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Anonymity, accountability and rights: a Kantian view of online anonymity in the South African constitutional framework

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2021
https://hdl.handle.net/10539/33072

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Research report

Date: 21 April 2021

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Anonymity, accountability and rights: A Kantian view of online anonymity in the South African constitutional framework

Candice Leigh Grieve

1 Introduction

The invention of the internet marked a major change in human history. Not only has the internet changed how people access information, it has fundamentally changed how people interact with one another. It can no longer be doubted that online actions and words can and do have serious impacts on people's lives, and the online world has become a space in which the very best and very worst of human ethical behaviour takes place. It is therefore important that ethicists give serious consideration to how people behave online. This is especially true considering that the internet has introduced a number of new ethical challenges or, at the very least, added complexities to existing ones. Whereas in the physical world, human action is limited by constraints such as time and place, the same is not always true online. Ethicists therefore need to consider the online world not only as a place where ethical actions play out but as a place where unique ethical issues are emerging which require urgent attention.

One of the most important issues to assess relates to anonymity online. Prior to the internet being widespread, anonymous action was, for the most part, hard to perform and relatively easy to unveil. Online, however, sophisticated and effective tools for anonymity are within the reach of users without them needing to have special skills, knowledge or forms of access. Thus, people are able to mask their identity and act anonymously with greater ease and on a much grander scale. This brings a number of ethical questions to the fore – Is there anything inherently wrong with acting anonymously? Should everyone be allowed to act anonymously, or only some people? What should be done if someone acting anonymously does something wrong or illegal? Who, if anyone, has the authority to regulate anonymous action?

There are some who would argue that online anonymity cannot be regulated and that we have to accept that online anonymity is increasingly prevalent and practically unavoidable. Putting aside this pessimistic position though, many say that anonymity should be allowed, if not encouraged, because there are various positive effects of allowing anonymity online including freer self-expression (Voorhoof 2010). A number of ethics writers argue that anonymity is not inherently a bad thing and that, as a general rule, it should be allowed (Minjeong 2003, 6). In fact, there are many who think that people are entitled to act anonymously online (ACLU of Georgia v. Miller 1997). This paper disagrees with the 'pro-anonymity' arguments and suggests that there is good reason to regulate online

anonymity. For reasons dealt with in the paper, the argument for restrictions on online anonymity is made from a Kantian perspective, particularly a Kantian-based perspective of human rights. In short, this paper argues that:

1. There are no human rights on which a "right to act anonymously" can be founded; and

2. Anonymity undermines agent accountability and therefore (at least from the Kantian perspective of the right), there is good reason to restrict people's ability to act anonymously.

The questions to be assessed in this paper are:

1. Do people have any entitlement to be anonymous online? More accurately, are there any human rights (e.g. privacy, freedom of expression) on which one can base a claim that people are entitled, as a matter of course, to act anonymously online?

2. Does the easily-available anonymity which the online world offers have any effect on the status of agents? In particular, and looking at the question from a Kantian perspective, does anonymity detract in any way from an individual's accountability and ethical agency?

3. In light to the answers to the above, are there any reasons to think anonymity might not be desirable as the norm online?

This assessment will be structured as follows:

1. Firstly, the Kantian view of ethics (divided into the right and morality) will be explained;

2. Secondly, I provide an analysis of why a Kantian framework is a 'good fit' with rights-based theories of ethics and, specifically, in the South African constitutional context;

3. Third, I set out a number of constitutional rights in South Africa and the effect anonymity has on them. In this section, I also provide an argument as to why there can be no 'right to anonymity';

4. Fourth, I present an argument against an entitlement to anonymity online from the perspective of the Kantian theory of right;

5. Fifth, I give some limited views on the question of online anonymity from the perspective of Kantian morality; and

6. Finally, I briefly describe and answer a potential objection to my arguments using the specific example of "doxing".

2 The Kantian framework

It is important to specify what is meant by a "Kantian framework" (and what is meant by a "Kantian framework of rights" – though this is dealt with later). As a starting point, Kantian academics are at pains to distinguish between the actual writings of Kant on ethics (Kant's ethics) and ethical thinking derived from, but not strictly adherent to, Kant's original writings (Kantian ethics) (O'Neill 1993, 183-184). The assessment forming the substance of this report falls into the realm of *Kantian ethics*. Of course, the question that then arises is precisely what 'Kantian ethics' entails.

Kantian ethics can be split into portions – namely the theory of right and Kantian morals (unlike other ethicists, Kantians do not use 'ethics' and 'morals' interchangeably) (Ripstein 2009, 11). The theory of right concerns itself with the relations between people and the "outer form" of people's conduct (Ripstein 2009, 11-12). The "outer form" of a person's actions ties in with the concept of "coercive enforcement" (dealt with later) in that the "outer form" of people's actions can be coerced (i.e. someone can be prevented from acting in a certain way) which is vital if the right is to effectively govern relations between people. Kantian morality, on the other hand, looks at the interior element of an agent's motivation and thus deals with an agent's 'internal world'. The two areas do have some similarities – both, for example, emphasize the equality of persons and require us to respect other agents (Wood 2008, 78-79). However, they remain separate and, in light of this separation, an agent can perform an action which is right, but not moral, if the outer form satisfies the requirements of the right but the agent's 'internal world' (e.g. their motivation) does not meet the requirements of Kantian morality.

Before fully explaining the difference between 'right' and 'moral' in more detail, it is helpful to understand what an 'agent' is. In this assessment, an agent refers to an actor capable of acting ethically or unethically. Kant, in his

writings, provides a specific “theory of human nature” as well as a definition of an agent. Varden notes that Kant views a human agent as comprised of ‘animalistic’ characteristics (for example, human social elements) as well as characteristics of ‘higher functioning’ (Varden, Kant and Privacy 2020). It is the ‘higher functioning’ aspect (i.e. rationality) that is important for ethical agency. Kantian ethics thus gives special status to agents capable of rationality. In Kant’s own writings, only human beings are recognized as rational agents, with animals being incapable of rationality (Faggion, Madrid and Pinzani 2016, 154). Though there are vigorous debates about whether non-human animals can be rational, this will not be examined here and rational agents will be taken to mean humans.

2.1 The Kantian theory of right

The theory of right is centred on the “universal law” which holds that “an action is right if it can co-exist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law” (Ripstein 2009, 12-13). Put more simply, actions are right if they do not infringe on the freedom of others or if they are in accordance with rules that respect the freedom of others. The key concept of the universal law is thus freedom, which Kantians take to be being one’s own master – in other words having the ability to make determinations about one’s own life and actions for oneself, without being coerced or compelled to obey another person’s will (Ripstein 2009, 13). The importance of freedom stems, as Gewirth puts it (albeit not in a Kantian context), from the fact that “freedom is a necessary condition of human purposive action” – in other words, whilst agency is a core part of being able to act ethically, freedom to make one’s own choices is a central requirement of agency (Gewirth 1982, 15).

As mentioned, the right is concerned with the ‘external’ aspect of an agent’s actions. The right does not dictate what an agent should want, it merely seeks to ensure that everyone has the same equal freedom to pursue their own agendas. The right is thus the “supreme limiting condition” imposed on all to ensure that everyone acts in a manner which respects the freedom of others (Faggion, Madrid and Pinzani 2016, 57). The right therefore gives rise to ‘juridical duties’, being duties that every agent must obey which regulate one’s conduct and which an agent can be coercively bound to obey by the State. These are duties which one owes to others (i.e. that regulate the means one employs in seeking one’s ends and one’s interactions with others) (Faggion, Madrid and Pinzani 2016, 53-55). It does not, however, dictate what an agent should prioritize in their life or what ends an agent should seek by their actions (Wood 2008, 75).

