CRIME AND LAW: AN AMERICAN TRAGEDY

THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE. By William J. Stuntz. Cambridge, Mass.: Harvard University Press. 2011. Pp. viii, 413. $35.00.

Reviewed by Robert Weisberg[*]

INTRODUCTION

The cruelly early death of Professor William Stuntz cost us our deepest thinker about criminal law. I use the term "thinker" because the clichéd term "scholar" would miss the point. Law professors speak of each other as scholars in part as a default. Given the vocabulary of the profession, it makes no sense to call ourselves "lawyers" in the way our colleagues can call themselves economists, historians, philosophers, or chemists. But the term "scholar" summons up an image of classical and historical erudition, an image that corresponds poorly to the analytic commentary that many legal academics write; more importantly, it would mischaracterize Stuntz's contribution. Stuntz was surely erudite in all the venerable ways, and his sensitivity to historical perspective was exquisite, but his writing does not depend on reference to esoteric knowledge, primary materials, or archival sources — nor on any methodological breakthroughs of empirical science. His materials were the legal doctrines, manifest institutional structures, and empirical data available to all of us. 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. Moreover, in his most declamatory message, Stuntz joins the large contemporary chorus that has denounced the state of incarceration in America for both its embarrassing magnitude and its ugly disproportionalities.[1] But the title suggests that the system has collapsed *from* something — that at times our criminal justice system has done things right such that it can point

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[1] *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 54–57 (2010); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 3–4 (2006).

us down a righteous path. We can put things in terms of Stuntz's bad (current) world and good (to some extent past, and possibly future) world.

Here are some key features of the world that Stuntz laments that we now inhabit: In the state criminal courts, which do most of the work in our system, we see high-volume, bureaucratic justice dominated by plea bargains (p. 7); much of the litigation we do see is about peripheral procedural matters (p. 196); *jury* trials almost never happen in part because *trials* almost never happen (p. 39); we skimp on and dither about police budgets, while prison populations swing widely with political winds and turn upward even at a time of lowering or flat crime rates (p. 5); and prosecutorial discretion often takes the cynical, even sadistic, form of strategically choosing from a menu of highly technical criminal laws with rigid mens rea requirements and strict and severe sentencing schemes such that there is little left for a trial judge — or any honest jury — to do (p. 4). At the federal level, we see a hyper-regulatory criminal law that not only is harsh and rigid itself, but also perversely interacts with state law by offering a backup threat for local district attorneys to deploy in securing guilty pleas (p. 66). At both levels, crimes are often pretextual or contrived to help prosecutors finesse the proof problems that they would face in proving conventional wrongful intent (pp. 300–01).

Here are some key features of the world Stuntz would prefer: At the state level, the ruling penal code would be mostly about the core *malum in se* crimes against person and property and would be written in transparent lay prose (pp. 303–04); prosecutors would be comfortable bringing large numbers of winnable cases to trial and would accept a certain number of acquittals as a reasonable outcome of the system (pp. 302–05); they would face neither voters' wrath nor loss of professional ego if they lost cases, because the jury system would be simple and efficient enough to make trials common and timely (p. 302); the jurors would be defendants' true peers and neighbors (p. 304); they would recognize in the jury instructions not just technical elements of crimes but normative principles of wrongfulness (pp. 303–04); they would administer a healthy dose of rational jury nullification, because their ethical sense would enable them to recognize the mercy-deserving frailties of some defendants (p. 304); and defense lawyers would have resources, especially for investigation (pp. 299–300). In this world, juries might even get to decide issues of law as well as fact, thereby minimizing any role for appellate courts to micromanage the criminal law definitions that might constrain juries' ethical judgments. More broadly, this would be a world where most of the investment in criminal justice would be up front — in density of policing, rather than in imprisonment (pp. 30–31, 138–42). Federal statutory law would cover core crimes for which federal jurisdiction is a provable practical necessity, not a constitutional contrivance (pp. 305–07). And federal consti-

tutional law, abetted by congressional power under the Fourteenth Amendment, would serve primarily as a check on state criminal law to advance the values of equal protection and proportionality (p. 291).

Ultimately, Stuntz's diagnosis and call for transformation of the system might be said to revolve around three principles. First, criminal justice should be decentralized, and the costs and benefits of the operation of the system should be internalized: the more local the system is, the better (pp. 311–12). Second, the system should always favor substance over procedure. By substance he means fairer definitions of crimes, and measurement of sentences and adjudication that focuses chiefly on determining guilt or innocence and not on fine-tuning investigative and adjudicative rules (p. 196). Finally, federal law, on its own terms and as a model for state law, should eschew hypertechnical regulatory crimes in favor of core criminal offenses and, through constitutional decisions and implementing legislation, provide a check on state law, to prevent unequal application of criminal law and irrationally severe punishment (pp. 305–07).

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. But we should resist that temptation. This Review will argue that when we hold these principles to the standard of structural design guidelines, they prove less reliable, less clear, and less grounded in pragmatic political science than such a standard demands. 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.

Underscoring our legacy of slavery as historical admonition, Stuntz presents the moral predicate that punishment is a very bad thing, and we should view it as a tragic necessity, not a moral imperative or value.[2] Thus, he believes that relentless self-criticism is the only hope for

[2] In this regard, in one of his more intriguing but cryptic epigraphs, Stuntz cites President Thomas Jefferson's comparison of a fundamental quandary about slavery to holding a "wolf by the ear" — that we cannot let it continue, and yet we fear that its end will threaten self-preservation (p. 41). For Stuntz, despite the great differences in magnitude, purpose, and circumstance, the resonances between prisoners today and the slave population should haunt us. Modern prisons govern the poorest of Americans; the inmates cannot vote even though their numbers augment the representation entitlements of the polities where the prisons sit; of course, prisoners today are disproportionately the descendants of slaves; and, as with slavery, the prospect of large-scale liberation frightens the majority (p. 44). "[B]oth slavery and imprisonment were once regarded as necessary evils, and only later seen as moral and social goods" (p. 45).

creating a criminal justice system that is stable, humane, and efficient. The noble risk Stuntz undertakes is to draw lines between good moral vision and bad moral reactiveness, between sensible institutional reform and quixotic, possibly destructive social engineering. Stuntz may well intend — and clearly we should infer — that this risk is one taken in the form of the relentlessly self-critical and morally chastened process of worrying about criminal punishment, not in the form of optimistic programmatic reform. The practical result might prove to be marginal, incremental, and experimental improvements in our system, motivated by a kind of national embarrassment about the condition we have fallen into. Indeed, Stuntz might object to drastic overhaul, even if it were possible, precisely because he fears what human fallibility wreaks when it attempts categorical institutional change.

I. DECENTRALIZATION

One of Stuntz's most acute observations is an apparently mundane point about the very mundane subject of local government: that the county remains the major unit of government for criminal justice (p. 6). Within the county, wealthy suburban voters elect officials with a mandate for harsh criminal law enforcement and punishment, even though most of the criminals and most of the victims reside in distinctly nonsuburban municipalities (pp. 7, 35). It was not always thus, and Stuntz wants us to imagine the possibility of restoring the "good world" I sketched above through a historically specific example.

It is hardly a utopian vision, and Stuntz treads lightly over the irony that his model era is called the Gilded Age — indeed, he is surely wary of inviting complaints that he has fallen prey to sentimental Golden Ageism. But in his sweeping review of American history, Stuntz recurs to the late-nineteenth-century period when our major cities absorbed waves of immigration of ethnic groups from Europe and yet somehow developed both a general municipal polity and a concomitant criminal justice system that illustrate the ideals — or at least positive attributes — he admires (pp. 131–42). The immigrant influx and the new presence of large numbers of unskilled young men of different ethnicities in a dense and newly industrialized urban world, he notes, could have easily turned New York into Belfast or Beirut in a manner of social conflict we see later in American cities (p. 18). But he sees in that period a sense of responsible social ownership of the instruments and consequences of criminal justice: both crime and imprisonment were stable, and the legal rules allowed social common sense to ensure equilibrium in the state's wielding of its harshest instruments (pp. 133–35). The key to this story — the point from which generalization might be drawn — is that it is indeed about internalization: It is partly a matter of political choice that the city is responsible for preventing crime rather than sending its offenders far away at the expense of the

state budget. It is partly a causal matter — policing is preventive and reduces the need for prison.

