his essay "On the Wrongfulness of Unauthorized Publication of Books," Kant develops the idea that an author's book is his speech to the public. A book "represents a discourse that someone delivers to the public."¹⁹⁰ "In a book, as a writing, the author *speaks* to his reader . . ."¹⁹¹ A book is "the means of carrying on the interchange of Thought."¹⁹²

Further, artistic spirit is talent to express ideas and to make them universally communicable; the artist gives expression to forms and speaks through them.¹⁹³ *Artistic* expression is elemental to autonomy also insofar as it relates to beauty, and beauty is the symbol of morality. Beauty in nature shows a harmony and purposiveness, as does the reason of rational beings—the expression of which is the moral law.¹⁹⁴ With aesthetic cognition the imagination is free, giving itself its own rules.¹⁹⁵ Like the exercise of genius, so too the exercise of autonomy is self-legislation.¹⁹⁶

¹⁸⁸ KANT, *MM*, *supra* note 5, §§ 6:429-30, at 552-53.

¹⁸⁹ *Id.* § 6:238, at 394.

¹⁹⁰ *Id.* § 6:289, at 436-37.

¹⁹¹ *Id.* § 8:80, at 29-30 (emphasis in original); see also *id.* §§ 8:83-84, at 32-34, § 8:86, at 35-36 (indicating that writing is the *speech* of a person (*opera*)), § 8:81* [Kant's note], at 30 (literary works deliver "a *speech* to the public").

¹⁹² IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 131 (W. Hastie trans., photo. reprint 1974) (1887) (translation of IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1797)).

¹⁹³ IMMANUEL KANT, *CRITIQUE OF JUDGMENT* § 5:317, at 145-46, § 5:323-24, at 151-53 (Nicholas Walker ed., James Creed Meredith trans., 2d ed. 2007) (1781).

¹⁹⁴ *Id.* § 5:351, at 178-79, § 5:354, at 181-82; see also ARTHUR C. DANTO, *Postmodern Art and Concrete Selves: The Model of the Jewish Museum*, in *PHILOSOPHIZING ART: SELECTED ESSAYS* 123, 125 (1999) (for Kant, the principles of moral life, as the principles of aesthetic judgment and of artistic creation, are uniform and universal). Danto challenges the claim of such universality with a communitarian response to art. *Id.* at 126.

¹⁹⁵ *Id.* at 135-46.

¹⁹⁶ See Donald W. Crawford, *Kant's Theory of Creative Imagination*, in *ESSAYS IN KANT'S AESTHETICS* 151, 172 (Ted Cohen & Peter Guyer eds., 1982) (discussing that for Kant, imagination is the free conformity to laws); see also MURDOCH, *supra* note 85, at 9 (The "work of art, not subject to an empirical concept, is produced by the free spontaneous activity of the imagination acting in accord with the notion of 'an object in general'.").

Thus the autonomy of *expression* is important to Kant. Moreover, the importance of one's communicating thoughts to another shows the importance to the individual autonomy of *the other*. The obligations of the autonomous individual to that other are discussed throughout this article.

2. Hegel

Post-Kantian thinkers further developed the concept of autonomy in relation to the autonomy of expression. Hegel uses the Kantian notion of autonomy. For Hegel, "in choice the will is explicitly free."¹⁹⁷ Like Kant, Hegel developed a concept of self-determination as freedom.¹⁹⁸

Hegel then took the concept of self-determination to a concept of self-development more explicitly.¹⁹⁹ For Hegel, "all necessarily strive to realise conceptions of freedom inherent in their self-consciousness, through self-development."²⁰⁰ Freedom is self-determination, creation, development, and growth towards the telos.²⁰¹

Expression is a necessary element of Hegel's theory of self-development. As Taylor explains, Hegel set himself the task of synthesizing freedom and expression, building upon the expressivist theory formulated in the work of Herder.²⁰² Expressivist theory brought back the Aristotelian categories in which the subject realizes a certain form.²⁰³ Yet Hegel's conception

added another dimension in that it looks on this realized form as the expression, in the sense of

¹⁹⁷ G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* §§ 21-24, at 42-43 (S.W. Dyde trans., 2001) (1820); HUGH A. REYBURN, *THE ETHICAL THEORY OF HEGEL: A STUDY OF THE PHILOSOPHY OF RIGHT* 107-08 (1921).

