



Cleveland State University  
EngagedScholarship@CSU

---

Law Faculty Articles and Essays

Faculty Scholarship

---

Spring 2020

## Consentability, Autonomy, and Self-Actualization

Jonathan Witmer-Rich

*Cleveland-Marshall College of Law, Cleveland State University, [j.witmerrich@csuohio.edu](mailto:j.witmerrich@csuohio.edu)*

Follow this and additional works at: [https://engagedscholarship.csuohio.edu/fac\\_articles](https://engagedscholarship.csuohio.edu/fac_articles)

 Part of the [Contracts Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

### Repository Citation

Witmer-Rich, Jonathan, "Consentability, Autonomy, and Self-Actualization" (2020). *Law Faculty Articles and Essays*. 1137.

[https://engagedscholarship.csuohio.edu/fac\\_articles/1137](https://engagedscholarship.csuohio.edu/fac_articles/1137)

This Article is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Articles and Essays by an authorized administrator of EngagedScholarship@CSU. For more information, please contact [research.services@law.csuohio.edu](mailto:research.services@law.csuohio.edu).

# CONSENTABILITY, AUTONOMY, AND SELF-ACTUALIZATION

*Jonathan Witmer-Rich*

Nancy Kim's *Consentability* provides a fascinating exploration of the many thorny problems in consent theory and practice—such as whether individuals should be permitted to voluntarily inflict self-harm, and whether they should be permitted to sell body parts or personal (body-based) services. Kim articulates several principles designed to help decision-makers understand and evaluate whether and how consent can operate in these arenas and others. Her contributions include the Regret Principle and evaluating consent's impact on Future Autonomy.

In this response essay, I will engage with Kim's contributions by focusing on the competing principles underlying consent. These include:

1. protecting and furthering the individual's self-interest ("Self-Interest")
2. protecting a right to autonomy grounded on an inherent right to self-sovereignty ("Self-Sovereignty")
3. protecting a right to autonomy grounded on the value of self-actualization and self-governing ("Self-Actualization")

Kim, relying on foundational authorities such as J.S. Mill and Joel Feinberg, articulates and puts to good use all of these conceptions.

I offer several points in response to Kim. First, I contend that clearly delineating the overlapping but distinct principles that underlie consent is critical for any conceptual project, like Kim's, seeking to propose a framework for consent. Second, I argue that clearly adopting one (or more) of those distinct principles would help guide decision-making in hard cases. Third, throughout this response I will argue that promoting the good of Self-

Actualization—as articulated by Joseph Raz—is the most appealing and valuable way for the law to evaluate consent.

This essay proceeds as follows. In Part I, I will follow Kim’s lead in articulating the various foundational principles that might underlie the normative power of consent. Here I highlight how these foundational principles contain substantial overlap, which often leads commentators to use them interchangeably, but emphasize how these overlapping principles are different in crucial respects. In Parts II and III, I will illustrate how these conceptual distinctions matter by turning to two of Kim’s central rubrics for consentability: Impacts on Future Autonomy, and the “Regret Principle.”

## I. CONSENT DEBATES AND UNDERLYING JUSTIFICATIONS

Various underlying justifications for consent overlap substantially, but still represent fundamentally different versions of consent. Carefully distinguishing among these underlying conceptions prevents us from silently shifting our arguments from one to the other, and lays bare the value choices to be made in formulating the law of consent.

The first distinction is that between autonomy and self-interest. In her conclusion, Kim notes that “[t]he purpose of consent is to empower individuals, to give them a tool with which to exercise autonomy and maximize their self-interest.”<sup>1</sup> These two values—exercising autonomy and maximizing self-interest—are very frequently in accord. Increasing an individual’s autonomy often also enables her to maximize her self-interest. Likewise, empowering an individual to maximize her own self-interest often increases and promotes her individual autonomy. Kim discusses both concepts throughout her book.<sup>2</sup>

At the same time, self-interest and autonomy are different values, and in hard cases they can result in different analyses and outcomes. Autonomy is about the ability to make choices—which can include making bad choices that diminish one’s own interests. A person who freely and voluntarily chooses an option that conflicts with her own interests has nevertheless acted autonomously. Maximizing self-interest, in contrast, is not just

---

1. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 218 (2019).