The modern criminal justice system resulted from a breakdown of this method of governance, with the migration of African Americans from the South to the North decades later, followed by a secondary migration of whites from cities to suburbs still some years later (p. 16). The historical accidents of state and local government were such that these fleeing whites often stayed within the same county as the cities they left behind (pp. 34–36). The result was the perverse externality that Stuntz believes helped ruin criminal justice at the local level and, as I will note later, exemplifies the ruination of criminal justice on a wider level.

Aside from a light-hearted, self-deprecating invocation of the Berle and Means theory of the separation of ownership and control in corporations (pp. 37–38),[3] Stuntz needs no complex or abstract theory here. He needs only an acute eye for historical irony and for the way that apparently irrelevant but deep-seated institutional facts can control the effects of dynamic social variables. First, if suburban jurors could sit on the cases of inner-city defendants, all the communal gains of moral and social empathy would be lost — even independent of the obvious racial differences that those jurors would probably confront. Second, the county elections of judges and prosecutors enabled suburban voters to endorse tough-on-crime policies that were irrelevant to them. Whatever their claims of public safety concerns, they were at little risk of actual victimization (even if the symbolic politics of crime allowed them to portray themselves as moral victims of social degradation). Surely inner-city residents were the true victims of crime, but it would be disingenuous for suburban voters to say they were voting for the protection of their "fellow" county residents. Rather, they were voting for policies that included harsh targeting of drug prosecutions and stop-and-frisk policing for people who thereby "consumed" criminal justice without much capacity to control it.

Stuntz's depiction of the Gilded Age local polity is an attractive one — but obviously historically vulnerable. He is prepared to defend it against charges of sentimental revisionism: for example, he observes that the local prosecutors, courts, and juries often showed considerable leniency toward groups one might not think had much social power — African Americans who killed or assaulted whites, and women who killed their husbands in domestic disputes (pp. 135–37). As Stuntz bluntly puts it, these outcomes did not have anything to do with high moral refinement in the cities; rather, these people won leniency be-

[3] *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

cause everyone got leniency (p. 137). But critics of modern criminal justice will resist the notion that useful inferences can be drawn from this quaint but intriguing historical data set. In particular, the picture of internalization is troublingly associated with a view of a polity and society that does not generalize well or comfortably. It smacks of an "organicist" society, where the consensus of moral belief and social attitude is sufficient to serve as a harmonious partner to law. Although Stuntz largely avoids the dangerously tempting mantra of "community," he invites the skepticism that any reliance on such a sentimental and even tautological concept deserves.[4] It is a sign of his own honest discomfort over this organicist vision that one of the awkwardly fitting parts of this book is about the South, the perverse nightmare picture of a purportedly organicist society. Stuntz persistently wants to return the story to the North, but putting aside the complex story of criminal justice during Reconstruction, to which I turn below, he spends a great deal of time reviewing the unique structure of pre-Reconstruction southern criminal justice (pp. 91–97). He describes it as an oddly lenient and fair system, but one in which hybrid private and public enforcement lay with slave owners and the leniency often showed to the accused was really a matter of respect for their property value to the owners (pp. 92–94).[5] It may be a sign of Stuntz's irreducible intellectual honesty that he neither avoids the South nor tries to proffer any reassuring arguments that it fits into this picture. Rather, this frightening version of an organicist society is left to serve as an admonition as we evaluate Stuntz's thesis about the North.

Stuntz does not purport *Collapse* to be a comprehensive history of American local government. But the historical sources of the Gilded Age would seem to bear on the value of the model. Stuntz would probably reply that a better explanation is, as so often is the case, historical accident: that cities retained a fair amount of autonomy from state and federal government, and that ethnic immigrant groups won enough power to control the laws (pp. 24–25, 29–30). In fact, he traces this deference to local control in part to the odd coincidence of one of the late nineteenth century's great business scandals in an area otherwise irrelevant to criminal justice: the failure of state credit in the wake of corrupt and wasteful investment in the great canal system led the machinery of politics to weaken state governments — at least for a short while (pp. 90–91). If this description smacks of a benign vision of Tammany Hall criminal justice, it is worth remembering that Tam-

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[4] *See generally* Robert Weisberg, *Restorative Justice and the Dangers of "Community,"* 2003 UTAH L. REV. 343.

[5] Stuntz also spends some time on the distinct features of the American West — but that story is mostly the conventional one about the phenomenon of vigilantism that ultimately gave way to a West largely resembling the Northeast (pp. 150–55).

many Hall had its legal virtues in terms of outcomes, if not in elegance of process.

But even if we take the Gilded Age world as a given, Stuntz does not offer a design theory of local political process that helps us generalize the virtues he perceives. As a result, even *within* a dominantly minority and poor jurisdiction, the issue of internalization is more complex than Stuntz here admits.

First, there is the problem of the scope of the lawmaking power delegated to the locales. Stuntz imagines a polity that can be trusted with legislating substantive crimes, on the assumption that most of these crimes will be the core *malum in se* crimes, with tolerable divergences representing local moral consensus. As discussed below, it may be wildly optimistic to assume that a local polity has such power to assimilate differences that it avoids moral panics, and also such common sense that it avoids contrived pretext crimes.[6] But even if local crimes are facially drawn in neutral and innocuous terms, any criminal law inflected with moral content works quite openly with rules of criminal procedure to allow for highly manipulative allocations of police power. Stuntz himself is probably our foremost authority on the blurry distinction and subtle interaction between substance and procedure in criminal law. Nevertheless, in his vision of the Gilded Age, he elides the ability of local government to expand the penal laws as a way of enabling police to control disorderly or deviant conduct while nominally complying with procedural limits on investigation. This approach is especially true for what may be called "community" or local crimes, identified by Professor Wayne Logan as efforts to "legislate against social disorder."[7] Such local crimes may encourage even perfectly fair-minded prosecutors to target certain groups and police chiefs to target certain neighborhoods, and invite prolific police interference with liberty when combined with the power to engage in stop-and-frisk searches[8]: it is far easier to establish reasonable suspicion that a crime has occurred with such a long and varied menu of crimes.

But these community crimes can involve even more serious concerns about executive branch discretion: the void-for-vagueness principle by which the Supreme Court has sought to curtail the most expansive invitations to arbitrary discretion has focused on what might be called the core crime against social disorder — loitering or vagrancy. Stuntz would presumably denounce the most egregious of these laws,

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[6] *See infra* pp. 1446–47.

[7] Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1425–26 (2001). Logan lists a number of such municipal crimes, such as disturbing the peace, obstruction of public space, public indecency, gambling, vandalism, automobile "cruising," nuisances, and public intoxication. *Id.* at 1425–28.

