

# INTELLIGENCE AGENTS, AUTONOMOUS SLAVES AND THE U.S. SUPREME COURT'S WRONG (AND RIGHT) CONCEPT OF PERSONAL AUTONOMY

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## **Abstract:**

*This paper traces the boundaries of consent in the relations of recruited intelligence agents and their handlers. The U.S. Supreme Court considered these relations to be contractual. However, such a contract, according to the Supreme Court, is unenforceable. An Agent's autonomy largely underpins the argument for the prima facie legitimacy of Human Intelligence (HUMINT) relations with each agent. Autonomy is also an essential element in recognizing the formulation of a recruitment contract. Sketching its boundaries in the human intelligence context (namely between the spy recruited typically within enemy ranks and the recruiter) raises the paradoxical question: How free is the free choice to give up freedom of choice? In contrast to the common deontological approaches, this paper offers an account of personal autonomy which incorporates the examination of dignity-compromising (dehumanizing) influences on the choice-making process of the agent. If being autonomous is an exclusive human condition, then a condition in which a person is both dehumanized while making his choice, yet remains autonomous nonetheless, must be wrong. Hence, it is argued that any hierarchical model of personal autonomy should be interpreted as if incorporating a test of a dignity-compromising influence on the desires-setting or choice-making process of a person. The case of voluntary intelligence agents, as in the case of consenting slaves, emphasizes a distinction between two points in time: Before and after making the choice to become an agent. This paper's interpretation of autonomy suggests that even the most agreeable intelligence agent is not autonomous during the second phase due to the influence of the irreversibility problem. The very fact that the potential choice to reverse is being held by another person (the handler) is a humiliating influence on agent's choice to proceed and therefore suggests the agent is non-autonomous. The U.S. Supreme Court's classification of handling relations as contractual is, therefore, wrong. However, by denying the binding promissory power of the handling 'contract', the Supreme Court is in fact right. Due to lack of autonomous will, these relations cannot formulate a contract to start with.*

## **Keywords:**

Autonomy, Consent, Dignity, Intelligence Agents, U.S. Supreme Court.

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### I. INTRODUCTION

In its historical *Totten* case concerning claims of intelligence agents, the U.S. Supreme Court considered the relations of a recruited agent and his handler to be contractual in nature. However, such a contract, according to the Supreme Court, is unenforceable in court.<sup>1</sup> Over a century later, the Supreme Court reaffirmed its ruling in the *Tenet* case.<sup>2</sup> It seems that the new rule even bans the very filing of any contractual claim of an intelligence agent against the intelligence agency. In addition to being anachronistic, the Supreme Court's reasoning seems inconsistent. Its secrecy-based reasoning should have similarly applied to claims of contractors in ultra-secret projects or to claims of intelligence agencies' employees.<sup>3</sup> This paper seeks a compelling explanation for this ruling: To start with, is a contract between a handler and an intelligence agent possible? Are intelligence agents sufficiently autonomous even when acting voluntarily?

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<sup>1</sup> *Totten v US* 92 US (1875) 105. This case started as a 'simple' contractual claim against the federal US Government filed by the estate manager of a former intelligent agent. The agent, Lloyd, was recruited and handled by Lincoln himself. Apparently, the promises made by the government in return for the spying services were not kept. The US Supreme Court ruled that a contract between a handler and an intelligence agent is beyond judicial scrutiny. Court's decision was very much based on the argument that judicial scrutiny of such contract is detrimental to state's interests. In addition, the Court found such contracts to include an implied condition of mutual understanding of its unenforceable nature.

<sup>2</sup> *Tenet v Doe* 544 US (2005) 1; *Goung v United States* (1988) 860 F 2d 1063 (Fed Cir). In the case of *Tenet*, two former spies – a husband and a wife – claimed that the CIA was in breach of its commitment to pay them a life-long pension upon their defection. Surprisingly, the Supreme Court reaffirmed the status of agent-handler contract to be beyond judicial scrutiny.

<sup>3</sup> *Webster v Doe* 486 US (1988) 592; *United States v Reynolds* 345 US (1953) 1.

I argue that on the one hand, the U.S. Supreme Court is right in determining the intelligence contracts to be unenforceable. On the other hand, I argue that the Supreme Court's ruling is fundamentally wrong since the agent-handler relations cannot be contractual. By using a proposed dignity-based interpretation to the hierarchical model of personal autonomy, I argue, in a somewhat paradoxical manner, that such relations cannot form a contract. I show that the agents are typically being non-autonomous through the process, irrespective of the recruitment and handling being based on voluntary consent.

The term 'agent' is frequently used to describe different agents in the realm of espionage and intelligence. This paper deals with recruited agents only. These are individuals who serve as human intelligence sources. They are recruited and handled by highly trained officers of an intelligence agency – the handlers. A handler is an employee and a citizen of the country she works for. The recruited agent, in contrast, is in many cases (but not always) a member of the forces or government of the adversary, such as an officer of the adversary army. Once recruited, such an agent will be covertly handled so he can routinely communicate information to his handler, perform for her tasks beyond enemy lines and get his instructions.<sup>4</sup> For example, a handler can be a Central Intelligence Agency (CIA) case-officer. She is an official of the American government, as an employee. She is expected to collect information from human sources, namely from agents she manages to recruit. An exemplary recruited agent can be, for instance, an Iranian Scientist who works for the Iranian defense industry. If recruited successfully, this scientist agent can communicate valuable secret information to the handler. Naturally, bringing a person to agree to work against his own people and community is a complicated task. The reasons for the agent's consent vary; greed, revenge, ideology or pursuing excitement, are all good examples to the motivation of agent's

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<sup>4</sup> The handler-agent relations are unique. In most cases, if caught, the agent will face criminal charges of espionage and even death. He will be considered to be a traitor by his community. The recruitment task is therefore extremely challenging. The handler, initially and typically viewed by the designated agent as 'the enemy', is expected to convince the designated agent to assume the enormous risk and switch loyalties.

consent. This paper analyzes such agreement. I argue that such agreement can never be autonomously given even when made by the most willing agent.

The question of the freedom of choice of the agent goes far beyond the doctrinal level of determining if a contract with the handlers has been formed. Although not a ‘justification’ in the regular sense, one of the very first arguments raised in supporting Human Intelligence (HUMINT) is the consent argument.<sup>5</sup> It rests on the alleged agents’ informed and free consent to recruitment. The agent is described as an autonomous person voluntarily and knowingly accepting the offer to serve as a recruited agent. While consent does not justify the consensual act, it does carry the potential to remove objections to the act grounded in potential damages to the agent. Since we assume X weighs her interests best, it makes no sense to raise objections to X’s autonomous act, arguing for negative consequences to X. Painting the relations with the agent in contractual colors therefore has a moral and legal objective. It intends to relax concerns of potential observers. They should gather from such contractual relations that both parties have freely calculated the mutual balance of risks and benefits and that such balance has been independently judged to be beneficial to each of the involved.

It is believed that most recruited agents are indeed being recruited and operated voluntarily. Normally, no apparent means of coercion is involved.<sup>6</sup> Are these agents therefore deemed autonomous agents? As mentioned, the U.S. Supreme Court adopted the contractual approach

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<sup>5</sup> H Klehr, ‘Reflections on Espionage’ (2004) 21 Social Philosophy and Policy 141, 156-158. HUMINT is a code word in the world of espionage for HUMAN INTelligence, namely intelligence gathered from human sources. It should be noted that HUMINT is a far broader activity than handling agents. It includes all information collection that is based on interaction with humans, such as handling agents, interrogating people, questioning people, meetings or even getting informative anonymous phone calls. This paper, as mentioned, deals solely with one type of HUMINT: running (handling) recruited intelligence agents. For the various sources of intelligence and the theory of their use, see: M Herman, *Intelligence Powers in Peace and War* (Cambridge UP 1996).

<sup>6</sup> See S Wood, ‘Americans Who Spied Against Their Country Since World War 2’ (1992) Defense Personnel Security Research Center. These findings match similar empirical research: MF Wiskoff and CC Fitz, ‘The Defense Investigative Service’s Issue Case Data Base: Analysis of Issue Types and Clearance Adjudication’ (1991) US Department of Defense, Defense Investigative Service, Monterey, CA.

to HUMINT based on the consent of the agents and hence on the view that these agents are autonomous.<sup>7</sup> The essence of this paper is to rethink this contractual presumption.<sup>8</sup> It questions the very possibility of an autonomous agent, regardless if voluntary. It is mainly centered on the paradox of respecting people's free choice to step into freedom-limiting situations. In other words, certain types of intelligence agents force us to answer the paradoxical question: How free is the free choice to give up freedom of choice?

In the course of re-contextualizing intelligence agents' contractual freedom, it is necessary to review the philosophical models of personal autonomy. I begin with presenting the basic hierarchical model of autonomy and its modern enhancements. I then suggest a new approach and interpretation to these models of autonomy, centered on a dignity-based test of potential influences over the preferences and desires setting and identification process of a person. As opposed to a mainstream deontological approach, I argue against viewing dignity as a derivative of autonomy.<sup>9</sup> I also argue against Dan-Cohen's view of

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<sup>7</sup> In its *Totten* case, the Supreme Court even anchored the secrecy-based reasoning to the 'contract' itself. The Court assumed that this contract included an unwritten understanding that both parties' lips must remain sealed. *Totten v US* (n 1) at 107.

<sup>8</sup> One methodological comment is required concerning philosophical autonomy and legal autonomy. One could possibly argue that the US Supreme Court is not necessarily wrong but rather merely applying a 'legal' concept of autonomy, supposedly different in content from the philosophical meaning of personal autonomy. I disagree. While a legal argument calling for limiting autonomy in certain cases may be reasonable, I believe a legal argument cannot be reasonable if calling instead for limiting the notion of autonomy itself. While I am aware of the existence of opinions to the contrary and even to legal fictions, this paper is written as a philosophical analysis of law. It views law from the philosophical perspective and it addresses autonomy accordingly. If law needs to have a different concept of autonomy or even if Court could answer the current argument with a 'legal argument' is far beyond the scope of this paper.

<sup>9</sup> See, for instance, Hill's description of mainstream deontological approaches viewing dignity as a derivative of autonomy in the Kantian sense: 'Immanuel Kant held that autonomy is the foundation of human dignity and the source of all morality; and contemporary philosophers dissatisfied with utilitarianism are developing a variety of new theories that, they often say, are inspired by Kant'. TE Hill, *Autonomy and Self-Respect* (Cambridge UP 1991), 43. See similar opinions on autonomy being the ground according to Kant for dignity at: TE Hill, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell UP 1992), 38-41; C Korsgaard, 'Fellow Creatures: Kantian Ethics and Our Duties to Animals' (2004) 25 *The Tanner Lectures on Human Values* 26, 81-83; CM Korsgaard, *Creating the*

dignity and autonomy as independent notions. While common deontological approaches find us to be respect-worthy as a result of our capacity for autonomy, I believe our autonomous capacity is conditional upon our being respected.

