

## Autonomy, Paternalism, and Drugs

This paper is motivated by the conviction that the war on drugs is irrational and inhumane. The current regime of drug laws in the United States represents an inconsistent set of responses to a serious social problem; tobacco and alcohol are legal, even though their costs to society far exceed those of illegal drugs like marijuana, heroin, and cocaine. The prosecution of the "war on drugs" by federal, state, and local governments has gone on longer than any other war in American history and, as with any war, has left a landscape littered with the wrecked lives of both participants and innocent bystanders. But, again as with any war, it has also produced a peace movement seeking to end the hostilities. This paper is a contribution to that movement.

In what follows, I seek to set out a theoretical basis for the humane reform of drug laws, one which acknowledges the very real human costs of drug use while still rejecting the criminalization of that use. I shall argue that the appropriate policy response to use of drugs is paternalistic in character, though of a rather non-traditional sort. The conception of paternalism that I advocate finds its inspiration in Kantian moral and political theory in that it seeks to protect the concrete realization of autonomy by human beings. At first glance, this might strike one as paradoxical since the autonomy of the moral agent would seem to be incompatible with a paternalistic approach to legislation. Nonetheless, I think there is a manner of constructing a form of legal paternalism that is distinctively Kantian in character and provides the theoretical framework of a coherent drug policy offering the best hope for a reform that is realistic, humane, and respectful of individual liberty.

I shall devote my first section to the Kantian conception of the person, including most importantly a reconstruction of Kant's conception of persons as ends in themselves, what I take to be the main argument for this formulation, namely, the rational person's status as a subject of action rather than as a mere object. On the basis of this theoretical framework, I shall in the second section consider arguments for the current criminalization of the use of a variety of controlled substances. I shall then apply this framework to develop a Kantian version of legal paternalism in the third section. Kantian paternalism seeks not to impose a particular conception of happiness on its subjects, but rather to preserve and protect *in concreto* the autonomy of the moral agent. In my fourth and final section, I shall conclude by exploring the policy implications of Kantian paternalism with regard to current drug policy. There I shall argue that it is permissible to criminalize the use of a drug if and only if the drug in question is, first, addictive and, second, its addictiveness is what I call "dominative."

### I.

I begin with Kant's second formulation of the categorical imperative,

according to which persons are to be treated as ends and not simply as means. In connection with this, Kant distinguishes between two types of ends. Ends are subjective if they are those "which a rational being arbitrarily proposes to himself as consequences of his action"; these "are material ends and are without exception only relative, for only their relation to a particularly constituted faculty of desire in the subject gives them their worth" (Kant 1980b, 45-46). In contrast to these, objective ends "are given by reason alone" and "depend on motives valid for every rational being" (45). Only objective ends "afford any universal principles for all rational beings or valid and necessary principles for every volition," for such ends themselves possess validity for rational agents as such (46).

Given the purposive character of human action, and in keeping with freedom as a precondition of morality, the ends guiding our actions must be freely adopted, though their source may lie either in our reason or in our desires. If their source is the former, the ends are objective, or valid for all rational beings; if the latter, they are purely subjective, as rational beings differ in their particular desires. Kant (1980b) locates such an objective end in rational nature itself, which leads to the second formulation of the categorical imperative: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only" (46). In turn, Kant (1980a) defines humanity as "the capacity to set oneself an end—any end whatsoever" (51). Thus, the second formulation amounts to the claim that we ought to treat the power to set and, I would add, rationally to pursue ends as an end in itself. In contrast, Kant (1965) defines an object of the will as "a thing that I have the physical power to use" (52). Consequently, when Kant states that a person is an end in itself, he means that a person is a subject capable of forming and pursuing purposes in her own right and not just an object to be used for the attainment of another's subjective ends.

Kant's argument (1980b) for this claim is that: "Man necessarily thinks of his own existence in this way; thus far it is a subjective principle of human actions. Also every other rational being thinks of his own existence by means of the same rational ground which holds also for myself" (47). In short, one necessarily considers oneself to be an end in itself, and the reason why one does so in one's own case holds for all other rational beings as well. This rational ground is freedom and, on whatever basis we ascribe freedom to our own will, we must also attribute it to all rational beings. Kant's point here is a simple one. Since each human being must consider herself to be a subject of purposive action and not solely as its object, one cannot will that one should be used merely as a means for the attainment of another person's ends. Consequently, one cannot will that the maxim 'Always treat others solely as a means to my ends' be a universal law.

