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Three Interrelated Views of Punishment

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Peter Karl Koritansky: *Thomas Aquinas and the Philosophy of Punishment*. (Washington, DC: Catholic University of America Press, 2012. Pp. x, 209.)

Jeffrie G. Murphy: *Punishment and the Moral Emotions*. (New York: Oxford University Press, 2012. Pp. xxiii, 322.)

William J. Stuntz: *The Collapse of American Criminal Justice*. (Cambridge, MA: Harvard University Press, 2011. Pp. viii, 432.)

It is very unusual for books under review to relate to each other as instructively as do these three books on punishment. They truly deserve to be read and reviewed together.

Peter Karl Koritansky's *Thomas Aquinas and the Philosophy of Punishment* is an attempt to defend a refurbished version of Aquinas's justification for punishment against a Benthamite utilitarian or a Kantian retributive justification of punishment. Koritansky seeks to purge Aquinas's view of its justification for the physical punishment of heretics while retaining grounds for punishment that are superior to the best that either a utilitarian or a retributive justification of punishment can offer.

Koritansky argues that Aquinas's defense of punishing heretics is based on a mistaken assumption, popular in his time, that political authority should be used to enforce the laws of the church. Once that assumption is abandoned and the grounds for political authority is recognized to be what can be justified by reason alone, Koritansky believes that Aquinas's justification for punishment can be seen to be preferable to its utilitarian and Kantian alternatives.

For Koritansky, utilitarian justifications for punishment are fatally flawed by the utilitarian's failure to recognize that "actions that are morally evil by their objects are not rendered acceptable because of good ends" (74). Needless to say, utilitarian justifications of just about anything seem to be marked by this failing. Similarly, Koritansky thinks that the best modern retributivist theories cannot explain how a criminal act constitutes an advantage that must be canceled out by the disadvantage of punishment for the sake of fairness (197). He claims not to be able to understand how persons who wrongfully kill others abrogate to themselves a greater liberty than those who just wrongfully take the property of others, and for that reason,

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deserve a greater punishment—a mainstay thesis of contemporary Kantian retributivists. Nevertheless, what appears to be the main advantage of Aquinas's theory of punishment, according to Koritansky, is that by situating punishment within the larger order of divine providence, the theory is able to moderate the harsher features of Kantian retributivism (169).

Surprisingly, Jeffrie G. Murphy, one of the Kantian retributivists that Koritansky is attacking in his book, wants to achieve a similar result without rejecting the Kantian retributivism he has long defended. In *Punishment and the Moral Emotions*, Murphy still professes to defend a Kantian theory of punishment, but he now seeks to give it a religious foundation. He appeals to the idea that human beings have a special moral preciousness because they are created in the image of God and are his beloved children (xvi). In his earlier work, Murphy had defended a retributive hatred of the criminal. But he now sees things differently. He writes: "If I were capable of a certain kind of faith, then perhaps I could relax a bit the clenched fist with which I try to protect myself, sustain my self-respect, and hold my world together all alone" (19).

Murphy recounts a famous passage from Dostoevsky's *The Brothers Karamazov* in which Ivan tells the story of a general who after discovering that one of his servants, a boy of eight, had thrown a stone at his favorite dog causing the dog to limp, gathered his entire household together, placing the boy's mother in front of them all. He then had the boy strip, told him to start running, and then set his pack of wolfhounds at him, tearing him to pieces. Reflecting on the general's action, Murphy asks whether it would ever be proper to forgive him for what he did, and perhaps even willingly have him as a guest in one's home (191).

Murphy's answer is that the general may well be unforgivable, but that it does not follow that he can legitimately be regarded as something less than a human being and treated accordingly, for example, by being tortured. According to Murphy, "One who accepts a divine command to love one's neighbor and regard every member of the human species as a neighbor has a perfectly adequate ground for abandoning any degree of dismissive hatred that might lead to seeing the unrepentant general as vermin or a monster or a piece of excrement lacking in all human dignity" (203). As to whether one should attempt to bring about the general's moral transformation, for example, by inviting him to dinner in one's home, Murphy is ambivalent.

In any case, Murphy's refurbished Kantian retributivism can be seen to parallel closely Koritansky's refurbished Thomistic theory of punishment. Koritansky sees an advantage to situating punishment within a larger order of divine providence, and Murphy thinks it is important to give punishment a religious foundation in order to anchor a robust account of human dignity. So Koritansky's grounds for rejecting Kantian theories of punishment cannot apply to Murphy's current view.

