

American Criminal Justice – Problems and How They Came to Be

It is clear to most observers that there is something wrong with the American criminal justice system of the modern day. There is greater dissent about the origins and causes of this criminal justice problem. William Stuntz, a law professor at Harvard University, offers a comprehensive description of what he sees as the dominant problems in modern day American criminal justice in his book *The Collapse of American Criminal Justice*.

These problems include, broadly speaking, increased frequency and severity of punishment, increased discretionary prosecution, and discriminatory application of criminal law that Stuntz argues follows from the discretion issue. Stuntz provides a detailed historical background on how this malfunctioning criminal justice system came to be, blaming factors such as a shift from local to centralized justice, politicization of the judicial process, and emphasis on procedural law over substantive law. The claims made in this narrative are, for the most part, well-researched and supported, with relevant statistics provided when necessary. However, in some cases, Stuntz does not address evidence that might suggest some holes in his claims; for example, analysis of the black majority in Washington D.C. would suggest that local institutional control by the black community may not result in a very different criminal justice system. Despite some limitations, *The Collapse of American Criminal Justice* provides a clear and well-argued view on the interactions between a number of factors in creating the criminal justice system that is so well-known and criticized today.

It is established early on in the book that Stuntz views as detrimental the American emphasis on defining procedural law much more clearly than substantive law. Stuntz first argues for the claim that constitutional law “pays too much attention to procedure, and too little to

substance” (Stuntz 2011, 80). Later in the book, he analyzes several Supreme Court decisions decided in Earl Warren’s court that reinforce this emphasis on procedural law over substantive, demonstrating the harm caused by these decisions by considering their effects on the criminal prosecution trends that follow.

Stuntz argues that the American emphasis on procedural law is misplaced for two reasons. The first is that procedure is more prone to variance based on “pragmatic judgments and adaptation to changing conditions” than is substantive law, which is typically backed up by moral principle, which is typically less fluid. The second is that elected officials can more easily use substantive law to get around procedural limits than vice versa (Stuntz 2011, 79). They can do this by redefining the content of a criminal statute, by creating a large enough list of related offenses or using severe sentencing threats for existing offenses to encourage guilty pleas, or by criminalizing common social behavior and selectively enforcing the relevant statute, allowing for a suspect of an unprovable crime to be tried for unrelated crimes he may have committed. Yale law professor James Whitman concurs, claiming that the “procedural approach has not been beneficial” (Whitman 2007, 262). He provides support for the claim by arguing, as Stuntz did, that procedural protections are “weak” and “easily evaded.” In addition, Whitman reasons that procedural protections are less generalizable than substantive ones; he argues this is the reason for why the European abolishment of flogging generalized to more dignified treatment of prisoners, while flogging in America was banned on the grounds of arbitrary application, rather than some larger substantive right to dignity (Whitman 2007). Stuntz also provides an example for the generalization claim by showing how the criminal justice decisions arising from the procedure-heavy Bill of Rights failed to generalize into a comprehensive equal protection provision in American law (Stuntz 2011).

In addition to these arguments, both Stuntz and Whitman agree that the expansion of procedural rights, for instance during Earl Warren's time in the Supreme Court, produced "the politics of backlash" (Stuntz 2011, 236). Increasing crime rates, combined with political convenience and desire to look tough on crime, combined with the perception of procedural protections as pro-criminal technicalities resulted in politicians expanding criminal penalties and punishment (Whitman 2007). This effect deals another blow to the American emphasis on procedural protections over substantive, and leads neatly into another factor that Stuntz identifies as having led to an unfair criminal justice system – that of politics affecting judicial process.

The political effect on the judicial process in the United States is clearly described by Stuntz. Unlike in pre Civil War America and modern European countries, the large majority of American district attorneys and judges are elected (Stuntz 2011). It follows from this that these elected officials are prone to being swayed by trends in public opinion among the voting population. Harvard Law School professor Carol Steiker agrees, saying that the aforementioned district attorneys and judges are subject to "populist influence" (Steiker 2003). This influence from a population that wants to see crime punished harshly in a time of increased criminal activity, combined with the increased expense of prosecuting this crime caused by the expanded procedural protections mentioned above, results in several of the evils Stuntz points out in the American criminal justice system. One major evil is the dramatic decrease in jury trials for criminal cases due to the increased use of plea bargaining, where a defendant is threatened with extreme sentences or other means, unless he pleads guilty and accepts a reduced (normal) sentence. This leads to many more convictions, making the justice system more "efficient" at imprisoning larger numbers of people, including minorities (Stuntz, 2011 257). If the criminal justice system in the United States was composed largely of law experts and bureaucrats instead

of elected officials, the influence from the lay public would decrease greatly. The European experience, as well as the opinions of the American Bar Association and the American Law Institute as cited by Steiker, indicates that were law to be left to the experts, one might see a less severe and more logically grounded judicial process than exists today (Steiker 2003).

The Warren Court's criminal procedure decisions, by expanding procedural rights during a time of rising crime (referred to as "bad timing" by Stuntz), had another unfortunate effect on the American criminal justice system – that of centralization of previously local authority (Stuntz 2011, 238). These decisions allowed national politicians, such as Reagan and Nixon to make political issues of crime. Nixon used crime as a way to appeal to racists, by criticizing those who would show leniency toward black criminals (Alexander 2010). Both benefitted from being able to use these criticisms for political gain, while not being burdened with the responsibility of action, due to their inability to reverse Supreme Court decisions (Stuntz 2011). Both were part of a trend Stuntz identifies as a "mistake" – the transfer from local to centralized justice.

While there may be merit to the identification of this as a factor in the criminal justice system, Stuntz does not adequately justify such identification. He is clearly in favor of local justice; he points out the fact that the first wave of Irish and Italian immigrants to Northern cities protected themselves through local control through election of the government officials relevant to crime and policing of their neighborhoods, not through nationalized and severe law enforcement. However, modern experience, specifically that of Washington D.C. as analyzed by James Forman in his paper *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow* would seem to suggest that local control of policing and justice may not be much of a factor in our criminal justice system's problems. Washington D.C. is a majority black jurisdiction, with a long-time majority black city council, all black mayors, and a locally controlled majority black

police force. Local officials thus have much power over crime policy; Congress typically respects the city council's decisions on criminal matters. Despite this local control, city officials have not attempted to create leniency, and in fact have argued for tougher criminal penalties. Black incarceration rates are similar to those in other cities with far less local control over criminal justice (Forman 2011). These facts may suggest that local control over criminal justice may not be a significant factor in the evils Stuntz identifies in his book. If such a connection exists, then Stuntz, in a rare move of incompleteness, fails to show it adequately by ignoring the relevant current case of Washington D.C.

Stuntz's *The Collapse of American Criminal Justice* provides an in-depth and well backed up perspective on what the American criminal justice system is like, and how it got to be that way. The blame is placed on politicization of the criminal justice system, the victory of procedural law over substantive law; less legitimately so, blame is placed on a transfer of criminal justice power from local to central authority. Despite the strange lack of consideration of modern examples in support of the latter claim, the book as a whole is a reliable and insightful account of the development and machinations of a complex system formed from varied interactions and coincidences of history.

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