The objective end of action, then, is provided by the end-setting capacity of rational agency itself, and one treats humanity as an end by respecting that capacity. In this regard, Kant propounds two complementary conceptions of persons as objective ends—a negative and a positive one. According to the negative conception

of persons as objective ends, treating another as an end means not interfering with her in the pursuit of her morally permissible ends, whereas treating oneself as an end involves avoiding manifestly self-destructive behavior. In the positive sense, one treats another as an end when one adopts her ends as one's own and strives to further her efforts to achieve those morally permissible ends. With regard to oneself, this involves trying to develop and perfect one's own natural capacities, and thereby one's ability to set and pursue ends.

In contemporary Kantian theory, the distinction between objective and subjective ends roughly corresponds to the two capacities that constitute Rawls's model conception of the person. The effective sense of justice at least partially captures the idea of persons as objective ends in that public principles of justice are concerned fundamentally with regulating our interactions with one another. On the other hand, the notion of subjective ends is incorporated in the conception of the good, that is, in the capacity to formulate, to revise, and rationally to pursue a conception of the good life.

## II.

With this framework in mind, let us now turn to the issue of the criminalization of drug use. At issue is the personal liberty of adults to choose whether to use consciousness-altering substances, a liberty which is recognized in the case of tobacco and alcohol. I begin with a presumption in favor of personal freedom: those who seek to restrict the freedom of individuals have the burden of proof in justifying that restriction. Given the central role accorded to autonomy within both a liberal society and Kantian moral and political theory, restrictions of choice need to be justified by appeal to considerations that either override the value of autonomy or are required to implement it. In this regard, two moral principles are often appealed to as justifications of laws proscribing the use of controlled substances — the Harm Principle and the Benefit Principle. Of course, the evaluation of arguments based on these principles involves a mixture of empirical, conceptual, and moral issues.

According to the Benefit Principle, a restriction of freedom may be justified if it produces significant benefits to persons other than the actor herself, and thereby in turn to the society. Along these lines, the reduction of drug use through its criminalization generates reduced absenteeism and increased productivity at work. Thus, considerable economic benefits accrue to the society by means of criminalization of drug use. There is an obvious empirical question here: do the benefits generated by criminalization outweigh the costs of enforcing those laws? I shall only take note of that issue here and instead focus on the logical and moral issues involved with this appeal. First, the same argument could be made for the criminalization of both alcohol and tobacco use. More importantly, this type of argument commits one to treating persons as means—in this case, as factor of production—rather than as ends in themselves. Thus, within a Kantian framework, it ought to be rejected on

moral grounds, regardless of the outcome of the cost-benefit analysis suggested above.

As the weightier consideration, appeal to harms does not suffer from such an objection. According to the Harm Principle, a restriction of liberty may be justified if it prevents significant harms to persons other than the actor. Proponents of the war on drugs maintain that the use of proscribed substances generates just such harms in the form of criminal activity by addicts and violence by traffickers.

First, one must distinguish between the harm caused by the use of the drug and the harm caused by the criminalization of that use. There is no empirical evidence that marijuana, cocaine, or heroin are criminogenic substances, that is to say, that criminal behavior is an immediate effect of their use. Instead, the burglary and robbery by addicts is an attempt to secure sufficient funds to procure adequate supply. Criminalization of the drug increases the price of the drug, for it both reduces the supply and adds a premium for risk. Further, the violence associated with the drug trade results from the fact that it is for all practical purposes carried on within a state of nature among its participants, which as Hobbes pointed out is essentially a state of war, even if hostilities have subsided at any particular moment. The stakes and insecurity of this state of nature are increased by the active pursuit of its parties by governmental agents, who are in turn vulnerable to being corrupted by the nature of undercover work and the large flows of cash involved.

Of course, this is not to say that drug use produces no harms; it does. But we must distinguish here between direct, primary harms and indirect, secondary harms—the latter being the harmful consequences of the former. In the case of those substances that are prohibited, the direct, primary harms are to the user herself; these consist of the obvious physiological damage to one's body, as well as the psychological effects of use. As a result of those harms, the user's family and friends suffer from the deterioration of a loved one, the indirect, secondary harms to those close to the user. Thus, drug use would seem to be a strong candidate for paternalistic legislation oriented towards protecting the user from himself.

### III.

Let us now consider the case for a paternalistic approach to drug laws. For the purposes of this paper, I adopt the standard formulation that legal paternalism is the principle that a law may be justified if it serves to protect agents from inflicting serious harm on themselves. In liberal theory, paternalism is viewed with considerable suspicion, for it has usually involved imposing a particular conception of the good life on unwilling agents, who are in effect treated as children. The term itself suggests, in the words of the old television series, that father knows best.

