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"USING PERSONS" AND THE JUSTIFICATION OF PUNISHMENT

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The short essay that follows has a very modest ambition. I want to explain why I have difficulty understanding a common motif in discussions of the moral status of criminal punishment. The goal is to stimulate other, more acute scholars to dispel the confusion and clarify the concept that troubles me.

The problem arises in certain contributions to the perennial debate about the moral justification of the practice of punishing criminals. Punishment involves subjecting persons to forms of "hard treatment" – fines, imprisonment, sometimes even death – that would in other contexts egregiously violate important rights of the affected person. Why, then, is it morally legitimate – permissible, and possibly obligatory – to inflict such treatment on persons found guilty of crimes?[1]

Many efforts have been made to answer this question by propounding so-called theories of punishment. A large number of these theories fall into one of two rival categories: consequentialism and retributivism.[2] Consequentialists believe that the practice of punishing criminals is justified by the good consequences it produces. Deterrence, rehabilitation, and incapacitation are among the

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[1] Of course, one might conclude that punishment is *not* morally legitimate. Few writers have taken this view. For a recent example of one who does, *see* Deirdre Golash, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW (2005). Page cited?

[2] "Consequentialism" is the general term for the view that the goodness of outcomes is the *only* relevant factor in determining the rightness or wrongness of actions, practices, or institutions. The term was introduced in 1958 by G. E. M. Anscombe, who contrasted it with "old-fashioned Utilitarianism." *See* G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1, 12 (1958). The term "utilitarianism" is often used in a broad sense to denote what I am calling "consequentialism." In a narrower sense, "utilitarianism" refers to one particular (and historically prominent) consequentialist theory. Consequentialists disagree among themselves about what determines the "goodness" of states of affairs. *Welfarists* believe that it is determined by the amount of individual well-being in that state, with everyone's well-being counted equally. (Some welfarists look to the *total* amount of well-being, others to the average amount. Some look only to the well-being of persons, while others take into account the well-being of all sentient creatures.) "Utilitarianism" in its narrower sense refers to the combination of consequentialism and welfarism. *See* Shelly Kagan, NORMATIVE ETHICS, 60-61 (1998).

consequences most frequently appealed to. Retributivists, on the other hand, insist that punishment is justified simply because it does justice – it gives offenders what they deserve – and that any good consequences that may result are a happy accident.

One objection to consequentialism, that a variety of retributivists have advanced, is the claim that consequentialist theories depict punishment as involving "using persons," or "treating persons as mere means," and that such a practice is morally prohibited. This objection is leveled particularly at theorists who emphasize deterrence. Some retributivists focus on "special deterrence" – punishing the criminal to deter him from criminal acts in the future – a practice famously condemned by Hegel.[3] Others appear to target "general deterrence" – punishing the criminal in order to deter other persons from engaging in crime.[4]

One response open to consequentialists is that they also take account of consequences of punishment other than deterrence. And at least some of these other consequences – such as incapacitating the criminal or reforming her character – neither treat her in a manner designed to affect other people nor amount to simple threats. I am interested in the "using" argument itself, however, so I will forgo such responses and focus on the argument as it applies (or doesn't) to deterrence theorists.[5]

The problem to which I wish to draw attention is simply: what, exactly, does it mean to "use persons," or to treat them as mere means, and are deterrence theories of punishment in fact open to this objection?

The idea that these consequentialist theories endorse "using persons" in a morally improper manner has been presented in a variety of ways. A straightforward example is Jeffrie Murphy's argument that:

> [A] utilitarian theory of punishment (Bentham's is a paradigm) must involve justifying punishment in terms of its social results – e.g., deterrence, incapacitation, and rehabilitation. And thus even a guilty man is, on this theory, being punished because of the instrumental value the action of punishment will have in the future. He is being used as a means to some future good – e.g., the deterrence of others.[6]

Many authors similarly attack consequentialists for using the offender "as a means toward other people's ends."[7]

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[3] "To base the justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog. It is to treat a man like a dog instead of with the freedom and respect due to him as a man." G. F. W. HEGEL, PHILOSOPHY OF RIGHT 246, addition to ¶ 99 (T.M. Knox trans. Oxford University Press 1952) (1820).