2. *See id.* at 15, 41, 53-55, 74-78.

about the ability to make the choice, but about evaluating the outcome of that choice—did it serve the chooser’s self-interest?

Kim discusses, as one concrete example, individuals who seek serious modifications of their own bodies, such as through breast enhancement surgery or elective amputation.<sup>3</sup> If our fundamental value is autonomy, we might choose to respect individuals’ decisions to elect severe and permanent body modifications, even if we have grave doubts about whether those choices will serve their long-term interests. In contrast, if our fundamental value is protecting and furthering each individual’s self-interest, we might intervene to restrict their autonomous choice when we have sufficiently serious concerns about harm to their long-term interests.

John Stuart Mill famously argued that insofar as we seek to maximize individuals’ self-interest, we should defer to their own judgment. Kim quotes Mill, who argues that an individual’s “voluntary choice is evidence that what he chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it.”<sup>4</sup> Mill argues this point further: the community’s interest in an individual “is fractional, and altogether indirect: while, with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by any one else.”<sup>5</sup> When the state or community judges what is best for an individual’s own interests, that judgment “must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.”<sup>6</sup> Accordingly, “in each person’s own concerns, his individual spontaneity is entitled to free exercise . . . . All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good.”<sup>7</sup>

Mill’s claim is here somewhat contingent—contingent on the idea that an individual is, in fact, the best judge of their own

---

3. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 22-32, 175-187 (2019).

4. *Id.* at 91 (citing JOHN STUART MILL, *ON LIBERTY* 110 (1859)).

5. JOHN STUART MILL, *ON LIBERTY* 70 (1859).

6. *Id.*

7. *Id.* at 71.

interests. As Mill states, it may often be the case that each individual will better judge, compared with some third party such as the state, what will best serve their own self-interest. But there may also be cases in which that self-interest is better served by limiting the individual's own (faulty) decision-making in favor of the decision-making of some third party (possibly the state). Embracing the fundamental principle of "protecting each individual's self-interest" means we must be open to at least evaluating the argument, in given cases, that certain choices are very likely to harm an individual's self-interest rather than advance it. Further, this principle also suggests that at times, allowing the state (or some other third party) to direct certain decisions will better serve that individual's self-interest.

Instead of focusing on self-interest, we might instead choose to be centrally concerned with protecting individual autonomy. If we focus on autonomy, and not maximizing self-interest, we will reject arguments that appeal primarily to protecting individuals from their own bad judgment. As a value distinct from self-interest, autonomy—the right and ability to choose—would appear to protect an individual's right to choose poorly as well as to choose wisely.

In addition to separating the concepts of "autonomy" and "self-interest," the concept of autonomy itself can be conceptualized in several different distinct manners, and these differing conceptions again push us in different directions in hard cases. As Kim recognizes, "[a]utonomy, like consent, is a multi-faceted concept."<sup>8</sup>

By calling autonomy "multi-faceted," Kim invokes Joel Feinberg's incisive discussion of the many different values that autonomy can serve to vindicate. These include:

- "the capacity to govern oneself or competence"<sup>9</sup>
- "the condition of self-government," for "[a]n autonomous individual . . . is authentic to himself and self-directed"<sup>10</sup>
- "an ideal of character" that "derives from the condition of self-government and includes virtues

---

8. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 53 (2019).

9. *Id.* (citing JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 27-51 (1986)).