Aside from these negative connotations, my own endeavor to construct a Kantian variant of paternalism confronts a fundamental problem: namely, that by interfering with agents' pursuit of their own subjective ends, the approach seems to

violate the negative sense of respect for persons as ends in themselves. Kant's own comments on paternalism are quite harsh and well-supported within the framework of his moral theory. The paternalistic state is "the greatest conceivable despotism," for it treats persons as being unable to discern "what is truly useful or harmful to themselves" and thus in need of guidance by the state "as to how they ought to be happy" (Kant 1977, 74). Any effort to protect agents from themselves involves imposing on them a particular conception of happiness that they do not share. This might be acceptable if there were an objective conception valid for all rational agents as such. But happiness simply is the sum of the satisfaction of all one's inclinations, and one's inclinations depend on the particular constitution of one's faculty of desire and thus are purely subjective in nature. There can be, then, no universally-valid conception of happiness, and any attempt to base legislation on a happiness amounts to an arbitrary imposition of one person's purely subjective conception upon another in violation of the latter's autonomy. Therefore, legislation ought only to protect each person's pursuit of her own subjective ends insofar as she respects other's pursuit of their own private ends, i.e. legislation ought to establish the conditions of maximum equal freedom.

Following Kant, Rawls's line is quite similar. In the absence of some overarching conception of the good, justice becomes a problem of coordinating the activities of different moral agents pursuing a multiplicity of conceptions of the good. The result is unanimous agreement of the Equal Liberty Principle and its primacy in political affairs; each person is morally entitled to a maximum system of basic liberties compatible with a similar system for all. In a pluralistic society, we simply cannot expect that any single conception of the good will command general assent, and thus, it has become a bedrock principle that the state ought to remain neutral as regards different conceptions of the good life, not seeking to impose any particular conception, but rather allowing individuals to pursue their own happiness according to their own lights. A serious commitment to liberal pluralism, then, would seem to support legalization of all controlled substances, perhaps with educational efforts to promote informed decision-making and restrictions on marketing and sales to protect the youth of the society.

If we are to construct a properly Kantian variant of paternalism, we must find some basis other than a particular conception of the good for intervention into what would appear to be purely private decisions. In ordinary parlance, paternalism is the doctrine that persons need to be protected from themselves, and this rather rough rendition of the principle is actually quite incisive for the argument that I am about to make. I propose that we may locate the grounds for a limited paternalism in the capacity for end-setting itself. Though no purely subjective end may serve as the basis for legislation and thereby be used to define another's appropriate interests, each rational agent possesses an interest of practical reason in the exercise of her capacity to develop and rationally to pursue ends; in fact, it is precisely in virtue of this capacity that one is an objective end. In so far as it aims at right or justice,

legislation seeks to secure and protect individuals in accordance with the negative conception of persons as objective ends.

In the *Metaphysics of Morals*, Kant (1965) proposes the following principle: "any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it" (35). On the basis of this claim, he concludes that "if a certain use of freedom is itself a hindrance to freedom according to universal law (that is, unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws" (36). Though he is discussing external relations among agents in this context, the principle with which he starts is clearly of more general application, for we ought not to assume at the outset that the only threat to the status of a person as an objective comes from others. Consequently, his conclusion can be expanded to include an agent's own actions in detriment to her freedom. A person, then, may be protected against herself by prohibiting activities detrimental to her own freedom as a rational agent. Given Kant's principle, this type of prohibition is not a restriction of freedom, but rather is consistent with it.

Certainly, an individual can engage in self-destructive activities that threaten her own status as an objective end. This occurs when she compromises the very ability to set and rationally to pursue subjective ends, that is, when she sacrifices the end-setting capacity that defines her as a rational agent and thereby as an objective end. Under such circumstances, intervention through legislation may be appropriate in order to secure the concrete, empirical conditions of rational agency by legally prohibiting such activities, even if they pose no threat to others. What such legislation seeks to advance is not any particular conception of happiness or the good in the form of some subjectively chosen end but freedom itself, and thus could not be characterized as a "despotic imposition." In Rawls's terms, if we have an interest in exercising our capacity for developing and rationally pursuing some conception of the good, then we also possess an interest in protecting that capacity even when the threat to it comes from ourselves.