¹⁹⁸ See HEGEL, *supra* note 197, §§ 4, 21-24, at 28-30, 42-43; Zbigniew Pelczynski, *Freedom in Hegel*, in *CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY*, *supra* note 10, at 150-52 ("The attribution of true self-determination to spirit Hegel derived from Kant"); TAYLOR, *supra* note 12, at 12, 76-77.

¹⁹⁹ See HEGEL, *supra* note 197, §§ 6-7, at 32-35; DUDLEY KNOWLES, *ROUTLEDGE PHILOSOPHY GUIDEBOOK TO: HEGEL AND THE PHILOSOPHY OF RIGHT* 31 (2002); Pelczynski, *supra* note 198, at 178.

²⁰⁰ Pelczynski, *supra* note 199, at 178.

²⁰¹ HEGEL, *supra* note 197, §§ 6-7, at 32-35; see KNOWLES, *supra* note 199, at 31.

²⁰² TAYLOR, *supra* note 12, at 11.

²⁰³ *Id.* at 1-2, 7.

clarification, of what the subject is, something which could not be known in advance. It is the marriage of these two models, of Aristotelian form and modern expression, which enables us to speak here of *self-realization*.²⁰⁴

3. Romanticism

The evolving conception of autonomy reflects Romantic roots as well. The development of the notion of the creative individual is part of this development. The Romantics took the "classical ideal of personality as an organic unity of fully developed, freely active human powers."²⁰⁵ Some Romantic ideas of creativity have roots in Kantian thought²⁰⁶: as seen above, Kant's model was of spontaneous breakthrough creativity, where the genius could create original art.²⁰⁷ Hegel was not a Romantic, but certain of his concepts share ground with Romanticism.²⁰⁸

For the Romantics, self-development was a form of self-realization, and expression was crucial to it.²⁰⁹ On the expressivist view, "men reached their highest fulfillment in expressive activity."²¹⁰ In the Romantic period the notion of creative expression developed. Artistic creation came to be seen as "essentially an act of self-expression."²¹¹ The Romantics glorified the individual's unique

²⁰⁴ *Id.* at 16. For Hegel, expression of the individual was expression of Geist, the cosmic spirit. *See id.* at 11-27. The Hegelian expressive unity has today been "anthropologized – transferred from Geist on to man." *Id.* at 141.

²⁰⁵ W. H. BRUFORD, *THE GERMAN TRADITION OF SELF-CULTIVATION* 75 (1975).

²⁰⁶ MONROE C. BEARDSLEY, *AESTHETICS FROM CLASSICAL GREECE TO THE PRESENT: A SHORT HISTORY* 245 (1966).

²⁰⁷ Paul Edward Geller, *Must Copyright Be Forever Caught Between Marketplace and Authorship Norms?*, in *OF AUTHORS AND ORIGINS* 168 (Brad Sherman & Alain Strowel eds., 1994).

²⁰⁸ *Id.* at 12.

²⁰⁹ TAYLOR, *supra* note 86, at 375.

²¹⁰ TAYLOR, *supra* note 12, at 2. On the different senses of the term "fulfillment" *see infra* text accompanying notes 236-43.

²¹¹ BEARDSLEY, *supra* note 206, at 247-48 (citing Wordsworth and Hugo); *see also* GEORGE DICKIE, *ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS* 19-21 (1974).

self-development.²¹² That development supported rights of expression, as discussed below.

While the notion of self-development was "most fully elaborated among the early German Romantics,"²¹³ it may be seen in Britain through Mill's conception of liberty as well.²¹⁴ As seen above, freedom of choice on a metaphysical level, namely autonomy, is the justification for needing to ensure freedom of choice on a political level, namely liberty.²¹⁵ For Mill, man develops individuality through the exercise of choice.²¹⁶ Liberty is necessary for "the free development of individuality."²¹⁷ Mill's concept of liberty is close to the philosophical notion of autonomy as self-development and self-expression. In contrast with the continental view of freedom in the state,²¹⁸ self-development can be seen in Mill's concept of individual liberty from the state.

