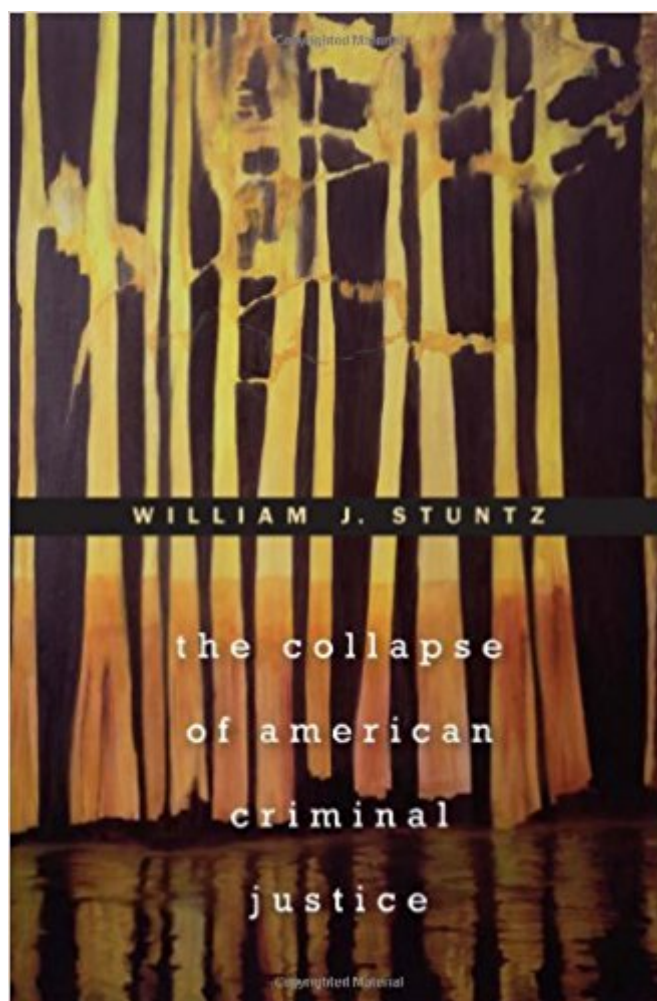


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# The Collapse Of American Criminal Justice



## Synopsis

The rule of law has vanished in America's criminal justice system. Prosecutors now decide whom to punish and how severely. Almost no one accused of a crime will ever face a jury. Inconsistent policing, rampant plea bargaining, overcrowded courtrooms, and ever more draconian sentencing have produced a gigantic prison population, with black citizens the primary defendants and victims of crime. In this passionately argued book, the leading criminal law scholar of his generation looks to history for the roots of these problems and for their solutions. The Collapse of American Criminal Justice takes us deep into the dramatic history of American crime—bar fights in nineteenth-century Chicago, New Orleans bordellos, Prohibition, and decades of murderous lynching. Digging into these crimes and the strategies that attempted to control them, Stuntz reveals the costs of abandoning local democratic control. The system has become more centralized, with state legislators and federal judges given increasing power. The liberal Warren Supreme Court's emphasis on procedures, not equity, joined hands with conservative insistence on severe punishment to create a system that is both harsh and ineffective. What would get us out of this Kafkaesque world? More trials with local juries; laws that accurately define what prosecutors seek to punish; and an equal protection guarantee like the one that died in the 1870s, to make prosecution and punishment less discriminatory. Above all, Stuntz eloquently argues, Americans need to remember again that criminal punishment is a necessary but terrible tool, to use effectively, and sparingly.

## Book Information

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## Customer Reviews

The capstone to the career of one of the most influential legal scholars of the past generation. (Lincoln Caplan, New York Times)

The Collapse of American Criminal Justice is a searching--and profoundly disturbing--examination of American criminal law in action. William Stuntz's posthumous study establishes that our main achievement has been the incarceration of millions, and in the process we have given short shrift to the minimal objectives of a democratic legal order--fairness and equality. This is a masterful work. (Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania)

Bill Stuntz brought humanity, passion, and a broad intellectual vision to the study of criminal justice. His book tells the compelling story of the injustices created by the rise of discretionary power, the resurgence of discrimination and the impoverishment of local democracy. His analysis has implications beyond the shores of the USA; and helps us to see where a more hopeful future might lie. (Nicola Lacey, All Souls College, Oxford)