In light of its focus on the external and on limiting the actions of individual agents, the right is inextricably tied to questions of law and public order. On a Kantian interpretation, the central function of public and legal institutions must be ensuring that the universal law is applied and followed in a manner which allows a "plurality of persons" to exist freely within a society (Ripstein 2009, 9). In this regard, public institutions are granted a special dispensation, namely, the ability to use "coercive enforcement" to ensure that the universal law is respected (Wood 2008, 79). For example, a State may coercively enforce the theory of right by imprisoning an individual who infringes the freedom of others by, for example, committing assault in order to protect the freedom of others and ensure compliance with the Kantian requirements of the right.

2.2 Kantian morality

Under the Kantian framework, morality deals with the 'internal element' of ethics. Significantly, some of the key issues Kantian morality deals with include:

1. Why an agent performs the actions they perform; and

2. Whether the agent acts with a good will.

For a Kantian, a good will is the only "unconditional good" (O'Neill 1993, 176). A good will is defined as a will "which makes its decisions on the basis of the moral law" (i.e. a will which is directed by a desire to act morally) (Johnson and Cureton Spring 2019, 4). Kantian morality, unlike Kantian right action, cannot be coercively enforced.

In terms of the principles underpinning morality, Kantian agents must act in accordance with the supreme moral law, the Categorical Imperative (O'Neill 1993, 177). The Categorical Imperative has three articulations, being:

1. Universalizability: One must only act in accordance with maxims that the one could accept as universally applicable.

2. Treating others as ends: One must respect the rationality and autonomy of others, and one is obliged to treat people as "ends in themselves" (and never treat others as a "mere means").

3. The kingdom of ends: Agents are both moral 'legislators' and 'subjects' in that they create the very maxims to which they are bound. In a properly and ideally ethical system, all agents form part of a "kingdom of ends" in which each agent is an ends in themselves, and respects that this is true of everyone else.

   (Darwall 2003, 24-25) (Shafer-Landau, Chapter 11 - The Kantian Perspective: Fairness and Justice 2010) (Shafer-Landau, Chapter 12 - The Kantian Perspective: Autonomy and Respect 2010)

Unlike the theory of right (which concerns itself only with the external conduct of an agent), morality *does* speak to what ends (internal goals) an agent should seek. For example, from a moral perspective, an agent is obliged to be benevolent to others and should pursue self-improvement (Wood 2008, 75). However, the duties arising from morality are "duties of virtue" (as opposed to juridical duties) – in other words, these are duties that are complied with internally through self-regulation, and cannot be coercively enforced by public authorities (Wood 2008, 74-78). In light of this, moral duties come in different forms (e.g. perfect vs imperfect duties) depending on the stringency of their application under a Kantian framework (Johnson and Cureton Spring 2019).

Morality in the Kantian sense is also able to accommodate a plurality of different 'goods' or worthy ends depending on the skills, position and interests of different agents – for example, a musician and sportsman may both achieve some level of self-improvement through their different endeavours (self-improvement being an important component of treating oneself as an end and not a mere means). Furthermore, Kantians are firmly of the view that a morally worthy agent would always adhere to the principles of right action and act in a way which respects others' freedom and autonomy (O'Neill 1993, 177).

Perhaps the most significant concepts for Kantian morality are:

- The inherent dignity of persons – arising from the fact that every person is an "ends in themselves" (and never a "mere means") and must be treated in accordance with their inherent dignity.

- The equality of persons (since all persons are "ends in themselves") and the fact that an agent should be consistent in their treatment of different persons.

- The recognition of the fact that persons have inherent dignity despite their differences and that morality must allow for this diversity and ensure that different individuals are able to coexist peacefully despite it.

(Johnson and Cureton Spring 2019)

2.3 Kant on states

Turning back to the theory of right action, it is helpful to sketch briefly the position of the State and public authorities, particularly to facilitate the discussion of the South African Constitution from a Kantian perspective. The State (made up of various public authorities and institutions) has a unique status. As I have mentioned, it alone has the ability to coerce compliance with the universal law – through policing and punishment. The State is therefore vital to the concept of right – it is the body capable of enforcing the universal law through its (valid) coercive powers, and it is also the body responsible for ensuring that citizens are not subject to coercion by others (Varden, Kant and Privacy 2020, 413-414). Linked to this, the State also has the distinctive capacity to levy taxes on citizens which is vital to the State's ability to fund the activities it must undertake (Ripstein 2009, 25-29).

Being a citizen of the State is not a voluntary choice that an agent makes (Ripstein 2009, 189-191). However, the State still has special duties towards all of its citizens. The State's true function is to create "the rightful condition in which each person can be his or her own master" (Ripstein 2009, 194). As a result of this (and its special ability to collect taxes), the State has specific, special duties to vulnerable citizens such as the poor. This is because, as Wood puts it, ""[i]f I must either face destitution or else live only by working for you on your terms, then I am not free to choose how I live" (Wood 2008, 84). In other words, the poor are at great risk of being subject to other people's wills which would undermine their status as free agents. The State must therefore put all its citizens in a position to act autonomously, which may require ensuring their basic needs are met (as without those needs being met, the vulnerable may be subjugated by others) (Ripstein 2009, 25-29).

A government that does not respect the universal law does not qualify as a "public authority" on the Kantian view. Varden gives the example of Nazi Germany which oppressed, mistreated and murdered its Jewish citizens (in blatant violation of the universal law) and notes that the Nazi regime was not a public authority in the Kantian sense (Varden, Kant and Privacy 2020, 415). As a result, the 'coercive enforcement' by the Nazi regime was not legitimate and citizens did not owe the regime the same duties they would have owed a legitimate government (e.g. the due

payment of taxes) (Varden, Kant and Privacy 2020, 414-416). Persons living under an illegitimate government live in something akin to a "state of nature" being a state in which justice is "impossible" (Varden, Kant and Privacy 2020, 412-413).

In light of its obligation to ensure the autonomy of all citizens, the State must be impartial and must be fiercely guarded from being hijacked by private persons seeking their own gain. As a result, Kantians favour a republican and constitutional set-up for states (O'Neill 1993, 180). The ideal would thus be a government of democratically elected representatives subject to a constitution in terms of which "power belongs not to human beings but to the laws" (Ripstein 2009, 191).

3 Kant and the Constitution

The most relevant portion of the Constitution for the purposes of this paper is the Bill of Rights (Chapter 2 of the Constitution) which contains the fundamental human rights recognised and protected in South Africa. In order to understand the application of a Kantian framework to the Constitution, the initial questions that must be addressed are:

1. What is meant by human rights?

2. How do human rights link to a Kantian framework?

3. Is a Kantian framework useful in discussing and developing South African constitutional rights?

Each of these issues is addressed in turn below.

3.1 The definition of human rights

Rights refer to the entitlements that an entity or individual has. Rights can arise in a number of different circumstances – for example, entering into a contract with another person may give you certain contractual entitlements that your counterparty is obliged to meet. Relevant to this assessment though are human rights.

Human rights are entitlements that all living human beings are deemed to have by virtue of their mere existence as humans (Gewirth 1982, 1-3). It is important to note that all rights (human rights, contractual rights and others), create both entitlements and duties. If a person has a right (i.e. is entitled to something), this simultaneously creates obligations on other parties. These obligations may be negative (e.g. not interfering with X's right) or positive (e.g. being required to take active steps to ensure X's right) (Nickel 2019, 2).

One must, however, distinguish between moral rights and legal rights. Moral human rights are rights that, ethicists would argue, apply to human beings based on certain underlying ethical arguments and principles. Legal human rights are more straightforward – they are the human rights recognized and protected by a particular country's legislation (Nickel 2019, 1-3). In South Africa, the Bill of Rights is the foundational source of *legal* human rights.

This distinction between moral and legal rights does not, however, mean that the two concepts do not overlap. In arguing for a human right to be legislated, a legislator will likely appeal to moral arguments. Similarly, an ethicist who believes a certain human right is significant will argue that it must be codified into law.