The influence of expressivist and Romantic ideas on Mill's political thought is evident.²¹⁹ Mill invokes von Humboldt for the view that "the end of man . . . is the highest and most harmonious development of his powers to a complete and consistent whole," for which freedom is a requisite.²²⁰ Taylor sees in Mill's vision of liberty "the expressivist notion that each man's fulfillment is unique and cannot be foreseen, much less prescribed, by any other" and

²¹² BRUFORD, *supra* note 205.

²¹³ LUKES, *supra* note 26, at 67.

²¹⁴ See MILL, *supra* note 28, at 54-60; Smith, *supra* note 159, at 184, 190, 211. The influence of expressivist and Romantic ideas on Mill's political thought has been documented. See TAYLOR, *supra* note 12, at 70, 137; LUKES, *supra* note 26, at 70; ISAIAH BERLIN, *John Stuart Mill and the Ends of Life*, in *FOUR ESSAYS ON LIBERTY*, *supra* note 18, at 199.

²¹⁵ See discussion *supra* Part I.B.1.a. and text accompanying note 29.

²¹⁶ MILL, *supra* note 28, at 53-58.

²¹⁷ *Id.* at 54. Mill embodies in his conception of liberty a notion of self-development, self-mastery, individuality, forming one's own character, and hence responsibility for his own desire. Smith, *supra* note 159, at 211; see also O'NEILL, *supra* note 57, at 31. Berlin underscores that for Mill, the defining essence of humanity is capacity for choice, and that freedom of choice is necessary for molding one's own character, individuality, and self-transformation. BERLIN, *supra* note 214, at 178, 189.

²¹⁸ TAYLOR, *supra* note 12, at 51; MARY ANN GLENDON & DAVID BLANKENHORN, *SEEDBEDS OF VIRTUE 185-95* (1995). Von Humboldt, for instance, "advanced the thesis that the highest purpose of the state was to promote conditions favoring the free and harmonious unfolding of individuality." GLENDON, *supra* note 37, at 71.

²¹⁹ BERLIN, *supra* note 214.

²²⁰ MILL, *supra* note 28, at 54 (citing Baron Wilhelm von Humboldt).

cites Mill's complaint against modern society's mediocrity and stifling of originality as having roots in Romantic protest.²²¹

4. *Modern View: Autonomy of and as Expression*

Autonomy as self-determination has moved to self-development, and, in turn, the concept has become oriented towards "human flourishing."²²² The modern view sees as essential to freedom "that men determine their purposes out of themselves."²²³ Finnis writes of autonomy as the conducting of one's life, and the constituting of oneself.²²⁴ Rawls writes of the aim in the original position for each "to fashion his own unity."²²⁵ Raz's notion of autonomy as the authoring of one's life is also a theory of self-determination.²²⁶ Richards and Scanlon write of autonomy and self-development.²²⁷

Self-determination and self-development depend upon expression, in the modern view. The capacities needed for determining one's life are not strictly limited to rational choice, but include capacity for expression as well. Richards's²²⁸ and Lukes's²²⁹ views of autonomy partake of both contemporary conceptions of autonomy as choice, consisting of rational reflection and also expression. "The kernel of the idea of autonomy is the right to make choices and decisions. . . . [T]he most basic autonomy-right is the right to decide how one is to live one's life."²³⁰ Lawrence Friedman describes Western society as a republic of choice.²³¹

²²¹ TAYLOR, *supra* note 12, at 70, 137; *see also* LUKES, *supra* note 26, at 70; BERLIN, *supra* note 214, at 199.

²²² *See* FINNIS, *supra* note 8, at 192.

²²³ Taylor, *supra* note 10, at 102.

²²⁴ FINNIS, *supra* note 8, at 261.

²²⁵ RAWLS, *supra* note 92, at 563 (emphasis added).

²²⁶ RAZ, *supra* note 58, at 204.

²²⁷ Richards, *supra* note 11, at 206; Scanlon, *supra* note 165, at 141.

²²⁸ Richards, *supra* note 183, at 253-54.

²²⁹ LUKES, *supra* note 26, at 52, 127-28, 131, 135.

²³⁰ FEINBERG, *supra* note 21, at 54.