10. *Id.* at 53-54.

such as self-reliance, personal responsibility, moral authenticity and integrity”<sup>11</sup>

- “sovereign authority to govern oneself or the ‘right’ to personal sovereignty”<sup>12</sup>

Relatedly, Kim cites JS Mill for the proposition that “the goal of freedom was utility,” in the “largest sense, grounded on the permanent interests of man as a progressive being.”<sup>13</sup> The concept of “man as a progressive being” is based on the concept that it is important “not only what men do, but also what manner of men they are that do it.”<sup>14</sup>

Joseph Raz has further articulated this idea. Raz argues that we value an individual’s choices because “[a]utonomy is a constituent element of the good life.”<sup>15</sup> Raz embraces the view that “it is the function of governments to promote morality,” and that “[m]orality is thought to be concerned with the advancement of the well-being of individuals.”<sup>16</sup> Individual well-being, in turn, “consists in [the individual’s] successful pursuit of valuable, willingly embraced goals.”<sup>17</sup>

For Raz, individual well-being requires that the individual “adopt and pursue goals because [she] believes in their independent value.”<sup>18</sup> “Autonomy means that a good life is a life which is a free creation.”<sup>19</sup> The “concern for autonomy is a concern to enable people to have a good life.”<sup>20</sup>

In contrast with this view of autonomy as based on self-actualization and self-government, autonomy can instead be conceptualized as simply reflecting individual self-sovereignty. This self-sovereignty view has been most vigorously advanced by Joel Feinberg. He argues that “sovereignty is basic and underivative. Sovereignty is, in a sense, an ultimate source of authority.”<sup>21</sup> Feinberg explains that “to say that I am sovereign

11. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 54 (2019).

12. *Id.*

13. *Id.* (quoting JOHN STUART MILL, ON LIBERTY 24 (1859)).

14. *Id.* (quoting JOHN STUART MILL, ON LIBERTY 24 (1859)).

15. JOSEPH RAZ, THE MORALITY OF FREEDOM 408 (1986).

16. *Id.* at 415, 267.

17. *Id.* at 288.

18. *Id.* at 308.

19. *Id.* at 412.

20. JOSEPH RAZ, THE MORALITY OF FREEDOM 412 (1986).

21. 3 JOEL FEINBERG, HARM TO SELF 48 (1986).

over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there.”<sup>22</sup> Just as state sovereignty is “basic and underivative,” Feinberg views the individual’s right to autonomy as a “right of self-determination” that is “entirely *underivative*, as morally basic as the good of self-fulfillment itself.”<sup>23</sup> “The life that a person threatens by his own rashness is after all *his* life; it *belongs* to him and to no one else. For that reason alone, he must be the one to decide—for better or worse—what is to be done with it in that private realm where the interests of others are not involved.”<sup>24</sup>

Feinberg recognizes that this conception of “sovereign autonomy” has significant implications for the relationship between the values of autonomy and liberty. If self-sovereignty is a deontological value—an underivative birthright—then a sovereign person may choose to sell or alienate some or all of her physical body or her liberty. Feinberg acknowledges that while “freedom is an important good in human life . . . [i]t is very important to recognize that freedom is one kind of good among many, that persons have been known to get along well with very little of it, and that rational persons are often willing to ‘trade’ large amounts of it for goods of other kinds, including simple contentment.”<sup>25</sup> Accordingly, “[t]he *de jure* autonomous person will surely reserve the right to ‘trade off’ his *de facto* freedoms for goods of other kinds, as measured on his own scale of values and determined by his own judgments.”<sup>26</sup>

Kim rejects this outcome, arguing that “[t]he fact that a person has control over his or her body is not the same thing as being the ‘owner’ of it, which necessarily implies something external to the self and which can be traded.”<sup>27</sup> Kim quotes JS Mill’s famous argument that respecting a person’s voluntary choices does not entail allowing that person to forego that liberty, for example by selling part of her body or liberty. As Mill states, “the reason for not interfering . . . with a person’s voluntary acts . . . is concern for his liberty.”<sup>28</sup> “But by selling himself a slave, he abdicates his liberty; he foregoes any future use of it, beyond

---

22. 3 JOEL FEINBERG, HARM TO SELF 53 (1986).

23. *Id.* at 59.

24. *Id.*

25. *Id.* at 65.