In discourse, the distinction between legal and moral debates on rights is often muddied; with writers presenting ideas which weave concepts from legal rights and moral rights together. It should be noted that I do not intend to make a legal argument about human rights. What I intend to demonstrate is that an *ethical* understanding of 'rights' does not ground an *ethical* entitlement to anonymity. To the extent that I refer to the legal understanding of certain rights (e.g. privacy), I do so only to focus on the moral understanding of these rights that South African laws and courts have recognized. As I have said, legal ideas around human rights are linked to the moral ideas around rights (Gewirth 1982, 2) (Nickel 2019, 4). However, the discussion about the intersection between ethics and law is complex and will not be dealt with here. Suffice to say that an intersection exists (especially when dealing with human rights) and that the South African constitutional project is certainly, at least in part, an ethical project. The Constitution is not merely aimed at a legalistic protection of negative rights but also at fostering a diverse and inclusive society where mutual respect and cooperation prevail. The upshot of the *ethical* arguments presented here is simply that there may be some *ethical* impetus to put in place laws regulating online anonymity.

Different theorists in the legal and ethics spheres have many different ideas regarding the content of human rights, the number of rights and the justification for human rights. This assessment will, for reasons to be explained below, take a Kantian approach to human rights.

3.2 Kantian thinking and human rights

Kantian ethics (both the Kantian concepts of right and morality) is an important theory in the justification and understanding of human rights. However, many rights theorists rely on Kantian ideas without expressly naming Kant. Gewirth, for example, notes that the aim of rights is to ensure that "each person [has] rational autonomy in the sense of being a self-controlling, self-developing agent" (Gewirth 1982, 5) – a thesis with a distinctly Kantian flavour. Yet even when not explicitly acknowledged, the Kantian idea that all people are equally deserving of having their dignity recognized (and having their freedom respected) is foundational to today's theories of human rights. Kantian ideas not only provide a basis for human rights (i.e. the inherent dignity of persons based on their autonomy) but also rules regarding how persons should be treated (i.e. in a manner that respects and preserves that dignity and autonomy) (Faggion, Madrid and Pinzani 2016, 50-54). It is therefore not surprising that themes from Kantian ethics consistently find their way into human rights discourse. This can be demonstrated with reference to the United Nation's Universal Declaration of Human Rights – a document considered to be of paramount importance for legal and ethical rights theorists worldwide.

In terms of the Kantian theory of right, Article 29 of the Universal Declaration of Human Rights states that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others" (United Nations 1948). This is an example of the preservation and limitation of a person's freedom as is required by the Kantian theory of right. Furthermore, Articles 22 and 25 recognize the right of persons to social security and a sufficient standard of living (United Nations 1948). These rights are aimed at ensuring people should have their basic needs met which, for a Kantian, is key to ensuring they are not vulnerable to losing their freedom and agency.

In terms of Kantian morality, Article 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights" and that "they are endowed with reason and conscience" (United Nations 1948). The centrality of equal and inherent dignity is apparent (as it is in the realm of Kantian morality). Furthermore, the notion that a diversity of people can be accommodated within a society and that they should be able to co-exist peacefully is demonstrated in Article 18 which enshrines everyone's right to their own beliefs, religion and freedom of thought (United Nations 1948).

One important point to note from a *Kantian* perspective of rights is that there is not necessarily a plurality of human rights whereas many legal rights frameworks (e.g. the Constitution and the Universal Declaration of Human Rights) do contain a 'plurality of rights'. For a Kantian though, the core concept of dignity contains "a multiplicity within the one human right" – in other words, all the 'rights' that a person may have (for example, the right to privacy or bodily security) flow from that person's single right to have their dignity recognized and respected (Faggion, Madrid and Pinzani 2016, 52 citing Hoffe 2010, 87).

3.3 Kantian-rights thinking in the South African context

The next issue is whether a Kantian view of rights is useful in a South African constitutional context. The simple answer is an unequivocal 'yes'. The South African Constitution incorporates and reflects a number of concepts from the Kantian theory of right and the Kantian view of morality.

As a starting point, Chaskalson (the former President of the Constitutional Court) notes that "human dignity, equality and freedom" are the foundational values of the Constitution (Chaskalson 2011, 1380-1381). All three of these concepts are core to Kantian ethics, the former two to morality and the latter to the theory of right.

Chaskalson goes on to offer a comprehensive view of the history of South Africa, in which people of colour had their dignity disregarded and disrespected, and to deal with some of the important case law around dignity (Chaskalson 2011). He does this to counter the view that dignity is a "vacuous concept" (Chaskalson 2011, 1381). In this vein, South African courts have repeatedly emphasized the importance of dignity. In *Makwanyane*, the Constitutional Court ties the concept of dignity to our "common humanity" (S v Makwanyane 1995, 329) – in line with the Kantian moral idea that humans (as free and rational agents) have *inherent* dignity. In fact, in the *Dodo* case, the court went so far as to quote Kantian terminology to describe the concept of dignity, noting that people "ought to be treated as ends in themselves, never merely as means to an end" (S v Dodo 2001, 38).

In terms of the Kantian theory of right, in *Walker*, the Constitutional Court also emphasized that fairness must be assessed "simultaneously from the diverse points of view" which links with the Kantian idea of the universal law (under the theory of right) and the accommodation of a diverse range of people within a society (City Council of Pretoria v Walker 1998, 130). Moreover, section 36 of the Constitution recognises that rights (including the rights dealt with above) may be subject to reasonable limitations – for example, where public interest requires an

infringement on a person's privacy (President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999). This ties to the position of the universal law under the theory of right as the "supreme limiting condition" requiring that people should be allowed to be autonomous to the extent that they do not infringe on the autonomy of others (Faggion, Madrid and Pinzani 2016, 57).

Further echoes of Kantian thinking on 'the right' can be found in South Africa's approach to socio-economic rights – rights which create positive obligations on the government to ensure everyone has access to "a basic set of social goods" (Currie and de Waal 2013, 564). Firstly, the Constitution recognizes the Kantian idea that people's basic rights should be met to enable them to be autonomous (i.e. not vulnerable to be coerced by others). Secondly, the Constitution follows the Kantian lead by placing the obligation to meet these basic needs on the State which, as discussed above, is correctly positioned to have this obligation from a Kantian perspective (Currie and de Waal 2013, 564-566) (Ripstein 2009, 25-29) (Wood 2008, 84). Finally, the Constitution entrenches South Africa as a constitutional republic in which the 'power belongs to the law' in that the Constitution is the supreme law of the land. The South African framework thus takes on the exact form of governance that Kant advocates (O'Neill 1993, 180) (Ripstein 2009, 191).

It can therefore certainly be said that the Kantian goals of:

1. Every person being autonomous and self-determining subject to the restriction of respecting the autonomy of others (the theory of right); and

2. Individuals being treated as entities with inherent, equal dignity (morality)

resonate strongly with what the South African Constitution strives towards.

In summary then, the use of a Kantian framework is appropriate because:

i. Kantian thinking has influenced rights-based theories of ethics. These rights-based ethics have, in turn, had a profound influence on legal conceptions of rights;

ii. More specifically, the important ideas from Kantian ethics (such as human dignity) align well with the ideals of the South African constitutional framework.

4 Rights and anonymity

4.1 Anonymity

Anonymity can be defined as a condition in which a person or entity is not identifiable because their usual identifying markers (e.g. their name) cannot be attributed to them (Wallace 2008, 168). There are a number of ways in which a person can make themselves anonymous depending on the context – from hiding their face to using a throw-away account on the internet that cannot be traced to them. Obviously a person can be unintentionally anonymous (e.g. the owner of the car that was parked next to me is 'unidentifiable' unless I see that person in the car, and happen to know who that person is) but the main concern for ethicists and for this paper, are instances where a person takes deliberate steps to render themselves unidentifiable (Wallace 2008, 171).