Bill Stuntz was our leading scholar of criminal procedure. Stuntz argues that much of what we think about American criminal justice is wrong. The system is neither too lenient nor too punitive, but too prone to both extremes, and the extremism is caused by too little democracy. Sweeping, learned, and bracingly original, Stuntz's crowning achievement is a wonderful book. (David Alan Sklansky, Boalt Hall School of Law, University of California, Berkeley)

This is a brilliant book by a supremely decent man. A great scholarly mind from the world of small towns, Stuntz has unique and profound insights into the perverse effects of centralized control of the criminal process of modern America. His vision of a better, more humane, more local justice offers more hope than the work of any scholar I know. (James Q. Whitman, Yale Law School)

Smart and surprisingly provocative, The Collapse of American Criminal Justice is an instant classic. Stuntz sets aside the conventional wisdom and offers fresh--and paradigm shifting--analysis of crime, punishment, and politics. Every prosecutor, defense attorney, judge, and law maker in the country should take Stuntz's powerful insights to heart. The Collapse of American Criminal Justice is indeed the achievement of a lifetime. (Paul Butler, author of Let's Get Free: A Hip-Hop Theory of Justice)

The Collapse of American Criminal Justice [is] a blistering critique of the "arbitrary, discriminatory, and punitive beast" that our nation's criminal justice system has become...Stuntz, who passed away earlier this year, was the Henry J. Friendly professor of law at Harvard University and one of the nation's leading scholars of criminal law and procedure. His work was well-known for uncovering counterintuitive paradoxes at the heart of the American justice system, and Collapse is filled with them...Its diagnosis of our criminal justice system demands attention. Even more so its suggested remedies....Stuntz himself recognized that his suggestions would prove a hard sell in today's political climate. He prudently opted for hope rather than optimism. But politicians, and the voters that elect them, would be wise to

consider Stuntz's account seriously, because what to do about our deeply flawed criminal justice system--well, that is a puzzle worth trying to solve. (Jay Wexler Boston Globe 2011-09-18)The book is eminently readable and merits careful attention because it accurately describes the twin problems that pervade American criminal justice today--its overall severity and its disparate treatment of African-Americans. The book contains a wealth of overlooked or forgotten historical data, perceptive commentary on the changes in our administration of criminal justice over the years, and suggestions for improvement...Virtually everything that Professor Stuntz has written is thought-provoking and constructive...Well worth reading. (Justice John Paul Stevens New York Review of Books 2011-11-10)It's a fascinating, passionate, compassionate, often brilliant book...It's a work that deserves to have a significant influence on American criminal-justice thinkers from across the political spectrum...Stuntz documents serious problems, describes how they deepened, and points the way towards improvement. His book deserves a wide readership. (Eli Lehrer National Review 2011-10-31)How has the American criminal-justice system become one of the most punitive in the world without providing a corresponding level of public safety? In *The Collapse of American Criminal Justice*, William J. Stuntz...offers a provocative big-picture answer...The overarching themes of *The Collapse of American Criminal Justice* deserve wide discussion, and the book as a whole can be rightly seen as the capstone to a distinguished legal career. Americans may debate whether our criminal-justice system has truly collapsed, but few would argue that it can't be improved. (Paul G. Cassell Wall Street Journal 2011-10-26)This volume is exceptionally rich, insightful, provocative, and well-written. It is bound to have great influence on academic thinking, and perhaps in time on the criminal justice system itself...Stuntz's book will repay much closer scrutiny than I can give it in a review...[An] important book. (Richard A. Posner New Republic 2011-11-17)The most important book about law in the United States published in the past thirty years. It is impossible to overstate the ambition of Stuntz's undertaking...*The Collapse of American Criminal Justice* asks what went wrong and how it can be put to rights. Stuntz covers much ground and floats many reforms...Stuntz links the modern justice system to that of the nineteenth-century South. Today many criminally accused--especially minorities--continue to be judged by outsiders rather than one another, he argues, and this deprives the justice system of legitimacy...Rarely has one volume synthesized and revealed so much about American law. The scourge of racism in our justice system persists. Those who fight it must read this book. (Michael O'Donnell The Nation 2012-01-10)[A] masterwork...[Stuntz] is the most forceful advocate for the view that the scandal of our prisons derives from the Enlightenment-era, procedural nature of American justice. He runs through the immediate causes of the incarceration epidemic: the growth of post-Rockefeller drug laws, which