My conclusions suggest that voluntary intelligence agents are non-autonomous agents and therefore their consent could not serve as a counter-argument against objections to their recruitment. This is mainly related to dignity undermining influences on either their decision to be recruited (such as the easy case of manipulation) or on their decision to continue operations (like the irreversibility of the relations).

If my new interpretation of agents' autonomy is correct, then a contractual approach to HUMINT relations might be majorly weakened. Under an autonomy-based approach to contracts, there cannot be a valid basis to the contractual approach if indeed recruitment or further operation of an agent is not a reflection of free will (even if no means of coercion is applied).<sup>10</sup> This stands in contradiction to the U.S. Supreme Court's understanding of handling relations as contractual, as reflected by the *Totten* and *Tenet* cases.<sup>11</sup>

In section II, I present various types of intelligence agents who voluntarily accept their recruitment and handling. These exemplary relations reflect a spectrum of the autonomous will of such agents. In section III, I briefly present the basic moral meaning of consent. Section IV outlines the basic meaning of the notion of personal autonomy. It presents the inherent difficulty in determining if

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*Kingdom of Ends* (Cambridge UP 1996); AW Wood, *Kant's Ethical Thought* (Cambridge UP 1999).

<sup>10</sup> T Gutmann, 'Some Preliminary Remarks On a Liberal Theory of Contract' (2013) 76(2) *Law & Contemporary Problems*; C Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard UP 1981); TM Scanlon, 'Promises and Contracts' in P Benson (ed), *The Theory of Contract Law: New Essays* (Cambridge UP 2001) 86, 92; RE Barnett, 'A Consent Theory of Contract' [1986] *Colum L Rev* 269; A Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92(7) *Virginia Law Review* 1391; R Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?' (1996) 16 *Oxford J of Legal Studies* 503.

<sup>11</sup> *Totten v US* (n 1) ; *Tenet v Doe* (n 2). In *Totten*, the US Supreme Court went as far as concluding that the President of the United States and hence the entire executive branch, bears the authority to engage on behalf of the US with contracts with human sources.

voluntary intelligence agents are indeed autonomous. The basic idea of autonomy seems to fail to tell us what makes a difference between, for example, a voluntary intelligence agent and a voluntary elite soldier. For instance, a volunteer to the French Foreign Legion, an elite military unit, agrees to be subjected to the will of her commanders. That is the essence of being commanded as a soldier. What makes her more autonomous than the Iranian scientist who agrees to accept the will of his handler as a recruited agent?<sup>12</sup> In section IV, I suggest Frankfurt's hierarchical model of personal autonomy as the source for an answer. In section V, I suggest a dignity-based interpretation of the hierarchical model. This interpretation, as is argued, shows why in contradiction to Dan-Cohen's argument there cannot be autonomous slaves. Accordingly, I show why there cannot be autonomous intelligence agents. I conclude by illuminating the conclusions that follow from the proposed dignity-based interpretation.

In a way, the entire debate over the autonomy of intelligence agents is no more than a good excuse for promoting the understanding of other servile relations characterized by self-imposed limitations on the scope of freedom, such as prostitution and sale of organs. I argue that the proposed interpretation of the hierarchical model of autonomy can enhance our understanding of these common types of relations.

## II. THE CONSENTING INTELLIGENCE AGENTS

Discussing the theory of personal autonomy may lead to abstract notions. However, the dilemmas of the HUMINT world are far from being abstract and are chillingly real. I therefore use a few illustrative practical examples throughout this paper, all of which are of recruited agents consenting to their recruitment approaches or to being further handled.

I begin with two illustrative agents. Both are anonymous. One is evidently real, although his identifying details are unknown. Let us call

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<sup>12</sup> Elite units are military units of Special Forces. They are assigned the more complicated and dangerous military tasks. Their soldiers are typically volunteers. In volunteering, they assume both the entailed risks and the total subjection to their commanders. They work for their country. In contradistinction, the recruited agent typically works for an intelligence agency of an adversary nation against his own country. But apparently, both the volunteer soldier and the volunteer agent make a similarly free decision to assume risks and give-up freedom.

him *X*. *X* is a recruited double agent operated by the CIA inside the Soviet Union. In one of his meetings with his case officers, he is anxious and nervous. He has a real reason to believe the KGB is suspecting him. Apparently, he is expected to go through a debriefing and even a polygraph check by the KGB handlers upon his return. He asks for cessation of his activity as an agent. His case officers are not willing to lose his valuable services yet. They convince him he can easily learn how to outsmart a polygraph. They take him through a fake polygraph check and show him fake successful results. The agent relaxes and agrees to further operate as an agent and travel back to the Soviet Union.<sup>13</sup> A more trivial example while discussing autonomy is the false flag recruitment. In such a case, the agent is recruited and misled to believe he is assisting a friendly state, while actually being operated by the enemy.<sup>14</sup>

Alternatively, one can think of agents who have more understanding of the intelligence game or agents who express a clear desire to be operated. First is Aldrich Ames, a senior American CIA officer stepping into a Soviet embassy and offering his information services for money. His operation resulted in considerable damage to American intelligence, including the arrest and execution of a few American recruited agents. Numerous intelligence operations were frustrated.<sup>15</sup>

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<sup>13</sup> DL Perry, 'Repugnant Philosophy – Ethics, Espionage and Covert Action' in J Goldman (ed), *Ethics of Spying: A Reader for the Intelligence Professional* (Scarecrow Press 2006), 225-226.

<sup>14</sup> As an example for this technique, let us imagine an agent who is an Iranian General whom the CIA wish to recruit. The American case officers have reason to believe the General is antagonistic toward America and likely to refuse. Knowing his sympathy towards France, they approach him pretending to be officers of the French Secret Service. He agrees and eventually is recruited and is handled for years. His operation is fully based on consent. In fact, the general even likes being an agent and the only abnormality with his activity is the fact that he mistakenly believes to be working for the French Service.

<sup>15</sup> US Senate Select Committee on Intelligence, 'An Assessment of the Aldrich H Ames Espionage Case and its Implications for US Intelligence', Report of the 103rd Congress, 2nd Session (1 November 1994) <[www.intelligence.senate.gov/pdfs103rd/10390.pdf](http://www.intelligence.senate.gov/pdfs103rd/10390.pdf)> accessed 8 July 2014; D Wise, *Nightmover: How Aldrich Ames Sold the CIA to the KGB for \$4.6 Million* (HarperCollins Publishers 1995); P Earley, 'Confessions of a Spy: The Real Story of Aldrich Ames' (GP Putnam's Sons 1997); T Weiner, D Johnston and NA Lewis, *Betrayal. The Story of Aldrich Ames, an American Spy* (Rockland MA, Wheeler Public 1996); V Cherkashin and G Feifer, *Spy Handler: Memoir of a KGB Officer; The true story of the man who recruited Robert Hanssen and Aldrich Ames* (Basic Books 2005); BB Fischer,



Ames initiated his own recruitment. As a senior intelligence professional, he was fully aware of the rules of the intelligence game and its risks.

Avishay Raviv is another agent, recruited by the Israeli General Security Agency ('GSA') and operated within circles of right wing extremists during the early 90's. Raviv had been identified as suffering from personality and behavioral issues, including an obsessive ascription of importance to the relations with his handlers.<sup>16</sup>

In order to further complicate the example, let us imagine a new agent, with extreme servile aspects of Raviv's personality. Let us call him the monk-agent. Just like the monks of St. Ignatious of Loyola described by Taylor, he is willingly subjecting his will to the will of his handlers<sup>17</sup>. According to the Ignatian rules, monks are required to fully subordinate their wills to the will of their abbots. Personal discretion is believed by this order to be exposing the monks to the temptations of Satan. Another good analogy is the servile woman presented first by Thomas Hill.<sup>18</sup> She takes pleasure and fully consents to devoting herself to taking care of her husband's needs and promoting his interests. This type of subjection in the cases of the servile woman, the monk and the monk-agent, is absolute. They all willingly accept the will of another person, whether a husband, an abbot or a handler, to be their own.<sup>19</sup>

Acceptance of the handler's will is held to be superior to the monk-agent's, as if it were a self-imposed imperative. The agent is guided by

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'Spy Dust and Ghost Surveillance: How the KGB Spooked the CIA and Hid Aldrich Ames in Plain Sight' (2011) 24 Intl J of Intelligence and Counter Intelligence 268.

<sup>16</sup> Criminal Case 2070/99 *State of Israel v Avishai Raviv*, Jerusalem Magistrate Court, unpublished

<sup>17</sup> I use this example mainly because it is also specifically relevant to the HUMINT context of the discussion on autonomy. On the monks of Saint Ignatious of Loyola as described by Taylor, see: JS Taylor, *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (Cambridge UP 2005), 1-29.

<sup>18</sup> TE Hill Jr, 'Servility and Self-Respect' in Hill, *Autonomy and Self-Respect* (n 9).

<sup>19</sup> According to Hill, the servile person acts in violation of the duty to his own self. The argument presented in this paper is different in the sense that I argue against the view that his choice for servility is autonomous in the first place. Rather than arguing like Hill, that this choice is autonomous yet unacceptable (although Hill argues such choices are rarely autonomous), I argue that the choice for servility is never autonomous.

the belief that acting in accordance with the case officers' will is practically the right route. This example is philosophically complex, since whenever the monk-agent implements his handlers' will, he is in fact positive in his feeling of indirectly implementing his own will. The radical nature of the monk-agent example by no means indicates that this is a rare occurrence. While such an extreme instance of servility is probably rare, I believe a more moderate type of a servile agent is quite common.<sup>20</sup>

All of these exemplary agents have agreed to their recruitment. None of them faced any apparent means of coercion in order to motivate this consent. But we can already easily identify the first two agents as non-autonomous. Under any account of autonomy or consent, both false flag recruitment and the fake polygraph check are considered as critical external intervention with free will. As a result of the clear intervention, both agents adopted a will they mistakenly identified as their very own. Are Ames and the monk-agent autonomous persons distinctively making a free choice? This question places us in a junction allowing us two alternative routes, neither of which seems to offer an easy ride.

