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Comments on Hill:
“Punishment, Conscience, and Moral Worth”

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This is an interesting paper to me, among other reasons, because it deals with both halves of Kant’s *Metaphysics of Morals*; that fact alone also makes it somewhat unusual. It proposes in particular that there is a kind of analogy between conscience as an inner voice of morality and punishment as a provider of incentives against antisocial actions through punishment as deterrence.

As Hill points out, there has been quite a lot of discussion of Kant’s views on punishment, but not much about his views of conscience. Nevertheless, there remain scholarly puzzles about Kant’s views on punishment, and there is hope that we can learn something about Kant’s views on punishment by drawing out the comparisons with conscience, as well as learning more about conscience. Such comparisons help to make clearer than ever a fact about Kant’s theory of punishment that I think both Hill and I agree on and find worth emphasizing, viz., that Kant’s discussion of punishment is not simply a presentation of isolated moral intuitions about the deserts of felons, and the appropriate anger we direct toward malefactors. It is rather in a variety of ways embedded within, and very much an outcome of Kant’s general theory of morality.

Kant himself has little to say about connections between the two parts of *Metaphysics of Morals*, and yet we have much to learn from teasing out the relevant points of comparison. One such connection that is important in Hill’s discussion, and that I take to be both important and correct, is that we have a (qualified) ethical duty to obey the law. Hill’s account of the motivation that a morally good person would have for obeying the law is, I think, correct and important, and helps us to bring *Recht* and *Tugend* into closer relation; this account of how our duty to obey the law works can also help us see that punishment is not only a topic in law or external duty, but is a legal topic with a moral background.

Let me briefly explore another such connection between the two parts: Kant does not say, but I think we must assume, that for an individual to be properly subject to punishment, he or she must possess inner freedom.

Hence, it is not appropriate to punish cats or machines that malfunction, and for a similar rationale it is not appropriate to punish unintentional acts or acts that are the product of mental illness, unless there is at least an indirect connection with human intention, and hence freedom.

Here is another connection between *Recht* and *Tugend* that should be of interest: If an individual acts badly, we can fairly reliably infer a bad intention. However, we cannot reliably infer good intentions from good actions. The act of giving to charity may be done for all sorts of morally neutral or even bad motives, and we are not, in general, able to infer good motives. But an evil action can hardly flow from a good intention, and hence there is a lack of symmetry.

Hence, we can say that if someone performs a punishable act, there is also an inner moral evil (intent or attitude) in the one punished. Or, to put the point in something like the contrapositive: No one should be subject to punishment unless there is an inner moral evil present in that person. This would be true even if we take the position that the only appropriate thing to be punished is the external act, rather than the inner intent. And we should also be clear that it would be wrong to punish a mere evil intent that was never manifested in action. E.g., Gloria has a great hatred for her ex-landlord, but she successfully resists the strong impulse to do him harm, or even, she never seems to have enough time successfully to stalk and shoot him; if her evil intent leads to no overt act, she would not be punishable.

Let us ask concerning Kantian autonomy: How can it be compatible with autonomy to have one's behavior forcibly interfered with, as it is when the individual is punished, e.g., given a prison sentence? If we speak initially in terms of "outer freedom," we can say that punishment is intended to resist wrongful interferences with others' freedom, which is what punishable offenses are. Punishing a bank robber makes clear the state's position that such an action is wrong, and deters the punished person and others from performing such acts, thereby preserving a rightful range of freedom for external action of banks and depositors. Further, to mention a point that Herbert Morris makes in "Persons and Punishment,"¹ the punishment system maximizes freedom by not interfering with anyone's behavior until the individual actually acts wrongly, and violates a law; this was one way in which a social system of punishment compares favorably with a social system of therapy, in Morris' view.

So the punishment system, by deterring antisocial acts, preserves external freedom. Well, one might reply, it does so only by interfering in a very serious way with the autonomy of the person punished. But then Kant could reply, that there are two sorts of freedom-lawless, wild freedom, which he is not interested in, and freedom as acting in accord with practical requirements on action, including moral requirements. Punishment

is a hindrance to a hindrance of (external) freedom, and is in this system consistent with autonomy.

We can imagine a similar kind of dialogue concerning inner freedom. Consider an individual's freedom, which she might forcibly insist upon, to drink herself into a drunken stupor. Imagine moral suasion being applied to such a stupor-prone individual, whether from herself or from others. It might be urged that refraining from such indulgences would be an interference with personal autonomy, and that moral considerations, which would wish to pull one back from such free behavior, even if they come from inside oneself, are incompatible with true self-determination. A person who is constantly on guard against personal indulgence was described in the 60s as "up tight" and the thought was that such an individual was lacking in a certain important sort of personal freedom. But Kant's reply is that only moral freedom is true freedom, and in this sense such self-constraint is an act in favor of personal freedom. Here, it will be noticed, the imagined Kantian replies to complaints that either punishment or moral self-constraint would be anti-autonomy, are closely analogous.