punished minor drug offenses with major prison time; "zero tolerance" policing, which added to the group; mandatory-sentencing laws, which prevented judges from exercising judgment. But his search for the ultimate cause leads deeper, all the way to the Bill of Rights. In a society where Constitution worship is still a requisite on right and left alike, Stuntz startlingly suggests that the Bill of Rights is a terrible document with which to start a justice system--much inferior to the exactly contemporary French Declaration of the Rights of Man, which Jefferson, he points out, may have helped shape while his protégé Madison was writing ours. The trouble with the Bill of Rights, he argues, is that it emphasizes process and procedure rather than principles...In place of abstraction, Stuntz argues for the saving grace of humane discretion. Basically, he thinks, we should go into court with an understanding of what a crime is and what justice is like, and then let common sense and compassion and specific circumstance take over. (Adam Gopnik New Yorker 2012-01-30)A hugely important and timely work...I am immensely impressed by the candor and clarity of his critique of the American justice system, and find almost nothing to disagree with. (Scott Horton Harper's blog 2011-12-06)[Stuntz's] final book, *The Collapse of American Criminal Justice*, crowns an intellectual career that very few have equaled...William Stuntz [was] 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 the author's 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. (Paulo Barrozo Commonweal 2012-03-23)The capstone achievement of the most remarkable criminal justice scholar of the past generation. Although the book is a long parting lament, Stuntz thought that it still may be possible to undo much of the damage of the past century...If we were to restore local democracy in criminal justice, he argues; if we put more cops on the streets and fewer young black men in prison; if courts worried less about privacy and more about how police officers treat criminal suspects, the quality of justice might be a little less strained. (David Skeel Books & Culture 2012-04-24)The cruelly early death of Professor William Stuntz cost us our deepest thinker about criminal law...His contribution, fully realized in this grand valedictory book, was to teach us to think creatively and critically about how we design the technology of government and to accept responsibility for its means and its products. In *The Collapse of American Criminal Justice*, Stuntz demonstrates that American criminal justice is a disaster. It is a horrendous mess of mismatched means and ends, of legal protections thwarted and misguided, of political demagoguery imposing brutal penalties on the undeserving,

and of willful inefficiencies in the institutions created to protect both public safety and the public fisc...Like most of Stuntz's work, *Collapse* is a profoundly thoughtful achievement of systems analysis. The breadth and scope of its policy proposals tempt us to read it as a blueprint of major design components needed for programmatic reform...Rather, we should read *Collapse* as an exhortation to, and model of, a way of thinking about criminal justice. This way of thinking requires astute analytic rigor in identifying the decisive choices in the building of legal institutions and a proper respect for the human frailty--individual, collective, and institutional--that produces the frequently awful unintended consequences of these choices. (Robert Weisberg Harvard Law Review 2012-05-01)

The scandal of criminal justice in the United States is by now a familiar one, its facts are well known, its causes extensively canvassed. So what can another book tell us that we don't already know? A surprising amount, as it turns out...Most critiques of American criminal justice are by liberals and progressives, but Bill Stuntz--who died, aged fifty-two, shortly before this book was published--was a registered Republican, an evangelical Christian, and a revisionist thinker with a fondness for "law and economic" perspectives. His viewpoint is refreshingly unpredictable and runs against the grain of conventional wisdom. It is a devastatingly critical account nevertheless. American criminal justice is, he writes, devoid of the rule of law, "wildly unjust" and the "harshest in the history of democratic government."...The *Collapse of American Criminal Justice* is a powerful indictment of the U.S. system, and a history of its unraveling. But its author insists that a legitimate, effective criminal justice might be attained if American constitutional democracy can be properly brought to bear. (David Garland Times Literary Supplement 2012-06-01)

Stuntz's book makes an eloquent, deeply reflective and historically well-rooted plea for a return to humane, fair and effective criminal justice. Every legislator, politician, judge, attorney, law student and lay citizen interested in understanding and improving our system should study this book. It will very deservedly be a centerpiece for any future discussion of criminal justice reform. (Frank R. Herrmann America 2012-07-16)

William J. Stuntz was Henry J. Friendly Professor of Law at Harvard University.