26. *Id.*

27. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 41 (2019).

28. *Id.* at 91 (quoting JOHN STUART MILL, ON LIBERTY 184 (1859)).

that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing to dispose of himself.”<sup>29</sup>

For Feinberg, in contrast, “[t]here is no paradox . . . when a morally autonomous person exercises his sovereign right of self-government to diminish his own *de facto* freedom of action.”<sup>30</sup> When we think of *state* sovereignty, Feinberg explains that “there is neither conceptual nor (necessarily) moral difficulty when a political state renounces some part of its sovereignty.”<sup>31</sup> Accordingly, “[i]f we transfer the whole concept of sovereignty from the nation to the person, then we should expect the same implications for the personal forfeiture of autonomy.”<sup>32</sup> For Feinberg—but not for Kim—“[a] perfectly autonomous person would have in Mill’s words the ‘*power of voluntarily disposing of his own lot in life,*’ even if that involved forfeiture of his *de facto* freedom in the future.”<sup>33</sup>

Having canvassed these authorities offering different conceptions of why consent and autonomy are valuable, Kim does not definitively embrace any one theory (or combination of theories). Rather, she articulates what she refers to as a more “literal” definition of autonomy as “*freedom to move, act or think without assistance or constraint.*”<sup>34</sup> I will consider this definition of autonomy, and further explore the competing underlying justifications for consent, in the course of discussing two of Kim’s major contributions—a focus on Future Autonomy and the Regret Principle.

## II. CONSENTABILITY AND FUTURE AUTONOMY

One of Kim’s major principles for evaluating consentability is assessing that choice’s impact on the individual’s future autonomy. Kim creates a hierarchy of autonomy interests and explains that it serves as a “hierarchy of which interests *if violated* would most diminish the future self’s options by constraining the future self’s freedom to act and think independently.”<sup>35</sup> The question of “future

29. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 91 (2019) (quoting JOHN STUART MILL, *ON LIBERTY* 184 (1859)).

30. 3 JOEL FEINBERG, *HARM TO SELF* 65 (1986).

31. *Id.* at 70.

32. *Id.*

33. *Id.* at 69.

34. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 74 (2019).

35. *Id.* at 76.



autonomy” is thus a central guiding principle throughout the book.<sup>36</sup>

Turning back to the underlying justifications for consent, Kim’s “future autonomy” principle appears to be grounded in the importance of autonomy as opposed to self-interest. Her hierarchy is not based on assessing which interests, if violated, would diminish the future self’s *self-interests*, but rather future *autonomy*.

The next logical question is which conception of autonomy Kim is concerned with—autonomy as self-sovereignty, autonomy as self-actualization, or something different? Kim explains her hierarchy as follows:

[A] proposed activity would pose a threat to the consentor’s autonomy if it would limit the consentor’s capacity to act and think independently and without assistance. Under this definition, a decision which provides more opportunities and options for the consentor enhances autonomy, while one that reduces them diminishes autonomy. This definition for the purpose of determining the threat level to autonomy differs from other definitions which focus on self-actualization.<sup>37</sup>

The more literal, less conceptually rich nature of Kim’s definition of autonomy comes at a cost—a loss of depth and nuance in application. For many individuals, projects of self-actualization and self-formation commonly involve creating bonds that significantly constrain our future selves. A young man’s decision to enter the priesthood entails accepting substantial restrictions on his future self’s freedom to make other choices related to vocation, intimate relationships, and fathering children, among many others. But voluntarily accepting those burdens is part and parcel of what makes joining the priesthood such an important and profound vocational choice. Becoming a priest has a social and religious depth and weight that far outweighs many other vocational choices, such as choosing to become a car salesman for a few years. The latter profession offers much greater future

---

36. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 74 (2019) (“Given the unpredictability and irrationality of human behavior, acts which limit future capacity may promote one’s present autonomy but risk limiting one’s future autonomy.”); *id.* at 121 (“These human fallibilities impair decision-making and may lead to regretted actions which impair future autonomy.”).

