Crime and Punishment

by MICHAEL O'DONNELL

William Stuntz, who died in March at 52 after a long struggle with cancer, was a law professor who devoted his career to ending the scourge of racial discrimination in the criminal justice system. Widely acknowledged as the leading criminal procedure scholar of his era, Stuntz defied easy labeling. He was a conservative and an evangelical Christian whose preoccupation with race and mercy allied him with liberals, and whose insights were contrarian and often quite radical. Students and colleagues of all political persuasions admired him for his generosity and humility. His illness and death prompted an outpouring of tributes, including a conference at Harvard Law School attended by all manner of luminaries, and a memorial issue of the *Harvard Law Review* headlined by the liberal constitutionalist Pamela Karlan. Michael Klarman, one of Stuntz's liberal colleagues on the Harvard faculty, wrote of Stuntz in his tribute: "I believe that he was the greatest law professor of his generation."

Stuntz gained a measure of recognition outside the academy for the grace he displayed publicly while dying. In a blog titled "Less than the Least," he recorded his struggle with cancer and chronic back pain. His posts revealed the workings of a remarkable mind and a modest personality that sought to make sense of the end of life. In one of his final entries, when he knew that death was fast approaching, Stuntz wrote:

> More and more, I've come to see my cancer's natural progression as containing within it great gifts. Cancer steals life, but the theft is slow and happens in stages. None of it catches me by surprise, for which I'm thankful. I'm even more thankful to have the opportunity to finish some work and, especially, to do things for my spouse and our kids that I might not have done had I expected to live a long time yet. Life feels more precious than it did before, yet I don't feel the need to cling to it as much as I did before. Whatever happens with the course of my treatment—maybe the next set of films will be better; maybe not—I'll be fine. God is good.

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The Collapse of American Criminal Justice
By William J. Stuntz.
Harvard. 413 pp. $35.

Stuntz mentioned "some work" that he was grateful for the opportunity to finish. The work in question is *The Collapse of American Criminal Justice*, and it is 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 book's opening sentence reads, "Among the great untold stories of our time is this one: the last half of the twentieth century saw America's criminal justice system unravel." The imprisonment rate in the United States, at 506 per 100,000 in 2007, is much higher than it has historically been, and is closer to Russia's rate (513) than Western Europe's (Germany's is seventy-four and France's seventy-two). The black inmate population was seven times higher in 2000 than in 1970, reaching a rate of 1,830 incarcerated per 100,000. That figure, Stuntz writes, "exceeds by one-fourth the imprisonment rate in the Soviet Union in 1950—near the end of Stalin's reign, the time when the population of Soviet prison camps peaked." Stuntz contends that "the criminal justice system is doing none of its jobs well: producing justice, avoiding discrimination, protecting those who most need the law's protection, [or] keeping crime in check while maintaining reasonable limits on criminal punishment."

Preoccupation with the shame of America's criminal justice system is usually a liberal's burden; conservatives typically double-book the cells and cheer at the mention of Rick Perry's record-setting number of executions in Texas. Well before Tea Partiers hooted in support of the death penalty at a Republican presidential debate in the fall, Republicans had claimed the mantle of the "law and order" party, whose standard solution to crime was to lock more people up. Stuntz has little patience for this type of rhetoric, which he calls the symbolic politics of crime. The Democrats play at symbolism too, of course. Shortly before the New Hampshire Democratic presidential primary in 1992, Arkansas Governor Bill Clinton took a detour from the campaign trail and flew home to oversee the execution of Ricky Ray Rector, a brain-damaged black man convicted of murdering a police officer. The ghastly stunt worked; Clinton overcame a poor showing in Iowa to place second in New Hampshire, becoming the Comeback Kid. Politicians today court voters "not by fighting crime but by talking about it," Stuntz writes. The talk is cheap in every sense of the word.