²³¹ FRIEDMAN, *supra* note 60 (analysis focuses on American society, but also covers England and Western Europe); *see also* Goodin, *supra* note 103 (discussing the ubiquity of choice in political theories, among utilitarians and contractarians, and the current preoccupation with models of choice (rational, social, public, collective, etc.)); TAYLOR, *supra* note 181, at 28-29 (discussing modern society and expressive choice).

"The new variety of individualism stresses self-expression . . . cultivating the inner human being, expanding the self, developing the special qualities, uniqueness of each person." The argument offered here is that autonomy *of* self-expression has become autonomy *as* self-expression.

5. Freedom of expression

The centrality of self-expression to autonomy also can be seen in contemporary legal freedom of expression doctrine. Rationales for the freedom of expression are frequently cited as democracy, truth, and autonomy.²³² The autonomy rationale takes on three forms. First, a collective consequentialist view justifies autonomy insofar as it is *for* the *social* good. Post justifies freedom of expression on the basis of autonomy for democracy.²³³ On the individualist view of the rationale, autonomy has two aspects: as a consequentialist *good* and as a deontological *right*. These two forms are discussed below. It is the latter which coheres with the developments seen in the concept of autonomy discussed herein.

The consequentialist view of autonomy of expression as for the individual *good* takes autonomy as necessary to, and promoting of, individual flourishing. Freedom of expression on that view is arguably seen not as an end in itself, but as a means to the end of self-development. Freedom of expression is justified for its role in fostering self-fulfillment,²³⁴ or self-realization.²³⁵ In the 1976 case *Handyside v. United Kingdom*, the European Court of Human Rights

²³² See, e.g., *Abrams v. United States*, 250 U.S. 616, 624, 630-31 (1919) (Holmes, J., dissenting) (discourse on truth); SCHAUER, *supra* note 177; ERIC BARENDT, FREEDOM OF SPEECH 14 (2d ed. 2005).

²³³ On Post's view, the function of public discourse in democracy is to respect individual autonomy, and to reconcile the will of the individual with the general will. Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 280-85 (1991) [hereinafter Post, *Racist Speech*] (individualism flows directly from the central project of democracy) (citations omitted); see also Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 603 (1990).

²³⁴ *R v. Home Secretary of State for the Home Dep't, ex parte Simms* [2000] 2 A.C. 115 (H.L. 1999); JOEL FEINBERG, FREEDOM AND FULFILLMENT 91, 94, 316 (1992).

²³⁵ THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970); see also BARENDT, *supra* note 232, at 14 (self-development and fulfillment).

wrote of the freedom of expression as one of the basic conditions for "the development of every man."²³⁶

A contrasting view is of autonomy of expression as a deontological *right*. Feinberg identifies self-fulfilment as a concept of well-being, and as having a crucial role in defining the *good* for man; he distinguishes self-determination as a *right*.²³⁷ Schauer also distinguishes between views of self-development whereupon freedom of expression is central to the good life, and individual autonomy and choice.²³⁸ The autonomy rationale used in the freedom of expression analyses of Fallon,²³⁹ Ronald Dworkin,²⁴⁰ Baker,²⁴¹ and Schauer²⁴² may be termed deontological. Kant is specifically called upon in Richards's view that the protection of autonomy as implied in the freedom of expression is the protection of the capacity for moral choice.²⁴³ For Justice Brandeis in *Whitney v. California*, free speech is both an end and a means, thus recalling both the deontological and consequentialist justifications.²⁴⁴

The deontological view is in focus in the instant analysis. It is consistent with the Kantian concept of autonomy, which has been identified with the *right* rather than the *good*.²⁴⁵ Indeed, the right for Kant is the good will.²⁴⁶ Yet the good will is for Kant good in itself, not a means to an end—such as what it may effect or accomplish,

²³⁶ 72 Eur. Ct. H.R. (5493); see also *Zana v. Turkey*, 27 Eur. H.R. Rep. 667 ¶ 51; RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* 1058-59 (2000) (discussing *Zana v. Turkey*).

²³⁷ FEINBERG, *supra* note 234, at 91, 92-97, 316.

²³⁸ SCHAUER, *supra* note 177, at 48-50.