37. *Id.* at 74.

freedom and flexibility—and, partly as a consequence, may be less deeply meaningful.

Many significant choices in life are like this. Pursuing a serious and deeply meaningful path—such as choosing a serious career, choosing to marry, or choosing to have (or not to have) children—are all decisions that open up certain future options while foreclosing many others. A serious commitment to life-long intimate partnership with one person entails abandoning countless other future relationships, and yet also opens up the opportunity for a relationship with a depth far beyond what any of those many short-term relationships could provide.

Kim's version of autonomy means that "a decision which provides more opportunities and options for the consentor enhances autonomy, while one that reduces them diminishes autonomy."<sup>38</sup> With respect to many important life decisions, it is not clear that this framework is helpful or desirable. It may not be helpful because the "opportunities and options" created by one choice versus the other may be very difficult to assess or compare. It may not be desirable because some choices that seem, on balance, to reduce future "opportunities and options"—such as entering the priesthood, or committing to life-long marriage—are valuable choices of self-actualization, even if they limit more superficial "opportunities and options."

Instead of embracing "self-actualization" as the core value underlying autonomy, Kim could instead embrace Joel Feinberg's conception that an individual's right to autonomy flows directly from his or her self-sovereignty. After all, "[t]he life that a person threatens by his own rashness is after all *his* life; it *belongs* to him and to no one else."<sup>39</sup> The most striking aspect of Feinberg's "autonomy as self-sovereignty" conception is the degree to which it resists external assessments of whether the individual is benefiting in some way from their autonomy. With Mill's "self-interest" conception, the central question is whether the individual's choices are serving their self-interest. But from a perspective of self-sovereignty or self-ownership, in contrast, there is little room to assess whether the state of being autonomous is "good for" the individual or not. She is not autonomous in virtue of the benefit it bestows on her, and thus she remains autonomous

---

38. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 74 (2019).

39. JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 59 (1986).

even if no benefit can be found. Kim rejects this outcome, arguing that “[t]he fact that a person has control over his or her body is not the same thing as being the ‘owner’ of it, which necessarily implies something external to the self and which can be traded.”<sup>40</sup>

In contrast with Kim’s more “literal” definition of autonomy, Joseph Raz powerfully makes the case that self-actualization—the ongoing human project of creating and embodying coherent and meaningful values and choices—is the most fundamental good of autonomy, and is the good that society should seek to further in the law of consent. If so, then furthering and protecting that right to self-actualization is more important—more fundamental—than the literal freedom to think, act, and move without assistance. Under autonomy as self-actualization, decisions should not be judged according to whether they will constrain a future self’s freedom to move, act, or think, but rather whether those decisions are part of the process of developing and embodying one’s own values and goals.

In this regard, Raz identifies four conditions of personal well-being. First, well-being “consist[s] of the successfully pursuit of goals which [the individual] has or should have.” Second, the individual “adopt[s] and pursue[s] goals because [she] believes in their independent value.” Third, an individual’s “well-being depends, at the deepest level, on his action reasons and his success in following them.” Fourth, “a person’s well-being depends to a large extent on success in socially defined and determined pursuits and activities.”<sup>41</sup>

These criteria provide a basis to evaluate individual decision-making that perhaps better captures what matters to us about our autonomy than simply the ability to move, act, or think without assistance or constraint.

### III. THE REGRET PRINCIPLE

Another major component of Kim’s conceptual project is what she deems the “Regret Principle.” She argues that consentability should be limited based on the consenting party’s future regret. In particular, Kim explains, “[t]he regret which is the focus of this book has a permanent negative effect on our happiness and well-being because it limits or damages our *future* autonomy in a

---

40. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 41 (2019).

41. JOSEPH RAZ, THE MORALITY OF FREEDOM 308-09 (1988).

significant way.”<sup>42</sup> Kim argues “that the state should intervene to minimize or avoid this type of profound regret, which I will refer to as the Regret Principle.”<sup>43</sup> This Regret Principle illuminates a central tension in consent theory, between decisions today and impacts of those decisions tomorrow, and offers guidance on how to navigate that tension.