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, but his answer is two-pronged. The first part of it is structural: "local democracy" must be restored to the criminal justice system by reducing plea bargaining and holding more jury trials—and the jurors must live in the same communities as the victims and the accused. The second part of Stuntz's answer is technical: he argues that we must turn away from the law of criminal procedure—broadly speaking, the guarantees of the Bill of Rights like the right to counsel and the freedom from unlawful search and seizure—and toward the substantive law of equal protection, which the Supreme Court left for dead during Reconstruction. The former proposal is an arresting insight that seems broadly correct and broadly unobjectionable (except to prosecutors). The latter is as provocative as anything you will read from a serious legal commentator, and raises many problems. Both proposals will be probed and tested by scholars for years.

In a sweeping analysis that jumps through various eras in American history, Stuntz argues that the regional justice systems of the nineteenth century are proof of the signal importance of the jury trial. In the years between Reconstruction and the Great Depression, the Midwest and Northeast had large police forces, frequent jury trials, low crime rates and low inmate populations. To Stuntz, the combination is the model of a successful justice system. Jurors were free to acquit—and frequently did so—based on generic arguments that the crime was morally excusable or justified (for instance, because it was committed in self-defense), or that the accused did not act with malicious intent. Most important, police, prosecutors and jurors frequently came from the same communities as the perpetrators and victims of crimes. Rather than entering a justice system of outsiders, the accused faced their peers.

In many ways, the justice system in the nineteenth-century South was the opposite. Police forces were smaller, and crime rates

and inmate populations were higher. As for the composition of juries:

> Blacks and poor whites were the groups most often victimized by southern crime and most often subject to southern punishment, but blacks had no influence over southern laws or southern courts, and poor whites had little. Instead, the South's formal justice system was governed by those who least needed its services and least depended on its fairness.

In consequence, blacks found themselves at the mercy of white policemen, prosecutors and juries. (Outside the formal justice system, of course, they faced lynch mobs.) Police and prosecutors ignored crimes by whites against blacks like Emmett Till, while white juries convicted blacks like the Scottsboro boys on the flimsiest evidence.

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. Political clout lies disproportionately in the hands of majority-white suburbanites rather than majority-black inner-city residents, and jury pools are typically drawn countywide. This means that white voters elect white attorneys who prosecute black defendants, who in turn face judgment by white juries. The decision-makers have little stake in how the justice system works. To them, Stuntz writes, "crime is an abstraction."

With its assumption that members of a particular race think alike and will acquit their own, regardless of the evidence, this argument risks reducing jury behavior to tribalism. Stuntz pre-empts this objection on two fronts. The first is data: his analysis does suggest a historical correlation between representative juries and lower conviction rates. Courtroom practice bears out this finding, and any litigator will tell you that jury selection is indeed a crass business. The lawyer for each side wants the jury box to look as much like his client as possible in terms of income, geography, gender and race. But Stuntz concedes the limits of the data, not to mention the impossibility of isolating jury demographics as the sole determinant of conviction rates. Therefore, his second point is rhetorical—and the rhetoric is anathema to most conservatives. Jurors drawn from the communities affected by crime, Stuntz argues, are desirable because they exhibit an empathy in their decision-making that unrepresentative juries often lack. He contends not that representative jurors simply acquit those who look like them and convict the rest, but that they bring a measure of understanding, common sense and mercy to the enterprise of pronouncing judgment.

Residents of all neighborhoods, safe or dangerous, face two conflicting pressures, according to Stuntz. On the one hand, they want crime-free streets. But on the other, they do not want to see their sons and husbands sent to prison and their communities destroyed. "Local political control over criminal justice," Stuntz writes, "harnesses both forces without giving precedence to either." Jurors who judge their neighbors send dangerous felons away, but at the same time are more receptive than outsiders to defense arguments that raise doubts about the culpability for the charged behavior. They acquit more often, and in the right cases—especially where the defendant's conduct is excusable or not morally blameworthy. When voters and officials outside the affected communities assume power over criminal punishment, this equilibrium disappears. As Stuntz puts it, "anger and empathy alike are weaker forces when they come from voters who see crime on the evening news than when they flow from voters' lived experience."