Both types of agents are well informed and express clear consent to their recruitment. Accepting a concept of personal autonomy that determines the monk-agent to be non-autonomous seems almost an inherent logical error. After all, the monk-agent is aware of the handler's level of control of his will, and yet, deems such control to be a genuine reflection of his very own will. On the other hand, considering the monk-agent to be autonomous intuitively seems just as wrong. Our intuition rejects seeing servility as possibly co-existing with exercising free will.

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<sup>20</sup> According to certain HUMINT professionals, a typical concept of running an agent requires absolute control of the agent's will and mind (W Hood, *Mole* (WW Norton & Company 1982), 29; Perry, 'Repugnant Philosophy' (n 13). The concern of a certain level of servility as part of humint relations is fortified due to the fact that a substantial number of recruited agents are "walk-ins", namely volunteers who initiate their recruitment. See Wood (n 6); Fitz and Wiskoff (n 6).

### III. THE AUTONOMY AND CONSENT CORE ARGUMENT

The importance of consent within legal and moral analysis of practical issues cannot be exaggerated. In many cases, signs of consent are the only differentiating element between severe harmful acts on the one hand and acceptable practices on the other.<sup>21</sup> It is consent that distinguishes between rape and normal sexual intercourse, between slavery and employment relations or between theft and donation. Accepting consensual acts does not mean labeling them as justified or right.<sup>22</sup> It does however reflect the exceptional authoritative power society refers to personal acts of consent and reflection of human will.<sup>23</sup>

If we respect people's autonomy and believe that an agent's choice to accept a recruiting offer is an exercise of such autonomy, so the argument goes, we should respect the agent's choice. We are expected to refrain from objecting to the recruitment as long as it is consensual and as long as the ground for arguing against operating the agent is relying on potential harm to the agent. Just as we do respect a young woman's choice to volunteer for an elite military unit, irrespective of the related risks and potential damages, so we should respect an agent's consent to assume the risky and morally problematic task of a recruited intelligence agent.<sup>24</sup>

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<sup>21</sup> P Young, *The Law of Consent* (North Ryde NSW, Law Book Co 1986).

<sup>22</sup> Hill, *Autonomy and Self-respect* (n 9), 49.

<sup>23</sup> See for example an attempt to offer a complete Kantian consent-based criminal theory: DAJ Richards, 'Human Rights and the Moral Foundations of the Substantive Criminal Law' (1978) 13 *Georgia L Rev* 1395. On another front, a wide-range paternalistic legislation practically fixes new borders to personal autonomy on a daily basis. Most western states prefer to force us to fasten seat belts while driving rather than simply respect our personal choice not to do so. The deliberation process in setting such a rule is not focusing on the question: "Are the persons autonomous while fastening seat belts?" The debate is rather focusing on the question of what the counter arguments are for not respecting the driver's choice on the matter.

<sup>24</sup> At this point, I conduct this analysis based on a general assumption that autonomy does have an important positive value irrespective of the tough debate over the nature of this value, whether of an intrinsic or of an instrumental value. I simply assume people's choices should be respected and therefore not protested, for the very reason of being their own. By that, I do not mean to say that any act is justified, provided it is autonomous. Other considerations may obviously prevail. But so long as we don't hold under the circumstances any prevailing counter considerations, autonomy should be respected. By that, the consent argument does not argue for human collection as justified, but rather as permissible. L Hawort, *Autonomy: An*

Cases of what seem to be clear autonomous acts, which still need to be rejected based on other prevailing considerations, seem to erode the moral status of personal autonomy. Scholars frequently ask us to balance personal autonomy against competing values. Dan-Cohen even further uses these examples in order to call for ascribing a lower level of importance to personal autonomy in comparison to other values, such as dignity.<sup>25</sup> It is the trivial cases of people accepting the unacceptable that mostly shake the foundations of the notion of autonomy as a morally validating concept. Take the case of *Brown*, where a husband was prosecuted and charged for beating his wife regardless of an alleged prior consent of the woman. Allegedly, the wife expressly asked her husband to beat her each time she got drunk.<sup>26</sup> Dan-Cohen uses the case of *Brown* as a building block for a new normative scale. In this scale, dignity is superior to autonomy, while the two notions remain independent.<sup>27</sup>

The link I wish to propose between autonomy and dignity suggests a different approach to the *Brown* case than Dan-Cohen's. For now, I will only mention that according to my suggested approach, the wife is not autonomous to start with and therefore the case represents no contradiction between autonomy and dignity. Another important conclusion drawn from the case of *Brown* is that our moral attitude to personal choices is context-sensitive. While we may respect the choice of a woman to practice martial arts and to be consensually beaten as part of her training, we refuse to respect a similar choice of a woman in the family relations context.<sup>28</sup> Any suggested account of personal autonomy must, therefore, be sensitive to different contexts, such as the differences between sports and married life.<sup>29</sup>

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*Essay in Philosophical Psychology and Ethics* (New Haven, Yale UP 1986); G Dworkin, 'Is More Choice Better than Less?' (1982) 7 *Midwest Studies In Philosophy* 47, 55-56

<sup>25</sup> M Dan-Cohen, 'Defending Dignity' in M Dan-Cohen, *Harmful Thoughts-Essays on Law, Self and Morality* (Princeton and Oxford, Princeton UP 2002) 150, 154-157.

<sup>26</sup> *State v Brown* 364 A 2d 27 (NJ Super Ct Law Div 1976), *aff*, 381 A 2d 1231 (NJ Super Ct App Div 1977).

<sup>27</sup> Dan-Cohen (n 25), 154-157.

<sup>28</sup> One can view this point as a source of strength to the authoritative power of autonomy, since it illustrates consent's flexibility and sensitivity to different contexts.

<sup>29</sup> A similar issue arises in contracts law in cases where the formation of the contract is 'proper' and yet we refuse to validate the deal based on its content. RE Barnett, 'A Consent Theory of Contract' (1986) 86 *Columbia L Rev* 269.

Accordingly, our interpretation of autonomy must eventually show special sensitivity to consent in the specific human collection context. However, the starting point for such analysis must be a preliminary review of the notion of autonomy in general.<sup>30</sup> In order to determine if voluntary intelligence agents are indeed autonomous, a deeper understanding of the notion of personal autonomy is required.

#### IV. AGENTS AND THE PARADOX OF RESPECT FOR AUTONOMY

Autonomy is generally defined as a personal condition related to the psychological ability for self-government.<sup>31</sup> The link between the notion of autonomy and the notion of freedom is obvious. Being autonomous may also be involved with the right that such psychological condition is not interfered with.<sup>32</sup> The basic concept of autonomy therefore means both a psychological condition of self-government and a right-based concept of avoiding external interference with such condition.<sup>33</sup>

The typical handler-agent relations seem at first glance to be in contradiction to both meanings of autonomy. The substantial level of control and the potential mental manipulation derogate the psychological competence of self-government. And it seems to be externally interfering with the agent's capability to produce the conditions for self-government:

But the highest in the tradecraft is to develop a source that you 'own lock, stock and barrel'. According to the clandestine ethos, a 'controlled' source provides the most reliable intelligence. 'Controlled' means, of course, bought or otherwise obligated. Traditionally it has been the aim of the professional in the clandestine

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<sup>30</sup> J Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99 *Ethics* 1, 109.

<sup>31</sup> J Feinberg, *Harm to Self, Vol. III in The Moral Limits of Criminal Law* (New York, Oxford UP 1986), 28.

<sup>32</sup> T Hill, 'The Importance of Autonomy' in EF Kittay and DT Meyers (eds), *Women and Moral Theory* (Rowman and Littlefield 1987) 129-138, at 133.

<sup>33</sup> Meyer for instance suggests a similar distinction between the two 'internal' and 'external' meanings of autonomy. He prefers to define them as 'positive' and 'negative' meanings of autonomy. See: M Meyer, 'Stoics, Rights, and Autonomy' (1987) 24 *American Philosophical Quarterly* 3, 267.

service to weave a psychological web around any potentially fruitful contact and tighten that web whenever possible.<sup>34</sup>

Achieving this goal requires a well-learned technique of gradually draining signs of independence:

The officer is painstakingly trained in techniques that will convert an acquaintance into a submissive tool, to shred away his resistance and deflate his sense of self-worth.<sup>35</sup>

At this point, I cannot avoid re-citing Hood's very clear description of the meaning intelligence organizations ascribe to the term 'control':

No espionage service can tolerate the merest whiff of independence or reserve on the part of an agent... With a new agent, the case officer's first task is to maneuver him into a position where there is nothing that can be held back – not the slightest scrap of information nor the most intimate detail of his personal life. Until this level of control has been achieved, the spy cannot be said to have been fully recruited.<sup>36</sup>

Obviously, this is an extreme description of the reality of HUMINT relations. If all handling relations had matched this description, moral analysis of HUMINT would have been trivial. And deep philosophical debates about personal autonomy would not be necessary. However, agents have their own cards to play. They source the information. Some of them, as in the case of Ames, are intelligence professionals. But even in the case of far more moderate handling, a substantial level of control is maintained. Accordingly, if intelligence agents seem to be non-autonomous under both meanings of autonomy – even in moderate cases of handling – then how can one accept (not object to) human intelligence collection on the ground of respecting the agent's autonomy? Similarly, as opposed to the Supreme Court's perception of handling relations, how can a non-autonomous agent be seriously viewed as a party to a contract?

A counter argument points at other choices people make in life which also result in limiting personal freedom. And yet, we still expect such

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<sup>34</sup> G Drexel Jr, 'Ethics and Intelligence', in J Goldman (ed) J Goldman (ed), *Ethics of Spying: A Reader for the Intelligence Professional* (Scarecrow Press 2006), 6.

<sup>35</sup> *ibid* 7.

<sup>36</sup> Hood (n 20), 29; Perry, 'Repugnant Philosophy', (n 13) at 230.

choices to be respected. The young woman electing to join an elite military unit is a good example of such a choice.<sup>37</sup> It is safe to assume that her scope of freedom for self-government will be dramatically limited as a soldier compared to her civilian life. So, can there be choices, which we do find autonomous and therefore respect-worthy, irrespective of such choices resulting in limitation on the agent's scope of autonomy?

I believe an answer may lie within further analysis of the nature of the psychological condition of autonomy. I argue that a valid source for a normative distinction between the young drafted woman and a common intelligence agent could be partially found in the separate models of personal autonomy of Frankfurt and Dworkin.<sup>38</sup> I then offer a new perspective on the hierarchical model of autonomy, which in my view, may assist in answering the main questions of this paper: Is the consensual intelligence agent autonomous? What distinguishes between our respect to the autonomy of an elite soldier and the autonomy of an agent? Facing these questions, we are puzzled by the need to determine the scope of the freedom to give up freedom. This is where the hierarchical model of personal autonomy becomes relevant.