[8] Terry v. Ohio, 392 U.S. 1, 8 (1968).

but are there some versions of them he would delegate to locales to reflect moral consensus? An arguably nonegregious version thereof was the carefully tailored gang-loitering law passed by the crime-weary and desperate city government in Chicago, but it was still struck down in *City of Chicago v. Morales*.[9] Would Stuntz have been on the losing side of that decision?[10] Concern about the procedural effects of vagrancy laws also leads to a question more directly about local jurisdiction over procedure. However weak current constitutional law is in controlling prejudicial or arbitrary discretion, one might say that this problem is wholly avoided in any examination of the Gilded Age because there were essentially no Fourth Amendment rules in play anyway. Thus, Stuntz's general devaluation of the procedural line reflects a tropism toward something he manages to avoid in his Gilded Age picture precisely because the matter of police discretion is a mostly empty space there. But Professors Tracey Meares and Dan Kahan, the key academic proponents of the law nullified in the *Morales* case, based their argument on a notion of local control that was also carried out, even more controversially, on the issue of local-majority power under the Fourth Amendment.[11] In their much-discussed view, the Fourth Amendment might apply differently in areas where minority group members dominate the voting rolls. In such places, the group that dominates politics represents both the major victims of crime and the most frequent victims of police abuse. Given its power to internalize the costs of both policing and restrictions on policing, this group deserves special constitutional deference.[12] Stuntz would have done well to address the controversy over this proposal and its relation to his valorization of local control.[13]

Moreover, specifying the proper unit for internalization is remarkably tricky. Stuntz tends to assume that substantive lawmaking can be done safely at the state level, while the community-based moral consensus over discretionary matters can be sited at the municipal level. But his effort to identify the truly self-internalizing locale by looking to the municipality rather than the county runs into the problem identified by Logan: under the esoteric doctrines of state constitutional and

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[9] 527 U.S. 41 (1999).

[10] Stuntz's only reference to vagrancy laws in *Collapse* is an appropriately acerbic reference to the presence in the Deep South of such laws, which he labels crimes of "displeasing the authorities" (p. 209).

[11] *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 206.

[12] *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160–66 (1998).

[13] For evidence of how heated this issue became, compare Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrongs*, BOS. REV., April/May 1999, at 4, with Carol S. Steiker, *More Wrong than Rights*, BOS. REV., April/May 1999, at 13.

local government law, the historical evolution of city governance has led to greater power of substantive lawmaking in cities — especially in the form of crimes against social disorder — and to concerns about arbitrary, prejudicial enforcement that the Gilded Age model supposedly prevents.[14]

Finally, there is another complicating lens through which we can view internalization and county governance — in terms of the county's relationship to the state. Stuntz's emphasis is on the loss of control over the smaller entity of the city within the larger entity of the county. But consider the county as a smaller entity within the state. Stuntz may be both understating the homogeneity of the county and overlooking its power to externalize the costs of its questionable policies upward and outward. A common complaint in death penalty states is that the frequency of capital charges and death sentences varies hugely among counties.[15] From that perspective, counties are not arbitrary collections of smaller units that deserve self-control. They are relatively coherent and distinct cultural entities with consistent views of criminal justice. That coherence may have become even stronger because in many populous counties in the United States, "cities" are somewhat arbitrary subunits of densely populated suburban or exurban sprawl. Yet these counties impose their views on the state in the sense that it is the state that is the true legal authority in implementing capital punishment. Much as some might decry the interstate disparity in the death penalty, the *intrastate* disparities may be more worrisome, even though they may be attributable to local control. And it is not just a matter of the death penalty. Largely through prosecutorial discretion and power, counties have substantial power to determine who goes to state prison, but on the whole the state bears the costs of imprisonment.[16]

None of these concerns diminishes the importance of Stuntz's evocation of the Gilded Age as a site of values that would make our crim-

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[14] Logan, *supra* note 7, at 1413–14.

[15] *See generally* Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801 (2007).

[16] *See* W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California Counties' Incarceration Rates — And Why It Should*, 28 GA. ST. U. L. REV. (forthcoming 2012) (manuscript at 7–8) (on file with author) (arguing that California counties send prisoners to prison at rates that cannot be explained solely by local crime levels, and noting that the state pays for localities' prison commitments). Further permutations abound. Counties are often victims of the externalization wrought by cities. The cities control most of the police, and it is the cases that they send to the county prosecutor that set most of the district attorney's agenda — and, even in the very short run, can populate the county sheriff's jail space. That may be why in some states, cities must pay upstream "booking fees" to counties. *See, e.g.*, CAL. STATE ASS'N OF CNTYS., BOOKING FEES 1–2 (2006), *available at* http://www.csac.counties.org/images/public/Advocacy/aoj/BF%20fact%20sheet%20-%20Oct%2006_FINAL.pdf.

inal justice system more fair, humane, and efficient. They only suggest that the decentralization/centralization axis cannot work as a structural design tool in any consistent and desirable way — even by Stuntz's own general standards. Moreover, as already should be obvious, the valorization of localism in this first part of Stuntz's value set overlaps and conflicts with the other values and distinctions that animate *Collapse*.

II. PROCEDURE AND SUBSTANCE

For Stuntz, the locus classicus for the federal role in criminal law is Reconstruction, when federal law supplied the government with just the tools it needed to fight the most substantial and substantive of crime problems: the post–Civil War brutality inflicted on ex-slaves, the refusal of state criminal justice to prevent it, and worse yet, the implementation of state criminal justice to exacerbate it. For Stuntz, the potential of federal criminal law was exemplified by the statutes associated with the Civil Rights Amendments, especially the Enforcement Act of 1870,[17] whereby the vision of the Equal Protection Clause could be fulfilled (pp. 108–11). Stuntz recounts the missteps of Supreme Court doctrine in this area. He looks back fondly at the promise of cases like *United States v. Hall*,[18] in which a federal court declared that Congress could authorize federal prosecutors to "operate directly on offenders and offenses" when private violence threatened rights secured by the Fourteenth Amendment.[19] But this promise was short-lived, and when Reconstruction faltered, we ended up with *United States v. Cruikshank*,[20] whereby the Supreme Court told the executive branch it must stay out of the matter of stopping racial and political violence except where that violence could be directly traced to the actions of state officials (pp. 114–18). For Stuntz, the state action requirement was a snare and a deception because the Equal Protection Clause demanded a wider vision of how criminal law could serve to help ensure the literal meaning of the term — that is, how it could be implemented to provide equal protection for blacks. Part of the story was the Court's refusal to allow prosecutions of purportedly private figures, however blurry the lines might be between local officials, local lynch mobs, and anti-Reconstruction insurgents. The other part of the story lay in a narrow reading of the Fourteenth Amendment that made it nearly impossible to prosecute private citizens for civil rights violations (pp. 113–17). Ultimately, this interpretation led to what became

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[17] Ch. 114, 16 Stat. 140.

[18] 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,281).

[19] *Id.* at 81.

[20] 92 U.S. 542 (1876).

the other pernicious reading of the power of Congress to enforce the Equal Protection Clause: the need to prove purposeful racial discrimination and the impossible burden of proving racist purpose when it is not express but is clearly embedded in all the discretionary decisions that judges, juries, prosecutors, and police make.

The implications of the failure of Reconstruction are clearer in light of the consequent contemporary shift in the meaning of the Fourteenth Amendment for criminal law — the Warren Court mistakes, which Stuntz decried in 1997, but which he now more fully frames as part of this book's larger historical arc (pp. 216–18). From this first challenge to liberal legal theology to its restatement and augmentation in *Collapse*, the critique is a masterpiece of rhetoric and provocation. It is a Luther-like act of nailing passionate theses to the door of a complacent establishment view that the Warren Court's procedural revolution not only helped redress the unfairness and racism of American criminal justice, but also was a key component of the civil rights revolution more generally. At the heart of the critique is a great historical irony: in Stuntz's view, the Court deployed the Fourteenth Amendment to revive a 1791 scheme of procedural rights that has proved an inapt and counterproductive prescription for the problems of mid-twentieth-century criminal justice, while squandering a deeper potential in the Civil War Amendments to redress these ills more foundationally. While this argument has great power to motivate reform, I argue that, as with the other components of *Collapse*, *that* power would itself be squandered if the critique is not read in its best light. It is a dazzling performance in doctrinal reinterpretation and programmatic diagnosis, but its value is different from, and goes well beyond, any reframing of doctrine or programmatic prescription.