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Nevertheless, the common ground that both Koritansky and Murphy now share—their appeal to religious authority to support their theories of punishment—does raise a problem for their views. Koritansky claims that the basic problem with the theory of punishment that Aquinas actually defended was that it permitted punishment to be used to enforce the dictates of a religious authority. But doesn't Koritansky make the same mistake in his refurbished Thomistic theory of punishment by incorporating an appeal to divine providence?

Likewise, Murphy appeals to a religious requirement to love one's neighbor to support his theory of punishment, but then at times he attempts to find a nonreligious foundation in Kant for the very same requirement (206).

Another similarity shared by Koritansky's and Murphy's theories of punishment is that neither relates his view to the actual practice of punishment, even to the actual practice that currently exists in the United States.

At one point, Murphy recognizes that this does raise a problem for the relevance of his view. He writes: "let me baldly state that … the whole American system of so-called 'criminal justice' has to a great degree become a moral and administrative mess—a great bloated monster driven by competing and sometimes inconsistent values, and sometimes by no values at all, but simply by cruelty and indifference or institutional inertia. It calls, in my judgment, for radical rethinking and redesign. Thus I cannot help thinking that spending a lot of time tinkering with the small counters of the present system that might be affected by remorse and apology"—which appears to be what Murphy is actually doing in his book—"is rather like, as the saying goes, rearranging the furniture on the deck of the *Titanic*" (174).

In this regard, William Stuntz's *The Collapse of American Criminal Justice* could not be more different from Koritansky's and Murphy's books. Stuntz does not describe features of an ideal criminal justice system, as do Koritansky and Murphy. Rather, Stuntz describes in embarrassing detail the actual features of the criminal justice system we have in the United States and then proposes fundamental reforms that are urgently needed.

Stuntz begins by noting how the American criminal justice system has changed from being one of the most lenient justice systems in the late 1960s and early 1970s to becoming by century's end the harshest system in the history of democratic societies (2–3). Americans started with punishment levels lower than Sweden's and then proceeded to build a justice system more punitive than Russia's (34). In 1972, 77 of every 100,000 Texans were housed in state penitentiaries; by 2000, the figure was 730. Massachusetts's imprisonment rate was 32 for every 100,000; in 1997 it was 278. Between 1973 and 2003, Mississippi's imprisonment rate rose from 76 to 763 (46–47). Today, per capita black incarceration is 80 percent higher than the rate at which Stalin's regime banished its subjects to the Gulag (48). Moreover, with the exception of homicide, most Western European nations are as crime-ridden as the United States or more so. What is different is the

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imprisonment rate. In the Netherlands the rate is 78 per 100,000; in Germany it is 74, France 72, and Scandinavian rates are still lower (50).

In addition, Stuntz emphasizes over and over again how the United States's system of penalties falls disproportionately on blacks and Latinos. Thus, while 10 percent of black adults, 9 percent of white adults, and 8 percent of Latinos use illegal drugs, Blacks are nine times more likely than Whites and nearly three times more likely than Latinos to serve prison sentences for drug crimes (4). Today among white men, the imprisonment rate stands just under 500 per 100,000: the highest in American history by a large margin. Among black men, the number tops 3,000; among black men in their twenties and thirties, the figure exceeds 7,000. If present trends continue, one-third of black men with no college education will spend time in prison. For those who do not finish high school, the figure is 60 percent (34). Moreover, if social stigma is the main deterrent that criminal sentences provide, then the more the members of any community are punished, the less the deterrent effect that punishment will have (52). Another contributing factor with respect to imprisonment for drug offenses that Stuntz notes is that federal legislation punishes the possession of 1 gram of crack cocaine to the same degree as possession of 100 grams of powder cocaine. As it turns out, most powder cocaine users are white. Blacks are also a minority of crack cocaine users, but they are the overwhelming majority of crack defendants (23–24).

In terms of their exposure to criminal violence, Stuntz points out that Americans live in two strikingly different societies. In Chicago's racially integrated, but mostly white Hyde Park, today's homicide rate is 3 per 100,000. In neighboring Washington Park, with a 98 percent black population, most of them poor, the rate is 78 per 100,000 (21). Large portions of major cities are war zones, while other large portions of those same cities, along with most of the rest of the country, are reasonably safe (21). What actually happens is that poor neighborhoods experience too much punishment where punishment does little or no good, for example, with respect to drug crimes, and too little punishment with respect to crimes of violence where punishment is most needed to preserve social peace (55). This is because cash-strapped police forces put their time and attention where arrests and convictions are cheapest—low-end drug crime, where mere possession can solve the case—and avoid more-expensive-to-solve violent crimes in violence-plagued neighborhoods (55).