Progress in technology has opened up an entirely new world to agents who wish to act anonymously. The internet in particular has changed the way people live, learn, work and socialize. The online world is very much a part of the real world and what happens online has significant and real consequences. Yet, in stark contrast to the physical world, the online sphere allows agents to act anonymously in an entirely new way. Not only are agents able to better conceal their identity than they would in the physical world, they are also able to act anonymously for the bulk of their time online (as opposed to in the physical world where people are predominantly identifiable in some sense, and must take special steps to be anonymous).

A number of issues have arisen linked to this ability to be anonymous. Multiple studies have suggested that "anonymous individuals generally end up choosing selfish strategies motivated by self-interest" (Nogami and Yoshida 2013, 1284). More than this though, it would appear that people are more inclined to act, not just selfishly, but unethically when acting anonymously. Of course, there are many examples of this in the online sphere. For example:

1. Agents are able to engage in bullying or shaming behaviour anonymously. This can even take the form of a 'mob' of anonymous users bullying an individual in instances of 'vigilantism', where there is a lack of accountability as the 'mob' members ensure that they are unidentifiable.

2. Agents are able to form groups of like-minded individuals where all of the participants are anonymous. This is particularly troubling where these groups are hate groups and individuals are given the ability to normalize

and expand their bigotry and hatred. A disturbing example of this came to light when a large number of law enforcement personnel in the United States were discovered to be anonymous members of online white supremacist groups.

(Laidlaw 2017) (Statt 2019) (Wallace 2008, 165-168)

The question that must be asked then is: are there any human rights on which an agent can rely to claim an entitlement to act anonymously online – especially where their anonymous actions may cause harm? There are three rights within the South African Constitution which could potentially ground an entitlement to be anonymous, namely privacy, freedom of speech and the right to security of person.[1] Each of these will be dealt with in turn below.

4.2 Privacy

4.2.1 The South African legal position

The right to privacy is enshrined in section 14 of the Bill of Rights (The Constitution of the Republic of South Africa 1996) – although privacy has been a feature of South African law for a long time before the creation of the Constitution. Privacy is recognized as a personality right (i.e. a right linked to one's identity) and has been defined as "life characterised by seclusion from the public and from publicity" (Neethling 2009, 431). For as long as privacy has been recognized as a right (under the Constitution and/ or common law), South African courts have had to consider the meaning of privacy in order to delineate the limitations of privacy and distinguish between lawful and unlawful invasions of privacy (Currie and de Waal 2013, 294-295).

Arguably the most important cases regarding the right to privacy are *National Coalition for Gay and Lesbian Equality* (National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998), *Bernstein* (Bernstein and Others v Bester NO and Others 1996) and *O'Keeffe* (O'Keeffe v Argus Printing & Publishing Co Ltd 1954).

[1] There may be other rights but this paper focuses on these three.

In *National Coalition for Gay and Lesbian Equality*, the Constitutional Court held that the right to privacy "recognised that we all have a right to a sphere of private intimacy and autonomy which allowed us to establish and nurture human relationships without interference from the outside community" (National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998).

In *Bernstein*, the Constitutional Court linked privacy to the conditions "necessary to have one's own autonomous identity" which ties privacy to the Kantian concept of the right (which deals with the prerequisites for an agent to be autonomous). Similarly, the court in ***O'Keeffe*** linked the right to privacy to the concept of dignity and, citing Villiers, noted that privacy is one of a person's "primordial rights" and that "every person is bound to respect [these] primordial rights; and they are capable of being enforced by external compulsion" (O'Keeffe v Argus Printing & Publishing Co Ltd 1954, 247 citing de Villiers 1899, 24-25). Interestingly, this contains elements of the Kantian theory of right (in that the right to privacy is capable of coercive enforcement) and morality (in the reliance on the inherent dignity of persons).

4.2.2 Privacy and anonymity

Anonymity has frequently been tied to the right to privacy. Privacy encompasses one's ability and right to choose what information about oneself to disclose (or not disclose) (Neethling 2009, 431). Anonymity, as described above, refers to the ability to withhold information about oneself in the form of the markers that identify one (Voorhoof 2010, 3). The link thus seems to be in the discretion a person has to withhold information about themselves.

There are, however, issues with linking anonymity with the right to privacy, let alone grounding an entitlement to anonymity in the right to privacy. As a starting point, it is not clear that a lack of anonymity necessarily undermines the right to privacy – one can maintain privacy without being anonymous in many instances. Secondly, privacy is tied to the private sphere and most online interactions happen in the public sphere. Arising from this, it must be noted that there seems to be a tension in claiming a right to privacy when one is acting in the public sphere. This point is well-made in the *Jordan* judgment where the Constitutional Court, quoting the American judgment in *Roberts*, noted that "[p]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly" (S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002) (Roberts v United States

Jaycees 1984). Thus, if an agent chooses to act in the public sphere (which the majority of the online realm is), it is contradictory for them to fall back on a right to privacy merely because it suits them.

4.3 Freedom of expression

4.3.1 The South African legal position

Section 16 of the Constitution guarantees the right to freedom of expression, including the right to "receive or impart information or ideas" (The Constitution of the Republic of South Africa 1996). The right to freedom of expression is seen as fundamental to democracy, good governance and information-sharing (South African Litigation Centre 2017).

The Constitutional Court has tied freedom of speech to the concept of dignity and has referred to the importance of free expression in the preservation and advancement of people's autonomy (Islamic Unity Convention v Independent Broadcasting Authority 2002, 26-28) (South African National Defence Union v Minister of Defence 1996, 19-35). These ideas tie to the Kantian theory of right (as the ability to express oneself is an expression of one's autonomy) and Kantian morality (in the links to human dignity).

As with all rights in the Constitution, the right to freedom of expression can be limited (The Constitution of the Republic of South Africa 1996, s36). The wording of section 16 itself also expressly limits the right to freedom of expression by, for example, prohibiting war propaganda (The Constitution of the Republic of South Africa 1996). Furthermore, the Constitutional Court has held that freedom of expression is not a "pre-eminent" right (i.e. a right that surpasses others) as it is in other countries (such as the United States of America) (The Citizen 1978 (Pty) Ltd and Others v McBride 2011, 148). From a Kantian perspective, this would make sense as freedom of expression is linked to one's autonomy and dignity but is in turn limited by the dignity and autonomy of others.

4.3.2 Freedom of expression and anonymity

Anonymity has long been associated with freedom of expression (Baker 2014, 166-168). For example, anonymity is often viewed as essential to whistle-blowing and the expression of viewpoints in difficult

circumstances (for example, criticizing one's government – especially where the government is oppressive) (Minjeong 2003, 2-4). In a less extreme example, it may be suggested that anonymity has a significant positive impact in that it creates space for people to overcome difficult power dynamics by expressing themselves anonymously, such as when women opt to anonymously share stories of sexual abuse by powerful men (as in the #MeToo movement).

Despite this, it has tritely been suggested that "freedom of speech does not mean freedom from consequences".[2] It must be noted that anonymity has the exact result of allowing an agent to avoid consequences (Voorhoof 2010, 3). This is an issue which will be dealt with in more detail below.

4.4 Freedom and security of person

4.4.1 The South African legal position

The right of each person to freedom and security of person is set out in section 12 of the Constitution (The Constitution of the Republic of South Africa 1996). This right aims to "protect the physical integrity of every person" (Freedman 2012, 72). This is demonstrated by the express provisions in section 12 which prohibit things such as torture (The Constitution of the Republic of South Africa 1996). This right would be recognized both under the Kantian theory of right and Kantian morality as infringing on someone's bodily integrity could adversely affect their autonomy and/or their inherent dignity. As with all constitutional rights, the right to freedom and security of person is subject to limitation (The Constitution of the Republic of South Africa 1996, s36).