²³⁹ Fallon, *supra* note 6, at 884.

²⁴⁰ RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (1996).

²⁴¹ C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 52 (1989). Baker also writes of the use of speech to develop oneself, which resonates with consequentialist arguments. See *id.* at 59.

²⁴² Frederick Schauer, *Speaking of Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 58, at 178, 189; SCHAUER, *supra* note 177, at 65. Schauer, with Scanlon, also takes the freedom of expression as a line of demarcation separating the individual and government. SCHAUER, *supra* note 177, at 71.

²⁴³ Richards, *supra* note 183, at 252-53.

²⁴⁴ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

²⁴⁵ See SANDEL, *supra* note 130, at 5-7; see also notes 113-16 and accompanying text (discussing autonomy and right).

²⁴⁶ I am indebted to Ralph Walker for discussion of this point.

for example, happiness.²⁴⁷ In some senses Kantian moral theory may be considered teleological.²⁴⁸ For example, Kant's concept is one of self-actualization of the human essence in reason, as discussed above,²⁴⁹ and as such can be termed teleological. Additionally, the kingdom of ends is for Kant a moral ideal.²⁵⁰ Yet Kantian theory is primarily deontological rather than consequentialist: Kantian autonomy *is constituted by* the capacity, rather than by the exercise of such capacity *for its fulfilment*.²⁵¹

The capacity for expressive choice makes us autonomous. Freedom is not dependent or conditioned upon the actual exercise of it. This was the case for Kant, Hegel, and Mill,²⁵² and it is the case for current expressivist conceptions as well. As with Kantian autonomy, autonomy as self-expression is an unconditional capacity of all, on the basis of which equal rights of expression for all are justified.

Today's conception is not only freedom of choice for self-development and expression, but as constituted by self-expression. Autonomy *of* self-expression has become autonomy *as* self-expression. The argument offered here is that autonomy has come to mean the capacity and exercise of the free will in expression.

²⁴⁷ See KANT, GMM, *supra* note 5, §§ 4:394-96, at 50-52.

²⁴⁸ See *id.* § 4:436, at 85-86* [Kant's note] ("*Teleology* considers nature as a kingdom of ends, *morals* considers a possible kingdom of ends as a kingdom of nature. In the former the kingdom of ends is a theoretical idea for explaining what exists. In the latter, it is a practical idea for the sake of bringing about, in conformity of this very idea, that which does not exist but which can become real by means of our conduct.") (emphasis in original). Caygill also refers to Kant's discussion of ends. CAYGILL, *supra* note 13, at 388-89 (arguing that, for Kant, determination of will and all moral judgments are determined by an end); see also THOMAS AUXTER, KANT'S MORAL TELEOLOGY (1982) (arguing for a reading of Kant's moral theory as teleology); *supra* notes 66, 95, 187.

²⁴⁹ See *supra* text accompanying notes 184-88.

²⁵⁰ See *supra* notes 65, 93 and accompanying text.

²⁵¹ This is especially evident insofar as the autonomous being can choose evil. See *supra* notes 76-77, 165 and accompanying text.

²⁵² Hegel's two aspects of the will can perhaps be seen as unconditional and conditional. HEGEL, *supra* note 197, § 5, at 30-32 (absolute abstraction, universality), § 6, at 32-33 (the will of a particular subject with a determinate object); see also KNOWLES, *supra* note 199, at 30 ("Where the first element of the will is abstract, the second is concrete; where the first is indeterminate the second posits a determinacy . . ."); cf. discussion of *Wille* and *Willkür* for Kant, *supra* Part I.B.1.c.; Smith, *supra* note 159, at 191 ("[T]he actual attainment of Mill's ideal of personality development is not presented as a necessary condition of freedom.").

Autonomy is understood today in line with the ethos of our modern culture as freedom of choice, self-development and self-expression.²⁵³

C. DIGNITY, RESPECT – AND OBLIGATION

Autonomy as self-expression thus can be seen to have developed from the Kantian concept of autonomy. In addition, autonomy as self-expression shares with Kantian autonomy many central features. Dignity and respect are among those shared features. It is submitted that obligations of respect should be recognized in common as well.