In his earliest work, Stuntz was the somewhat wry and detached observer of the laws of unintended consequences and the way institutions adapt themselves once they recognize those consequences. He set out with sensible assumptions about the natural proclivities and tropisms of individual and bureaucratic behavior, and then observed the good and bad matches of institutions to functions in light of criminal law's purported goals.[21] But in the next major phase of his work, Stuntz viewed unintended consequences as tragedies. In his magisteri-

[21] Thus in *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991), Stuntz puzzled over the dual structure we have for warrant hearings and suppression hearings and the odd disconnects in judicial and political debates, whereby, for example, liberals both questioned the utility of warrants and complained when courts limited the warrant requirement. Stuntz noted that warrants could protect the police from later damage claims, but once suppression replaced damages as the remedy of choice, the dynamics changed: warrants benefit only defendants, but how much they do so depends on which harm (police dishonesty or after-the-fact judicial bias) defendants most fear. *Id.* at 899–918.

al article *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*,[22] Stuntz's systems analysis produced his most famously provocative and controversial insight. Again, he relied on conventional materials, but here those materials, the major Warren Court cases, were both the sacred texts and the professional training manuals of a generation of academics in (and reformers of) criminal law. Here, Stuntz performed an act of radical iconoclasm on these texts' authors, arguing that the noble commitment to constitutional procedure as a way of redressing the brutalities and inequalities of the criminal justice system was a disastrous historical turn.[23] This focus on procedure had the perverse effect of draining the moral lifeblood of criminal trials, and of diverting them from the central task of separating the innocent from the guilty. It replaced this noble mission with highly technical and often peripheral issues of procedure, so that the favored defendants were the ones with more skilled lawyers adept at motion practice, and the costs of litigating these claims were such that prosecutors were motivated to manipulate cases with unrefusable high-volume plea bargains.[24] So, the triumph of proceduralism has led us to our current pass, where rather than using ample public funds to visit crime scenes and parse statements by witnesses to help exonerate the innocent or at least put the state to its hard demands of proof, defense lawyers alternate between cutting and pasting motions full of the nuances of the exclusionary rule and engaging in mass-produced acquiescence to prosecutorial bureaucrats armed with credible threats of draconian sentences.

Stuntz finds a deep historical source for these errors — and therein lies one of the major themes of the book. Put simply, our grand constitutional rights to criminal procedure emerged, at least in latent form, long before our criminal justice institutions and machinery developed or in some cases were even invented (pp. 69–74). These rights are a very bad mismatch for the systems of police, prosecutors, and prisons that only came to mature a century later. In fact, the cases announcing these rights arose in contexts that seem wildly anachronistic and inapposite now (p. 72). So the Fourth and Fifth Amendment principles were nurtured in political cases about sedition under colonial law (pp. 71–72), or, oddly enough, a century later in white-collar cases, where these amendments were really the tools of tax cheaters in avoiding annoying and clumsy government regulation.[25] These cases were very bad candidates for transplants to the world of modern urban

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[22] 107 YALE L.J. 1 (1997).

[23] *Id.* at 26–27, 41–53 (arguing that the focus on procedure diverted constitutional attention from key issues of factual innocence and proportionality of punishment).

[24] *See id.* at 4.

[25] *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886).

criminal justice. Stuntz is envious of France's Declaration of the Rights of Man and Citizen of 1789, which at least imported some substantive notion of justice into the guarantees of freedom of action and parsimony of punishment (pp. 76–78).[26] It is substance, he insists, which must be foundational because criminal justice should be about consensus moral notions of wrong and harm. It is perverse to freeze procedure into Mount Rushmore status, because procedure should be pragmatically adaptable to circumstance (p. 79).[27]

The modern civil rights era saw no shortage of overt racist violence, but the Court's focus turned to the direct victimization of the poor and black by the states' criminal justice systems, not the systems' failure to protect them. When the brutality and inequality of state criminal justice achieved some public notoriety in the 1920s and 1930s, the Court had before it opportunities for dramatic federal intervention by virtue of the very infamous trials it brought up for review. And cases like *Moore v. Dempsey*,[28] *Powell v. Alabama*,[29] and *Brown v. Mississippi*[30] now reside in the history books as grand statements of principle indeed.

Not so for Stuntz, who sees these cases as the real sources of Chief Justice Earl Warren's big mistakes a few decades later. The Supreme Court saved the defendants in these cases, but how? The *Moore* case turned on a right to change of venue,[31] *Powell* on a due process–based right of counsel,[32] and *Brown* on a due process–based right against coercive interrogation.[33] For Stuntz, the flaw in these cases was not their reliance on still inchoate and very limited procedural doctrines. After all, Stuntz concedes, these cases all had the implicit advantage of relying on principles of criminal procedure that have some roots in the Bill

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[26] *See also* FRANK MALOY ANDERSON, THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE, 1789–1907, at 15, 59–61 (2d ed. 1908) (detailing the 1789 and 1791 versions of the Declaration of the Rights of Man and Citizen).

[27] Stuntz's attack on the Bill of Rights even extends to the Confrontation Clause (pp. 226–27). Various parts of the Sixth Amendment have been the subject of a robust revival of defendants' rights in recent years, in part because Justice Scalia has found an expansive reading of parts of the Sixth Amendment consistent with his originalist vision. *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2530–42 (2009); Giles v. California, 554 U.S. 353, 355–76 (2008). And if Stuntz otherwise associates Justice Scalia with the harsh and irrational regime he is denouncing, he would give no credit to Justice Scalia here. In fact, he would see Justice Scalia as allying himself with the worst foolishness of the Warren Court. The constitutionalization of the hearsay rule arises from a perversely abstract deontological notion of confrontation that bears no meaningful relationship to fairness of proof and simply has diminished the capacity of criminal trials to sort through factual evidence.

[28] 261 U.S. 86 (1923).

[29] 287 U.S. 45 (1932).

[30] 297 U.S. 278 (1936).

[31] *Moore*, 261 U.S. at 89.

[32] *Powell*, 287 U.S. at 71.

[33] *Brown*, 297 U.S. at 286.

of Rights, so that the cases could be said to foretell the more systematic application of these rights some years later once the provisions were held to be incorporated through the Fourteenth Amendment — *Gideon v. Wainwright*[34] after *Powell* and, among others, *Miranda v. Arizona*[35] after *Brown*. Their flaw was that, by virtue of being about procedure, they were solving the wrong problems (pp. 201–06). These cases were about racist injustice, and what they merited was some constitutional challenge worthy of that magnitude and form of injustice. The Court could have read the Eighth Amendment to forbid the death penalty for rape, at least when rape laws were always used in such racist ways. Or it could have redefined the Equal Protection Clause to demand that the states be accountable for the disparities in their choice of defendants. And so the refounding of procedural rights through incorporation and their redefinition and even expansion in post-incorporation cases does not impress Stuntz much at all.

Cases such as *Moore*, *Powell*, and *Brown* still led to the world of irrelevant procedure Stuntz denounces, and he cites actions of the Warren Court Revolution that only worsened the real problems. As reflected in the famous "Impeach Earl Warren" signs on the highways of that era, the public displayed immediate and significant resistance to the Court's forays into criminal procedure.[36] At the time, the public was increasingly worried about the rise of violent crime, especially in inner cities, and the Court's decisions gave its critics political cover: since the target was a bunch of white elitists in Washington, not the inner-city criminals themselves, the critics could launch a full-throated attack. The Warren Court Revolution also provided a chance for what Stuntz calls "cheap talk": because elected politicians could not overturn these decisions (at least directly), the politicians were free to denounce them through symbolic demagoguery with no responsibility for any official action (p. 238).

In *Collapse*, Stuntz doubles down on this theme, and a revealing example of his iconoclastic method is his reading of *Duncan v. Louisiana*,[37] a straightforward instance of incorporation. In *Duncan*, the Court held that the right to trial by jury applied to the states[38] for a crime punishable by two years in prison.[39] The case is iconic for this act of incorporation, but it is also a piece of old furniture, well worn and neglected, because the jury trial right now seems so obvious a de-

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[34] 372 U.S. 335 (1963).

[35] 384 U.S. 436 (1966).

[36] MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN 1953–1969, at 65, 186 (2005) (including photograph).

[37] 391 U.S. 145 (1968).

[38] *Id.* at 149–50.