4.4.2 Security and anonymity

Anonymity ties to the right of security of a person in some, but not all, cases where anonymity occurs. In instances where anonymity *is* linked to this right it is because there is a risk that the person will suffer

[2] See for example Yousef Munayyer 'Freedom of Speech, Not Freedom From Consequences' The New York Times (2015) available at https://www.nytimes.com/roomfordebate/2015/01/10/when-satire-cuts-both-ways/freedom-of-speech-not-freedom-from-consequences (last accessed on 11 August 2020).

physical harm if their identity is disclosed (Voorhoof 2010, 3-4). The best examples of this often refer to individuals living in totalitarian regimes who risk arrest, prosecution and even death merely for levying fair criticism against their governments (Voorhoof 2010, 3-4).

However, there does not seem to be a clear and constant link between anonymity and the right to security of persons. As mentioned above, the security of a person is not relevant in every case where someone acts anonymously (e.g. a person making online posts criticizing someone in another country usually has no cause to think that they must act anonymously lest they risk being physically harmed). Therefore, it does not seem that a general entitlement to anonymity could be founded in the right of security of a person.

4.5 A 'right' to anonymity in a South African constitutional framework

Various writers, especially in the legal setting, have referred to a 'right to anonymity' (Voorhoof 2010) (Martin and Fargo 2015). In their view, there are already recognized entitlements be anonymous within many legal systems even if a more general right to anonymity has not yet been codified (Martin and Fargo 2015, 365).

However, Martin and Fargo, in their assessment of the legal right to anonymity, argue that "South Africa is one of the most restrictive nations of online anonymous speech in the world" (Martin and Fargo 2015, 363). They refer to South African laws requiring mobile and internet service providers to maintain a database of identifying client information as well as requirements to share this information with government authorities in certain circumstances (Martin and Fargo 2015, 363-364). Martin and Fargo argue that the right of freedom of expression (which is recognised on an international level and in most, if not all, democratic nations) requires a right to anonymity online in line with "recognizing the primacy of 'core' online anonymous expression to public life" (Martin and Fargo 2015, 371). Though I note that Martin and Fargo do accept that this right to anonymity may be subject to reasonable qualifications set out in appropriate legislation (Martin and Fargo 2015, 386). Voorhoof, like Martin and Fargo, ties a right to anonymity to freedom of expression and provides examples of what he believes are actual instances of legal systems recognizing a right to anonymity – such as the secret ballots (a common feature of voting in democratic countries) and closed court proceedings where the names of one or all the parties are withheld from publication (Voorhoof 2010, 5-7). Referring to the fictional example of George Orwell's *1984*, Voorhoof argues that "… a society in which the individual is permanently monitored and where (occasional) anonymity is inexistent, is

dehumanising. It is indeed only in modern democracies that rights of anonymity became respected and guaranteed as fundamental human rights" (Voorhoof 2010, 3).

Minjeong, in dealing with the idea that a right to anonymity flows from the right to freedom of expression, contends that a right to anonymity is also important for the protection of the right to free association (Minjeong 2003, 1-3). Minjeong argues that online communities are important spaces for association between like-minded people in order for them to share ideas, experiences and advice. Minjeong specifically makes this point with reference to various pieces of case law in the United States of America dealing with the right of individuals to associate anonymously as well as the rights of collectives to facilitate anonymous association between their members (Minjeong 2003, 7-14). Case law in the USA, according to Minjeong, protects a right to anonymity in the context of free association, provided that the association:

1) acts within the law and has lawful aims;
2) "has a history of their members being harassed"; and
3) can demonstrate that anonymity is required to protect the members' association rights.

(Minjeong 2003, 20)

It must be noted that notwithstanding his arguments about anonymity and freedom of association, even Minjeong recognizes the priority of freedom of expression as the pillar of arguments in favour of a right to anonymity (Minjeong 2003, 1-3).

Starting with the arguments related to freedom of expression, it is important to note that often these arguments come from sources prioritizing the constitutional framework of the USA (Martin and Fargo 2015). In the USA, the right to freedom of expression is paramount, which is not the case in South Africa (The Citizen 1978 (Pty) Ltd and Others v McBride 2011, 148). In South Africa, as explained above, the right to dignity 'ranks above' the right to freedom of expression. The significance of this lies in the fact that comparing the USA and South Africa involves a comparison of countries with fundamentally different value systems. For example, in South Africa, the Constitutional Court recognized that, in a particular context, a man referring to his co-worker as "daardie swart man" (that black man) could be offensive and could undermine his co-worker's dignity (Rustenburg Platinum Mine v SAEWA obo Bester and Others 2018, 52-60). It is difficult to imagine a court in the USA making as nuanced a judgment where the words themselves appear neutral but are insulting in the specific context. It seems more likely that a court in the USA would rely on a freedom of expression and the lack of express vulgarity. It is therefore not

at all clear that arguments based on the USA's constitution, and its reverence for freedom of expression, should be accepted in a South African constitutional context.

Turning to broader comments on the arguments made by writers such as Martin and Fargo, Voorhoof and Minjeong, it is unclear how an inability to hide behind a veil of anonymity directly undermines human rights such as freedom of expression and free association. In fact, Voorhoof's Orwellian nightmare seems to rather overstate the position (Voorhoof 2010, 3). Anonymity is not synonymous with privacy – one can have private spaces and interactions without being anonymous (e.g. family interactions may be private but one is not anonymous in those spaces) – nor is anonymity synonymous with free expression or freedom of association.

Though there may be specific cases where anonymity is useful, it seems there are often instances where anonymity is important because there is some other value or practical purpose at play. To demonstrate this, some of the examples are dealt with below:

1. Courts are sometimes willing to allow victims of sexual assaults to have their names withheld from the publication (Voorhoof 2010, 6). In South Africa, section 154 of the Criminal Procedure Act, 1997 allows for this. This allowance is aimed at protecting victims from harassment and humiliation (Voorhoof 2010, 6). There are two points to be made in this regard. Firstly, that sexual assault is private in nature – in particular, victims of sexual assault have had an intensely private and personal aspect of their life violated by the perpetrator against their will. These are not instances of the victim acting in the public sphere and expecting to remain anonymous. On the contrary, these are instances of someone being assaulted and having their privacy breached by a perpetrator. Secondly, allowances of the sort contained in section 154 of the Criminal Procedure Act are often aimed at preventing victims from being threatened and coerced by their attacker or persons seeking to assist their attacker by tampering with the victim's testimony.

2. Some form of anonymity is often granted in court proceedings related to children (in that the children are not named or identified), especially where those cases deal with sexual crimes against children (Voorhoof 2010, 6). Again, in South Africa, section 154 of the Criminal Procedure Act deals with this. The two points raised in respect of sexual assault cases apply here again. In addition, it must be noted that children are especially vulnerable to coercion. Furthermore, most legal systems provide special concessions for children taking into account that they are under-developed and require special care and guidance.

3. Voting, especially voting for government offices, usually takes place by secret ballots (Voorhoof 2010, 5). It is not clear that secret ballots constitute examples of 'anonymity' in the same manner as anonymity in the online sphere. Voters are, in fact, required to identify themselves and *prove* their identity to demonstrate that they are eligible to vote – in this sense, they are not anonymous at all. Furthermore, once again, there is the risk of coercion – secret ballots exist precisely to prevent people from being coerced to reveal their vote which could lead to individuals being coerced into voting in a particular manner. The secrecy of the ballot is therefore not quite the same as the 'secrecy' one can achieve by posting anonymously online – ballot secrecy is tied to maintaining the integrity of the voting process where the "secrecy" of posting anonymously online does not serve a similarly important practical purpose.