Finally, let me consider the question of whether the Kantian conscience has a motivational role. Hill seems to want to affirm a *motivational* role for the Kantian conception of conscience. Let me construct an interpretation of the Kantian conscience according to which the *motivational* role would continue to be played by the agent's *Willkür* (faculty of choice) rather than specifically by conscience.

Kant insists that we cannot have an obligation to have a conscience, and that we would be just lacking a moral nature if we did not have a conscience at all. What is usually being said when we say that someone does not have a conscience is that such a person does not listen to her conscience. But what the conscience is " ... is practical reason holding man's duty before him for his acquittal or condemnation in every case that comes under a law" (*MS*, Ak., VI, 400). I read this as saying that conscience itself does not motivate; the possibility of being moved by conscience is instead left to the agent's *Willkür*. The duty that relates to conscience, Kant tells us (Ak. VI, 401) is " ... to cultivate one's conscience, to sharpen one's attentiveness to the voice of the inner judge and to use every means to obtain a hearing for it ..." Hence, we have only indirect duties with respect to conscience, and our direct duties relate to our responsiveness to conscience.

The comparison, then, would be not just between conscience and punishment, both of which are motivators to moral action. Rather, the fuller comparison is between the criminal justice system of laws, including punishment, and the inner set of faculties of choice that include conscience. Conscience is most directly comparable to "law," for each in its way puts before us salient characteristics of action as being morally relevant, especially in a negative way. So we can get analogous inner conversations:

"Driving while drunk is against the law, and that must be a reason for thinking it morally wrong as well. That suggests I have a conclusive moral reason for refraining." "My conscience tells me that defrauding my uncle out of his inheritance is wrong. I can't seem to discover the error of that way of thinking (i.e., by my conscience), and so what I did must have been morally wrong. I should consider whether there is some way to undo what I did." Both law and conscience are moral signposts, signals of salience, one in the internal realm, one in the external realm.

In the case of the external signpost, the law, we understand the mere statement of law to be connected with provisions for criminal punishment, which would move us if no moral consideration did, to refrain from breaking the law. The incentive that is specially connected with law is an external one, viz., threat of punishment.

In the case of the internal signpost, one's conscience, we understand the judgments about morality that it supplies us with, and we (viz., our faculty of choice) respond in some good or not so good way. Our *Willkür* may not be listening at all, in which case no response; we may be tuned into the message of conscience, in which case we move away from the wrongful choice through the self-constraint of moral motivation.

Perhaps a reason why there has not been much discussion of Kant on conscience is because by itself, and apart from a moral self that listens to and responds to its deliverances, it is an incomplete faculty. Kant insists that we cannot have a duty to have a conscience, and that we cannot have a direct duty to develop our conscience—either idea leads to an unacceptable regress. Rather, what we develop is our responding system, the moral self, the *Willkür*.

In the case of the institution of punishment, the laws, and the criminal justice system must both be constructed within the state, and there is much more to be said about how this construction is to proceed, though not in this comment. Thus, we get Kant's theory of the state, and of punishment.

The analogy is between (1) in *Recht* a mere precept of law and the motivation that is added to obeying this precept by the provision of punishment, and (2) in *Tugend* the precept provided by conscience and the motivation provided by *Willkür*. This way of stating the analogy is suggested by Kant's remarks in the general introduction to his *Metaphysics of Morals*:

In all lawgiving (whether it prescribes internal or external actions, and whether it prescribes them a priori by reason alone or by the choice of another) there are two elements: First, a law, which represents an action that is to be done as objectively necessary; and second, an incentive, which connects a ground for determining choice to this action subjectively with the representation of the law.²

Both the institutions of criminal punishment, and even conscience are consequences of human imperfection, I think. They both swing into action only when there is a prospect of serious wrongdoing. If all individuals acted morally perfectly, there would be no criminal violations, and the institutions of criminal justice would wither away. In fact, it might be urged that in a society of morally perfect finite beings, the state would not be necessary, and that all we need to move to a satisfying state of anarchism, would be for all of us to modify ourselves into morally perfect finite beings. Analogously, such a morally perfect individual would, I think, never hear the voice of conscience, and, we might add, a person possessed of perfect virtue after the model of Aristotle also might never hear that voice. If that is correct, then conscience acquires the importance it has in Kant's moral philosophy because of Kant's characteristic idea that there is so often a *conflict* between duty and inclination.

NOTES

¹ Herbert Morris, "Persons and Punishment," *Monist* (1968) 52(4): 475-501.

² Immanuel Kant, *Metaphysics of Morals*, §3 Ak., VI 218f.