[39] *Id.* at 161–62.

velopment, and because no one pays much attention to the facts that generated it. While he recognizes the importance of a jury trial right for state defendants, Stuntz is most intrigued by *Duncan*'s untold backstory. Gary Duncan, a young black man, was prosecuted for an absurdly trivial battery in a very racially and politically charged context (pp. 212–14). Amidst a dispute about school integration, he was protecting two young relatives from thuggish white schoolmates when he arguably committed a minor battery on one.[40] Because of a hypertechnical but correct reading of the battery statute in Louisiana, there was little problem in convicting him in the first bench trial (p. 213). But even when the case came back on remand from the Supreme Court, there would have been little problem convicting Duncan in a jury trial because the elements of the crime left potential jurors little room for leniency, even if they were sympathetic. Worse yet, Duncan did not even get a jury the second time around because, in a devious and facially generous ex post facto move, the Louisiana legislature lowered the maximum sentence for minor battery below the *Duncan* threshold for a Sixth Amendment right to a jury trial (p. 214). A Sixth Amendment victory had proved pyrrhic in a case in which the state controlled the underlying substantive criminal laws and in which no constitutional law protected Duncan from the prosecutor's willful pursuit of him. The solution, according to Stuntz, should have been found in an equal protection comparative analysis of outcomes by race across similar cases (pp. 214–15).

This reading of *Duncan* is dazzling, and the case's deep irony and remarkable missed chance probably excuse any exaggeration. But the reading's value must be carefully weighed. Procedure and substance may not be as zero-sum as Stuntz portrays them, nor does the abstract procedure/substance line map on to Stuntz's jurisprudential preferences as nicely as it may first appear. For one thing, changing a sentence is really a substantive event and potentially a matter of proportionality, which Stuntz places on the opposite side of the line from procedure. And yet, changing the maximum sentence enabled the state to stay on its preferred side of the procedural line in *Duncan*. More importantly, *Duncan* was the necessary predicate for the one very notable case in which the Court has actually invoked equal protection in modern criminal "procedure" — *Batson v. Kentucky*.[41] Batson, too, was charged with low-level crimes[42] subject to a fair amount of technical and definitional manipulation. And yet, conviction on those charges led the Court to make a drastic change in the fairness of

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[40] *Id.* at 147.

[41] 476 U.S. 79 (1986). *Batson*, of course, declared it a violation of equal protection for a prosecutor to target jurors for peremptory challenges solely on the basis of race. *Id.* at 97–98.

[42] The crimes were "second-degree burglary and receipt of stolen goods." *Id.* at 82.

state criminal systems precisely by manipulating the law of standing to enable Batson to benefit from a remedy logically owed to dismissed jurors. While it may not have been a Sixth Amendment case, *Batson* would have been a nullity without *Duncan*, and in any event, *Batson* has done an impressive, if indirect, job of carrying out the very mission of equal protection for which Stuntz yearns.

Stuntz might argue that, ever since Reconstruction, juries have been the problem as much as the solution in racial justice, but it was by tackling prejudice within the realm of juries that the Court did what Stuntz so often valorizes. *Batson* looked back to the noble promise of *Strauder v. West Virginia*,[43] which had first announced the application of equal protection to jury composition.[44] But almost a century after *Strauder*, in *Swain v. Alabama*,[45] a cowardly Court permitted the states a safe harbor by embedding their racist jury selection procedures in case-specific peremptory challenges.[46] When *Batson* corrected *Swain*, it restored the promise of *Strauder*. Moreover, as I will note below, it did so through a maneuver that helped the Court avoid the challenge that Stuntz perhaps quixotically demands that it take on: statistical analysis of state criminal law.

Another context in which Stuntz says he would have preferred that the Justices focus on substance rather than procedure was the breadth and severity of the substantive criminal law that were the real source of the system's iniquities and inequities. Stuntz argues that a robust use of the Eighth Amendment and other doctrines would have served the interests of justice better — and would have denied the states and the legislatures the constitutional pass they now enjoy in defining crimes and setting sentences.[47] And the Court would have found a way to provide defense counsel with ample resources to prove factual innocence rather than bring a contrived menu of procedural arguments that divert the trial from that goal.[48] Stuntz argues that the most purely procedural of doctrines — the Fourth Amendment — disserved some vulnerable victims of the police investigation by making it too legally expensive to invade the privacy of the better off.[49] Worse yet, constitutional indifference to legislation of contrived, harmless, or inchoate crimes enabled the state to target large numbers of poor drug users and dealers, as both a bad proxy effort to deal with more serious

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[43] 100 U.S. 303 (1880).

[44] *Strauder* invalidated a state's facial racial classification that barred African Americans from serving on juries. *Id.* at 309–10.

[45] 380 U.S. 202 (1965).

[46] *Id.* at 221.

[47] *See* Stuntz, *supra* note 22, at 65–74.

[48] *Id.* at 69–71.

[49] *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1804–15 (1998).

crime and as a concession to racist public imagination about poor people's violence.[50]

Two cases illustrate the Court's attempt to grapple with these substantive issues. *Douglas v. California*[51] was a transitional case in which the Court established a right to counsel for the first appeal.[52] The background case, *Griffin v. Illinois*,[53] had planted some seeds for a bold constitutional intervention into criminal justice by guaranteeing poor defendants a right to transcripts necessary for appeal;[54] it foretold the possibility that de facto wealth discrimination would be forbidden in criminal cases. *Douglas* cited both due process and equal protection arguments in building on *Griffin*,[55] but a few years later, when the defendant in *Ross v. Moffitt*[56] unsuccessfully sought to extend *Douglas* to collateral review, the question was whether *Douglas* really meant to rely on a wealth-focused equal protection ground.[57] When Justice Rehnquist's opinion in *Ross* implicitly read, or rewrote, *Griffin* and *Douglas* to be only about due process,[58] it steered the Court down a procedural path and away from a substantive path focused on wealth and class. Yet the outcome may have been mooted or subsumed anyway by the Court's broader retreat from wealth-based equal protection holdings outside of criminal justice.[59]

In fact, the issue of wealth-based discrimination raises a striking irony here. Stuntz believes that American criminal justice has been dangerous in part because it has so arrogated to itself power to control the threat of deviance inherent in the heterogeneity of our social life. Yet he hopes for a reformed criminal justice system through which a constitutional principle can address economic inequality even while the Court cannot find a way to do so in the larger non-criminal law apparatus of the welfare state.

And so, the problems of the procedure/substance distinction proliferate — and in a way that is all too predictable, as a kind of deconstructive target practice that any such boldly generalized and abstract framing invites. Citing the vague moral precepts of the Continental Declaration of Rights simply elides vast cultural and institutional dif-

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[50] Stuntz, *supra* note 22, at 50–51.

[51] 372 U.S. 353 (1963).

[52] *Id.* at 357–58.

[53] 351 U.S. 12 (1956).

[54] *Id.* at 19.

[55] *Douglas*, 372 U.S. at 355–56.

[56] 417 U.S. 600 (1974).

[57] *See id.* at 611–15.