[4] "The principal charge against deterrence as an important factor in penalty-fixing is, therefore, that the criminal is treated as a means toward other people's ends; he is merely a device used to give others a lesson." WOJCIECH SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 253 (1985).

[5] In what follows I shall both use "consequentialists" and "deterrence theorists" to refer to those consequentialist theorists of punishment who believe that the practice is justified, wholly or partly, by its deterrent effects.

[6] Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 219 (1973).

[7] SADURSKI, *supra* note 4, at 253. *See, e.g.,* K. G. Armstrong, *The Retributivist Hits Back*, 70 MIND 471, 484 (1961) ("using him as a mere means to somebody else's ends"); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 353 (1983) ("treating the criminal as a means to satisfy social purposes").

Treating someone in this manner means that the individual is not regarded as "a being whose freedom and responsibility are to be respected and who, to a considerable extent, shapes his own fate." Instead, he is viewed as one "whose destiny is not crucially determined by his own free decisions and actions, but by the aims for which he will be used as a means."[8] Herbert Morris, in his celebrated critique of a purely consequentialist "therapeutic" treatment of offenders, likewise objects that in such a consequentialist system "our responses to the human being are determined, not by his choices, but by ours in disregard of or with indifference to his."[9]

Other authors find it particularly objectionable that the offender does not *share* the objectives and choices that are imposed on her: "Underlying the various ideas of moral justification is a prohibition against treating people in such a way that they cannot share the purposes of those who are so treating them."[10] R. A. Duff offers yet another ground for believing that the pursuit of deterrence "fails to accord a proper respect" to offenders "as autonomous moral agents."[11] His objection is that proper respect for the offender requires that we "offer her not just reasons, but *relevant* reasons for action; reasons which are appropriate to the action in question."[12] Christine Korsgaard agrees: "Any attempt to control the actions and reactions of another by any means except an appeal to reason treats her as a mere means[.]"[13] Similarly, Thomas Hill believes that a proper recognition of the inherent dignity of human reason implies that "in trying to influence others one should appeal to their reason rather than try to manipulate them by nonrational techniques."[14]

The authors point out variations of Immanuel Kant's influential theme in ethical thinking. The "categorical imperative" that Kant regarded as the fundamental principle of morality is formulated in several different ways (which Kant believed were equivalent), one of which is: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."[15] In discussing criminal punishment in a later work, Kant put it this way: "a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality."[16]

What Kant meant is not at all immediately evident,[17] and has been the subject of persistent debate among Kant scholars – of whom I am in no way one. Let us, therefore, see whether any of the formulations of the other authors quoted above can shed light on the anti-consequentialist argument concerning criminal punishment.

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[8] IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 35 (1989).
[9] HERBERT MORRIS, *Persons and Punishment*, *in* ON GUILT AND INNOCENCE 31, 46 (1976).
[10] GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 31 (1988).
[11] R.A. DUFF, TRIALS AND PUNISHMENTS 189 (1986).
[12] *Id.* at 180.
[13] CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 142 (1996)
[14] THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 50 (1992).
[15] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 38 (Mary Gregor trans., Cambridge University Press 1998)(1785) [4:429]. The bracketed numbers in this and subsequent citations to Kant indicate the volume and page number of the passage cited (more accurately, the German original of that passage) in the 23-volume Academy edition of Kant, which is the standard reference.
[16] IMMANUEL KANT, METAPHYSICS OF MORALS 105 (Mary Gregor trans., Cambridge University Press 1996) (1797) [6: 331].
[17] "Few formulas in philosophy have been so widely accepted and variously interpreted as Kant's injunction to treat humanity as an end in itself." HILL, *supra* note 14, at 38.

In addition to echoing Kant's objection about treating a person "merely as a means to the purposes of another," these authors articulate three other grounds for condemning the consequentialist view of deterrence: (1) it endorses motivating people to act as we wish by giving them *irrelevant and improper reasons* for doing so; (2) it treats the person punished in a manner not determined by *his own* choices; and (3) it treats the criminal in such a way that he *cannot share the purposes* of those imposing the treatment. But none of these ideas will yield an anti-consequentialist argument that is even prima facie plausible.