PHIL FARNSWORTH

William Stuntz

Jury composition does not matter if there are no jury trials. Stuntz points out that over the past few generations, the jury trial has become a rare occurrence, a key cause being the rise of the plea bargain. Such agreements, in which defendants forgo trial in return for a lesser sentence, used to be a resource-saving shortcut in easy or straightforward cases. Now they have replaced trials as the central mechanism of separating the guilty from the innocent: today more than 95 percent of felony convictions in metropolitan counties are the result of guilty pleas.

Stuntz explains that four trends contributed to the rise of the plea bargain. First, funding for prosecutors and defense attorneys did not increase commensurate with crime during the crime wave of the 1960s. For cash-strapped district attorneys and public defenders, plea bargains were much faster and easier than trials, leading to what Stuntz calls "assembly line adjudication." Second, early in the twentieth century, criminal laws became broader, encompassing more conduct and making convictions easier to obtain. This gave prosecutors more leverage in plea negotiations. Stuntz explains the history in a fascinating chapter on the "culture wars" over lotteries, prostitution, liquor and other vices. Third, the war on drugs gave prosecutors a fallback crime to charge if they could not prove all the elements of a violent felony, rendering drug convictions a proxy for more serious but unproven crimes. And fourth, the growing popularity of three-strikes laws and mandatory-minimum sentences stacked the bargaining process in prosecutors' favor. It is no exaggeration to say that with the ability to threaten life sentences for sometimes minor crimes, prosecutors became something like extortion artists.

The institutionalization of the plea bargain, Stuntz writes, produced a system of official discretion rather than law. Prosecutors have all the power, and they decide which laws to enforce and when. Stuntz illustrates the point with the elementary example of highway speed limits, which many drivers regularly exceed. In such a system, police officers could stop almost anyone, so they must decide whom to stop. Granted unlimited discretion, they often discriminate. And in *Whren v. United States* (1996), a decision Stuntz deplores, the Supreme Court held that so long as an officer has cause to believe a driver violated a traffic law, the officer can pull over the driver even if his real motive is discriminatory.

Stuntz suggests another, more controversial cause for the rise of the plea bargain. The Warren Court's criminal procedure revolution of the 1960s aggressively interpreted the Bill of Rights—especially the Fourth, Fifth and Sixth Amendments—to provide strong protections to criminal defendants. The most famous cases are *Mapp v. Ohio*

(1961), which excludes from trial evidence obtained through illegal searches; *Gideon v. Wainwright* (1963), which guarantees the right to counsel in felony cases; and *Miranda v. Arizona* (1966), which requires police to apprise suspects in custody of their rights to counsel and against self-incrimination. Stuntz contends that these requirements made trials more expensive, and thus led prosecutors to seek plea deals more frequently.

Stuntz is right that when the price of something rises, people begin to look for cheaper alternatives. But it is not possible to gauge in any empirical way the conscious and unconscious decisions of thousands upon thousands of prosecutors in response to the Warren Court's collective jurisprudence. Stuntz writes in the language of economics—incentives, agency costs and marginal utility—which, when applied to law, can whiz past questions of causation like rocks skipping over calm water. To be fair, he deserves credit for expressing caution about which trends produced what results, displaying a humility uncommon in the fields of law and economics.

There are other problems with the theory that the jurisprudence of the Warren Court produced more plea bargains. The impact of some Warren Court decisions has been more costly trials, but the price is worth paying. A criminal trial is more expensive when the defendant has counsel than when he does not, but only in the sense that buying something is more expensive than stealing it. Nevertheless, constitutional protections do not always increase the cost of criminal litigation. Miranda warnings are cheap to give, and most defendants talk anyway. Suppression hearings, in which defendants seek to exclude unlawfully obtained evidence, happen before trial, and plea deals are frequently struck after such hearings, not before. And many costs have nothing to do with the Warren Court. Much of the complexity of criminal litigation stems from the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, not the Warren Court's interpretation of the Bill of Rights.