Stuntz notes that in the late nineteenth century, unlike today, working-class immigrants and their offspring largely governed the justice system that governed them (29–30). In northern cities, slots on police forces were patronage jobs, filled by political machines that depended on the votes of the working-class immigrants whose streets most needed patrolling. Those urban machines also chose the district attorneys who prosecuted criminal cases and the judges who tried those cases. Then as now metropolitan counties included large chunks of suburban territory outside city limits. But in the

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late nineteenth and early twentieth centuries those suburbs were sparsely populated. Cities contained the votes that mattered. In addition, urban communities exercised power in jury boxes as well as through ballot boxes. Locally selected juries decided nearly half of serious criminal cases, and those jurors were no prosecutorial rubber stamps. Frequently, they acquitted. More than three-quarters of turn-of-the-century Chicago homicides led to no criminal punishment—not because the perpetrators could not be identified, but because no jury would convict them (30). Today, most urban district attorneys and trial judges are still elected countywide, but the makeup of metropolitan county electorates has changed thanks to rising numbers of voters from suburbs and well-off neighborhoods (32). Today, black crime is mostly governed by white judges and white politicians and by the white voters who elect them (60). Moreover, more inmates are in state and federal prisons, not because of drug offenses which are only 20 percent of the prison population, but chiefly because prosecutors have charged and convicted more criminal defendants than in the past (47).

According to Stuntz, another important feature of our current criminal justice system is that jury trials once common have become rare events. The overwhelming majority of criminal convictions—more than 95 percent—are by guilty pleas and most of those are the result of plea bargains (7). This tends to remove control of the criminal justice system from those who are most affected by it.

Still, the US punitive justice system actually punishes a remarkably small fraction of serious crimes. Out of the tens of millions of felonies that occur each year, American prosecutors convict 1.1 million felons, roughly 700,000 of whom must serve prison sentences (52). So it turns out that punishment in the United States is random and selective as well as discriminatory.

What then is Stuntz's remedy? According to Stuntz, the United States's criminal justice system stopped working when a particular kind of democracy—the kind in which residents of high-crime neighborhoods shape the law enforcement that operates on their streets—ceased to govern the way police officers, prosecutors, and trial judges do their jobs (309). So Stuntz's remedy is to give local neighborhoods more power over the administration of justice within their own bounds, as they once had. There should be more jury trials with juries drawn from neighborhoods not metropolitan counties. Stuntz also thinks that local governments should also pay more for the prison beds they use and less for the police officers they employ (283).

Stuntz's book provides an illuminating account of the US criminal justice system and its deficiencies. Stuntz's remedy is also appropriate. Surely, we should at least recapture for the US system the greater fairness it had earlier when local neighborhoods had greater control over the process.

Yet isn't there more that justice or fairness requires of our system of punishment? While Koritansky and Murphy may have been in error in trying to capture an ideal system of criminal justice without relating it to the one we

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actually have, the reform that Stuntz proposes for our actual criminal justice system seems too limited.

For consider: Doesn't the justification for inflicting the penalties of a criminal justice system presuppose that there is already in place a justified system of distributive justice? If the distribution of income and resources in a society is fundamentally unjust, how could the criminal justice system be justified in enforcing that very same unjust system? So if we want to determine what would be a justified criminal justice system, we are going to have to ask ourselves what would be a justified distributive justice system, that is, what resources and opportunities each person should have in a just and fair society. Put another way, the justification for enforcing criminal penalties on people crucially depends on the justification of the underlying distribution of income and resources. This would seem to hold true particularly with respect to crimes against property. If the distribution of property is fundamentally unjust, surely enforcing that distribution through the criminal justice system cannot be just.

So while Stuntz is correct that our criminal justice system needs to be reformed by returning to our better practices from our past, more still needs to be done to secure the justice of the underlying distribution of income and resources on which the legitimacy of the criminal justice system depends. Presumably, even Koritansky and Murphy, with their focus on ideal theories of criminal justice, would, if pressed, agree that such an addition to Stuntz's proposed reform of our existing criminal justice system is needed. If so that would serve to strongly interconnect the views of the three authors under review here.

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