Look first at the contention that a policy of deterrence gives people the wrong sort of motivation to obey the law – it provides reasons that are irrelevant, reasons not "appropriate to the action in question."[18] What such a policy does, of course, is to motivate compliance with the law by demonstrating that failure to comply will lead to very unwelcome consequences (most often incarceration). Is this really improper?

Consider the following scenario: My next-door neighbor recently began to breed and raise St. Bernard dogs for sale. Unfortunately, she is a careless, sloppy slob. I have complained to her several times about the foul odors from her property, the continuous barking at all hours, and rats and flies infesting her home (and mine), but she has just laughed off my complaints. Now, with my patience exhausted, I inform her that unless she remedies the obnoxious conditions that are making my own house unlivable, I will bring a nuisance action against her. She will have to spend lots of money on a lawyer – and more when I win both damages and injunctive relief (as I assure her I will). In doing this, I am giving my neighbor a reason to change her behavior that is "irrelevant" in the same way that Duff and Korsgaard think deterrent punishment is. A *relevant* reason would be an explanation of just how her behavior is seriously interfering with my use and enjoyment of my home that would get her to agree that she has behaved wrongly and must change her ways.[19] Yet surely it is highly implausible to insist that by threatening (non-frivolous) legal action I am failing to show proper respect to my inconsiderate neighbor, or treating her as a mere means in a morally illegitimate fashion.

Some might claim that my threat to sue actually counts as an appeal to reason, because I am simply allowing my neighbor to engage in a fully informed, rational balancing of the costs and benefits of continuing her unneighborly behavior. But by the same logic, a deterrent policy merely gives citizens the data to make an accurate assessment of the costs and benefits of breaking the law, and thus it too does not supply "irrelevant" reasons for obeying the law.[20]

Next, consider the claim that what makes consequentialist deterrence wrongful is that the person punished is treated in a manner not determined by his own choices, decisions, and actions, but by the purposes of the punishing authority. The consequentialist can reply that his theory of punishment is not in fact guilty of the sin alleged. For the criminal is punished precisely because of his own choices, decisions, and actions. Indeed, a consequentialist can add that just *what*

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[18] Duff,DUFF, *supra* note 11, at 180.

[19] Duff explains that "the proper aim of a system of law which addresses its citizens as rational agents is to bring them not merely to obey its requirements, but to accept those requirements as being appropriately justified," whereas "[i]n using punishment as a deterrent," we "try instead merely to secure the citizens's obedience." *Id.* at 185.

[20] Moreover, by this logic a gunman's "your money or your life" would also be an appeal to reason, since the gunman is giving his victim information needed to make a rational assessment of the costs and benefits of turning over the money!

punishment is meted out itself depends on what exactly the criminal did.[21] Thus Morris, for example, is simply wrong when he asserts that punishment as consequentialists conceive of it manifests "indifference" to the choices the offender made.

Of course, our treatment of the criminal – punishment – is not *itself* something the criminal has chosen.[22] But it is absurd to find consequentialism morally flawed for that reason. There is nothing necessarily morally deficient in giving people treatment they do not choose or desire: I do nothing immoral when I give a student a grade lower than what the student had hoped to receive.

My treatment of my students, like the punishment of criminals, may not be what the person affected desired, but it is at least based on that person's own individual actions. Yet even treating a person in a manner *not* based at all on his or her actions need not be morally suspect. There are, for example, age requirements for voting (as for many other activities). Even an unusually mature, thoughtful, well-informed 17-year-old is barred from voting. And this is because of a judgment that most people are not mature enough to vote before age 18, and that it would be too burdensome (and open to abuse) to make case-by-case judgments. Her own choices (and qualities) are not what determine how we treat her; rather, our collective assessment of people *in general* gets applied to her, with no attention paid to her individual qualities. But it is, I suggest, false to insist that our mature 17-year-old is not being "treated as a person," and that we are morally required to assess each person's competence to vote individually, without regard to her age.

What of the last of the three versions of the anti-consequentialist argument that we are considering? This version is that the vice of consequentialist deterrence is that the person who is punished cannot share the purposes of those who do the punishing. One prominent Kant scholar believes that this, in fact, is the gist of Kant's conception of "treatment as a mere means": "The question whether another can assent to your way of acting can serve as a criterion for judging whether you are treating her as a mere means."[23] Another outstanding Kantian, however, flatly disagrees, and says of the ability to share another's purpose: "it would be a mistake, I think, to suppose that it represents [Kant's] whole understanding of the matter – or even his most dominant line of thought."[24] Lacking the competence to adjudicate this dispute, I will not consider whether treating someone for a purpose he cannot share really captures Kant's meaning, but only whether such treatment is necessarily morally iniquitous.