The interesting point arising from all of these examples is this – in reality, the general rule is that one is not anonymous and anonymity is only allowed in special circumstances (such as those mentioned above) because there are compelling reasons. Yet, authors such as Voorhoof appear to motivate for a *general* right to anonymity (Voorhoof 2010, 3-4), notwithstanding that their examples (e.g. court cases where parties' names are withheld) relate to *specific* exceptions to the general rule of non-anonymity.

There is also another issue with linking human rights to a 'right to anonymity' or arguing that anonymity is a right in itself – namely that human rights attach *to individuals*. A person does not have rights in the abstract. They have rights as an individual human or, differently put, as an *agent*. The idea of agency is, of course, bound up with accountability (Bodle 2013 Vol 41 No. 1, 2) (Marx 2006, 19). Human rights exist to protect a special feature of humanity. Furthermore, many rights-theory authors identify this special feature as 'agency' (i.e. the ability to act and do so autonomously) (Nickel 2019, 5). Authors like Griffin even specify that this agency refers moral agency – the ability not just to act but to act and to have one's actions labelled moral or immoral (Nickel 2019, 5). Regardless of the precise views one has on agency, at the very least, it is not clear that a person would be entitled to rely on their human rights such as freedom of expression, which they have by virtue of their status as a human agent, to undermine that very agency. If I rely on my freedom of expression as an agent to air an odious worldview for example, why should I be able to rely on my right as an individual to free expression on the one hand whilst simultaneously divorcing myself from the accountability that should go hand in hand with my having rights? It would seem counterintuitive that I should be allowed to claim the upside of my human right to freedom of expression whilst swerving the downside of being responsible for my actions. This suggests that there are significant difficulties with relying on human rights (which result from human agency and which attach specific to people as individuals) to ground an entitlement to act anonymously precisely because anonymity may separate an individual from their

accountability and thus their own agency. The issue of agency in a Kantian sense will be dealt with later. However, this author would like to note that the ideas raised about rights being tied to accountability (through) agency are not new within academic discussions about rights. There are a number of authors who raise concerns about the emphasis in modern rights discourse on 'rights' without a corresponding emphasis of 'responsibility' (Saul 2001, 566-582). Some even going so far as to suggest a draft Declaration of Human Responsibilities to go alongside the Universal Declaration of Human Rights (Saul 2001, 571). Notwithstanding this, the simple points to be made here are:

1. rights attach to people as individuals;
2. regardless of the rights we have as individuals, there is some expectation that we must also be responsible for our actions as this is an essential part of being an agent.

Building on the above, and assuming that a Kantian framework is helpful in assessing South African constitutional rights, there may well be a Kantian argument (related to the argument made above) against people having the unrestricted ability to be anonymous (as is the case online). This is dealt with in the next section.

5 Some Kantian arguments against anonymity

5.1 Anonymity and accountability

The context of online interaction has served to strengthen many authors opposition to anonymity because it is a setting in which some of the most disturbing negative effects of anonymity are continuously demonstrated (Wallace 2008).

The first and most obvious difficulty with online anonymity is its role in facilitating crime – including exceptionally reprehensible crimes such as the production and dissemination of child pornography (Cassim 2015, 304-305). Further, the investigation, apprehension and prevention of crimes where online anonymity can be (and is) used, is exceedingly difficult – which undermines law enforcement efforts (Wallace 2008, 183).

For example, a young girl in South Africa was compelled to take Facebook Inc to court in 2020 to obtain an order that Facebook be forced to disclose the identity of an online harasser who had threatened her with, amongst other things, gang rape. Facebook initially opposed her application to have her harasser's identity disclosed but

eventually decided to withdraw their opposition – though Facebook still faced public criticism for their initial unwillingness to cooperate (Thamm 2020). Whilst the young woman and her family went to great effort and expense just to identify the person who threatened her, her harasser was (at least initially) shielded from accountability for their vile threats by their easily-obtained online anonymity.

This issue was also recently highlighted in an article by Nicholas Kristof in the New York Times demonstrating the pervasive problem of anonymous users on the site PornHub uploading content depicting rape, torture, the sexual assault of children and pornographic videos featuring people (predominantly women) who had not consented to those recordings of themselves being taken, let alone shared with the world. The piece also highlights the unrelenting difficulties that victims of these uploads face, including being humiliated and shamed, being stonewalled when they request the removal of the videos, and seeing the videos re-uploaded after being removed (Kristof 2020). PornHub (rightly) received significant backlash for its parts in allowing and facilitating this – with MasterCard and Visa threatening to prevent PornHub from being able to receive payment using their platforms (Nelson 2020). The main perpetrators (i.e. the people uploading these unlawful videos), on the other hand, have thus far faced no consequences. In this regard, it is important to highlight one of the main solutions suggested by Kristof (and supported by many), which was this: “only verified users [be allowed] to post videos” (Kristof 2020). In other words, rather than allowing unaccountable anonymous users (who may use throw-away accounts or other means to avoid culpability) to upload content, ensure that the people (or entities) uploading content are real, confirmed and traceable.

The PornHub and Facebook examples point to the most disturbing side-effect of anonymity – a lack of accountability. This points to the serious problems with a person’s agency that anonymity can cause. Commentators, such as Mark Zuckerberg, have suggested that online anonymity (which effectively enables an individual to have multiple personas) “is an example of a lack of integrity” (Bodle 2013 Vol 41 No. 1).

5.2 Anonymity and identity

In spite of the above, is also true that anonymity can be an expression of choice (i.e. choosing what to make public and what to keep private) and it may be argued that anonymity is tied to the autonomy of agents (Wallace 2008,

187). In a similar vein, for example, Varden argues that, far from being a threat to the status of agents, privacy is actually a vital part of an agent's autonomy and identity (Varden, Kant and Privacy 2020).

In responding to the view expressed by critics of anonymity (including Mark Zuckerberg), that people should not be able to have 'multiple personas', Ingram says Zuckerberg is in the privileged position of being "someone who has nothing to fear from being transparent about his life, and no need to maintain two different identities" (Ingram 2010). Wallace refers to the example of George Eliot – a woman who chose to write novels under a pseudonym which implied she was a man in order to for her works to be published and taken seriously (instead of being dismissed as "frivolous" as commonly happened to female authors in her time) (Wallace 2008, 179). Yet this seems to be an instance where anonymity was used protectively (i.e. to protect Eliot from the negative effects of her gender being known). Bodle takes this further and gives an example where anonymity allows individuals to engage in identity-building, namely the example of LGBT teenagers in strictly religious societies who are able to express and understand their own sexuality in anonymous online groups (Bodle 2013 Vol 41 No. 1, 23). It must be noted though that both of these examples do appear to be exceptional cases – in both instances, the anonymous agents are seeking to avoid discrimination and prejudice. It is not clear that these exceptional cases can be used to justify every instance of anonymous action or a general entitlement to act anonymously.

The Kantian perspective prioritizes "[f]reedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law" (Rauscher Spring 2017, 2). It would therefore seem reasonable that a Kantian could accept limiting one's ability to act anonymously where failing to impose limits would infringe the dignity and freedom of others. Thus, even if there are instances where people require some form of anonymity, it may be argued that anonymity in these cases can be accommodated in a more restricted manner (which will be dealt with later on).

5.3 Anonymity and exposing wrongdoing

Referring back to the example of whistle-blowers, there is value in analysing a similar but slightly different example. The term "whistle-blower", after all, has a specific history – it refers to employees or officials who expose illegal activity within their company or institution – but it is also worth looking at other instances where people expose wrongdoing anonymously, because in the past, this issue has led many to resist a policy of removing online anonymity. For example, in 2014, Google ended its controversial "real names" policy in terms of which users had to use their actual names on their accounts. The turning point for the "real names" policy came with the "My Name is Me" movement. In particular, this movement was spurred on by the plight of Vahid Online, an activist in Iran who

posted news online – an action which could have led to arrest in his home country at the time (Mackinnon and Lim 2014). More recently, through the "#MeToo" movement, there have been various examples of women wanting to share their stories of abuse at the hands of powerful men anonymously for various reasons (Hyndman 2017). In these cases, anonymity can be a way for women to ensure their own safety (from threats or harm by other people, or retaliatory abuse in cases where they still interact with their abuser) and can also be a way for these women to avoid the "label of victimhood" (if that is a concern for them).