Here Kim starts with the common liberal premise that “[i]n a free society, the government should respect individual autonomy and restrict very little between consenting adults.”<sup>44</sup> This does, of course, require that the state must “ensure that both adults are actually consenting.”<sup>45</sup>

Drawing on social psychology and behavioral economics, Kim stresses the “myriad ways in which [human cognitive processing] can fail to serve the best interests of the decision-maker,” and also the reality that “human beings are highly susceptible to social influence, context and pressure.”<sup>46</sup> Social science research “has revealed that human beings are prone to heuristics and biases, have difficulty assessing very complex information, make impulsive or ill-considered choices under time constraints, and are manipulable and subject to social pressures.”<sup>47</sup> These problems, Kim claims, “may lead to regretted actions which impair future autonomy.”<sup>48</sup> All of this, Kim argues, suggests that “the foundation upon which much of the thinking about autonomy was based is cracked and crumbling.”<sup>49</sup>

As with the Future Autonomy principle, Kim’s Regret Principle can be usefully interrogated by returning to the different underlying purposes of consent articulated above. Her criticisms of individual decision-making, based on the flaws and biases evident in human decision-making, seem to operate under the “Self-Interest” framework. Her criticisms reflect a concern about whether individual consent is advancing self-interest—whether individuals are, indeed, the best judge of their own interests. She argues, for example, that the failures in human decision-making show that individual decisions “can fail to serve the best interests

---

42. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 57 (2019).

43. *Id.*

44. *Id.* at 117.

45. *Id.*

46. *Id.*

47. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 121 (2019).

48. *Id.*

49. *Id.* at 117.

of the decision-maker.”<sup>50</sup> This is an argument most explicitly about self-interest, not autonomy. Yet at other points Kim appears to focus not on self-interest as such, but on autonomy. For example, she argues that the problems of human decision-making “may lead to regretted actions which impair future autonomy.”<sup>51</sup>

If we care fundamentally about the value of autonomy for furthering self-government and self-actualization, we will view Kim’s list of human frailties differently, and it is less evident that those problems mean that the foundation of autonomy “is cracked and crumbling.”<sup>52</sup> Autonomy as “Self-Actualization” is based on the idea that “[a]n autonomous individual . . . is authentic to himself and self-directed.”<sup>53</sup> Relatedly, the state of being autonomous promotes a certain “ideal of character” that “includes virtues such as self-reliance, personal responsibility, moral authenticity and integrity.”<sup>54</sup>

The problems with individual decision-making that Kim catalogues call into question whether individual decisions always “serve the best interests of the decision-maker,”<sup>55</sup> but they do not necessarily undermine the values of Self-Actualization. Even if my decisions can be flawed by self-deception and cognitive bias, by choosing autonomously I am nevertheless developing my own character as a choosing moral agent—developing my self-reliance, embodying the moral authenticity and integrity that comes from being responsible for my own choices.

Likewise, if we adopt Feinberg’s view that autonomy is grounded on Self-Sovereignty, we again would have less reason to conclude that the frailties of human decision-making were eroding the foundations of consent and autonomy. Self-Sovereignty is not based on the presupposition that individuals make good and unbiased decisions about their own interests, but rather on the view that “[t]he life that a person threatens by his own rashness is after all *his* life; it *belongs* to him and to no one else. For that reason alone, he must be the one to decide—for better or worse—

---

50. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 117 (2019).

51. *Id.* at 121.

52. *Id.* at 117.

53. *Id.* at 54.

54. *Id.*

55. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 117 (2019).

what is to be done with it in that private realm where the interests of others are not involved.”<sup>56</sup>

Accordingly, it is worth questioning whether Kim is in fact primarily interested in advancing each individual’s self-interests, or whether she is primarily interested in impairments of future autonomy. Individual regret is ordinarily thought of as related to errors about self-interest, but not necessarily about impairments to autonomy.