Autonomy and dignity are often considered complementary values.²⁵⁴ Like Kantian autonomy, autonomy as self-expression is said to invoke the dignity of the autonomous agent. This view is put forth by courts and commentators alike. The U.S. Supreme Court in *Cohen v. California* wrote: the “constitutional right of free expression . . . comport[s] with the premise of individual dignity and choice upon which our political system rests.”²⁵⁵ Emerson,²⁵⁶ Henkin,²⁵⁷ and Dworkin²⁵⁸ link the freedom of expression to the dignity of man.

It is submitted here that autonomy is the justification, and dignity the correlate value protected by the freedom of expression. Sometimes the linking of the two concepts—autonomy and dignity—may gloss over the differences between them.²⁵⁹ Moreover, Schauer critiques the use of dignity as a justification for the freedom of expression, as dignity may well prevail *over* speech rather than protect it.²⁶⁰ I would agree, but do not find this a weakness of the

²⁵³ FRIEDMAN, *supra* note 60; TAYLOR, *supra* note 181, at 28-29.

²⁵⁴ OLIVER, *supra* note 109, at 61; Feldman, *supra* note 46, at 54; Shepherd, *supra* note 26; Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964) (arguing that dignity is at the junction of various conceptions of autonomy).

²⁵⁵ *Cohen v. California*, 403 U.S. 15, 24 (1971).

²⁵⁶ EMERSON, *supra* note 235, at 6-7.

²⁵⁷ Louis Henkin, *Human Dignity and Constitutional Rights, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 58, at 210, 223.

²⁵⁸ DWORKIN, *supra* note 240 (relying however upon a conditional concept of dignity, which may be lost when disrespected).

²⁵⁹ See, e.g., Shepherd, *supra* note 26.

²⁶⁰ SCHAUER, *supra* note 177, at 190 (arguing that it takes dignity to signify a right to a minimum standard of treatment, and against dehumanization.).

autonomy rationale: it is, rather, a strength. It shows the necessary limits of the freedom of expression.

In addition to dignity, the autonomy rationale for freedom of expression is understood to ground the necessary respect for individuals. Here again the Kantian roots of the concept of autonomy are apparent. Ronald Dworkin defends freedom of speech and other fundamental liberties on grounds of a right to equal concern and respect,²⁶¹ associated with the Kantian notion of dignity.²⁶² Coleman and Murphy write of the freedom of expression as a respect-based, natural right, in accordance with Kantian thought.²⁶³ Scanlon's theory is also in this vein.²⁶⁴

Another feature which I believe must be recognized as common between the two is the obligations that autonomy entails. As with Kantian autonomy, so too autonomy of expression is often considered egotistical and narcissistic. Yet as has been seen, Kantian autonomy requires obligations of respect on behalf of the autonomous agent. Not only must the autonomous agent be shown respect; she must also show respect to others. It is this obligation that must be more widely acknowledged with regard to autonomy of expression.

D. THE RESPONSE TO THE CRITICS: OBLIGATIONS OF RESPECT

A further analogy between the Kantian concept of autonomy and the concept of autonomy of expression is with respect to their responses to critiques. The latter conception can—and must—respond to the critiques as the former concept has been shown to do. Autonomy of expression is universal as well, while still supporting the individual; that individual is a real, embodied person with attachments; the conception envisions not atomistic but social individuals; it entails obligations; and it is far from existential freedom. Each of these elements will be explored in turn. Most importantly, obligations are central to the autonomy of the expressor, under the current conception of autonomy of expression. The discussion in this

²⁶¹ DWORKIN, *supra* note 92, at 272-78.

²⁶² *Id.* at 198-99.

²⁶³ COLEMAN & MURPHY, *supra* note 176, at 86-101.

²⁶⁴ Scanlon, *supra* note 64. Schauer identifies the "style" as a Kantian one. SCHAUER, *supra* note 177, at 69.

section will, then, parallel the discussion in the first Part whereby the critiques of autonomy were countered.

1. *Expression is both individual and universal*

The first point discussed regarding critiques of Kantian autonomy was Kant's view that autonomy is based on reason. While autonomy as expression is not based in rationality, it is based on the capacity for exercise of the will. That capacity is held by all, universally. As such, it is a basis for equality. Like the capacity for reason, it is a universal attribute that recognizes each individual in her individuality. Like the capacity for reason, it is a moral vision.