The issue demonstrated by the Vahid Online and #MeToo examples should not be flippantly dismissed but the underlying problem of accountability remains – what if Vahid had not been posting critiques of his government but rather uploading child rape videos onto PornHub? The important point is this – Vahid Online is a victim of an oppressive regime and the #MeToo speaker has been subjected to abuse by a powerful man. From a Kantian perspective:

- Vahid's government (or more accurately, the individuals within that government who lead and facilitate its wrongdoing) act unethically and should be accountable for their actions as agents; and

- The powerful abuser has acted unethically and should be accountable.

But what is the ethical status of Vahid himself, or the #MeToo speaker? They are separate agents from the wrongdoers. No doubt that both Vahid and the #MeToo speaker are trying to operate in unimaginably difficult circumstances and are trying to do good, but in terms of Kantian agency, the actions they are responsible for are their own, not the wrongdoers'.

5.4 A Kantian answer from the theory of right

The crux of the issue then, is how one assesses and balances Vahid *and* the victims of the unlawful PornHub uploads? In particular, what would a Kantian perspective be on the effect of anonymity in these situations?

A Kantian take on this would focus on the concept of agency, which is vital to ethics, and which is inextricably linked to accountability – after all, the very crux of being an agent is that one can be ethically accountable for one's actions (Johnson and Cureton Spring 2019, 13) (Varden, Kant and Privacy 2020, 7). Before that though, what must be considered is where this fits into Kantian ethics (i.e. what can be said in respect of the theory of right and Kantian morality respectively).

From the perspective of the theory of right, the issue of anonymity must be examined using the universal law, which requires that "an action is right if it can co-exist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with universal law" (Ripstein 2009, 12-13). The starting point here is that anonymity is not an action *per se*. Rather, it is a special state in which an agent may perform an action. Thus, assessing whether anonymity can be 'universalized' without infringing on anyone else's freedom is unhelpful, as whether the anonymous action can be universalized would depend on the kind of action the agent performs whilst anonymous. In other words, anonymity is an "adjectival or adverbial" issue – it describes the manner in which actions are performed but not the actions being performed themselves. Some actions, for example, anonymously destroying another person's property would infringe on their freedom but many other anonymous actions may not (ACLU of Georgia v. Miller 1997).

One initial point regarding the theory of right and anonymity that can be made though, concerns the effect of anonymity on the effectiveness of the State. As discussed, the State has special coercive powers to enforce the universal law and punish infringements on other person's freedom (Wood 2008, 79). Anonymity, however, makes the job of the State (i.e. coercive enforcement) much more difficult as the State is unable to identify, punish and prevent those who may be violating the universal law – for example, those disseminating unlawful pornographic images of other people. Furthermore, it is not just an unfortunate side-effect of anonymity that it makes the State's job of coercive enforcement more challenging, it is one of the key reasons that people chose to act anonymously. It can therefore be argued that anonymity serves to directly undermine the State, which is to the detriment to all citizens. It would seem that the State would have good grounds to prohibit or at least restrict citizens' ability to act anonymously online in order to ensure its own ability to uphold the universal law (which serves the interests of all citizens).

It is not just the effect on the State that should be assessed though, there is another compelling reason to think that the right, under Kantian theory, would be undermined by unrestricted anonymity.

The essence of being an agent requires being accountable for failing to adhere to ethical rules and standards as one cannot be considered 'bound' by a rule unless there is some consequence for failing to adhere. The very difference that ethics makes in respect of actions is precisely that it introduces ethical accountability. If an animal kills a person, it is not "accountable" in a meaningful way because ethics does not apply to animals. When a human kills another person though, they *are* accountable because ethics applies to humans as rational and autonomous beings (Johnson and Cureton Spring 2019, 2, 11).

Relevant here is the Kantian view on the imputability of actions to agents. Kant defines imputation thus:

> "*Imputation (imputatio) in the moral sense is the judgment by which someone is regarded as the author (causa libera) of an action, which is then called a deed (factum) and stands under laws*."
>
> (Reath 1994, 262 citing Kant 1992, 227/53)

Imputation is therefore a vital component, and direct consequence, of human freedom. It is precisely because we choose our actions freely that those actions can be ascribed to us and that we can be held responsible for them (Uniacke 2005, 462). As Gewirth explains, we are free to make our own choices about our actions, which is vital to our agency which is, in turn, vital to being able to act ethically or unethically (Gewirth 1982, 15). Kant argues that complying with what is ethically required of one does not entitle one to praise or blame as one is merely meeting the standard one must meet. Blame can only be ascribed when one fails to comply with the ethical standards required. Similarly, praise can be attributed when one goes above and beyond what is ethically required (Uniacke 2005, 467).

In his original writings, Kant also argues that, from an ethical perspective, if a person acts contrary to what is ethically required of her, all of the bad results flowing from that action can be imputed to that person regardless of her knowledge of the consequences or the participation of other parties. However, if a person acts in accordance with what is ethically required of her though, she is insulated from all blame and even the bad results which follow her action cannot be placed at her door (Reath 1994, 259-261). This imposes quite a stringent view of accountability and, as a result, Kant's views on imputability are regarded by many of his critics as onerous (Uniacke 2005, 461-464). However, the mere fact that a view on liability is onerous is not, in itself, a good reason to dismiss it. In fact, stringent views of accountability and imputability are more commonplace than people believe – especially within the field of law. Employers are vicariously liable for their employees' actions (i.e. they are liable regardless of others' participation) and one can be held accountable for results flowing from negligence even when one did not intentionally cause the harm.

What then, does Kantian imputation mean for anonymity and the theory of right? Minjeong refers to the US case of *ACLU v Georgia* which makes the interesting claim that "the identity of the speaker is no different from other components of [a] document's contents that the author is free to include or exclude" (ACLU of Georgia v. Miller 1997). Respectfully, I cannot agree with this position. As established above, the identity of the person behind a word or action has an important role in imputation. Imputation of an action (and thus accountability) requires an agent to be identifiable – in order for the imputation of one's words or actions, people must be able to link and attribute those words and actions specifically to you. Anonymity, however, creates a divide between an agent and

their actions/words – those actions/words are not one's own as they cannot be attributed. Indeed, the agent who acts anonymously is not responsible for their words or actions in any real sense as they do not own them anymore. As a result, those anonymously-performed actions/words exist in a strange sort of bubble – they are unclaimed by their creator and un-imputable. The consequences of those actions/words thus do not attach to their creator. In some sense, the creator has the benefit of human freedom (they can act as they please) but circumvents the accountability that goes hand and hand with that freedom. The end result of this is as follows:

1. The anonymous agent puts words/actions into the public sphere without taking responsibility for them.

2. The recipients of those words/actions may be affected by them and may have views on them but they are unable to attribute them to the agent. For example, people who interact with the anonymous agent's words/ actions are unable to use those words/actions to form informed opinions of that agent. The example of the white supremacist police officers bears this out – the officers were able to dissociate themselves from their words and views, using anonymity, and thereby avoid accountability.