## V. THE HIERARCHICAL MODEL OF PERSONAL AUTONOMY

The hierarchical model of Frankfurt is based on the distinction between first level desires (or Lower-Order Desires, 'LOD') and second order desires (Higher-Order Desires, 'HOD').<sup>39</sup> The actual actions of a person are the objects of the Lower-Order Desires. For example, I want to walk and therefore walking is the object of my Lower-Order Desire. On the other hand, the objects of Higher-Order Desires are Lower-Order Desires and not actual actions. In such a case, an agent wants to desire. She controls the process of producing

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<sup>37</sup> For the sake of clarity, I shall assume this is a unit of volunteers. All a candidate needs to do in order to quit is to announce her will to quit, as ringing the bell symbolizes in the film *GI Jane*.

<sup>38</sup> H Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 *The J of Philosophy* 5; G Dworkin, 'The Concept of Autonomy', in R Haller (ed), *Science and Ethics* (Amsterdam, Rodopi 1981), 203.

<sup>39</sup> Although both Frankfurt and Dworkin initiated hierarchical models, the concept of hierarchy of desires is mainly related to Frankfurt and most of the following debates are centered on Frankfurt's model. Therefore when referring in this paper to the hierarchical model, I refer to Frankfurt's model.

preferences. A person not only produces desires to desire; she can strongly identify with such desires. This is the basis for Dworkin's 'full formula of autonomy'. It considers a person to be autonomous if she identifies with her desires in a process that is completely internal.<sup>40</sup>

This model assists us in making a rational distinction between the young woman draftee and the intelligence agent. The difference lies in the HOD and the identification process. Unlike the young draftee, we have strong grounds to doubt the authenticity of the HOD of the designated agent to desire to act as an intelligence agent. The false-flag recruitment of an agent is a perfect example of a discrepancy between LOD to work for the adversary and the HOD to desire to work for a friendly state. Such discrepancy is a result of deception, which disassociates our control of actions from our control of the will. Both choices, of the young draftee and the designated intelligence agent, will result in limitations on their LOD. However, based on the hierarchical model of Frankfurt, this in itself does not render them non-autonomous. It is the suspected influence over the HOD of the intelligence agent, which raises a doubt concerning his autonomous status.

For now, the hierarchical model managed to explain why the agent recruited under obvious manipulation is not autonomous, though formally showing consent. His desire to will to be handled by State *X* does not match and identify with his first order desire to be handled by State *Y*. But the model does not filter out all instances of manipulation. If the handler is sophisticated enough, she will lead the agent into confirming the maneuvered desire as though initially preferred by the agent, and as though it were his very own.

The hierarchical model manages to filter out desires, which do not match the actual HOD. But it faces difficulties when the manipulation 'takes over' the very HOD. The hierarchical model is expected to duplicate its erroneous outcome with regard to the monk-agent. Apparently, the model will determine such agent as autonomous. This is a result of the monk-agent identifying with his desire to accept the will of his handler. He wants to will whatever the handler desires. In contrast, I assume most readers intuitively find this agent to be non-autonomous. Something very wrong seems to be involved. But the

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<sup>40</sup> Dworkin, (n 38), 212.



hierarchical model seems blind to it and incapable of filtering out such consensual relations. At this point, a deeper analysis of the model and its alleged failures is required.

The hierarchical model is exposed to problems known as the problems of manipulation, authority and regression. Critics attack the requirement of identification of HODs and LODs.<sup>41</sup> They point to the need to be autonomous in the first place for this very act of identification. We can easily imagine a person who is ‘freely’ matching her HODs to her LODs and yet she has done so as a result of some manipulation. But the problem of manipulation can also carry a broader form, setting endless circles of intervention around the agent’s biography. A deeper look at his life story might show powerful influences on this identification process by his education, socioeconomic status and many other background factors.<sup>42</sup>

Another threat to the stability of the hierarchical model is its alleged exposure to regression. If autonomy requires identification between HODs and LODs, it may also require even Higher Order Desires in order for the agent to be the author of his HODs (HOD<sub>2</sub>) and these in turn will require an even higher level of desires in an endless form (HOD<sub>2</sub> to HOD<sub>n</sub>, while n could be infinitely increased). Apparently, autonomy cannot be determined, since it is dependent upon identification between an endless string of desires and higher desires.

The mirror image of the regression problem is the authority failure. If the source of authority of the LOD is internal to the agent’s self (HOD), then the regression problem will lead us in endless checks of approvals against the endless levels of desires. However, if in order to escape the problem of regression we point to an external source of authority of a desire, this might be far more detrimental to autonomy. LOD approved by a source external to the agent’s self could hardly be viewed as representing

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<sup>41</sup> I Thalberg, ‘Hierarchical Analyses of Unfree Action’ [1978] *Canadian Journal of Philosophy* 211, 219-220.

<sup>42</sup> This critique is obviously linked to the far broader determinism-free will old debate. I believe this critique applies to all potential models of autonomy and not merely to Frankfurt’s and Dworkin’s. Actually, it questions the potential maximal level of personal freedom in general, namely it raises doubts on how free a person can be rather than on how autonomous a person can be under a specific model of autonomy.

the agent's very own will. Apparently, the hierarchical model falls either into endless regression or else into external authority.

But this does not necessarily mean the model of Frankfurt collapses. Logically, there are two paths for solving the regression problem. The first path would be to present a method for determining a cut-off point in the endless string of levels of desires by way of reason. The second path would be to fine-tune the hierarchical model in order to show why proper review of the HODs could be sufficient, namely, how the HODs could escape the regression problem by resting on a solid (and internal) source of authority.<sup>43</sup>

A common case study for reviewing the models of personal autonomy is the case of consensual enslavement. The case of enslavement seems alarmingly relevant to the debate over the consensual recruitment of intelligence agents. The case of intelligence agents, as in the case of slaves, emphasizes an important distinction between two different points in time relevant to freedom of the will. The first is the one point shortly before making a choice. The second point in time is soon after, as the choice has been made. Both the voluntary agent and the consensual slave may be free upon assuming the task. But it seems that both the agent and the slave face a problem of freedom soon after making a choice.<sup>44</sup>

Using the consensual slave, Dan-Cohen suggests an extreme thought experiment. If we respect the slave's autonomy, we apparently need to respect his choice to be a slave. Since his scope of autonomy soon after

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<sup>43</sup> Frankfurt attempted to answer the regression problem with a different approach than the one suggested above. According to Frankfurt, there is no need for higher level desires on top of HODs as long as the identification between HODs and LODs is 'decisive'. In this manner, Frankfurt is taking the first approach I have referred to for solving the regression problem, namely by suggesting a method for cutting the endless string of desires higher than the HOD. It seems that Frankfurt's first attempt to cut the regressed level of HODs is mainly by way of fiat rather than by way of reason. As mentioned, the route that this paper suggests is different, since I am offering an internal source of authority, namely dignity and self-respect. H Frankfurt, 'Identification and Wholeheartedness', in DF Schoem (ed), *Responsibility, Character and Emotions* (Cambridge UP 1987) 27-45; Christman (n 30).

<sup>44</sup> Dan-Cohen (n 25), 154-157. The volunteer soldier seems to avoid the limitation of her freedom of the will soon after making her choice to be recruited. I further elaborate on this distinction between the two temporal phases of the choice when subsequently discussing the example of consensual enslavement.

making this choice is expected to be restricted, Dan-Cohen further imagines a consensual slave whose scope of autonomy is not derogated compared to his non-slave free counterpart, for example, due to his master's 'liberal' approach and relatively flexible terms of slavery.<sup>45</sup> Since our moral intuition rejects such a situation regardless of this 'liberal' approach, Dan-Cohen urges us to reach a conclusion on the limited importance of autonomy compared to other values, such as dignity. In contrast, I argue against the very idea of the consensual slave to start with. For obviously if one can point at an autonomous slave, one can theoretically point at an autonomous intelligence agent.

I contend that the idea of Higher Order Desires reveals the emptiness of the idea of consensual enslavement. By allowing the slave to be 'autonomous' within a 'reasonable' scope compared to a non-slave person, a virtual (and external) higher level of desires is being created.<sup>46</sup> While the slave is capable of setting his HODs and identifying them with his LODs (due to his master's 'liberal' rules of slavery), he is still not autonomous. The power of the master is equivalent to the creation of a virtual third and higher level of desires higher than the slave's HODs. The slave's owner now controls the higher level of HODs. The slave's owner externally sets the scope of the slave's HODs and can minimize that scope to zero at any given time subject to her sole discretion.

As opposed to Dan-Cohen's view, I believe the slave under these conditions is not autonomous while another person exercises such a dramatic control over the slave's HODs. In the hierarchical model's terms, one can define it as a situation in which the slave's HODs stem from a higher level of desires, which is both irreversible and located outside the boundaries of the slave. Therefore, the specific consensual slave is not autonomous. The problem of irreversibility is particularly relevant to handler-agent relations, which in many cases resemble

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<sup>45</sup> In order to refrain from status issues, Dan-Cohen even further defines the slave as autonomous de-facto. This way, the oxymoronic status of autonomous slave is avoided. The slave is not autonomous de-jure, but arguably autonomous de-facto. M Dan-Cohen, *ibid*, 156-157.

<sup>46</sup> Obviously, the reference to this third level of desires as virtual is strictly illustrative. The model does not recognize any level of desires higher than the HOD. However, this virtual level acts as if there is a third level of desires and by that assists us in understanding in such a case how non-authentic are the HOD's and realize that the HOD's stem from an external source of authority.

‘liberal ownership’. These relations seem friendly, pleasant and cooperative. And yet, the handler could revoke that condition at any time.<sup>47</sup> In contrast, the agent – just like the consensual slave – cannot unilaterally bring the relations into an end. His handlers hold the incriminating information. They can always respond with ‘burning’ the agent and revealing his true position.

Dan-Cohen does refer to this issue of irreversibility of the slavery status and the consequent fragile freedom granted by the owner, since this freedom is fully subject to the owner’s sole decision to revoke. Dan-Cohen suggests a hypothetic counter party to the consensual slave, enjoying a similar level of freedom, which due to some illness, could be abruptly and randomly revoked.<sup>48</sup> Apparently, this non-slave autonomous person shows us that even under the condition of potential revocation of freedom, a person, and therefore also the consensual slave, is still deemed autonomous. I argue against viewing a common denominator to a slave with relative freedom and to the person who might, at any minute, lose some of his freedom due to some illness. As I mentioned, many intelligence agents resemble the ‘autonomous slave’. They typically enjoy a high level of freedom while controlled. However, the handler remotely controls the scope of this apparent freedom.