[58] *See id.*

[59] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[W]here wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

ferences. But in any event, how descriptively clear is the distinction between substance and procedure anyway? Do we put the right to counsel on the "substance" side simply because it is essential to determining factual truth? And getting back to ground-level matters, just how zero-sum is the choice between procedure and substance? By what metric has a rights focus led to an underinvestment in the defense counsel resources that would have helped the factually innocent win acquittals? And what do we make of restrictions on procedural rights even at the very height of the Warren Court procedural rights revolution? When Chief Justice Warren himself wrote the decision giving police the power to stop and frisk in the absence of probable cause,[60] he allowed the police to circumvent the restrictions of criminal law definitions. Did he do so in part expressly because he acknowledged that the exclusionary rule was of limited utility to citizens in a world where police aim to restrict liberty without even worrying about criminal convictions?[61]

More fundamentally, nicely observing the historical irony that our concept of rights predates our modern legal institutions does not tell us whether this fact is indeed just a grand accident or a prescient admonition from some deeper national wisdom about the form that future antidemocratic government practices might take. Or if our rights obsession is neither a historical accident nor a wise admonition, what can we make of the possible motivations for it? Is it just naiveté on the part of our major legal institutions? Consider some very odd bedfellowship here. The legal historian Professor John Langbein has depicted the procedural innovations of American criminal justice as at best a folly and at worst a sinister deception.[62] They encourage the fantasy that we really give defendants these rights, when in fact we could not possibly afford to do so.[63] For Langbein, rights are effectively a tax on defendants and lead to a regime of plea bargaining that operates as a kind of nontrial by ordeal.[64] Langbein is a different kind of idealist from Stuntz and thus prone to a kind of cynicism Stuntz lacks: Langbein suggests that focusing on rights reflects a kind of moral and intellectual fecklessness in American government that he sees happily lacking in much continental justice. Yet in this regard, Langbein implicates another strange bedfellow of both himself and possibly Stuntz: the Critical Legal Studies movement, which for its own purposes could have embraced Stuntz's rights critique as a diagnosis of a brilliant

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[60] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[61] *See id.* at 14.

[62] *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–13 (1978) (comparing the modern practice of plea bargaining to the medieval law of torture).

[63] *See id.* at 14.

[64] *See id.* at 11.

false consciousness–raising mechanism of legitimation in the service of hierarchy.[65] Would Stuntz subscribe to such views? Elsewhere Stuntz cites the research of the psychologist Tom Tyler[66] to argue that belief in the legitimacy of the system's processes tends to encourage otherwise crime-tempted people to obey the law (p. 29). Would Stuntz see this effect as a virtuous byproduct of an otherwise-misguided obsession with procedure, or as a kind of brainwashing?

And yet, these objections do not threaten the power of Stuntz's rights critique once we understand it properly. Stuntz has been our foremost analyst of the complex interactions of parts of the criminal justice system, so the least likely explanation for the vulnerabilities of his critique is his intellectual naiveté. We have to see his critique in different and frankly bigger terms. It has embarrassed those commentators who have promoted Bill of Rights–based reform of criminal justice to recognize failure: mass incarceration, with its evident racial disparities, cannot be blamed on the Burger, Rehnquist, and Roberts Courts' cutbacks on Warren Court doctrine. On the other hand, it would be wrong to read Stuntz's critique straightforwardly as imputing the blame to Warren, and a more egregious error still to infer from Stuntz that conservative cutbacks on Warren Court doctrine will ameliorate the miseries of our system. The Warren Court story works at a more general level. Stuntz wants us to view our current condition in almost classically tragic terms, and to recognize that the failure of noble efforts may reflect subtle national choices whereby when we design institutions we lose sight of our animating goals.

III. WRONG AND RIGHT FEDERAL LAW

I have chosen to describe the third of the key axes in *Collapse* in terms of two possible roles for federal law — the regulatory and the moral. That axis may itself be hard to distinguish from the other two, and, as I will note, it implicates state as well as federal legal sins. But its utility may lie in enhancing our understanding of Stuntz's overall critique by reference to both specific attacks he makes on the corruption of national power he decries and the promise of national law he yearns to see fulfilled.

Stuntz does see a role for *conventional* federal criminal law. It might extend to the absolutely necessary regulatory matters of grave national interest that cannot be vindicated without a criminal law backup and that cannot be reached by state prosecutors (pp. 306–07).

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[65] *Cf.* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178, 215–16 (Wendy Brown & Janet Halley eds., 2002) (describing the typical Marxist critique of rights).

[66] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

But he would like it to resemble a kind of minimally necessary national version of local criminal justice, with conventional state and federal criminal law sharing a moral sensibility of a mundane but traditional sort. This sensibility is the situation sense of a population of citizens, officials, and jurors in separating the very harmful and very culpable from those citizens for whom punishment is gratuitous or prejudiced. But he assigns a higher moral task to federal law: the vindication of the principles that give all criminal law legitimacy — principles of fairness, equality, and proportionality, which are all federal matters because they are nation-defining values.

Consider Stuntz's rereading and revival of Justice Jackson's famed *Morissette v. United States*[67] opinion (pp. 261–62). *Morissette* is now often read rather dryly as a benchmark for technical mens rea analysis or legislative guidance, and is used as a pedagogic tool to teach law students how well-informed courts performing statutory interpretation can discern the difference between *malum in se* and *malum prohibitum* crimes.[68] But for Stuntz, *Morissette* is an exhortation that the great majority of criminal adjudications *should be* for *malum in se* crimes, because for him, the key to Justice Jackson's wisdom is not the definitional nuances of mens rea, but the principle that moral wrongfulness should be in the minds of the jurors when they make the decision to condemn (pp. 261–62). On this score, one target of Stuntz's wrath is the professionalized expert wisdom of the academics who created the Model Penal Code (MPC) (pp. 194–95). Although the MPC purports to disdain strict liability crimes,[69] it enables the creation of proxies for them by its hypertechnical, cognitively based definition of mens rea,[70] which drains criminal law of its authority to condemn. There is thus a non sequitur in Stuntz's reading of *Morissette*, because the evil denounced in Justice Jackson's opinion — strict liability — is rejected in Stuntz's enemy, the MPC. Requiring knowledge in a theft case is hardly inconsistent with the MPC's use of arguably technical mens rea terms. Moreover, even if *Morissette* happens to be a federal case, its denunciation of strict liability applies just as well to state crimes, and indeed Stuntz's association of the MPC and federal criminal law shows that the true distinction between regulatory and core moral crimes is not exactly about federal power anyway. For Stuntz, however, it has been *federal* criminal legislation that has exemplified and promoted the

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[67] 342 U.S. 246 (1952) (holding that, in crime of theft of government property, government must prove that defendant was aware that property had not been abandoned by owner).

[68] *See, e.g.*, JOHN KAPLAN ET AL., CRIMINAL LAW 195 (4th ed. 2000) (inviting the student to compare the crime in *Morissette* to that in several strict liability cases).

[69] *See* MODEL PENAL CODE § 2.05 (1985).

[70] *See id.* § 2.02.

kind of criminal laws that he denounces and that has served as a terrible model for state law as well.

For Stuntz, the great majority of federal criminal law is a monstrosity. Long ago unmoored from any sensible focus on intrinsically bad acts and uncontroversially necessary federal jurisdiction, it now is not only the worst offender among modern criminal regimes, but also the perverse model for and even enabler of parallel excesses at the state level. The symptoms are, of course, the opposites of the virtues of the positive local model. We have a maze-like, incoherent tangle of penal laws. Their mens rea components are so formulaic as to deny juries any chance of exercising any moral judgment about meaningful blameworthiness (pp. 260–62). The complexity and overlap of these penal laws, especially given the generosity that double jeopardy doctrine displays toward multiple punishments of single transactions, converts prosecutorial discretion from an exercise of wisdom to a selection of weaponry (p. 81). And the rigidity of the penal laws' sentencing scheme, while now in flux because of *United States v. Booker*,[71] nevertheless makes federal sentencing law the prime example of the power shift in sentencing from judge to prosecutor (p. 295).