This talk of the Warren Court leads to Stuntz's second major point, that American criminal law took a wrong turn in the 1960s. It is commonplace for conservatives to attack the Warren Court's criminal procedure decisions as misguided or judicially activist. Two standard arguments are that the exclusion from trial of illegally obtained evidence allows the criminal to go free when the constable blunders, and that the Court invited a political backlash that produced Richard Nixon, George Wallace and Ronald Reagan. (These arguments rarely make clear why we ought to blame the proponents of strong civil liberties rather than the demagogues who exploited fear and racism for political advantage.) But Stuntz's critique of the criminal procedure revolution—like most of his arguments—is more novel and ambitious than the typical conservative commentary. He contends not that the Warren Court was too radical but that it was not radical enough.

Stuntz levels three criticisms at major Warren decisions like *Mapp*, *Gideon* and *Miranda*. First, he portrays them as classic examples of the law of unintended consequences. The decisions were meant to level the playing field between white and black, rich and poor. But by creating a complex series of procedural requirements, they placed new emphasis on the quality of lawyers; only the best and most expensive could navigate the maze. Second, the Warren Court redirected the focus of criminal trials away from the guilt or innocence of the accused and onto the conduct of police officers. Third, the criminal procedure rules enforcing the Fourth, Fifth and Sixth Amendments began to seem like empty proceduralism. (The right to confront witnesses, for instance, often focuses juries' attention on the testimony of the forensic specialist who analyzed physical evidence rather than on the evidence itself.) Stuntz seems exasperated with procedure and eager to move the debate into substantive criminal law—two historically distinct fields that *The Collapse of American Criminal Justice* helps to synthesize and unify. Over time, the "relationship between the law of criminal procedure and a more just criminal justice system," he writes, "grew ever more indistinct. The law was its own justification."

One counterargument is that fair procedures help produce fair outcomes. When an appointed defense attorney sleeps through his client's trial, the trial's result becomes unreliable. A confession obtained through coercive interrogation or outright torture—as was common throughout the Jim Crow South and in Chicago's notorious Area Two as late as the 1990s—is as good as no confession at all. We recoil from trial procedures that prevent defendants from confronting their accusers and viewing the evidence against them, as the Supreme Court powerfully made clear in *Hamdan v. Rumsfeld* (2006), which invalidated the military commissions at Guantánamo Bay. Procedural fairness not only produces faith in the outcome of individual trials; it reinforces faith in the legal system as a whole.

Stuntz contends that the Warren Court's mistake was "to tie the law of criminal procedure to the federal Bill of Rights instead of using that body of law to advance some coherent vision of fair and equal criminal justice." In particular, he mourns as the road not taken the Fourteenth Amendment, which provides that no state may "deny any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause lived a brief but mighty existence during Reconstruction. It underpinned legislation like the Enforcement Act of 1870 and the Ku Klux Klan Act of 1871, through which federal officials aggressively prosecuted race terrorism and voter suppression. Prosecutions under these laws came to a halt in 1876 because of two Supreme Court decisions. *United States v. Cruikshank* held that the Equal Protection Clause applies only to government actors, not private citizens like Klansmen. And *United States v. Reese* required a showing of discriminatory intent to make out a claim under the clause—a showing that is all but impossible to make in suits against institutions rather than individuals. Both the state action doctrine and the intent requirement persist to this day.

Most legal progressives would follow Stuntz this far; *Cruikshank*, *Reese* and the death of equal protection are, after all, standard fare in constitutional law classes. Equal protection is a substantive principle against discrimination, whereas the Bill of Rights establishes procedural protections; the two seem made to complement each other. But where liberals would supplement the Bill of Rights with a reinvigorated Equal Protection Clause, Stuntz would travel back in time and replace the former with the latter. This is an astonishing claim, and Stuntz takes it to its logical conclusion: he blames not Earl Warren but James Madison for the state of criminal procedure law. By its plain text, he concedes, the "Bill of Rights' clear focus is procedure," and the "Constitution is not written with substantive criminal law in mind. More's the pity."