The problem that arises in the modern world is that the online realm creates a space in which anonymity is easily-attainable and is thus the norm (Voorhoof 2010). Further, when dealing with the online realm, many authors begin from the base assumption that anonymity is good and unproblematic based on the fact that they tie it to the concept of free expression or privacy (Voorhoof 2010). These authors, therefore, take the view that anonymity should be allowed except in certain, restricted cases (Minjeong 2003, 6). On the whole then, there is certainly a tendency amongst people to assume that individuals have some entitlement to act anonymously. For example, in the *ACLU v Georgia* matter, the view of the claimants was precisely that the proposed legislation infringed "on their right to communicate anonymously and pseudonymously over the internet" (ACLU of Georgia v. Miller 1997). In reality, the reverse is true. Anonymity should be the exception to the norm of identifiability if one considers the effects on agency and accountability outlined above. If one is going to be anonymous online, there must be good reason (for example, the protection of the identities of victims of child rape).

Anonymity must be monitored and regulated. For example, there may be forums where anonymity is allowed but if an agent steps outside the realm of appropriate, dignified use of anonymity, then they will lose their anonymity. Of course, the regulation of anonymity would be no small feat. A number of questions arise from this proposal that are beyond the scope of this assessment to answer. In terms of a preliminary sketch though, a few things can be said about ensuring non-anonymity is the norm and regulating anonymity, including:

1. The regulator in question cannot be a national entity. For an individual such as Vahid (or any individual living in an oppressive regime), it would do no good for the very State they are speaking out against to have the power to control their anonymity.

2. Considering this, and the fact that the internet is a *global space* for interaction, it seems that the regulator in question would need to be an impartial and *global* one. In other words, considering the internet's ubiquity and global reach, we would need to treat the whole online world as one State from a Kantian perspective.

3. The regulator would have to be considered some sort of State-like entity in order to have the powers of coercive enforcement required to make judgments regarding a person's conduct and take away people's anonymous status where appropriate.

Of course, I accept that even the broad sketch above represents a mammoth task. A global regulator for online behaviour is a big ask in a world in which we do not even have consistent and universal global justice and struggle to get countries to agree to even the most basic proposals. Nevertheless, the sketch sets out significant considerations which must be accounted for if online behaviour is to be properly regulated (which seems to be necessary in the present day).

5.5 The perspective from Kantian morality

Turning to the perspective of Kantian morality, the issue of agency, once again, comes to the fore. The second formulation of the Categorical Imperative relates to dignity and the requirement that people should be treated as an "ends in themselves" and not as a "mere means (Shafer-Landau, Chapter 12 - The Kantian Perspective: Autonomy and Respect 2010). The very basis of human dignity (i.e. the reason that people are considered to have dignity) is their "status as free rational agents" (Johnson and Cureton Spring 2019, 11). This means that it is precisely the fact that humans are rational and autonomous which compels us to respect their rational autonomy. Thus, as Kant makes clear in the third formulation of the Categorical Imperative (the 'kingdom of ends'), people are the source of moral rules but are also simultaneously bound by them (Johnson and Cureton Spring 2019, 11).

I would suggest that there are some instances in which the anonymous agent may treat himself as a "mere means" by acting anonymously. By divorcing himself from accountability (which is so integral to ethics and dignity), the agent undermines his own dignity. In doing so, the agent fails to treat himself as an "ends in himself". Take the example of an agent who acts anonymously in expressing and advocating hateful views (e.g. racism) in the hopes of spreading those views. Assuming the agent is predominantly motivated by his desire to spread these views,

then, in some sense, this agent treats himself as a mere vehicle for those views – i.e. a mere means for the dissemination of the viewpoint.

This is obviously not universally true – agents may act anonymously with other motivations as already discussed (for example, community building or necessary self-care) – but the explanation above may account for the human tendency to view anonymous actors as morally suspect until proven otherwise.

6 Potential objection and proposed response

The overall argument made above is that there is good reason to think that by allowing people to be anonymous, the accountability and the status of agents is undermined in a manner that a Kantian could not accept (Wallace 2008). There is one important distinction to be made here that has only been hinted at above, namely the issue of anonymity when considered against our views that some personal information should not be in the public sphere or that we are entitled to keep some personal information private.

An objector to the arguments made in this assessment may well raise the example of doxing. Doxing refers to the online practice of providing the personal information of someone else to the public as a punishment or form of revenge (Insights 2020). For example, an online user may publish the residential address of an individual with the intention of encouraging people to go to that person's home and intimidate or harm them. The instinctive response to doxing is that the user publishing the address has done something wrong, yet the objector may ask why, if a person's identity should not be anonymous, any of their other personal information should also not be public.

There are a number of points that can be made in response to this objection. The main point to be made though is the distinction between information about a person (e.g. their address or bank details) being publicized and a person *acting publicly*. The former relates to doxing and the latter to anonymity. It is certainly correct that individuals have an entitlement to have certain personal information kept private. For example, participants in a medical trial have clear and compelling reasons to have their personal information (in this case, information about their health) protected. Thus, information may be anonymized when publishing the results of a medical trial. This is because the participants in the medical trial are not *acting within the public sphere* by participating in the medical trial – they are not putting actions or words out into the world for which they may be accountable. They are merely providing information to researchers to assist in their research. This ties in with my disagreement with the statement in *ACLU v Georgia* that "the identity of the speaker is no different from other components of [a]document's contents" (ACLU

of Georgia v. Miller 1997). The identity of an individual *is* a distinct kind of information to other information – precisely because your identity is tied to imputing actions to you (and therefore to your accountability and agency). Conversely, the medical information of participants in a research study (for example, whether they suffer from diabetes) does not tie to their accountability or agency at all.

A similar argument can be made in respect of doxing. Say, for example, X makes a particularly offensive post online and, in response, Y makes X's residential address public. Neither Y, nor any other user, requires X's residential address in order to impute X's actions to them. All Y needs to impute X's bad conduct to X is X's identity. The publication of X's residential address does not remove anonymity on X's part. In fact, all the doxing of X does is open X up to potential harm by other private citizens – harm which those private citizens are not entitled to inflict no matter how upset they may be. In terms of a Kantian framework, if there is to be any coercive enforcement against X for their heinous post, that is not for Y or any private citizen to deal with, that is an action for the State. The doxing of X is not necessary for the State's coercive enforcement – as a uniquely placed entity, the State has special access to information such as people's addresses in any event. In fact, the ties between doxing and "vigilante action" by private citizens, gives us reason to think that a Kantian State would be obliged to take active steps to prevent and punish doxing.

7 Conclusion

The online sphere is no longer a "less than real" space, it is a space in which a large portion of all our lives play out. Anonymity is but one ethical issue which the online realm has brought to the fore – but it is an important one. Whilst some may argue that people should generally be entitled to be anonymous online, there is good reason to disagree with this.

Firstly, and looking at anonymity from a (Kantian) South African constitutional rights-based perspective, there is no right which can ground an entitlement to act anonymously. Notwithstanding specific objections to tying individual's rights to a 'right to anonymity', more generally, one must object because:

1. rights attach to individuals;
2. rights are tied to the idea of human agency and should therefore be tied to responsibility for the exercise of that agency; and

3. anonymity undermines that very agency by eliminating an agent's accountability.

Furthermore, there is good reason to think, more generally from a Kantian perspective, that because anonymity makes imputing an agent's actions to them impossible, it actually undermines the very concept of agency which is so core to the Kantian concept of ethics. However, it must still be recognized that there may be limited instances in which anonymity can be justified to the extent that:

1. The agent's use of anonymity is justified on special grounds (e.g. protection from harassment);
2. The anonymity is not sought solely to undermine the agent's accountability.

These exceptions, then, should be monitored and regulated. As a result of this and contrary to the current practical position, the norm which should exist is that people should not be allowed to act anonymously online unless there are exceptional and compelling reasons for this. What constitutes "exceptional and compelling reasons" may vary and figuring out the balance may be difficult, but it seems clear that there should be some sort of regulation, preferably on a global scale to ensure that people do not misuse online anonymity.

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