2. *Autonomy entails embodiment*

The expressive autonomous individual is not disembodied, but attached. Hegel's subject is determinate. Hegel writes "the ego is . . . the transition from undifferentiated indeterminacy to the differentiation, determination, and positing of a determinacy as a content and object. . . . Through this positing of itself as something determinate, the ego steps in principle into determinate existence."²⁶⁵ In contrast with the determinate ego, Hegel distinguishes the pure indeterminacy of the will, or pure reflection of the ego into itself, dissipating needs, desires, and impulses.²⁶⁶ Hegel's contrast between the determinate will and absolute abstraction or "universality" recalls the discussion above regarding the paradox of the coexistence of the universal and particular.²⁶⁷

Self-expression further subjectifies the self-actualization norm. As on the Romantic view, self-expression is unique to the individual. Self-development, realization, and actualization reflect the development, realization and actualization of the individual self.²⁶⁸

²⁶⁵ See HEGEL, *supra* note 197, § 6, at 32-33; see also KNOWLES, *supra* note 199, at 28-33; TAYLOR, *supra* note 12, at 18, 80.

²⁶⁶ HEGEL, *supra* note 197, § 5, at 30-32.

²⁶⁷ See *supra* note 125 and accompanying text.

²⁶⁸ Self-expression need not necessarily be personal expression of the individual's innermost thoughts and feelings, however. The term "self-expression" is used here to signify expression of the self, *i.e.* of the individual, but not necessarily of the personality. See Leslie Kim Treiger-Bar-Am, *The Moral Right of Integrity: A Freedom of Express-*

3. *The autonomous being is social*

It was shown above that Kantian autonomy exists in a community. Hegel analyzes the system of right—the normative life of a society—as the realm of the actualized spirit.²⁶⁹ For Hegel, “men are expressive beings in virtue of belonging to a culture; and a culture is sustained, nourished and handed down in a community.”²⁷⁰

The current conception of autonomy as expression is also social. Autonomy of expression (and autonomy as expression) is experienced by an individual not in atomistic isolation but rather in society. Expression is not an act of an isolated individual, but involves relation to another. Baker underscores this point.²⁷¹ As seen above, the freedom of expression doctrine protects not any form of self-expressive activity—in which case the freedom of expression principle would collapse into a general principle of liberty, as Schauer writes²⁷²—but expression in communication.

4. *Autonomy requires obligations*

The relational concepts entailed in the Kantian analysis of autonomy require obligations of respect between people. The obligations are both for and by the autonomous agent. It is submitted that today, too, autonomy as expression must be understood to entail obligations.

The concepts of autonomy, dignity, and respect establish a norm of civility. Oliver writes that dignity and respect are

on the face of it . . . individualist values. However, the values of dignity and respect are also civil or communitarian, since they require the position of

sion, in 2 NEW DIRECTIONS IN COPYRIGHT LAW 133, text accompanying nn.35-36, 65 (Fiona Macmillan ed., 2006).

²⁶⁹ See HEGEL, *supra* note 197, § 4, at 28-30.

²⁷⁰ TAYLOR, *supra* note 12, at 2.

²⁷¹ BAKER, *supra* note 241, at 48-50. Baker also sees self-fulfillment and self-development in a social collective. *See id.* at 53.

²⁷² SCHAUER, *supra* note 177, at 50-53; *see* COLEMAN & MURPHY, *supra* note 176, at 94; *see also* O’NEILL, *supra* note 57, at 185 (contrasting communication with “mere self-expression”).

the individual in society and in relation to others to be protected.²⁷³

However, Dawn Oliver places autonomy in the individualist camp.²⁷⁴ Post also characterizes autonomy as an individual norm and contrasts it with social norms of civility.²⁷⁵ I submit that autonomy itself is a norm of civility.

Autonomy *of* and *as* expression likewise must be seen as a norm of civility. O'Neill derides current notions of autonomy as self-expression, as being without obligation. She contrasts expression with communication: O'Neill believes that communication regards the relationship between two or more individuals and thus entails obligations.²⁷⁶ I submit that expression, as understood in the instant analysis, is itself communicative. It thus must entail ethical obligations.