A vigorous equal protection principle in criminal law, Stuntz writes, would allow judges and juries to attack the substance of unfair or discriminatory treatment rather than rely on prophylactic procedures that struggle to protect against it. For example, in *Duncan v. Louisiana* (1968), a black man was charged with battery for slapping a white child's wrist during a disagreement. The Supreme Court reversed his conviction because he received a bench trial rather than a jury trial. The state shuffled its procedures and convicted Duncan a second time. Rather than using the easily circumvented procedure of the Sixth Amendment's jury trial right, Stuntz argues,

an Equal Protection–based court would have thrown out the conviction on its face because it was nakedly discriminatory: no white person would have faced such a charge. This is where Stuntz believes the Warren Court was too timid. The Court tethered constitutional law to the text of the Bill of Rights, whereas Stuntz would give judges almost unlimited discretion under the broad and vague Equal Protection Clause to stomp out unfairness and discrimination wherever it appears.

One hardly knows how to respond to such breathtaking claims. Three points seem worth noting. First, as Stuntz acknowledges, the text of the Constitution is against him. The Bill of Rights is the most cherished section of the oldest written constitution in the world, and it says what it says. Second, Stuntz's alternative to the Bill of Rights—a substantive "equality" principle based on the Fourteenth Amendment—is not well developed, either in the book or in Stuntz's scholarly articles. All that discretion is a frightening thing: not all judges and justices are genuine foes of discrimination like Stuntz. The theory is little more than a wistful reflection on what might have been had the Supreme Court followed an alternate path. Sadly, one imagines that if Stuntz had lived a few years longer, he would have been able to develop his arguments more fully. Third, and most important, Stuntz seems to think that the purpose of the Constitution is to enact the most efficient system of criminal justice, or the one most successful at balancing crime and punishment.

But that isn't the purpose of the Constitution. Humble as Stuntz was, his scholarship demonstrated some of the arrogance of the law and economics movement, which is so pleased with its strides toward empirical truth that it frequently misses the big picture. The Constitution, and more specifically the Bill of Rights, is a guarantee about the type of society we live in, one where the poor are given lawyers and the police cannot barge down doors without a judge's warrant, efficiency be damned. Judicial decisions affirming these principles slow down prosecutions and cause political actors to respond in unpredictable ways. But they do not lead inexorably to institutional racism. Long before considering Stuntz's bold medicine, we must try less dramatic reforms like ending the war on drugs, providing better funding for prosecutors and defense attorneys, and repealing mandatory minimums and three-strikes laws.

Stuntz's despair over the criminal justice system must have been deep indeed to have led him to forswear the Bill of Rights. His unconventional proposals suggest that we must abandon all constraints if we hope to

find a solution to the problem of race and law. The burden of proof on such a motion is almost impossibly high, and Stuntz does not clear it. Yet if his attack on the Bill of Rights goes much too far, many of his other insights seem accurate—particularly his criticism of prosecutors' overbroad discretion. Reforms to one side, 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. ■

Algeria's Wounds

by RICHARD VINEN

The Harkis
The Wound That Never Heals.
By Vincent Crapanzano.
Chicago. 240 pp. $35.

Algeria
France's Undeclared War.
By Martin Evans.
Oxford. 457 pp. $35.

"The FLN wants us to leave Algeria and we want to remain.... Should France remain in Algeria? If you answer 'yes,' then you must accept all the necessary consequences." These words are spoken by Mathieu, the parachute colonel in Gillo Pontecorvo's film *The Battle of Algiers* (1966). They sum up a certain attitude toward the war that France fought from 1954 to 1962 to keep Algeria French. According to this interpretation, the war was about the simple fact of colonialism. The "consequences" to which Mathieu refers is the torture that the French army, more or less openly, used against Algerians. Pontecorvo portrays this torture graphically, but he does not really condemn it. Equally, the Algerian fighters of the Front de Libération Nationale (FLN) are portrayed as people who have no choice but to adopt ruthless tactics—the bombing of civilians and the murder of their own "antisocial" compatriots—in order to win Algeria's independence from France.