All formulas of autonomy, including the hierarchical model of Frankfurt, emphasize the psychological aspect of autonomy. Autonomy is very much related to a state of mind and the ability to transform it into preferences, desires and choices. The very awareness of the slave that his state of mind is constantly conditional upon a third party’s approval creates a new derogated state of mind and sense of freedom. This is all similarly relevant to a case in which the slave’s produced HODs and consequent LODs eventually match the master’s will after

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<sup>47</sup> For a first hand account of the irreversibility problem in the HUMINT context, see M Klingberg and M Sfard, *The Last Spy* (Hebrew Edition, Maariv 2007), 224-225. Prof Klingberg was an epidemiologist and vice president of the top-secret biological defense institute in Israel. Klingberg was also a senior agent recruited by the KGB and operating within the top-secret institute. For around 30 years, he communicated to the Russian intelligence invaluable secret scientific information from Israel. In his book, he describes his helpless efforts to bring his handling into an end, understanding that his voluntary handling could turn at any minute into being coercion-based.

<sup>48</sup> Dan-Cohen (n 25), 156.

all. It is the slave's awareness to the potential limitation that counts, not the actual influence it might (or might not) have over the content of the slave's will.

The influence of the virtual third and higher level of desires controlled by the master comes into effect in both a positive and negative manner. The negative manner is obvious: the HODs of the slave – or the intelligence agent in the case of this paper – can only be produced and implemented as long as the master – or the case officer – approves them and chooses not to interfere. But there is also a positive and active manner of interfering with the slave's process of setting desires and identifying with them. The very fact that the slave is aware of the veto power of the master and her power to bring immediate cessation to his scope of freedom influences, by itself, the psychological process of a free person.

The slave is also constantly aware of the irreversibility of his situation, of this dependence upon the master's good will and ever-temporary scope of freedom he will never control. This sense of clear subjection is fed into the slave's process of producing desires and identifying with them in a recursive manner. To use an illustrating case from another field, consider a journalist in a totalitarian country, notified by the totalitarian regime that his writing topics and expressed opinions are subject to the absolute censorship power of the army. And let us also suppose that for two years, the topics and opinions elected by the journalist did not justify censorship from the regime's perspective, namely the censorship prerogative is in force yet remains unexploited. Could this totalitarian regime seriously claim that the journalist exercised the right of free speech? I believe that this journalist exercises free speech no more than Dan-Cohen's illustrating autonomous slave exercises autonomy.

The idea of the virtual creation of a third and superior level of HODs also assists in explaining the distinction I have suggested between a soldier volunteering into an elite unit and a recruited intelligence agent. As this is a special unit of volunteers, which encourages only those who really want to stay, in being able to quit and stop obeying

her commanders, the soldier is autonomous.<sup>49</sup> She is capable of identifying her HODs with her LODs. There is no higher level of desires subjecting her HODs. On the other hand, just as the ‘consensual’ slave has a virtual third and higher level of desires controlled by his master, so has the intelligence agent. He is not autonomous since the very nature of the relations with the handler creates this irreversible third and virtual higher level of desires externally controlled by his handler. But why is it that the virtual third level of desires I present derogates and sometimes even nullifies autonomy? What is the difference between the consensual slave and the intelligence agent on one hand, and the sick person Dan-Cohen describes on the other hand? The answer, so I would like to argue, may be found in the proposed dignity-based approach to models of personal autonomy.

## VI. A DIGNITY BASED INTERPRETATION OF AUTONOMY

It is a belief shared by leading scholars that the hierarchical model constitutes the right foundation for understanding the psychological process of free action based on freely set desires.<sup>50</sup> However, its fine-tuning towards a coherent model continues. Generally speaking, the authority problem with regards to the HOD reflects an apparent logical no-through road. If the source for authority of the HOD is internal namely stemming from another psychological event happening *within* the boundaries of the agent then we need another verification of that other psychological event being freely initiated. This is the essence of the regression problem, since every relevant internal source of authority must be endlessly authenticated against a higher-level source (or desire). On the other hand, if the source for authority of the HOD is external to the agent, then how can one determine such a process of endorsing a desire as autonomous? This is where the modern attempts to enhance the hierarchical model come into the picture.

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<sup>49</sup> Again, in this example the assumption is that the elite unit is a unit of volunteers which even encourages candidates during training to quit so only those who really want do stay.

<sup>50</sup> See Taylor’s excellent summary on the current approaches to the hierarchical model and of its most recent and promising versions in his introduction to *Personal Autonomy*. JS Taylor (n 17), 1-29.

Both Frankfurt and other scholars made attempts to amend the model in order to meet its challenges. Dworkin argued that his demands for both procedural freedom and substantive freedom within his model avoid all three problems, including the problem of manipulation.<sup>51</sup> However, on top of failing to filter out cases such as the monk-agent, his requirement is too general, telling us to avoid wrong interventions in the autonomous desires-setting process, while it fails to tell us how to practically identify wrong interventions.<sup>52</sup>

Frankfurt's second attempt was to suggest a satisfaction-based analysis of identification.<sup>53</sup> This enhanced hierarchical model determines a person to be autonomous in reference to a desire, if that person accepts this desire as his own. The HOD under this approach is not normatively superior to the LOD. It is rather connected with a descriptive relation. The HOD, being descriptive and only describing the LOD as owned by the discussed person, apparently manages to avoid the problem of authority. By not being superior to the LOD and by not making a normative judgment on the LOD, we are no longer concerned with the level of authority they represent.<sup>54</sup>

Frankfurt's amended approach is still exposed to the manipulation problem.<sup>55</sup> Apparently, the monk-agent will comply with Frankfurt's requirement of satisfaction-based identification. Since the monk-agent is knowingly and willingly accepting the handler's (abbot's) will as his own, his HOD will identify with his LOD and describe them as his own. In such a case, we are left with a model confirming the monk-agent as autonomous, while we intuitively disagree.

Additional promising attempts to cure the inherent problems of the hierarchical model are related to Christman, Bratman and Kelstrom.

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<sup>51</sup> In short, the demand for procedural freedom requires that manipulation and deception do not influence the identification process. G Dworkin, 'Autonomy and Behavior Control' (1976) 23 Hastings Center Report; Taylor (n 17), 4.

<sup>52</sup> G Dworkin, *The Theory and Practice of Autonomy* (Cambridge UP 1988); Taylor, (n 17), 7-8.

<sup>53</sup> Frankfurt made two attempts of addressing the criticism on his model. The first suggested that a decisively made HOD could escape the problems of regression and authority.

<sup>54</sup> H Frankfurt, 'Reply to Gary Watson' in S Buss and L Overton (eds), *Contours of Agency* (MIT Press 2002), 160; Taylor (n 17), 9.

<sup>55</sup> Taylor, *ibid*, 11.

They all attempted to show that the HODs stem from an authoritative source over the LOD. Christman's model requires non-resistance of the person to the development of the desire accompanied by minimal rationality and lack of influence on self-reflection. Apparently, his model is also prone to fail in the case of the monk-agent, since it cannot reject consensual and total subjection to the will of another person, which is not the result of direct interference.<sup>56</sup>

Bratman's and Ekstrom's models both find a source for the authority of the HOD within the self of the person. Bratman's model requires that the person decides to treat his desire as reason-giving while being compatible with the person's other perceptions pertaining to what to treat as reason-giving.<sup>57</sup> Ekstrom's model finds a person autonomous on HODs that cohere with her other perceptions that constitute her core and true self.<sup>58</sup> At first glance, both last models of Bratman and Ekstrom have the potential of escaping the major problems of the basic hierarchical model: regression, authority and manipulation.<sup>59</sup> I believe resorting to the core self as a source of authority carries new types of risks. A new type of manipulation arises – manipulation and intervention in the constitution process of the self. Socioeconomic background, parenting approach, health condition and education are all examples of elements influencing the constitution of the core self and over which the person had limited control, if any at all.<sup>60</sup> This point leads me to raise another objection to these two enhanced models; their over-subjective approach.<sup>61</sup> They both represent a subjective analysis of autonomy and are dependent upon the person adopting a certain approach to her desire in order to be autonomous.

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<sup>56</sup> J Christman, 'Defending Historical Autonomy: A reply to professor Mele' (1993) 23 *Canadian Journal of Philosophy* 281; JS Taylor, *ibid*, 10.

<sup>57</sup> M Bratman, 'Identification, Decision, and Treating as a Reason' (1996) 24(2) *Philosophical Topics* 1, 9-11.

<sup>58</sup> LW Ekstrom, 'A Coherence Theory of Autonomy' (1993) 53(3) *Philosophy and Phenomenological Research* 599, 603-606.

<sup>59</sup> See Taylor's excellent outline in Taylor (n 17) at 13.

<sup>60</sup> Both models could also face difficulties in cases of a sharp and revolutionary change in a person's personality and structure of the self, while still no autonomy-nullifying influence has been involved.

<sup>61</sup> It is worth noting that the two models are not purely subjective. They do allow us, for example, to determine a person as non-autonomous although the person himself believes he is exercising free will, as in the case of the monks.



Intuitively, I believe that autonomy is a notion with strong sociological roots. Society sets the limits of autonomy. It influences a person's perception of her own autonomy and its limits. And yet, under these subjective models, social perceptions are not relevant in determining an autonomous decision or action.<sup>62</sup> On the other hand, the subjective approach makes sense, since an external source of authority over the agent's choice-making process seems to contradict the essence of autonomy. Attempting to solve these problems is far beyond the reasonable scope of this paper. However, a new interpretation of the hierarchical account of autonomy – any coherent account – could be most helpful in understanding the true nature of common aspects of 'running' an agent, like control, manipulation, servility and irreversibility.

Arguably, the HOD of the person is expected to confirm the authenticity of the endorsement of the LOD of a person. In order to verify the authenticity of the HOD, most recently proposed hierarchical models of autonomy tried to verify that the endorsement process was either free of external intervention or that the agent verifies or reaffirms his ownership of the LOD. I am not certain that an external intervention is by itself an autonomy-nullifying element. Take for example people who give other persons, like friends or spouses, a dominant influential position in their lives. Is the less dominant friend really non-autonomous?<sup>63</sup>

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<sup>62</sup> On the sociological aspects of the notion of autonomy, see: C Mackenzie and N Stoljar, 'Introduction: Autonomy Refigured', in C Mackenzie and N Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford UP 2000), 3-31; J Christman, 'Relational Autonomy, Liberal Individualism and the Social Constitution of Selves' (2004) 117 *Philosophical Studies* 143. This apparent social indifference of the models adds to their over rigidity. They seem to be blind to different views of autonomy that are influenced by changes of society, context, time and place. And yet being anchored to the core self of the person, the models of Bratman and mainly Ekstrum's, show sufficient flexibility in determining different levels of autonomy for different people in similar circumstances.