In examining this idea one must keep in mind that what is being condemned is not treating someone to achieve purposes she *does not* share, but treatment for purposes she *cannot* share. Hill

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[21] H.L.A. Hart famously argued that the issue of how much a criminal should be punished is independent of the issue of what justifies the institution of punishment in the first place. It is perfectly possible, said Hart, to justify the institution on purely consequentialist grounds while acknowledging that how much punishment is proper for a given offender is crucially shaped by principles of justice that do not themselves rest on consequentialist foundations. *See* H.L.A HART, *Prolegomena to the Principles of Punishment, in* PUNISHMENT AND RESPONSIBILITY 1 (1968).

[22] Some philosophers might dispute this and insist that, at least in some sense, the criminal *does* choose to be punished. Hegel, in characteristically opaque fashion, says that "The injury [the penalty] which falls on the criminal is not merely *implicitly* just – as just, it is *eo ipso* his implicit will, an embodiment of his freedom . . . " HEGEL, *supra* note 3, at 70, ¶ 100. And in the Addition to this paragraph, he adds, with perhaps more clarity: "Beccaria's requirement that men should give their consent to being punished is right enough, but the criminal gives his consent already by his very act." *Id.* at 246.

[23] Korsgaard, KORSGAARD, *supra* note 13, at 139.

[24] Hill, HILL, *supra* note 14, at 46.

underlines this point,[25] and Korsgaard agrees that what is meant is not "simply that the other person *does not* or *would not* assent to the transaction or that she does not happen to have the same end I do, but strictly that she *cannot* do so: that something makes it impossible."[26] One example that Kant uses is obtaining money from another by falsely promising repayment, and Kant asserts that "he whom I want to use for my purposes by such a promise cannot possibly agree to my way of behaving toward him, and so himself contain the end of this action."[27] Korsgaard explains "that the other person cannot assent to my action because he is not in a position to. This is because he is deceived . . . . [H]e doesn't know how I am acting, and you cannot assent to a transaction you do not know is occurring."[28]

With these explanations in mind, assume that a criminal who is punished cannot share the consequentialist purpose (or purposes) of the punisher. Does this suffice to show that there must be something morally illegitimate about imposing the punishment? I think not. Consider, for example, what happened at the time I moved from New York City to Los Angeles. My girlfriend Allyn had asked me to accompany her, on the evening before my flight, to a performance by her college orchestra. But when I arrived to pick her up, I found that she was giving me a surprise going-away party. She had lured me to the party by a deceptive request. Now, I had not "assented to her action." Nor could I have, for the same reason Korsgaard gives when discussing Kant's example – I "did not know how she was acting" and was thus "not in a position to assent." Yet I was delighted and touched by Allyn's action, and certainly did not regard myself as having been "used" or "treated as a mere means" in a morally illegitimate fashion.

It might be said that the reason Allyn's actions did not wrong me is that they were motivated by the desire to make me happy rather than a desire to serve her own interests. "We use people in order to get things for ourselves, or in order to hurt a third person, or as sacrifices to causes. Their *own* pain or pleasure is never the purpose for which they are used."[29] Perhaps, then, wrongfully "treating someone as a mere means" can be explained by means of a *conjunctive criterion*: acting toward someone in a manner not aimed at her own pleasure *and* for a purpose she cannot share.

Even as modified, this interpretation of "treating a person as a mere means" is open to an objection frequently found in criticism of Kant. Suppose that Jack, a mentally unbalanced neighbor who has been stalking my friend Jill for several months, comes to my door brandishing a gun and asks if I know where Jill is, saying he intends to kill her. I tell him I don't know where she is, and as soon as Jack is gone I call the police, who arrest Jack before he is able to track down his intended victim. Actually, when Jack appeared at my door, Jill was hiding in another room in my house. Here, my purpose in deceiving Jack is, of course, one that Jack cannot share. And I have certainly not done so in order to promote Jack's happiness or pleasure. I have thus treated Jack as a mere means, according to the criterion we are now examining. Yet few people (other than Kant himself) would say that my treatment of Jack was morally wrongful.[30]

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[25] "What is relevant is not whether the person who is treated as a means happens to like the ends in question or could psychologically bring himself to value them . . . ; it is rather that the maxim on which the agent acts . . . is such that there is no irrationality in anyone's willing it as a universal law." *Id.* at 45.