Profound regret about a past decision often reflects a present judgment that a past decision—such as the choice to pursue one career rather than another—failed to correctly serve one’s self-interest. I might experience profound regret because I chose to be a lawyer, when in retrospect I believe I would have been so much happier as a dentist. Knowing what I know now, I understand—in a way that my past self did not—that the practice of law does not serve my self-interests, because it does not fit my personality traits. In contrast, I would be much happier working as a dentist.

This type of regret is based on a diminution of my own self-interest, but it does not represent an impairment to, or violation of, my autonomy. To the contrary, my decision to be a lawyer may have been fully voluntary and autonomous—entirely my own decision. This regret does not stem from any autonomy violation (past, present, or future), but from a frank self-realization that one’s own prior, fully voluntary decisions badly served one’s own self-interests. This is perhaps the most bitter type of regret, as there is no one else to blame but your (past) self.

At other times, I might view some results negatively not so much because a decision failed to serve my self-interests, but because of violations to my own autonomy. Here too, however, there is a difference between regret about *past* autonomy impairments and regret about past decisions that have led to *future* autonomy impairments.

I might regret the fact that I became a lawyer rather than a dentist due to the fact that my parents insisted that I attend law school rather than dental school, and went so far as to agree to pay for law school while refusing to pay for dental school. This, I might argue, impaired my past autonomy—my freedom of decision-making. This sort of misfortune, however, is often described with

---

56. JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 59 (1986).

terms like resentment or anger rather than “regret.” I may have amassed material wealth and comfort as a result of my legal career (my material interests were well-served), while still suffering a bitter anger that my parents so heavily impaired by past decision-making (my autonomy was violated).

Kim yokes these different problems together when she contends that “[t]hese human fallibilities impair decision-making and may lead to regretted actions which impair future autonomy.”<sup>57</sup> But (1) “regretted actions” and (2) “impair[ed] future autonomy” are separate concerns. It is not clear whether Kim’s Regret Principle requires *both* future regret and impairment to future autonomy. Possibly, Kim is simply claiming that future regrets are commonly associated with impairments to future autonomy. In any event, it is worth emphasizing that these two concerns are separate.

There is thus a tension, in some cases, between Kim’s concerns of “Regret” and “Future Autonomy Impairments.” One way to limit future regret is for the state (or some other third party or institution) to intervene in individual decision-making to prevent choices that badly serve our own interests while fostering (or forcing) choices that advance those self-interests. This would often entail an autonomy violation to present, and also perhaps to future, autonomy—while at the same time minimizing future regret.

In contrast, greater protections for individual autonomy often create greater opportunities for regret. The project of autonomous self-actualization is meaningful, in part, because of the genuine opportunities for mistakes or failures. The visionary artist—a paradigm of individual self-actualization—may end up finding great meaning and satisfaction in creating works of art that inspire generations. Or she may end up isolated, unrecognized, and a failure.

Returning to Raz’s “Self-Actualization” concept, individual choices can be valuable because they allow each of us to live a life of our own choosing, to adopt values and goals and then live a life as a responsible moral agent in pursuit of those values and goals. This may result in regrets—choices that failed to achieve the desired successes. But regret is, in a sense, part and parcel of living one’s own life, being allowed to choose, create one’s own

---

57. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 121 (2019).

identity, and be the sort of being that has authorship and agency over one's own life. This is, perhaps, worthier of moral valuation than the brute fact of self-ownership, and more worthwhile than simple advancement of self-interest.

\* \* \*

This response has only engaged with a few of the myriad concepts and practical applications contained in *Consentability*. Kim's book engages productively with many additional areas, such as private contract, fraud and deception, and reducing opportunism. On the specific concepts addressed in this essay, hopefully it is evident from the discussion above that Kim's work is a serious and deeply-informed effort to grapple with the complexities of consent and autonomy, and offers a mix of conceptual tools that help sharpen and illuminate the boundaries and limitations of consent.