<sup>63</sup> This line of thought may seem similar to Raz's theory concerning the service conception of authority. However, Raz's argument deals mainly with the question of *when is x's authority over y legitimate*, while this paper seeks an answer to a more fundamental question: *is x exercising authority over y (or alternatively is y autonomous)*. Regardless of the different focus of the arguments, Raz deals – as a peripheral question – with the issue of identifying authority. For example, from his reference to this question it seems clear that the case of person x accepting person y's judgment rather than exercising x's own judgment isn't a case of y's authority over

Clearly, not every influence on desires setting is compromising autonomy, not even every causally critical influence. I further argue that not even any manipulation denies autonomous decision-making.<sup>64</sup> At the same time, I am not convinced that the verification of the lack of external influence should stem strictly from the discussed person's self. The case of the monk-agent may suggest that some cultural institutions may have a relevant normative position on the matter. This is why I suggest the notion of humanity or dignity as the verification tool for determining unacceptable intervention in the endorsement and identification process.

I suggest a similar route initially suggested by Frankfurt, only in the opposite direction. The original idea of Frankfurt in suggesting the hierarchical model was to sketch a unique concept of a person.<sup>65</sup> The idea is that persons are unique in their way of exercising their free will. By accurately describing the way human will is autonomously exercised, we could end up with a clear concept of a person. This attempt has obviously been proven to be unsuccessful. Apparently, we face difficulties in drawing the complicated concept of a person out of the model of free action. I argue that the task should have been set in the opposite direction.

As complicated as it may be, we do have a good understanding of the concept of a human and of humanity. We rarely argue the question of what are human beings. While this is difficult for us to define, we share social intuitions about what a human being is, and what humanity is. It is human autonomy, which we actually find difficult to define. But having a concept of humanity or dignity (as a representative notion of humanity) could assist us in making this definition. If autonomy is a unique human virtue, and if we recognize humanity or

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x, unless x permanently subjects his judgment to y's superior judgment. J Raz, 'The Problem of Authority: Revisiting the service conception' (2006) 90 Minnesota L Rev 1003, 1018. The main task of this paper is to tackle Dan-Cohen's argument according to which (and in contrast to Raz), autonomous slavery is theoretically possible, for if autonomous slavery is indeed possible as Dan-Cohen contends, it is obvious that so is the case with autonomous handling.

<sup>64</sup> On the philosophical analysis of manipulation, showing different types of manipulation with apparently different moral outcomes, see: R Noggle, 'Manipulative Actions: A conceptual and moral analysis' (1996) 33 American Philosophical Quarterly 43.

<sup>65</sup> Frankfurt (n 38), 6-7.

dignity, then an autonomous decision should be one taken without a dehumanizing interference. In this respect, I use dignity as a concept of humanity.<sup>66</sup> Therefore, I would like to offer a perception of autonomy that incorporates dignity-compromising influences on the choice-making process.

This theoretical and moral approach will result in preventing occasions where one makes a choice under dignity-undermining conditions while still considered to be autonomous. The reason is that unless such an interpretation is adopted, a human being adopting a desire under a dehumanizing effect might be determined autonomous after all. If being autonomous is an exclusive human status, we might reach in such a case an impossible condition in which a creature is both dehumanized in relation to trait  $X$  (autonomy), yet holds an exclusively human status in relation to trait  $X$ .

The hierarchical model seems the right mechanism to make this verification. As mentioned, this paper is absolutely not targeting the goal of suggesting a new model of personal autonomy. My proposal of the dignity-based review of autonomy could be incorporated, however, as an addition to most coherent models. Therefore, the account I suggest should be viewed as an interpretation relevant to most successful models rather than as an independent and comprehensive model by its own.

I am suggesting that the hierarchical model of personal autonomy should be interpreted so a person  $A$  is autonomous in reference to a desire  $X$  if and only if: (1)  $A$  endorses desire  $X$  as his own (under the terms of a coherent model); and (2) if, at the time of endorsing desire  $X$  as his own,  $A$  was not under an influence pertaining to  $X$  (whether internal or external to  $A$ ) which amounts to violating  $A$ 's dignity, and is related to fulfilling (1).

This interpretation of the hierarchical model leads to a few conclusions relevant to both the understanding of the notion of autonomy in general and agents' handling in particular. This interpretation suggests a new source for dealing with the regression and authority problems:

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<sup>66</sup> While I elaborate on this issue in later stages, it is nevertheless important to note at this stage that I am aware that identifying dignity with humanity is not necessarily a common and non-controversial approach.

humanity. We may not need to resort to any higher level of desires since the dignity-based review is definite. The use of human dignity as a representing notion of humanity is a potential source of authority. Humanity is both an internal and an external source of authority for the desires-setting process of a person.<sup>67</sup>

## VII. DIGNITY AND SELF-RESPECT

Using the term ‘person’ requires further clarification. One could argue that, as opposed to my suggestion, it is not at all clear what a ‘person’ means, in contrast to what ‘homo sapiens’ means. In the philosophical literature, not every biological human being is automatically deemed a moral person. Typically, some cognitive criteria must be met for a biological human being to be recognized by philosophers as a person in the moral sense.<sup>68</sup> Others, like Peter Singer, are located at the other end of the debate on human uniqueness, arguing that there is no such uniqueness.<sup>69</sup> There is an immediate link between this question and the question of what is respect or dignity. If only persons are legitimate claimants of dignity or self-respect, then one can hardly deal with defining the content of dignity unless simultaneously dealing with what makes a person.

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<sup>67</sup> We may also avoid the debate on the relations between internal influences (like drug addiction) or external influence (like coercion). The notion of compromised dignity may contain the two sorts of threats to freedom of the will. Both the uncontrolled need for drugs and the subjection to external coercion seem to be derogating the influenced person’s dignity while making his choice.

<sup>68</sup> The Kantian list of human traits being the source of the moral uniqueness of human beings reveals a capacity-based approach to persons, like the human capacity for self-legislation. This however did not prevent Kant from reaching the ultimate conclusion that as a result every human being deserves intrinsic value for the very fact of being human, although we do know these moral and cognitive traits Kant refers to are differential in reference to different individuals. I Kant, *Groundwork for the Metaphysics of Morals* (first published 1785, Yale UP 2002) 4:428, 36; 4:434-35, 42-43. Korsgaard offers a non-gradable Kantian approach to human rational capacity irrespective of people’s actual differences in such capacities in CM Korsgaard, ‘Fellow Creatures: Kantian ethics and our duties to animals’ (2004) 25 The Tanner Lectures on Human Values 81-82.

<sup>69</sup> As a result, Singer wishes to convince us that from the moral standpoint, humans and animals should be deemed equal. P Singer, ‘All Animals are Equal’ in T Regan and P Singer (eds), *Animal rights and human obligations* (USA, Pearson 1989), 148-162.

It follows from my argument that people recognize a person, namely the claimant of self-respect more easily than philosophers do. I am aware of the common perceptions of dignity and of self-respect, which do not necessarily overlap.<sup>70</sup> I argue for a smaller gap between the two concepts, if any. I believe Margalit's definition of one (dignity) being a behavioral expression of the other (self-respect) is a move in this direction.<sup>71</sup> However, for the sake of clarity, my argument will refer to dignity as self-respect. Therefore, by referring to dignity-compromising effect, like Margalit, I mostly mean humiliation.

This only opens the gate for many more questions. Who deserves self-respect? Is self-respect gradable? How do we determine one's humiliation? Do we cling to the humiliated person's subjective response to humiliation, or is an objective standard involved? Clearly, these are very important questions worthy of a more thorough and separate attention than what could be reasonably included within the discussion over the autonomy of intelligence agents. I will mainly state my answers to these questions rather than suggest a full philosophical or legal argument to support them. Luckily, Margalit's thorough account of self-respect offers many of the missing arguments in his *Decent Society*.<sup>72</sup>

I agree with Margalit's account of self-respect deeming every human being as worthy of self-respect, solely for the very reason of being human. Accordingly, I disagree with many philosophers who view certain cognitive demands as prior conditions for this moral status. I argue for the basic respect people deserve, whether professors or comatose, mentally ill, intelligent and educated adults or young children. It is indeed their basic and non-gradable right not to be humiliated. In agreement with Statman, I believe it takes a person with cognitive capacities to humiliate. However, as opposed to Statman, I see no further capacity required in order to be humiliated, other than simply belonging to the human species.<sup>73</sup>

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<sup>70</sup> D Statman, 'Humiliation, Dignity and Self-Respect' (2000) 13(4) *Philosophical Psychology* 523, 523-526. Also see Statman's reference to Feinberg's claims-based approach to dignity versus respect in J Feinberg and J Narveson, 'The nature and value of rights', (1970) 4 *The J of Value Inquiry* 243, 252-253.

<sup>71</sup> A Margalit, *The Decent Society* (Harvard UP 1996), 51-53.

<sup>72</sup> *ibid*, 57-112.

<sup>73</sup> Statman (n 70), 524-526.

I argue for a combined subjective and objective approach to determining humiliation. It is essential to take account of the agent's subjective sense of humiliation when such sense of humiliation affects his decision process. However, as the cases of the monk-agent and the servile woman suggest, an objective review of humiliation is of similar relevancy:

The servile woman sees it as her duty to serve her husband, take care of his needs and advance his career, and the fulfillment of these tasks brings her great pleasure and satisfaction. According to the psychological subjective concept of self-respect, her husband's behavior and demands do not injure her self-respect; hence they are not humiliating. According to the moral objective concept, however, the situation is humiliating, as it reflects an undermined sense of self-respect by the servile woman.<sup>74</sup>

Self-respect as a parameter in the hierarchical model of autonomy is therefore both a subjective and a social concept. The self-respect of person *A* is, in my opinion, both self-reflective as well as dependent upon social conventions of humanity. Person *A* can therefore be mocked and hence humiliated without necessarily feeling humiliated. It is sufficient that *A*'s surroundings deem it to be the case. In this sense, I follow Dan-Cohen's concept of collectivizing the notion of dignity:

Once an action-type has acquired a symbolic significance by virtue of the disrespect it typically displays, its tokens will possess that significance and communicate the same content even if the reason does not apply to them... As long as certain actions are generally considered to express disrespect, one cannot knowingly engage in them without offending against the target's dignity, no matter what one's motivations and intentions are.<sup>75</sup>

The idea that self-respect reflects the equal right not to be humiliated leads to the conclusion that the concept of self-respect is not gradable.<sup>76</sup> Therefore, there are no persons more self-respect worthy

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<sup>74</sup> *ibid*, 527

<sup>75</sup> Dan-Cohen (n 25) at 162.