This book made me more uncomfortable than any book I have read in at least the past three years. That is an enormous testament to its brilliance and importance. Stuntz claims that we have created a criminal justice system "both harsh and ineffective." If you accept as a basic principle that the criminal justice system exists to minimize the harm caused to all Americans, both criminals and non-criminals, then this is a damning indictment indeed. Criticism of the criminal justice system is the

rule, not the exception, in the academy, but the late Stuntz was that rarest of creatures--the openly-evangelical Christian academic. He approaches the issue from a different perspective than usual. He also possessed an exceptional clarity of thinking and discipline of thought. *The Collapse of American Criminal Justice* extensively maps the broad sweep of the history of criminal law and crime in America. Particular emphasis is given to regional trends and the differences therein, from the generally effective (and fair and just) system in New England to southern lynching to frontier justice in the west. His work here will be of great interest to any student of David Hackett Fischer's *Albion's Seed*. More relevant to modern criminal justice, I think, is his equal emphasis on the rise of procedure. "[T]he 1910 version of the *Cyclopedia of Law and Practice* devotes only fifteen pages to the issue of search and seizure, but in the 1932 version it runs 114 pages." Stuntz doesn't see this as a good thing, he accuses the Supreme Court of making "the constitutional law of criminal justice into something narrower and less useful: a constitutional law of criminal procedure." The Warren Court doubtless acted with good intent, but "in criminal justice as elsewhere, unintended consequences often swamp the intended kind." Why is this so? I'll explain, but first let me take a step back. To many a student of the law, including this reviewer (one with no affection for the Warren Court), our constitutional criminal procedure is a bedrock of the American Way, even liberal democracy itself. Stuntz argues though--forcefully--that the procedural protections were a product of chance. He traces them to a handful of high profile cases in the dusk of colonial America. Yes, so, weren't most rights enshrined in the Bill of Rights and the original Constitution in response to narrow violations of rights under British rule? They were, but Stuntz points out that each case can be seen as a matter of protecting Free Speech--a rather novel and dangerous concept at the time--instead of a disparate collection of procedural rights for criminals. Does Stuntz offer no protection for the accused, then? No, but he points to substantive, not procedural, protections as optimal, referencing the protection of substantive rights in the Declaration of the Rights of Man and of the Citizen, suggesting that our procedurally oriented protections were a matter of chance (fat lot of good the former did many French during their own revolution). Returning to my earlier point, the rise of procedure during the Warren Court (and, importantly, well before) is important because it did not exist in a vacuum. Contrary to popular wisdom, the accused had real protection before said rise. Stuntz points to Due Process and especially Equal Protection (the earlier forms of which have really lost favor). More important, I think, was the protection offered by a common law tradition firmly rooted in a requirement of the requisite *mens rea*, or "guilty mind." Things changed. Most of us are probably familiar (broadly speaking) with Prohibition, begun with the 18th Amendment and ended with the 21st. It's widely held as one of our great failures. John Hart Ely mocked it as a misguided

attempt at crudely touching substantive law with a constitutional system better suited for procedure (Ely and Stuntz would have disagreed on much). Stuntz sees it as a relic of history we should point to with pride. Not because banning alcohol is a good idea; it's a terrible idea. But because Prohibition was honest. The People wanted to do something. That something, questionably, couldn't be done constitutionally. They passed an amendment to the Constitution through the prescribed means. It didn't work. They again amended the Constitution; again it was through the prescribed means. The People perhaps learned something about the inherent game of whack-a-mole that is vice prohibition. Would be prohibitionists learned another lesson. We saw many more prohibition movements: against opium, against prostitution, against drugs in general. None were pursued through the channels Prohibition was despite their similar questionable constitutionality. Quite the opposite. What was more, while Prohibition never outlawed the possession itself of alcohol, the new prohibitions frequently did so. Modern procedural protections started to pop up around this time as well, culminating during the era of the Warren Court. The timing belies the notion that these protections are rooted in the Constitution. In context, they look even more like accidents of history. They end up serving the rich and recidivists rather than the most vulnerable. And who suffers the most when the inevitable backlash comes? The poor, the first-time offender, the innocent (as any good defense lawyer will tell you, the innocent defendant faces the distinct disadvantage that they don't know what really happened). The Nixon revolution brings non-Originalist jurors bent toward law-and-order, but the law-and-order is long since a matter of faith by the time the next wave of Originalist arrives. Meanwhile, facing a crime wave, Democrats are no more interested in being "soft on crime" than Republicans are. Substantive protections continue to wither away: better to game the system than to lack a guilty mind. And roughly there are depressing story rests. Crime has been in a decades-long freefall, but incarceration rates remain astronomical. The costs eat away at the public fisc, and locking away so much of a generation of black, male youth likely does more harm to black America than any number of public programs and anti-discrimination efforts could outweigh. There is, however, reason for hope. The taint of being soft on crime remains in theory, but crime has largely left the public consciousness, public ignorance of how much crime rates have dropped notwithstanding. Both Democrats and, probably better insulated politically, Republicans have a new freedom to act. It is with legislators that Stuntz pins his hopes. I think he's overly optimistic; a mass shooting or one other high-profile incident can change so much. On the other hand, I think he's far too pessimistic on reform through the judiciary. Judges on the Left have always had sympathies with the accused and are well insulated politically. The Originalist argument--and there is a strong one by Stuntz's own narrative, although he doesn't admit it--is a powerful one for judges on the Right,



