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William J. Stuntz

The Collapse of American Criminal Justice

Harvard University Press, \$35, 413 pp.

It is often said that facts are revolutionary. With their power to burn off the ideological mists that obscure our political vision, and to remind us of the unanticipated and sometimes negative consequences of our most well-meaning actions, facts can shake our views on matters great and small, dishing out intellectual therapy to the benighted and the bemused. The legal scholar William Stuntz, who died last year of cancer at fifty-two, was a master practitioner of this brand of therapy, filling his writings with counterintuitive observations in order to lay bare the weaknesses of a legal system he viewed as deeply flawed. To his scholarship he brought intellectual integrity, a profound sense of justice, and vision. His final book, *The Collapse of American Criminal Justice*, crowns an intellectual trajectory that very few have equaled.

Like much of Stuntz's previous work, *The Collapse of American Criminal Justice* focuses on historical analysis, the nature of systemic decision-making, and the unintended consequences of decisions – arguing, for instance, that landmark Supreme Court criminal-law decisions of the liberal Warren era, such as *Mapp* and *Miranda*, ended up harming those the court set out to protect, as states responded by enacting harsh sentencing laws, more expansive criminal statutes, and stepped-up enforcement that boosted inequalities in conviction and punishment. Stuntz's larger brief is that over-criminalization, over-punishment, and misplaced discretionary power have brought the American criminal-justice system to the point of collapse. In his view, our criminal-justice system is doing none of its jobs well. It isn't keeping crime in check, nor is it avoiding discrimination or protecting those who most need the law's protection. Inequality, rather than justice, is its chief product.

According to Stuntz, things were not always this bad. With the important exception of the South, with its punitive traditions, he notes that for most of the nation's history, "criminal justice institutions punished sparingly, mostly avoided the worst forms of discrimination, controlled crime effectively, and, for the most part, treated

those whom the system targets fairly." Though the system was far from perfect, he admits, "one might fairly say that criminal justice worked."

So what happened? One turning point, Stuntz argues, was the shift from the common law of crime and punishment to statutory criminal law – and the corresponding transfer of discretion from judges and juries to police and prosecutors. Instead of bringing the system in line with constitutional equal protection (the Fourteenth Amendment promise) and fulfilling expectations of certainty, rationality, and greater uniformity, this shift weakened democracy and reinvigorated racial inequality. The resulting "political collusion" between legislators and prosecutors, in Stuntz's analysis, corrupted the soul of our criminal-justice system. *The Collapse of American Criminal Justice* makes clear that this is a systemic problem. "When politicians both define crimes and prosecute criminal cases," Stuntz writes,

those two sets of elected officials – state legislators and local district attorneys – will work together to achieve their common political goals. Legislators will define crimes too broadly and sentences too severely in order to make it easy for prosecutors to extract guilty pleas, which in turn permits prosecutors to punish criminal defendants on the cheap, and thereby spares legislators the need to spend more tax dollars on criminal law enforcement.

This unjust system – a legal order this book condemns as "disorderly," "discriminatory," and "the harshest in the history of democratic government" – is at its root the product of flawed constitutional design. One design problem lies in the mismatch between political powers and political effects: suburban electorates who influence criminal-justice policies and legislation are by and large spared the enforcement consequences of those policies and laws, while inner-city communities who live with the consequences lack a political voice. Another problem lies in a legacy of tension between two constitutional ideals charged with control of the criminal-justice system during the century that followed independence: James Madison's Bill of Rights, and the legal guarantees of John Bingham's Fourteenth Amendment. "That century," Stuntz explains,

also saw the establishment of two different sets of institutional practices to govern the justice system's day-to-day operation. In the North, local democracy did most of the governing. In the South, democracy meant either the rule of rich whites or the rule of white mobs.... Over the last two-thirds of the twentieth century, the justice system embraced the wrong ideals and the wrong institutional arrangements. Earl Warren and his colleagues imposed Madison's Constitution, not Bingham's, on local police and prosecutors. And the neighborhood-level democracy that had governed criminal law enforcement in the industrial North faded, to be replaced by a more southern-style democracy in which residents of low-crime neighborhoods establish the rules for more crime-

ridden city streets. Today, black crime is mostly governed by white judges and white politicians, and by the white voters who elect them.