<sup>76</sup> Holding this position, I no doubt support the type of justification for self-respect to all humans embedded in the value we, humans, ascribe to the trait of being human while no other criteria is required. Margalit (n 71), 77

than others. This obviously does not mean that each individual is equally humiliated by the same humiliating act. The dignity violation review in the suggested interpretation of the hierarchical models applies to the environmental conditions apparently influencing the endorsement and identification process of the LODs by the HODs. Therefore, not every compromise to self-respect (namely humiliation) automatically means a risk to one's autonomy, unless it affects the identification process with one's desires.

Another very important implication of the suggested approach to autonomy is the sort of link it creates between the notion of autonomy and the notion of dignity. As opposed to scholars who argue for independence of the two notions, under this formula the mutual relations seem more interdependent.<sup>77</sup> This is the major difference between Dan-Cohen's approach and the one I suggest. While Dan-Cohen manages to imagine a situation where a person could be severely deprived of his dignity while making his choice and yet remain autonomous, my interpretation to the hierarchical models suggests it is totally impossible. In contrast to my proposed interpretation of autonomy, Dan-Cohen could define the consensual slave, the servile woman and the monk-agent as autonomous, although humiliated while making their choices.<sup>78</sup>

Addressing the irreversibility of the status of the slave and the reversibility of the rights granted by the 'liberal' owner, Dan-Cohen suggests a free counterpart to the 'autonomous' slave, who, due to some physiological disorder, might be deprived at any given time of his freedom of movement or choice. Dan-Cohen further asks us to imagine an owner of the slave who hardly ever changes her mind, and therefore is not likely to revoke the 'liberal' conditions of the slave. Dan-Cohen's arguments are most relevant to recruited agents. Handling relations are, as argued, largely irreversible. These relations typically allow some 'freedom' to the agent, however such scope of freedom is largely determined by the handler's revocable discretion.

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<sup>77</sup> For an approach arguing autonomy and dignity to be independent notions, see Dan-Cohen (n 25).

<sup>78</sup> To a certain extent, I believe it is this paper's suggested interpretation of current models of autonomy that best promotes Dan-Cohen's agenda of raising the value of dignity to the higher place it deserves in the moral analysis of law.

Dan-Cohen is right in arguing that it is the status of slavery that undermines the slave's dignity, as opposed to the physiological condition of his free counterpart. And yet, I wish to convince that this severe derogation of any person's dignity cannot leave him autonomous while such humiliation influences his choice-making process. Under my suggested interpretation, the slave is not autonomous in his acts and decisions, since the influence on him while making and identifying with his choices is dignity derogating.

I strongly resist disassociating the humiliation from its effect on the slave or agent's choice. We assume that the physiological defect of his counterpart does limit the scope of his potential choices and influence them. I argue, however, that it does not affect his autonomy since (to a certain level) we do not regard such limitation of choice as humiliating. This is why, in my opinion, most disabled people, although deprived of a wide range of potential objects of desires, are still autonomous.<sup>79</sup> The dignity-based interpretation of the hierarchical model of autonomy allows us to draw a distinctive line between the disabled person and the slave (or agent). And this distinction is irrespective of the fact that in theory, they do enjoy same scope of practical freedom.

The common deontological approach refers to a narrow conceptualization of autonomy, namely to the Kantian sense of autonomy as the human capacity for self-legislation, of setting rules of a universal value:

...the dominant trend in the deontological branch of liberalism has been to focus on autonomy. For the most part, dignity, if mentioned at all, has been seen as a matter of deferring to people's autonomy, and thus had no independent role to play.<sup>80</sup>

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<sup>79</sup> I do recognize however that from a certain level of physical limitation, disability may turn a person into non-autonomous. I believe the dignity-based interpretation of the hierarchical model of autonomy deals well with identifying this transition. It is the crucial point from which disability derogates the person's dignity which (in reference to his choice making procedure) turns him into a non-autonomous person.

<sup>80</sup> Dan-Cohen 25), 158. Dan-Cohen further refers to scholars challenging this approach: RG Wright, 'Consenting Adults: The problem of enhancing human dignity non-coercively' (1995) 75 Boston U L Rev 1397. As to mainstream deontological approaches viewing dignity in the Kantian sense of a reflection of the notion of autonomy, see: TE Hill, *Autonomy and Self-Respect* (Cambridge UP 1991),



Dan-Cohen deviates from this common approach by suggesting that dignity is not a derivative of autonomy but rather an independent value.<sup>81</sup> The interpretation I suggest reflects deviation from both approaches. The conclusion from my suggested interpretation is that dignity is not different to autonomy, at least not in the simple sense. Another conclusion is that autonomy is a broader notion than the Kantian autonomy to which most deontologists refer. It is much broader than the power to self-legislate. It is a notion reflecting the humanity of a person as a human being and as a person qua member of human society.

The suggested concept may also point out some of the limits of models of basic philosophical notions such as autonomy. These notions maintain recursive relations with social conventions. On the one hand, the notion of autonomy is a building block in the construction of social norms and social language. On the other hand, the outcome of this construction process is an important feedback and input in the construction of the notion of autonomy. As a result, autonomy's defining models cannot be static and scientifically accurate. Autonomy can only be based on dynamic, context-based and flexible foundations such as dignity or self-respect.

A point which needs to be discussed is obviously related to the definition of 'dignity' or, more accurately, what acts constitute humiliation and undermining of self-respect. It seems that if the interpretation of a model of autonomy now rests on an open concept, such as dignity, the new interpretation might not be helpful. Instead of asking, 'what is autonomy' we may be engaged in the question of 'what is dignity' or 'what is humiliation'? I believe this is not the case. After all, the entire argument is based on the assumption that we do intuitively recognize humanity and humiliation.

Humiliating a person, as concluded from the suggested concept and as suggested by Margalit, is treating a human being as nonhuman. We

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43; CM Korsgaard, *Creating the Kingdom of Ends* (Cambridge UP 1996); AW Wood, *Kant's Ethical Thought* (Cambridge UP 1999).

<sup>81</sup> Dan-Cohen argues that his argument for dignity as an independent notion in relation to autonomy is actually Kant's. According to Dan-Cohen, the mainstream of deontological readers of Kant misunderstand Kant's description of dignity as respect to autonomy and hence setting dependence relations between dignity and autonomy. Dan-Cohen (n 25), 158-159.

identify such occasions, just as we intuitively and immediately identify a creature as a human being and a human as sad or laughing or in pain. If we do not recognize dehumanized humans, this means we cannot recognize humans as well:

There are various ways of treating humans as nonhuman: (a) treating them as objects; (b) treating them as machines; (c) treating them as animals; (d) treating them as subhuman...<sup>82</sup>

The apparently blurred boundaries of the notion of dignity are not necessarily related to vagueness but rather to dignity being a dynamic notion. Self-respect (or dignity) reflects both a social and a personal perception of humanity. It therefore changes with time, place and context. We should therefore view this notion as dynamic and flexible rather than opaque. As I commented earlier, a definition of a notion such as dignity could never be scientifically accurate. And neither should it be.

Taking these insights back to the practical dilemmas concerning our group of voluntary agents, the questions remain: Have these apparently voluntary agents really made autonomous decisions? Can they ever be an autonomous party to a contract with a handler as the Supreme Court presumed?

## VIII. AGENTS AND THE RESPECT-BASED APPROACH TO AUTONOMY

The case of the false-flag recruitment seems relatively easy. A person driven into such an unreal environment is put into an unreasonable position. Just imagine what the agent will feel should the truth be revealed to him: he would feel angry, a loser, and a fool; humiliated. He just found out he has served the devil. We would think the same the critical influence on his preferences and desires setting while considering being an agent was humiliating. Such an agent is therefore not autonomous.

The combined subjective and objective measurement of self-respect allows us to reach this conclusion regardless of the agent himself not

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<sup>82</sup> Margalit (n 71), 89.

being aware of his humiliation upon making his choice.<sup>83</sup> On a lower scale, similar conclusions may arise with regard to *X*, the agent that was convinced based on a fake polygraph check that the risk he was facing was reasonable. *X* identified with a desire to continue his activity in a process that was affected by a humiliating influence. He is anything but an autonomous agent.<sup>84</sup>

Raviv's case is a little more complicated. Does taking advantage of his personality disturbance constitute an influence on his preferences-setting process amounting to humiliation? In my opinion the answer would probably be positive. However, Raviv's criminal verdict gives us reason to believe Raviv himself does not feel the same.<sup>85</sup> Raviv liked being an agent, and it is quite clear he does not view the influence on his choice as humiliating. This reveals a point of strength of the proposed interpretation to models of autonomy. Self-respect is a notion capable of absorbing both the agent's attitude to her choice, alongside society's attitude to the very same choice.

The monk-agent or Raviv may find the level of influence over their desires-setting process reasonable. At the same time, an objective observer aware of the social perception of such a condition may have a different view. She may consider their condition to be humiliating to a critical level of influence over the agent's choice making. This is why the proposed interpretation is manipulation resistant: In most modern societies, driving a challenged person into a dramatic and life-risking choice is considered to be a humiliating influence, irrespective of the formal prior consent of the recruit. This is why most of us won't find Raviv to be an autonomous agent once we become aware of his personality challenges.

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<sup>83</sup> As in the case of the seamless rape in the case of *Minkowski*, even if the agent is being handled under a false flag for his entire life, he is still humiliated while deciding to adopt the will to be handled and hence non-autonomous. This is a result of the objective element in defining humiliation. The reference to *Minkowski* is Dan-Cohen's (n 25). *State v Minkowski*, Cal. App. 2d 832; 23 Cal. Rptr., 92.

<sup>84</sup> The first two cases of agents, namely the cases of the manipulated agents are easily dealt with by the hierarchical model of personal autonomy. They're clearly non-autonomous agents based on the model. In contra-distinction, the monk-agent and agents with a strong element of servility, are the cases where the model is error prone since the agent reaffirms the deprivation of his will as a genuine reflection of his very own will.