If the war was indeed simple, then it could be said to have a clear ending in July 1962, when Algeria gained independence; under these circumstances it is not surprising that the French spoke little about the conflict in the ten or twenty years that followed. An amnesty law in France covered crimes committed during the war, and what public discussion there was of the war often took place outside France. Pontecorvo's film was an Italian/Algerian production. Pierre Vidal-Naquet's landmark book *Torture: Cancer of Democracy* was inspired by his experiences as a campaigner against French atrocities during the Algerian War but was published in London by Penguin in 1963 and not translated into French until 1972. In France, allusions to Algeria—of the kind found in, say, the 1982 gangster film *La Balance*—were usually brief and oblique.

In the past fifteen years, all this has changed. The trial of Maurice Papon, in 1997 and 1998, was ostensibly about his role as a Vichy official in the deportation of Jews during World War II, but it provided witnesses with a chance to evoke his role in the killing of Algerian demonstrators during the so-called Battle of Paris in 1961, when Papon was prefect of the Paris police. In 2000 Louisette Ighilahriz, a former FLN activist, described the torture she had endured at the hands of French paratroopers—though when she spoke publicly about the episode she was not seeking to expose her torturers but rather to find the French military doctor who had saved her life. Around the same time two former generals—Jacques Massu and Paul Aussaresses—discussed torture by the French army in Algeria. Aussaresses recalled his role with defiant pride, but Massu (one of the models for Pontecorvo's Mathieu) no longer believed that the end justified the means and expressed regret for what he had done.

More important, perhaps, than all this discussion, is that historians conducting interviews have discovered the extent to which Algeria haunted the lives of people even when it was not publicly evoked. Millions of French people had been in Algeria, either because they were European settlers—*pieds noirs*—who "returned" to France (a country many of them had never seen) in 1962 or because they were soldiers (mostly conscripts) who had served there, or because they were Algerian Muslims who came to France after 1962. Even people who had never set foot in Algeria knew something about the brutality of the war. The girlfriends and wives of soldiers were not, at the time, perceived as taking an interest in the war: one thinks of Catherine Deneuve's character in *The Umbrellas of Cherbourg* (1964). However, such women often did learn what their lovers had done, and in recent years, the wives and daughters of veterans have often been involved in discussions of the horrors that their menfolk endured, or inflicted. It is significant, incidentally, that in France many of the most distinguished young historians of the Algerian War are women.

Vincent Crapanzano's *The Harkis: The Wound That Never Heals* reflects the revival of interest in Algeria. Crapanzano, an anthropologist, is interested in one particular group of participants—Harkis, or Algerian Muslims who fought with the French Army. This is an uncomfortable subject. The Harkis were often victims of appalling violence from their compatriots as Algeria became independent. They were also badly treated by the French government. Charles de Gaulle sought to prevent them from getting to France. Many of them did escape from Algeria, sometimes with the complicity of the French Army, but they then spent years in squalid refugee camps, often ones that had been used for Spanish Republicans or Jews during World War II. Like most North African immigrants to France, they suffered racism from the French, but they also faced the hostility of other Algerians. The children of Harkis, who grew up in a world that gave little credit to anyone who had fought for French Algeria, sometimes came to despise their fathers.

Crapanzano also discusses his own discomfort. He repeats horrifying stories—about how dead babies were buried inside a camp during the first terrible winter of 1962 and about how a teacher tied a Harki schoolboy to a chair with barbed wire and left him overnight. However, Crapanzano does not necessarily believe everything he is told or expect his readers to do so. He draws attention to the contradictions in the Harkis' accounts of their experiences. He is worried that his Harki interlocutors will expect him to act as a spokesman, and he makes much of the repetitive, almost ritualized quality of Harki complaints, which he frequently describes with the word "litany."

I must confess that Crapanzano's book made me feel uncomfortable for reasons that the author may not have intended. Perhaps I am just missing the point, and because Crapanzano is keen to ensure that writers put their subjectivity at the center of their work, I should say that my attempts

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