similarly politically insulated from the usual charges of RINOism. There is so much more to say, but this review has already gone on far too long. Much worth reading and revolutionary has been omitted or only touched on in passing. I read this book quite some time ago, putting the review off for another time. Even all these months later, though, the heart (if not all the details, I fear a mistake lurks somewhere above) bursts forth with all available vehemence. It's changed my thinking, and thoroughly so. What more could you ask of a book?

The legal academy lost a giant earlier this year when William Stuntz passed away from an aggressive cancer. Stuntz was an amazing scholar who had the gift of explaining how legal doctrine in the area of criminal procedure frequently failed to measure up to the real world. "The Collapse of American Criminal Justice" is his defining masterpiece that marshals statistics, history, and logic to argue that our current criminal justice system is badly broken. He points to the facts that (1) we incarcerate more people per capita by far than our peer nations (550+ per 100,000, versus the 50-150 range), and in fact, we eclipse even Russia; (2) we incarcerate so many African-American men that in some cities, 1/3 or more of young African-American men are in prison, probation, or supervised release; (3) most criminal defendants plead guilty. The reasons for this breakdown are complicated, but Stuntz attributes it to a number of key factors. First, he points to the increasing centralization of criminal justice. It used to be that the judges, prosecutors, and juries in criminal cases came directly from the neighborhood that the criminal defendant did. This meant that there were local pressures to temper justice with mercy, since the defendant being sent away for incarceration was part of the community too. With the growth in suburban population, however, coupled with having larger districts -- meaning that the jury pool came from a wider swath of the population -- this local control was lost. Worse yet, the voting strength of the suburbs meant that the increasing bulk of voters were voting to reduce crime, even though they (suburbanites) were hardly the target of crime. The inner cities were. Second, Stuntz faults the Supreme Court during the reign of Chief Justice Earl Warren for its reliance on procedural protections that simply raised the cost of trials, without making them more accurate. Prosecutors have been able to evade these protections by inducing defendants to plead guilty, such inducements made more enticing because the substantive criminal law -- the part of the law governing what is a crime -- was left alone by the Court, and roamed free and wild. With broader laws available, prosecutors are able to ensnare more and more people, and pleading guilty becomes preferable to risking a long and protracted trial. Stuntz's solution is to return to local juries, local judges, local prosecutors, and to allow juries to play a more important role in the criminal justice system. (Right now, they are only responsible for

finding the facts.) He is of course cognizant of the sordid past of the Jim Crow era in the South, when all-white juries frequently engaged in jury nullification in favor of white defendants accused of killing African-Americans. This, he contends, is less of a problem today than the problem of discriminatory charging. Thus, Stuntz suggests that prosecutors be required to demonstrate that they are prosecuting people of different races for the same kinds of crimes, a proposal that would prevent prosecutors from harassing disfavored minorities. This is a spectacular, paradigm-shifting book. The arguments that he makes are daunting, and the solutions would be challenging to implement. He might not fully persuade as to his diagnosis or his prescription, but this book is guaranteed to make you think about the criminal justice system in a new way.

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