<sup>85</sup> *State of Israel v Avishai Raviv* (n 16).

The suggested interpretation also offers a new perspective on the monk-agent. As with Raviv's case, the dignity-based review allows us to overrule the monk-agent's personal perception by measuring it in relation to social concepts of humiliation. In most societies, substantial subjection of the will – regardless of it being genuinely consensual – is dehumanizing. It matches Margalit's definition of humiliating practices, such as treating people as if objects or machines, regardless of their willingness to be used as such. The fact that a servile person *A* adopts desires  $X_1$  to  $X_n$  on a constant basis purely due to adopting somebody else's will is putting *A* in a dehumanized condition while adopting his desires. He seems programmed and mechanical; not human and humiliated.

The case of Ames reveals another dimension of the proposed interpretation to personal autonomy. As opposed to recruited agents like Kilngberg, Ames didn't hold even an apparent moral justification for his activity. He personally approached the Soviets and offered his information and services for money. Other than pure greed, there seems to be no influence on Ames' recruitment choice, let alone a humiliating one.

What type of agent could be more autonomous in his choice to serve another state than Ames? He is a senior intelligence professional aware of all the methods and risks of the HUMINT relations. His skill made handling tricks, manipulation or tight control quite irrelevant. Due to his seniority, relations with his handlers should be quite balanced. Have we finally met an agent operating autonomously on his own will? Have we managed after all to describe a case of two autonomous parties who freely form a contract between a handler and an agent in accordance with the way the Supreme Court viewed handling relations? Not necessarily.

Ames, like most recruited agents, was exposed to the influence of the irreversibility of his status once recruited. Like the 'autonomous' slave of Dan-Cohen, it seems that we should similarly consider Ames not to be an autonomous agent.<sup>86</sup> From what we know, Ames was

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<sup>86</sup> While this point needs to be further analyzed in a different paper, it is my intuitive feeling that a dignity-based influence test, as proposed, may lead to a more balanced conclusion. In examining Ames' dignity while under this influence to

autonomous in the first phase of electing to be an agent, partly because there was no evident humiliating influence on his desire to will to act as a Russian recruited agent. However, as the case of Markus Klingberg reveals, almost all agents, like the consensual slaves, face a problem of irreversibility.

The only way out of the agent status is through the consent of the handlers, since they have the incriminating information and the ability to ‘burn’ the agent. No agent could be positive that the consent for cessation of his operations, even in a case where it is expressly given, is indeed genuine and will be respected. Applying pure cold rationality may lead the agent to adopt a more balanced approach to this problem of irreversibility, since the intelligence organization has many reasons to refrain from burning the agent.<sup>87</sup> Having said that, the risk to the agent of an assessment error in this regard is, in most cases, too high.<sup>88</sup>

As previously contended, the irreversibility problem of intelligence agents is analogous to the two temporal phases of consensual slavery. First is the deliberation and consent phase of accepting the enslavement. Second comes the phase following the consent, a phase during which the slave or the agent may consider cessation of the enslavement or handling relations. My interpretation of autonomy suggests that the agent is not autonomous during the second phase, even though he does not aspire to reverse his status or even expressly wishes to proceed as an agent.

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continue his services, I believe a dignity-based influence review may take into account his culpability and moral guilt.

<sup>87</sup> Applying pure logic, the agent should normally assume that his handlers would not punish his unilateral cessation of activity by way of exposing him. After all, such a move is not in the interest of the handlers and the intelligence organization they represent. His arrest might result with embarrassment to the handling organization. It might expose HUMINT methods and even serve as an intimidating experience that might be reducing the willingness of potential agents to be recruited in the future. However, stakes are too high. Taking the risk that his handlers might make an exception or find a sophisticated way of addressing these concerns is not necessarily smart. There is also the risk that the handling organization will take extreme moves to secure secrecy, including getting rid of the agent.

<sup>88</sup> For example, Marwan Ashraf's death raised many speculations, some of which connected his death to Israeli intelligence officers disclosing the fact that he served the Israelis as a recruited agent. U Bar-Joseph, ‘The Intelligence Chief who went Fishing in the Cold: How Maj. Gen.(res.) Eli Zeira Exposed the Identity of Israel's Best Source Ever’ (2008) 23 *Intelligence and National Security* 226.

The very fact that the potential choice to reverse is being held by another person is a humiliating influence on the agent's choice to proceed and therefore suggests he is non-autonomous. This condition is very similar to the virtual third level of desires that is created when a 'liberal' master owns a slave. The scope of freedom of choice allowed de-facto does not erase the slave's understanding that his practical freedom is at the mercy of his master.

The case of Markus Klingberg illustrates in vivid terms the irreversibility problem.<sup>89</sup> According to his version of the events, it takes him more than four years to gain the courage to confront his handler and announce that he wishes to quit. His handler does not use coercive language, but neither does he accept the announced cessation. Klingberg's words allow us a rare view into the situation from the agent's perspective:

I quickly analyzed the situation. If I refuse, I'm taking the risk of bringing the situation to boiling temperature. They may give up. They may not insist. And maybe they won't. Maybe they won't give up...The presumption behind these relations was that they are voluntarily established and hence their strength. Not once, the question of "what if" crossed my mind. What if I wish to quit. That I could quit just the way I joined...Actually, it was the first time where for a second, I raised in my mind the option of the Russians moving to the level of extortion. But I immediately rejected it. It was obviously the worst alternative. At least this way, when we maintain voluntary relations, there's respect and appreciation and the meetings could be conducted in good spirit. The move into a different level of relations will have enormous consequences. The voluntary relations leave some flexibility on my end...No. I decided I won't refuse. That the relations with the Russians must not turn into coercion.<sup>90</sup>

## IX. CONCLUSION

From to the proposed analysis, it follows that all recruited agents, from the 'simple' walk-ins like Ames to the complicated monk-agents, are not autonomous. Obviously, the immediate conclusion is that the Supreme Court's classification of handling relations as contractual is

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<sup>89</sup> On the case of Markus Klingberg, an Israeli defense scientist who was in fact a recruited Russian agent for around 30 years (n 47).

<sup>90</sup> Klingberg and Sfard (n 47), 224-25.

wrong. Even the most senior and professional recruited agents that voluntarily accept the recruitment seem to be inherently non-autonomous.

One possible explanation to what seems to be an inconsistent rule in *Totten* and *Tenet* cases may be that Court is in fact aware of the wrong conceptualization of the handling relations as contractual. Court may be aware of the inconsistency reflected by the view of a contract between non-autonomous parties. Determining such a handling ‘contract’ to be unenforceable diminishes the effect of such wrong classification of the relations. By denying the binding promissory power from the handling ‘contract’ the Supreme court is in fact right, because due to lack of autonomous will, these relations cannot form a contract to start with. Whether out of mere legal intuition or a clear legal strategy, the Supreme Court sets a wrong rule and then cures the rule by forcing a contradicting legal result. By that, the Supreme Court is wrong and right about handling contracts and about personal autonomy.

What could be the reason for this dual-head approach of the Supreme Court? This is obviously open for various possible explanations and should be the target of future research. I may outline briefly some of the potential explanations. First, this inconsistency could be another instance of the inherent problem of inconsistency in the law-espionage relations, which has been characterized in recent literature.<sup>91</sup> Specifically, in this case, the view of a non-enforceable contract allows the law to portray a legitimate type of relations without pouring any legal substance into them. The contractual color aims at creating the impression of autonomous persons freely consenting to their valuable tasks.

At the same time, determining such contract to be non-binding aims to avoid the discrepancy between this concept of autonomous handling and handling in reality. It allows the law to be simultaneously present and absent in the realm of espionage. Had the Supreme Court simply ruled that this realm is beyond judicial scrutiny, it could have been construed as placing a label of illegitimacy over this national activity. The dual-head approach of labeling the handling relations as

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<sup>91</sup> R. Bitton, ‘The Legitimacy of Spying Among Nations’ (forthcoming) (2014) 29 *American University Journal of International Law*.

contractual yet unenforceable allows the Court to refrain from developing a law of intelligence (had the contract been recognized as enforceable) and at the same time to avoid a questionable status of illegitimacy (had the court ruled that these relations exist in a legal vacuum).<sup>92</sup>

This paper's focus on handling contracts demonstrates a problem of inconsistency in the relations of law and espionage. From this analysis, it does not follow that law cannot or should not regulate espionage. To the contrary, just like regulating warfare, legal regulation of spying is extremely necessary. It does however show clearly, that as in the case of warfare, the regulation of handling relations cannot be based on the personal autonomy of the players. But if the parties to collection of intelligence from human sources are not autonomous and hence one cannot classify their relations as contractual, what legal groundwork correctly underpins them?

Answering this question is left for further research. Intuitively, the answer seems to lie in the universal requirements of necessity and proportionality. According to this view, what removes objection to the handling of an agent is not his consent but rather the condition of necessity. The agent's consent is still required, when relevant and possible. However, it is required in order to comply with the requirement of proportionality and not for recognizing the formation

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<sup>92</sup> Theoretically, an autonomous agent is not totally impossible. This can be remotely possible if for some rare reason the agent assumes he is not subject to the irreversibility effect (for example, due to circumstances that ensure safe cessation) and if the handling of such an agent does not involve tight control, manipulation, subjection, servility or coercion. A contract among autonomous parties for handling relations is feasible in such rare cases. For example, the dignity-based test reveals autonomous agents on the far extreme point from Ames – 'soldier-agents'. During World War II, the British intelligence recruited many agents from occupied European countries. Many of these agents had interests that completely overlapped those of their handlers. There had usually been no humiliating influence on their choice to become agents. Irreversibility was not an issue. Circumstances made all manipulation and agent running tricks unnecessary. Actually, as a result, their relations with their handlers resembled more the relations of elite soldiers with their commanders. RV Jones, *Most Secret War: British Scientific Intelligence 1939-45* (London, Hodder & Stoughton 1979); RV Jones, 'Intelligence Ethics', in J Goldman (ed), *Ethics of Spying: A Reader for the Intelligence Professional* (Scarecrow Press 2006), 24-25.



of a contract. For handling a voluntary agent, although not an autonomous one, is ever less harmful than handling by coercion.

Until requirements like necessity and proportionality constitute the basis for a new law of espionage, law and espionage will remain in the legal twilight zone. This undefined zone allows a comfortable position to both spies and judges, away from the constraints of consistency. In the relations of law and espionage, where one can be voluntarily acting and not autonomous, where law can be at once present and absent, it is no wonder the Court can be both right and wrong.