[26] KORSGAARD, *supra* note 13, at 138.

[27] KANT, *supra* note 15, at 38 [4: 429-30].

[28] KORSGAARD, *supra* note 13, at 347.

[29] Norvin Richards, *Using People*, 87 MIND 98, 99 (1978).

[30] Kant defended his view in 1797 in a short essay. *See* Immanuel Kant, *On a Supposed Right to Lie from Philanthropy*, *in* PRACTICAL PHILOSOPHY 605, 611-15 (Mary Gregor trans., Cambridge University Press 1996). The French author

Moreover, accepting the conjunctive criterion as a satisfactory account of "using someone as a mere means" would not explain why punishment, as the consequentialist's conceives of it, necessarily commits this supposed sin. For it appears to be false that the criminal *cannot* share the purpose of the punisher. Remember that we are taking that purpose to be deterrence, including deterring other people from acting as the criminal has done. Criminals are themselves human (something all too easily forgotten in conceptual discussions of punishment that are often remote from real-world practices), and many will have friends or relatives whose welfare they care about and whom they hope will not become the victims of other persons' crimes. (And the criminal may well strongly desire not to be victimized himself.) Consequently, a criminal could perfectly well agree that *in general* it is good to deter people – other people, to be sure – from committing crimes, and hence endorse the consequentialist's purpose of deterring others. He may disagree only about whether *he* should be punished to promote this goal.[31]

The arguments made in the four preceding paragraphs are not meant to challenge Korsgaard's account of what Kant means by "using people as mere means." Her account has been examined solely as a potential way of explaining what retributivist critics of deterrence believe is consequentialism's fatal flaw. For all I have said, Korsgaard may be completely correct about Kant's meaning. I am claiming only that whether or not this is Kant's notion, it does not yield a convincing objection to consequentialism about punishment.[32]

After examining three accounts of consequentialism's alleged vice of "using people" that frequently appear in retributivist critiques none of these accounts succeed. Of course, other accounts are almost certainly possible. In particular, expositors of Kant have written extensively on his concept of treating a person as a mere means. I cannot pretend, therefore, to have demonstrated that there is *no* way of explaining why the deterrence justification of punishment must "use people" in a morally illegitimate fashion. As I said at the beginning of this paper, my very modest goal has been to exhibit the difficulties I have encountered in grasping this retributivist argument, in the hope that other scholars will offer clearer and more persuasive accounts of what it is that the retributivists are getting at.

Benjamin Constant had written of "a certain German philosopher" who "goes so far as to maintain that it would be a crime to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house." *Id.* at 611. Kant's reply took issue with Constant's use of "crime" – the lie need not be a crime, although it "*can*, however, also become by an *accident* punishable in accordance with civil laws." But even if not criminal, the lie is nonetheless morally wrong, since "Truthfulness in statements that one cannot avoid is a human being's duty to everyone, however great the disadvantage to him or another that may result from it." *Id.* at 612. Kant insisted that this duty "makes no distinction between persons to whom one has this duty and those to whom one can exempt oneself from it, since it is, instead, an *unconditional duty*, which holds in all relations." *Id.* at 614.

[31] Hill, indeed, asserts that "in Kant's opinion, the criminal can rationally – though he may not – adopt the ends of deterrence and even retribution for which he may be punished." HILL, *supra* note 14, at 45.

[32] Korsgaard herself might well agree, since she believes that Kant's absolute ban on using people as mere means "gives implausible answers when we are dealing with the misconduct of others," and, in such cases, "is inapplicable because it is not designed for use when dealing with evil." KORSGAARD, *supra* note 13, at 151. Hill likewise finds that Kant's principle "invite[s] the charge of utopianism," being fully applicable only in "a world of thoroughly moral persons," and inapplicable, in particular, to criminal punishment. HILL, *supra* note 14, at 73.