Stuntz is appalled at the dishonesty of these shortcuts and their smooth entry into the DNA of American criminal law doctrine. Indeed, one of his primary examples is the mundane state law crime of robbery, where legislatures learned to lighten the burdens on police and prosecutors by enacting descending menus of lesser included offenses such as theft in certain specified places, along with a generous dollop of enhancements and upgrades for various extra motives or attendant circumstances (pp. 81–82). The greater ease of proving preparatory or collateral actions combined with hypercalibrated mens rea requirements (or sometimes none at all, in the case of strict liability crimes) tends to exacerbate these effects, thereby easing conviction (p. 81). And Stuntz indicts the Supreme Court as a co-conspirator in these legislative sins. For one thing, its occasional dedication to strict textual reading denies any relevance to conceivable legislative purpose, even where it is plausible to impute a rational sense to Congress, when

[71] 543 U.S. 220 (2005). In *Booker*, the Court held that the Federal Sentencing Guidelines violated the Sixth Amendment principle of *Blakely v. Washington*, 542 U.S. 296, 304 (2004), which ruled that the determination of any fact that raises the sentence beyond what would have been entailed by the jury conviction itself (or by a guilty plea) must be made by a jury. *See Booker*, 543 U.S. at 226–27. The result in *Booker* was a strange compromise whereby the Guidelines would be merely advisory for federal judges. *Id.* Stuntz spends little time on this issue except to observe near the end that the awkward *Booker* compromise at least offers judges some room to mitigate the rigidities of federal criminal law (pp. 295–96).

the technical elements produce bizarre results (pp. 171–72).[72] For another, in an era when the Court risked its legitimacy on narrowing the scope of Congress's power under the Commerce Clause, one sees the Court worry little about that power when crime is the issue. In that sense, the modern federal criminal code is the Bad New Deal we have forgotten.[73]

Where did this monstrosity come from? For Stuntz, the key story starts with a crude phase of American prejudice — when the immigrants who helped create the Gilded Age of urban justice posed a perceived moral threat to the native white Protestant population. Federal campaigns against such things as polygamy, narcotics, and prostitution arose from the moralistic notions of impurity associated with the deviant behavior of immigrant groups (or religious outsiders, in the case of Mormons). Such legislation as the Morrill Act[74] and the Edmunds Act[75] banning polygamy, the Harrison Act[76] regulating and largely banning narcotics, the Mann Act[77] aimed at the prostitution trade, and the Anti-Lottery Act[78] were the first large deployments of federal criminal law to exercise the symbolic demagoguery of national politics (pp.

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[72] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 484–86 (1917) (imputing "commercialized vice" to defendant's action in transporting woman across state lines, thus bringing action within scope of relevant statute).

[73] A crucial and revealing side point in this story is about Prohibition — obviously the most memorable outgrowth of the founding era of federal legislative moralism (pp. 178–86). But here Stuntz uncovers a powerful irony as he offers a fascinating rereading of Prohibition as the rule-proving exception: he concedes that the antiliquor laws somewhat anticipated the pattern of drug-law enforcement decades later. Even if the authorities were neutral in their motivations, the practical logistics of evidence gathering made it much easier for them to bust the high-volume, more visible working-class world of beer than the more secretive world of fine spirits (p. 183). But if we accept the principle that traffic in alcohol is illegal, then administration of that regime was tolerant and reasonable, focusing on the volume trafficker and not the end consumer. Prohibition prosecutions were relatively high-quality justice, and much of the enforcement was efficacious in reducing the worst and most uncontroversial social harms of alcohol. Laws did not bother with individual possession or medical use; prosecutors neither had many pretextual tools to use nor showed much inclination to use those tools they had, at least against small-time figures. This practice was transparent criminal justice, and in that sense, however irrational this particular American moral panic may have been, it was a moral panic ultimately conducive to rational public discussion. Where now few politicians would dare take overly strong stands for drug legalization, debate about alcohol was fair and open. And the repeal of Prohibition is telling because it underscores Stuntz's theme of internalization and externalization. Ultimately, the nation realized it had imposed this new moralistic regime on itself. It is as if the United States realized it had overreacted to its own moral concerns by criminalizing behavior too close to the normal impulses of most Americans. Thus, to repeal was strangely just rebalancing: a brief encore appearance of the Gilded Age model.

[74] Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

[75] Edmunds Anti-Polygamy Act of 1882, ch, 47, 22 Stat. 30.

[76] Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785 (1914).

[77] White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

[78] Anti-Lottery Act of 1890, ch. 908, 26 Stat. 465 (1890).

162–69, 177). These disfavored groups were the object of a vast federal externalization of puritanical attitudes by parts of the polity and of the ambitions of national politicians for whom this demagoguery was relatively costless. Moreover, as federal authorities encountered practical obstacles to investigating and proving some of these crimes, federal criminal law developed some of the doctrinal technology that Stuntz finds most pernicious: the proliferation of component, inchoate, or collateral crimes whereby, through legislative magic, the practical obstacles might disappear. Thus, cohabitation was a shortcut to polygamy, occupational licensing and tax laws might be shortcuts for narcotics or lottery crimes, and, of course, targeting interstate transportation for immoral purposes was the easy way to get at prostitution (pp. 177–78).

And Stuntz would add that, in its legislative rapacity, Congress not only has added these laws on top of traditional federal criminal law, but also has insinuated them into state criminal law through pointless duplicative jurisdiction, often with the perverse effect of adding to the state prosecutor's power through the threat of going to the federal prosecutor as a way of winning a guilty plea to the state charge (pp. 305–06). For Stuntz, federal jurisdiction should not be a pretextual hook by which this duplication and collusive leverage can be arranged; it should be a substantive principle by which Congress limits itself to crimes of national import that truly cannot be handled within the limited jurisdictions and resources of state governments.

Stuntz's polemic against federal criminal law derives in part from his earlier attack on pretext crimes as perversions of criminal law. In his paper with Professor Daniel Richman, he argued that deployment of such pretext charges as tax evasion, perjury, obstruction of justice, felon-in-possession, and other possession laws not only is unfair to defendants because it does an end-run around proving substantive culpability but also disserves the public interest in deterrence and prosecutorial accountability.[79] Of course, a great number of modern statutory crimes are "pretext" crimes in the sense already described — they are contrived sets of preparatory or collateral elements chosen to enable the police and prosecutors to get around the proof problems of the "real" crime. But Stuntz has previously reserved this term chiefly for the more contemporary variety of obstruction of justice or perjury charges[80] — often in white-collar cases — although he unavoidably cited the earlier examples, such as the tax charge used to convict mass killer Al Capone. *Collapse* pioneers a subtler and more important ver-

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[79] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 585–86 (2005).

[80] *See, e.g.*, *id.* at 584.

sion of that approach. The popular old tale about Capone underscores the fact that the government was engaged in "celebrity" criminal charges, at a time when doing so was a cheap and efficient way of engaging in the symbolic politics of crime. When, late in the 1920s, national unease set in about violent crime, J. Edgar Hoover learned the power of the celebrity prosecution to both stoke and satisfy public fears, and he thereby wrote a script for the Nixon-era campaigns decades later (pp. 186–87). Ultimately, Congress learned how to pull the levers of these statutory contrivances to carry out various campaigns of moral panic. Hoover may have had no interest other than bureaucratic aggrandizement, but he created a model of great use to elected politicians. So the quaint and quixotic era of Mann Act prosecutions becomes the terrifying regime of federal gun and drug laws, and then the pitiless complex of financial crimes legislation.[81]

Federal law thus created a regime of pretext much more massive and insidious than that born of early-twentieth-century moral panics. For Stuntz, the core pretext crime became the drug law itself (pp. 269–70). When violent crime in the 1960s and 1970s became a national epidemic, prosecutors learned how hard it was to identify, much less prosecute, the perpetrators of inner-city violence — especially as drug-related and stranger homicide began to overwhelm the more traditional interacquaintance violence that once dominated homicide rates (pp. 270–71). Prosecutors realized, however, that low-level mass-volume drug prosecutions, aided by lax Fourth Amendment rules, were perfectly feasible, and however unsystematically they thought this approach through, the notion may have been that arresting a large number of people involved in the drug trade would lead to catching — or at least deterring — some number of the killers targeted (pp. 271–73). For Stuntz, the costs of this proxy war have been many, from the wild inefficiencies of attacking gangs when neither the police nor the gang members themselves may know what the connection is between the prosecuted activities and outbursts of homicide, to, most sadly, the widening of the net to include truly collateral figures, such as hapless