Both *autonomy* and *expression* are relational. So too *autonomy of expression* is relational, as is the conception into which it has developed of *autonomy as expression*. As such, the conception must entail ethical obligations.

5. *Far from existential freedom*

Sometimes the current notions of autonomy and individualism are carried to an extreme of broad-based license, under which "anything goes." Taylor sees this resulting in the malaise of the me-generation.²⁷⁷ I submit that the two ideas of autonomy must be brought together: the Kantian roots of the current conception must be recalled, so that autonomy *of* and *as* expression is understood to consist of obligations.

As discussed above, one view of rights focuses on the responsibility they entail.²⁷⁸ In the ECHR, the responsible exercise of

²⁷³ OLIVER, *supra* note 109, at 64.

²⁷⁴ *Id.* at 60-62, 64.

²⁷⁵ Post, *Racist Speech*, *supra* note 233, at 285-86; Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); Post, *supra* note 118, at 735-38. Post however recognizes that today autonomy is incorrectly taken to mean atomistic, solely self-created identity. Post, *supra* note 120.

²⁷⁶ O'NEILL, *supra* note 57, at 185.

²⁷⁷ See generally TAYLOR, *supra* note 181.

²⁷⁸ See *supra* note 118.

rights entails duties. ECHR Article 10(1) protects freedom of expression, and Article 10(2) sets forth the responsibilities that freedom entails.²⁷⁹ It is submitted that the right of autonomy of expression must be understood as correlative not only to a duty on the part of the other to respect the right of the individual, but also to a duty on the part of the right-holder.

Nor, however, must the other extreme carry the day. The duty in which autonomy consists must not eclipse the individual's right to respect. Caution must be taken in shifting the emphasis in autonomy from right to duty, from recipient of care to giver of care; the self must remain central. Kantian autonomy upholds both. O'Neill takes the view that Kantian autonomy is not of persons but rather of principles. O'Neill writes that the "self" in "self-legislation" for Kantian autonomy is not the individual being, with the self as subject, but is a reflexive referral back to legislation, i.e., legislation that legislates itself.²⁸⁰ I believe this view may go too far. The self is centrally present for Kant, and certainly for the tradition of autonomy as it has developed.

III. CONCLUSION

The current conception of autonomy of expression has roots in Kantian autonomy. From these origins, the concept has developed over time.²⁸¹ The Kantian concept has been developed into today's conception of autonomy *of* expression, and indeed *as*, expression.

I submit that the application of Kantian theories to autonomy of expression is a legitimate use of the Kantian concept. An instance of such use is Kneller and Axinn's reliance upon "a Kantian orientation as a powerful tool in . . . analysis,"²⁸² even while acknowledging departures from Kant in their collection of essays on social theory. They call their collection

"Kantian" in a broad sense . . . it represents interests and developments of various aspects of

²⁷⁹ ECHR Article §§ 10(1), 10(2).

²⁸⁰ O'NEILL, *supra* note 57, at 85.

²⁸¹ See *supra* Part II.B.

²⁸² Jane Kneller & Sidney Axinn, *Preface* to AUTONOMY AND COMMUNITY: READINGS IN CONTEMPORARY KANTIAN SOCIAL PHILOSOPHY, *supra* note 128, at vii-viii.

Kant's thoughts that may very well go beyond the letter of the text, and in many cases, beyond what Kant himself might have ever thought about or advocated.²⁸³

Kant himself recognized that an author's words may be understood and developed in new directions. Kant wrote that "it is not at all unusual to find that we understand [an author] even better than he understood himself, since he may not have determined his concept sufficiently"²⁸⁴

It has been seen that, under the Kantian concept, autonomy requires respect *for* the autonomous self, and also entails obligations *of* the autonomous self. Those obligations counter the critiques of Kantian autonomy as egoistic and solitary. As the Kantian roots of the current conception of autonomy are recalled, the obligations entailed in autonomy that Kant shows must be seen as arising from the current concept as well. Those obligations require care.

²⁸³ *Id.*

²⁸⁴ See KANT, PURE REASON, *supra* note 55, § A314/B370, at 396.