This analysis goes to the heart of the matter, and poses urgent lessons for us today. Can we fix our broken system? Stuntz believed we could, and his prescription for the fix draws on his explanation for why the North historically had a fairer criminal-justice system. What he prescribes is more democracy, and of the local type, in order to “alter the allocation of power over criminal punishment in the United States in a way that legal conservatives as well as ... liberals might approve.” “Criminal law enforcement,” he goes on to remind us, “was once governed locally; the residents of the neighborhoods most affected by it had a large say in its size and character.” More democracy, Stuntz trusts, will reinstall mercy as a fixture of the criminal-justice system. “If anything about American criminal justice needs changing, that does.”

There is much wisdom and vision in this democratic prescription, and it is unlikely that the criminal-justice system can be fixed without some constitutional redesigning of the American democratic experience -- a redesigning, one might add, urgently needed in other areas of national life as well. However, persuasive as I find Stuntz’s focus on democracy, I suspect that unless it is supplemented by greater institutional commitment to reasoned, coherent, principled, and systematic thinking, the kind of change we need will not be forthcoming. Without an inflection of reflective judgment, local democracy is merely another “process” solution for a problem that Stuntz himself considers to a large extent one of “substance.”

Let me take a step back to explain my point. Constitutions constitute – and the first thing they constitute is social and political order. One phenomenon is universally implicated in order: violence. And of all forms of constitutional violence, none is more routinely deployed than punishment for criminal offense. From time immemorial, societies have used punishment to promote their most cherished values and avert their greatest fears. For those individuals facing the criminal law system, fundamental rights, including in some cases the right to life, are at stake. This is the arena where social misfortune, the blameworthy deficiencies of personal will and intention, and the awesome power of social and political orders all face off. Unless society and its institutions confront this reality in reflective, principled, and systematic ways, no amount of democracy will help.

Unfortunately, contemporary constitutional experience is under-reasoned, outsourcing to social and political forces interested only in their narrow stakes the power to influence fundamental aspects of our collective life. Unsurprisingly, the criminal justice system shares this broader constitutional lack of coherent reasoning, deploying its powers in a notably unsystematic and unprincipled way. What makes under-reasoning particularly stubborn is the way it feeds on itself; with a few honorable

exceptions, those who manage the criminal justice system take wholly for granted the legitimacy and reasonability of that system and the roles they themselves play in it.

That the criminal justice system is so impenetrable to demands of reason and principle results in large measure from the prevailing style of thought in criminal justice, shaped in an amorphous tradition of judicial reasoning that willy-nilly deploys tactical arguments that swing back and forth between popular will, historical tradition, or cost-benefit reasoning. Such haphazard style of legal thought detracts from a sustained approach to the architectonics of the criminal justice system based on reflective, principled, and systematic reason. As a consequence, American criminal justice has too often relied on a kind of judicial incrementalism in which judges participate in argumentative maneuvers that stabilize arbitrariness, encouraging an indulgent attitude toward obscurantist and prejudiced public opinion. I find this a bad combination for criminal justice in this country, and I believe Stuntz would agree.

In the end, then, yes, facts can be revolutionary; but they can also be oppressive and blinding. It all depends on whether we take reasoned responsibility for the world we inhabit. Factual therapy is likely to lead nowhere as long as we continue to outsource decisions about our criminal justice system to morally blind processes of decision making -- local democracy possibly included. I offer this thought as a complement to the work of William Stuntz, a scholar who perceived acutely the grievous mismatch that exists in America's justice system between individual rights and criminal justice machinery, between legal ideals and political institutions. *The Collapse of American Criminal Justice* rises to the complexity of the questions it raises, showing nuance, balance, and sophistication, and fulfilling Stuntz' extraordinary legacy even as it -- alas -- completes it. We owe William Stuntz a great debt. I am certain that the best way to pay this debt is by honoring his hope for a truly *just* criminal justice system. □□

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