[81] Stuntz is appalled by what has happened to white-collar crime, although unsurprisingly he cannot work up as much sympathy for its targets as he does for the inner-city defendants. But for him, the law of fraud has developed in a way interestingly parallel to, but different from, drug crimes: the old core definition of fraud at common law has expanded not so much through technical formulaic contrivances as through Congress's broad delegation to prosecutors of the undefined contours of the fraud definition, leading to what Stuntz sensibly decries as the *reductio ad absurdum* of white-collar crime. His main target is 18 U.S.C. § 1346, under which the government makes it a felony to deprive any person or institution of the honest services to which that party is entitled (p. 262). For a discussion of the breadth of this law, see David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1395–1414 (2008). Section 1346 was somewhat narrowed recently in *Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010), which held that, to avoid unconstitutional vagueness, § 1346 cases should be limited to those instances involving bribes and kickbacks.

women accomplices (pp. 267–70).[82] This perverse outcome is what federal-style criminal law has wrought: the legal technology that arose out of arbitrary national panics against local deviance became the instrument by which the criminal justice system doubly punishes the inner city. Large numbers of nonviolent people go to prison as proxy targets for killers, and actual violence goes underpoliced (p. 273).[83]

So consider how law and morality align and misalign for Stuntz. In response to unsettling social change — especially the arrival of immigrant groups and the manifestation of untraditional behavior — society falls prey to moral panic; democratic processes allow for, indeed invite, demagogic reactions by government; and yet dry-as-dust legal experts lend aid and comfort to these destructive panics by engineering supposedly value-neutral legal tools to make the panic-induced laws more efficient to operate. Here, as elsewhere in *Collapse*, Stuntz notes the vagaries of historical confluence: the MPC emerged in the era after World War II when crime dropped so much that there was little public resistance to delegating the making of criminal law to experts, and what they produced became precisely what they intended — a *model* for state legislation, but one that mirrored the by-then venerable features of the federal code (pp. 194–95, 266–67).

But he does sketch out a vision of a better constitutional law, and this is his boldest and perhaps most quixotic proposal of all. Stuntz would be highly selective in his deployment of federal power, stressing a close interplay between the criminal civil rights statutes and the Fourteenth Amendment (p. 291). His favored version of federal law is constitutional judicial review under the Eighth Amendment and even the Equal Protection Clause (and some wealth redistribution under *Strickland v. Washington*[84]) as a counterpoise to the excessive reliance on gratuitous procedure (pp. 214–15). It is as if Stuntz wants to reseize the foregone opportunities of Reconstruction law and to redirect the Supreme Court from the path it took under Chief Justice Warren.[85] It is as if he wants to go back one more time to *Douglas v. California* and re-embed equal protection into criminal justice. One case he wishes the Court could redo is, of course, *McCleskey v. Kemp*,[86] where the Court could not quite find the courage or will to denounce a death penalty system that had made it clear that the protection of the capital

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[82] For Stuntz's most poignant example, see *United States v. Hunte*, 196 F.3d 687 (7th Cir. 1999).

[83] Stuntz cites the notion of a "racial tax" as coined in RANDALL KENNEDY, RACE, CRIME, AND THE LAW 158–59 (1997).

[84] 466 U.S. 668 (1984).

[85] *See generally* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

[86] 481 U.S. 279 (1987).

murder laws was for white people only (pp. 119–20). He laments the less-noted case of *Town of Castle Rock v. Gonzales*,[87] where the Court reiterated the absence of any federal constitutional duty of a state to protect its people from private violence (pp. 120–21).

But perhaps most of all, Stuntz yearns for a redo of *United States v. Armstrong*[88] (p. 297). There, a black defendant said that even if he had been guilty of cocaine crimes, the government had no right to condemn him when it was ignoring similar crimes by whites.[89] It was the rare instance of a contemporary equal protection claim in a criminal case, and it lost, on two related grounds. First, of course, Armstrong had to prove the discrimination was purposeful.[90] Second, to get the detailed bureaucratic and documentary proof of pattern or prejudice that could conceivably help him make the case, he was forced to meet an almost insuperable prima facie burden, in order to avoid destructive intervention into the business of prosecution.[91] Stuntz does not quite tell us what he would want *Armstrong II* to say, but we can infer it to be a matter of what we might call the mens rea of the state. Disavowing cynicism about malevolent intentions of particular politicians, Stuntz refers to what he views as the reckless indifference of government to the consequences of its policies (p. 173). So it is as if an *Armstrong II* would demand of discriminatory prosecution claims a lesser burden substantively: the claimant would have to show that the state probably adverted to, surely was made aware of, but ultimately turned a blind eye to the arbitrary consequences of its actions. Agents of the state may not be purposely discriminating, but the state still must be accountable. And if that entails granting huge discovery rights, then such a burden is the fair cost of doing criminal justice business.

By contrast, Reconstruction was an *authentic* occasion for moral panic, and whereas the Court became the willing enabler of modern criminal regulation, it blew the chance to carry out congressional mandates when the very moral foundations of the country were in peril (pp. 104–08). On this score, Stuntz is vulnerable to the charge that his notion of how law should be infused with morality is highly selective. We might feel comfortable distinguishing a dominant group's anxiety about social deviance and heterogeneity from an enlightened nation's commitment to an ethic of equal justice. But there may be a blurry line between these situations when it comes to using law as an instrument to reaffirm national character. Moreover, popular passion and

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87 545 U.S. 748 (2005).
88 517 U.S. 456 (1996).
89 *See id.* at 459.
90 *See id.* at 465.
91 *See id.* at 468.

constitutional principle have far too complex a relationship in American history for this selective approval of moral value to be useful in the design of a legal system. In this regard, Stuntz's commitment to democratic populism in local justice may seem at odds with his distrust of democratic populism in the context of morally driven enactments of federal criminal regulation. Thus, while Stuntz strongly disdains the legal-engineering elitism he associates with the experts who created the MPC, at times he himself exhibits an elitist distrust of popular attitudes, similar to the morally progressive elitism in Western Europe that has overruled popular support for the death penalty there.[92] Further, the bad federal criminal law Stuntz denounces is actually an odd mix of the morally passionate and the dryly overregulatory, with the latter component not easily disentangled from progressive New Deal regimes. It is as if Stuntz deploys a special brand of Lochnerism,[93] designed to repeal the Bad New Deal by reference to his own notions of justice.

Yet again, to draw this conclusion is to misread Stuntz. As I note in my own closing thoughts, the true legal morality lies not in a programmatic hierarchy of specific moral views, but in a quality of self-conscious rumination over how to exhibit proper character as we design our imperfect institutions.

CONCLUSION

If Stuntz's call for a new *Armstrong*-type constitutional regulation of criminal justice were to be taken as fully intended, Stuntz would be vulnerable to his own charge. Stuntz's proposal would be a drastic overhauling of the Fourteenth Amendment doctrine, raising gargantuan problems of administration. So he might be accused of asking law to do too much, indeed of making it a moral crusade. But Stuntz's legacy will lie more in his spiritual challenge to reimagine law, rather than in any specific doctrinal proposal. This Book Review might well then turn to one of Stuntz's own book reviews, of a book called *Christian Perspectives on Legal Thought*, where with typical modesty and hesitation he proffered some of his views on how his Christianity informed his view of law.[94] For him, Christianity is ultimately relational, and the wrong relation of religion to law is for religion to supply any didactic lessons in drafting laws or any doctrinaire lessons about the perfect legal ideology.[95] Rather, the highest moral

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[92] *See generally* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 3–25 (1986).

[93] *See generally* Lochner v. New York, 198 U.S. 45 (1905).

[94] *See* William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001)).

[95] *See id.* at 1723–27.

calling of Christianity is to induce in believers a self-critical sense about their ability to design or divine perfect systems.[96] Stuntz wants morality in law, but on the key issues where there is wide consensus about the most essential matters of evil and of harm; otherwise he wants morally sensitive critique and a tilt toward mercy for offenders, in part because the lawmakers must recognize their own intellectual and ethical flaws.

[96] *Id.* at 1721–22.