#### IV.

Any reasonable discussion of drug use ought to start from an acknowledgment of its cross-cultural universality and ubiquitous presence in our own society. If we take this seriously, then the real issue we confront is not how to eradicate drug use, but how to regulate it. In the current political climate, we sidestep such a discussion in large part by means of a use of language that distorts reality: we simply do not call tobacco and alcohol 'drugs' and instead reserve that label for illegal substances. In order to attain clarity on these matters, we need first to consider the conditions under which we ought to prohibit the use of a substance, which will in turn determine the appropriate legal response to violations of such prohibitions.

I think it is clear at the outset that wherever we draw the line regarding the

legality of consuming particular substances, we ought to educate persons regarding the full range of such substances, legal and illegal. If we value autonomy, then we will take steps to insure that persons acquire sufficient knowledge of various substances. Autonomous choice requires that persons have at least a basic understanding of the consequences of using different substances.

With regard to prohibition, we need to distinguish between those controlled substances that are addictive by their very nature and those that are not addictive by nature, though some persons may in fact become addicted to them. In the former category, I would place cocaine and heroin, whereas marijuana would fall in the latter category. With respect to substances that are currently legal, tobacco would fall in the former and alcohol in the latter categories. The distinction between addictive and non-addictive substances is important here as a necessary, though not sufficient, condition for criminalization. On Kantian paternalist lines, an addictive substance might be an appropriate object of criminalization if it could threaten the end-setting capacity of rational agents. No such threat is posed by non-addictive substances, however, and thus it would be impermissible to prohibit marijuana, or alcohol for that matter. Cases of addiction to those substances, when they occur, ought to be treated as individual medical or mental health problems.

The permissibility of a prohibition of an addictive substance requires that one further condition be met, namely, that the addiction be what I term 'dominative.' For purposes of illustration, consider the case of nicotine in cigarettes. While nicotine is addictive, one can be a smoker and yet still live in such a way that one's life is not dominated by that addiction. The addiction is such that one still retains the capacity to set and pursue a variety of ends. In the case of heroin and cocaine, however, this seems not to be the case: one cannot be a regular user of those substances and retain one's end-setting capacity. Instead, one's life is so dominated by the addiction to the drug that one's life becomes oriented around its consumption. If this is the case, then one particular subjective desire becomes so strong as to trump all other desires and thereby destroys one's rational agency, at least for as long as one is addicted. In his useful work on the concept of autonomy, Gerald Dworkin (1988) defines autonomy as a second-order capacity for reflection on and revision of one's ends. Understood in these terms, we can characterize an addiction as dominative when its associated first-order desire and its attendant end have in effect eliminated the higher second-order capacity that is an essential feature of the person as a moral agent. Under these conditions, prohibition of such substances is permissible, though perhaps not obligatory.

Let us now consider the current response of the United States' criminal justice system. The current strategy in the drug war is committed to treating drug use as fundamentally a problem of supply to be addressed by means of crop eradication, interdiction of smuggling, and incarceration of the suppliers and consumers who constitute the domestic black market for those drugs. The adoption of a Kantian paternalist approach would shift the focus from supply, on the one hand, to addict

demand and reduction of harms to those other than the users, thereby effectively transforming the issue from one of justice to one of health. Within a Kantian paternalist framework, punishment of offenders guilty of possession and use is unjustified. If our goal is to protect persons from injuring themselves, then incarceration is clearly misguided for it inflicts injury on the person we seek to protect. Instead, a program of treatment aimed at freeing the addict from her addiction and thereby restoring rational agency would be mandated. Substance abuse, then, would cease to be a matter to be addressed by the criminal justice system and instead fall under the purview of the medical and mental health system.

In closing, I would like to call attention to the diversity of policy options compatible with Kantian paternalism across a broad range of issues, including but not limited to controlled substances. In addition to education and treatment, taxation and various forms of regulation would also be appropriate depending on the circumstances. This diversity is evidence of the richness of the Kantian tradition.

#### References Cited

- Dworkin, Gerald. 1988. *The theory and practice of autonomy*. Cambridge: Cambridge University Press.
- Kant, Immanuel. 1965. *The metaphysical elements of justice*. Translated by John Ladd. Indianapolis: Bobbs-Merrill.
- . 1977. On the common saying: 'This may be true in theory, but it does not apply in practice,' trans. H. B. Nisbet. In *Kant's political writings*, ed. Hans Reiss. Cambridge Studies in the History and Theory of Politics. Cambridge: Cambridge University Press.
- . 1980a. *The doctrine of virtue*. Translated by Mary Gregor. Philadelphia: University of Pennsylvania Press.
- . 1980b. *Foundations of the metaphysics of morals*. Translated by Lewis White Beck. Indianapolis: Bobbs-Merrill.